Opinion No. 51-5425

September 13, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Paul A. Tackett District Attorney Second Judicial District County Court House Albuquerque, New Mexico

*{*128}* Recently you inquired of this office whether the lease of equipment to the County of Bernalillo of a certain rock crusher, without advertising for bids as required by the Public Purchases Act, § 6-401 et seq., N.M.S.A., constituted a violation of this Act. A purported copy of the lease in question was submitted to this office.

From this lease it appears that the lessor furnished Bernalillo County with a rock crusher for a term of ten months, at a stipulated monthly rental. The instrument contained provisions as to care of the equipment, not uncommon to such agreements. It further provided that if all of the terms of the agreement were kept, the lessor would furnish the lessee with a bill of sale to the equipment upon total payment of the aggregate rentals named in the agreement.

The inquiry arises whether this is a purchase within the meaning of the Public Purchases Act, § 6-401 as aforesaid, since the monthly payments due for the rental of the equipment and the total rental to be paid under the agreement are each in excess of $ 500.

The lease in question was signed in the name of the Bernalillo County Board of Commissioners by two of the County Commissioners of Bernalillo County. § 6-401, N.M.S.A., defines as a purchaser, inter alia,: "Boards of County Commissioners and all County and State officials." There is no question whatsoever, therefore, that when a County makes a purchase it is bound by the terms of the Public Purchases Act.

§ 6-402 defines "goods." This is an all-inclusive definition and appears to be sufficient to include within it practically anything which can be purchased. No better illustration of what is included can be offered than the section itself which reads as follows:

"'Goods' defined, -- The word 'goods' as used herein shall include all goods, wares, merchandise, materials, supplies, furniture, equipment and every article or thing of whatsoever description purchased for the use of, or benefit of, any purchaser to which this act is applicable."

§ 6-404 spells out the requirements as to public bids in connection with any purchase by a purchaser governed by the Act or in connection with the execution of any contract as designated therein.

The first paragraph applies to purchases or such contracts involving more than $ 200 but less than $ 500. It has no application to the question under consideration.

The second paragraph, which is applicable to the immediate inquiry, is as follows:

"Purchases, or contracts for the construction, repair or improvement of buildings, or for materials or labor to be furnished or performed, which involve the expenditure at any *{*129}* one time of more than $ 500 shall only be made or entered into after notice, that bids will be received at a time and place designated in the notice, has been published for at least once each week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the purchaser is located."

The third paragraph provides for acceptance of the lowest bid, with certain exceptions not important to the immediate inquiry.

The fourth paragraph provides a means whereby expenditures of more than $ 500 may be made without advertising. It has no application to the question under consideration.

The last paragraph provides that purchases or sales made in violation of the Act are void. It further provides that bids are not required where the public interest will be better served and where it is impracticable to obtain bids. In such instance, the purchaser must obtain the written approval of the State Board of Finance for making such purchases or entering into such contracts without competitive bids. It is not necessary to consider this exemption for the reason that the written approval of the State Board of Finance was not obtained in connection with this transaction.

The first question that must be answered is whether such a transaction is a purchase within the meaning of the Act, that is, whether it is a purchase. The mere fact that the transaction is called a lease is not determinative. The substance of the transaction controls, not the appellation given it.

The word 'purchase' in its common sense means nothing more than a situation in which one gives money or something of value for any thing. The word purchase has been legally declared to imply acquisition. Marsh v. Lott, 97 P. 2d 163. Acquisition unless otherwise indicated means ownership involving title, both legal and equitable. Federal Trade Commission vs. Thatcher Mfg. Co., CAA Wash 5 Fed 2d 615.

It is readily apparent that while the subject matter of the lease which is machinery, called a rock crusher, falls within the definition of 'goods' as set out in § 402, the Board of County Commissioners of Bernalillo County, in executing a lease for the equipment, was not making a purchase thereof.

The lease provided that Bernalillo County during the term of the lease shall have use of the equipment. It requires it to take care of the equipment so long as the lease is in force. The title to the equipment remains in the lessor. Therefore, one of the essential or 'the essential' of a purchase is missing, namely ownership.

There are other features of the agreement distinguishing it from a purchase and a sale. Under a purchase and sale agreement title passes, unless it be a conditional sale, in which latter case title does not generally pass until the full purchase price has been paid. Under a purchase, the Vendor is bound to pay the purchase price or in default of performance is liable for the damages accruing to the vendor whether the sale be absolute or conditional.

Under the lease in question, the County of Bernalillo is bound to do nothing more than to pay the monthly rental so long as it uses the equipment. The lease provides that if default is made in payment of the rental, the lessee may take possession of the equipment. Nothing is said in the breach of the lease by the lessee. Assuming that a claim could be made that fact alone would not make the transaction a sale because the measure of damages could be different than in the case of a sale.

The transaction might be likened to conditional sale because the lease contains a provision that if all the terms of the lease are kept *{*130}* and full monthly rentals are paid, the lessor will furnish the lessee with a bill of sale to the equipment.

