

## **January 3, 2008 Procurement by the Albuquerque-Bernalillo County Water Utility Authority**

The Honorable Daniel P. Silva  
New Mexico State Representative  
1323 Canyon Trail SW  
Albuquerque, NM 87121

**Re:** Opinion Request – Procurement by the Albuquerque-Bernalillo County Water Utility Authority

This office has completed its review of the questions raised in your July 5, 2007 opinion request to Attorney General Gary K. King concerning the Albuquerque-Bernalillo County Water Utility Authority's (the "Authority") procurement of goods and services. More specifically, you have asked:

1. Does the language of Section 72-1-10(B)(3) (2003) authorizing the Authority to use city or county procurement processes mean that the City of Albuquerque (the "City") may procure goods and services for the Authority in accordance with the City's Purchasing Ordinance ("CPO"), adopted under the City's home rule charter?
2. If Section 72-1-10(B)(3) does not permit the Authority to procure goods and services in accordance with the CPO, does Section 13-1-135(A) (1999) permit the Authority and the City to enter into a cooperative purchasing agreement ("CPA") that would permit the City to procure goods and services for the Authority?
3. If the Authority and the City may enter into a CPA, does the language of Section 13-1-135(A) mean that the more restrictive provisions of either the Procurement Code or the CPO apply to procurement for the Authority?
4. May the Memorandum of Understanding ("MOU") between the Authority and the City be considered a CPA as that phrase is used in Section 13-1-135(A) (assuming it is properly filed with the state purchasing agent)?

Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that Section 72-1-10(B)(3) allows the City to procure goods and services for the Authority in accordance with the CPO. Because we answer your first question in the affirmative, we also conclude that the Authority and the City do not need to enter into cooperative purchasing agreements pursuant to Section 13-1-135(A) in order for the City to procure goods and services for the Authority.

The Procurement Code, NMSA 1978, Sections 13-1-21 through 13-1-199 (1984, as amended through 2006) (the "Code"), generally governs public purchasing by both state and local governments. Its purpose is to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public

funds, and to provide safeguards for maintaining a procurement system of quality and integrity. See NMSA 1978, § 13-1-29(C) (1984). The Code regulates the purchase of goods and services and creates minimum thresholds of public notice and bid or proposal competition. See N.M. Atty. Gen. Adv. Ltr. to State Representative James Taylor, 2003 WL 1957578 (N.M. A.G.). In doing so, the Code protects against the evils of favoritism, nepotism, patronage, collusion, fraud and corruption in the award of public contracts. See Planning & Design v. City of Santa Fe, 118 N.M. 707, 710, 885 P.2d 628, 631 (1994). The Code specifically exempts from its application municipalities having adopted home rule charters and enacted purchasing ordinances pursuant to their charters. See NMSA 1978, § 13-1-98(K) (2005). In accordance with this provision, the City is a home-rule municipality that has enacted a comprehensive purchasing ordinance and therefore, is exempt from the Code. See Albuquerque, N.M., Code § 5-5-1 et seq. (1998) (public purchases).

The New Mexico Legislature created the Authority in 2003 as a joint agency of the two local governments (Albuquerque and Bernalillo County) and expressly made the Authority “subject to the state Procurement Code and other applicable state laws.” See 2003 N.M. Laws, ch. 437, § 1, codified as NMSA 1978, § 72-1-10(A) (2003). In 2005, the Legislature amended Section 72-1-10 to make clear that the Authority “is a body politic and corporate, separate and apart from the city of Albuquerque and Bernalillo county” and “is a political subdivision of the state.” See 2005 N.M. Laws, ch. 345, § 1. It set out the Authority’s duties with greater detail and specifically provided that the Authority “is authorized to use city or county procurement processes or to contract with the city or county to further its public and corporate purposes.” See 2005 N.M. Laws, ch. 345, § 1.

Allowing the Authority to choose between the city and county procurement processes presents no conflict with Section 72-1-10(A), making the Authority subject to the Code. The Code itself exempts the City from its application, provided the City meets the criteria set forth in Section 13-1-98(K), concerning the adoption of a home-rule charter and enactment of a purchasing ordinance pursuant to its charter. The City satisfies both. This reading of Sections 72-1-10(A) and (B) is consistent with the well-established rule of statutory construction that requires us to look at the statute as whole, construing each section in connection with every other section, in order to give effect to each section and avoid making any portion of the statute superfluous. See Ramírez v. IBP Prepared Foods, 2001-NMCA-036, 130 N.M. 559, 562, *cert. denied*, 130 N.M. 459 (2001). Moreover, the CPO, like the Code, presupposes that the result of the City’s procurement process will be an award of a contract to a competitively selected bidder whose proposal is most advantageous to the City or the Authority, taking into account the factors set forth in the request for proposals. See N.M. Atty. Gen. Op. No. 92-06; see also Albuquerque, N.M., Code § 5-5-10 (2006) (setting forth procurement requirements).

With respect to cooperative purchasing agreements, Section 13-1-135(A) permits the Authority and the City to enter into a cooperative procurement agreement, entered into and approved by the governing body of each entity, for the procurement of any services,

construction or items of tangible personal property. Cooperative procurement agreements must specify the purpose of the agreement and the method by which the purpose will be accomplished. See NMSA 1978, § 13-1-135(A). However, because Section 72-1-10(B)(3) clearly allows the Authority to use the City's procurement processes and the City is exempted from the Code's applications, the Authority and the City do not need to enter into a cooperative procurement agreement, as contemplated by Section 13-1-135(A), in order for the Authority to procure goods and services in accordance with the terms of the CPO.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

SALLY MALAVÉ  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General