

Opinion No. 64-138

November 10, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Charles G. Witt, State Agency for Surplus Property Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does the State Agency for Surplus property have the authority to acquire, warehouse, and distribute surplus property?
2. Does such agency have the authority to execute certifications and agreements?
3. Does the agency have the power to assess and collect handling charges?
4. May the agency enter into cooperative agreements with the United States Government?
5. Does the agency possess administrative authority to promulgate directives for handling funds?

CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.
4. Yes.
5. Yes.

OPINION

ANALYSIS

Initially, a brief historical review of the creation and operation of the Office of Surplus property is vital to a complete answer to your questions. As pointed out in our prior Attorney General Opinion No. 6556, dated December 4, 1956:

"The Office of Surplus Property Agent was established by Chapter 45, Laws 1947, which Act provided that the office should expire at the end of the 36th fiscal year, which would have been July 30, 1949. In 1949 however, the State Legislature provided for the continuance of this agency under the Educational Budget Auditor by virtue of Chapter 179, Laws 1949. Again in 1951, the legislature continued the appropriation for the agency and in so doing approved its transfer from the office of the Educational Budget Auditor to the State Department of Education, Chapter 227, Laws 1951. Subsequent sessions of the legislature have continued to appropriate funds for this agency, not by specific line item, but pursuant to budget request submitted by the State Department of Education."

Our research and investigation has revealed that the office of surplus property remained under the control of the State Board of Education until the date of June 25, 1963, when the Agency was transferred from the administrative jurisdiction of the State Board of Education to the administrative jurisdiction of the Department of Finance and Administration by virtue of Governor's Executive Order No. 4, signed by Governor Jack M. Campbell.

By reason of such Executive Order the State Surplus Property Agency is at present an adjunct and administrative part of the State Department of Finance and Administration. Such Department by broad general statutory provision, has the authority to enter into contractual agreements with the federal government, subject to approval of such agreements by the State Board of Finance, for acquisition, administration and disposition of surplus property. This authority is expressly set forth in the Joint Powers Agreements Act (Laws 1961, Chapter 135) being Section 4-22-1 through 4-22-7, N.M.S.A., 1953 Compilation.

Federal Law, 40 U.S.C., Section 484, provides in applicable part that the Administrator of General Services (provided for in Chapter 11B of Title 5) may:

"(j) (1) under such regulations as he may prescribe the administrator is authorized in his discretion to donate without cost (except for costs of care and handling) for use in any State for purposes of education, public health, or civil defense, or for research for any such purpose, any equipment, materials, books, or other supplies (including those capitalized in a working capital or similar funds) under the control of any executive agency which shall have been determined under paragraph (2), (3), or (4) of this subsection to be usable and necessary for any such purpose. * * * **No such property shall be transferred for use, within any State except to the state agency designated under state law for the purpose of distributing, in conformity with the provisions of this subsection,** all property allocated under this subsection for use within such state.

(2) In the case of surplus property under the control of the Department of Defense, the Secretary of Defense shall determine whether such property is usable and necessary for educational activities which are of special interest to the armed services, such as maritime academies or military, naval, Air Force, or Coast Guard preparatory schools. If

such Secretary shall determine that such property is usable and necessary for such purposes, he shall allocate it for transfer by the Administrator to the appropriate State Agency for distribution to such educational activities. If he shall determine that such property is not usable and necessary for such purposes, it may be disposed of in accordance with paragraph (3) or paragraph (4) of this subsection.

(3) Determination whether such surplus property (except surplus property allocated in conformity with paragraph (2) of this subsection) is usable and necessary for purposes of education or public health, or for research for any such purpose, in any state shall be made by the secretary of Health, Education, and Welfare, who shall allocate such property on the basis of needs and utilization for the transfer by the Administrator to such State Agency for distribution * * *

(4) Determination whether such surplus property (except surplus property allocated in conformity with paragraph (2) of this subsection) is usable and necessary for civil defense purposes, including research, in any State shall be made by the Federal Civil Defense Administrator, who shall allocate such property on the basis of need and utilization for transfer by the Administrator of General Services to such State Agency for distribution to civil defense organizations of such state, or political subdivisions and instrumentalities thereof, which are established pursuant to State law. * * *

(5) The Secretary of Health, Education, and Welfare and the Federal Civil Defense Administrator may impose reasonable terms, conditions upon the use of any single item of personal property donated under paragraph (3) or paragraph (4), respectively, of this subsection which has an acquisition cost of \$ 2,500 or more.

* * * *

(k) (1) Under such regulations as he may prescribe, the administrator is authorized, in his discretion, to assign to the Secretary of Health, Education and Welfare for disposal such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of Health, Education, and Welfare as being needed for school, classrooms or other educational use, or for use in the protection of public health, including research.

* * * *

(n) For the purpose of carrying into effect the provisions of subsection (j) and (k) of this section the Secretary of Health, Education, and Welfare, the Federal Civil Defense Administrator, and the head of any Federal Agency designated by either such officer, are authorized to enter into cooperative agreements with State surplus property distribution agencies designated in conformity with paragraph (1) of subsection (j) of this section. Such cooperative agreements may provide for utilization by such Federal agency, without payment or reimbursement, of the property, facilities, personnel, and services of the state agency in carrying out any such program, and for making available to such state agency, without payment or reimbursement, property, facilities, personnel

or services of such federal agency in connection with such utilization. In addition, under such cooperative agreements, and subject to such other conditions as may be imposed . . . surplus property vehicle the Administrator may approve for donation for use in any state . . . pursuant to subsection (j) (3) or (j) (4) of this Section, may with the approval of the Administrator be made available to the State Agency after a determination . . . that such property is necessary to, or would facilitate, the effective operation of the state agency in performing its functions in connection with such program. Upon a determination by the secretary or the director . . . title thereto may with the approval of the administrator be vested in the State Agency. (Emphasis supplied)

* * * *

The Joint Powers Agreement Act clearly authorizes agreements with the Federal Government of the type contemplated under the federal act, supra. Section 4-22-3, N.M.S.A., 1953 Compilation, of the Joint Powers Agreement Act, states that "If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties" with the approval of the state board of finance.

On the basis of the above cited authorities it is our opinion that each of the questions posited above may be answered in the affirmative when conducted under the powers invested by the Joint Powers Agreements Act. See also Attorney General's Opinion No. 6556, December 4, 1956 and Attorney General's Opinion No. 57-151, dated July 2, 1957.