While a conditional sale probably falls within the purview of the Public Purchases Act and while the transaction has some aspects of a conditional sale, in my opinion the transaction is not a conditional sale.

Under our statutes the vendor of a chattel sold under a conditional sales contract, must record it to be protected against the claims of judgment creditors, etc., of the vendee. It is doubtful if a valid lease of a chattel would leave the chattel subject to the claims of creditors, etc., of the lessee under the claim that the transaction was in substance a conditional sale.

The strongest argument against the contention that the transaction is a conditional sale appears in 47 Am. Jur. 828. Therein the following statement is made:

"With few exceptions, the cases support the view that the essential elements of a conditional sale of personalty are a reservation of title in the vendor and an **obligation on the part of the vendee to accept and pay for the property in accordance with the terms of the contract,** the title passing automatically on the performance of that condition."

Under this particular agreement there is no obligation upon the lessee to accept and pay for the property in accordance with the terms of the lease. The mere fact that upon completion of the rental payments and performance of the terms of the lease, the lessor agrees to give a bill of sale, does not make the transaction a sale or a conditional sale. At best, it is an inducement to continue to live up to the lease. Even if a bill of sale were given upon completion of the lease so that at that very instance a purchase would occur, it is apparent that the purchase would be exempt from the Public Purchases Act because the purchase would involve the expenditure of less than $ 200.

Since the transaction is not a purchase we turn to the question as to whether the transaction is a contract for the construction, repair or improvement of buildings, or for materials or labor to be furnished or performed, which involve the expenditure at any one time of more than $ 500. If it is, it is subject to the Public Purchases Act.

It is obvious that the transaction is not a contract for the construction, repair or improvement of a building. Is it a contract for materials or labor to be furnished or performed? It is further obvious from the statute that only materials or labor can be furnished, that only labor can be performed. And it is equally clear that there is no labor involved so that the sole question remaining is whether the transaction is one involving materials to be furnished.

In 43 Am. Jur. 27, under the topic "Public Works and Contracts" the following statement appears:

"Contracts for the renting of real property or the hire of chattels generally are not considered within the provisions requiring contracts for work, supplies, or materials to be let upon competitive bidding."

In construing a statute requiring a contract for the furnishing of materials to be let to the lowest bidder where the sum expended exceeded $ 1,000 the Supreme Court of New Jersey, in the case of Peter's Garage, Inc. v. City of Burlington, et al., 3 Atl Rep. 2d 634, held that a contract to purchase a dump truck is not a contract for the furnishing of materials, supplies or labor. The Court held that the truck was apparatus and the furnishing of apparatus is not the furnishing of materials or supplies.

*{*131}* In a later case, the same Court, in the case of Solomon et al. v. The City of Newark, appearing in 59 Atl. Rep. 2d 386, held that a contract for the purchase of a motortruck chasis was a contract for apparatus and not a contract for materials or supplies within the statute. Other cases can be found supporting the view that a contract for the furnishing of machinery or equipment is not a contract for the furnishing of materials within the purview of statutes requiring competitive bidding.

Since it appears that a contract for the purchase of apparatus, as distinguished from materials, is not within the purview of a statute requiring bids when materials are to be supplied, a contract for the lease of such apparatus or equipment is not a contract for the furnishing of supplies.

In my opinion, therefore, the lease in question is not a contract for the furnishing of materials within the meaning of the Public Purchases Act.

It is to be noted, in considering this inquiry, that the second paragraph of § 6-404 requires on public expenditures involving more than $ 500 only in the case of purchases or contracts for materials to be furnished. The statute does not require bidding on contracts for the furnishing of goods as defined in Chapter 6 unless the goods are purchased.

It is to be noted that the Public Purchases Act was passed in 1939. At that time, similar acts had been on the statute books of sister states for many years and had been construed by courts of last resort. The legislature, therefore, was informed as to the judicial interpretation of the word 'materials' as used in such act.

If the legislature had intended that contracts for 'goods to be furnished,' whether by lease or otherwise, should be subject to bidding, it would undoubtedly have used the word 'goods' in the second paragraph of § 6-404 instead of the word 'materials.' It is further obvious from the third paragraph of § 6-404 that the word 'purchases' as used in that section refers to goods as defined in the Act and not to 'materials.' This is true even though the word 'materials' as defined in the Act includes the word 'materials' in the definition. The legislature has seen fit to distinguish between contracts for materials as distinguished from 'goods' or it would have used the all-inclusive term 'goods,' in referring to such contracts.

In my opinion, therefore, the transaction upon which the inquiry is based is not a purchase in the meaning of the Public Purchases Act, Chapter 6, N.M.S.A., and is not a contract for the furnishing of materials within such Act and the leasing of the machinery in the manner and form in which it was done does not fall within the Public Purchases Act of the State of New Mexico.

I trust that this fully answers your inquiry.