

March 30, 2011 Advisory Letter - County Transactions with Private Organizations

Honorable Mary Kay Papen
New Mexico State Senate
904 Conway Avenue
Las Cruces, NM 88005

Re: Opinion Request- County Transactions with Private Organizations

Dear Senator Papen:

You requested our opinion regarding the application of the state Procurement Code to county transactions with private organizations. According to your letter, the legislature has appropriated funds to counties to purchase real and personal property with the understanding that counties will lease the property to private organizations in exchange for certain services. The letter explains: "The county ... enters into a lease agreement with the ... [private] organization with provisions calling for fair-market rent to be paid in the form of in-kind services provided ... in lieu of cash." Your letter concludes: "Consequently, the local government is injected deeper into the commercial real estate and equipment rental markets as a landlord and property manager with ever-increasing administrative costs and no actual revenues to defray them."

Your letter asks eleven questions: (1) May a county use state-appropriated funds to purchase equipment or property pursuant to the Procurement Code and contract with a private organization or individual for the use of that property outside of the competitive bidding process? (2) May the legislature earmark an appropriation to direct a county to purchase property and lease it to a particular private organization? (3) If the legislation authorizing an appropriation does not name the private organization that lobbied for it, must a county enter into a contract with a particular private organization in the expenditure of those funds? (4) May a legislator require or request that the county involve a private organization that lobbied for an appropriation in the development of purchase specifications? (5) Does NMSA 1978, Section 4-38-13.1(A) bar class A counties in any way from contracting for the use of county equipment or property for the benefit of the enumerated public entities or any others providing services to significant groups of county residents? (6) May a state appropriation be used in a class A county to procure equipment for lease to a private organization? (7) Does NMSA 1978, Section 4-38-13.1(B) limit a county's authority to contract with a private organization for the use of county buildings or equipment? (8) In light of Sections 4-38-13.1 and 4-38-13.2, is a lease of a county-owned building or equipment at below market rates to a private organization demonstrating a consistent history of service to sick and indigent persons in the county, which service could legally be expected to be provided by a governmental entity, barred by the anti-donation clause of Article IX, Section 14 of the New Mexico Constitution? (9) If no, may the county donate the property to that private organization and remove it from its inventory? (10) What is the methodology or criteria on developing the fair-market value of the assets (everything from buildings to gardening facilities and sports equipment) leased to the private organization? (11) May a state agency, such as

the Department of Health, the Aging and Long Term Services Department or the Department of Finance and Administration, serve as fiscal agent and remove the local government from the process?

Based on our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that, in general, the legislature may make an appropriation to a county to purchase real or personal property and the county, subject to the Procurement Code and anti-donation clause, may enter into a transaction with a private organization where services are provided in lieu of monetary rent payments. With regard to your specific questions, we conclude that: (1) a county may use state-appropriated funds to purchase equipment or property pursuant to the procurement code and contract with a private organization or individual for the use of the real property; (2) the legislature generally may not earmark an appropriation to direct a county to purchase property and lease it to a particular private organization; (3) if the legislation authorizing an appropriation does not name the non-profit organization that lobbied for it, a county may enter into a contract with any private organization in the expenditure of those funds; (4) a legislator should not require or request that the county involve a private organization that lobbied for an appropriation in the development of purchase specifications; (5) Section 4-38-13.1(A) does not absolutely bar class A counties from contracting for the use of county equipment or property for the benefit of the enumerated public entities or any others providing services to significant groups of county residents; (6) a state appropriation may be used in a class A county to procure equipment for lease to a private organization; (7) Section 4-38-13.1(B) does not limit a county's authority to contract with a private organization for the use of county buildings or equipment; (8) a lease of a county-owned building or equipment at below market rates to a private organization demonstrating a consistent history of service to sick and indigent persons in the county, which service could legally be expected to be provided by a governmental entity, in light of Sections 4-38-13.1 and 4-38-13.2, is not barred; (9) a county may not donate the property to a private organization and remove it from its inventory; (10) the standard methodology or criteria on developing the fair-market value of the assets leased to a private organization is to use a set of comparable transactions; and (11) a state agency, such as the Department of Health, the Aging and Long Term Services Department or the Department of Finance and Administration, may serve as fiscal agent, but a county cannot remove itself from the procurement process.

Appropriations

The legislature has constitutional authority to appropriate, or earmark, money to a county for a specific purpose. The New Mexico Constitution states that: "money shall be paid out of the treasury only upon appropriations made by the legislature." N.M. Const. art. 4, § 30. It further states that each "appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied." *Id.* Therefore, the legislature has the authority to appropriate money to a county for the purchase of real property (buildings) and personal property (equipment or other property).

According to your letter, “In recent years, in response to lobbying efforts of private... organizations, the legislature has appropriated funds for the purchase ... of buildings implicitly ... for the benefit of the organization that sought the funding.” The Constitution prohibits appropriations being granted directly to private organizations. See N.M. Const. art. IV, § 31 (“No appropriation shall be made for charitable...or other benevolent purposes to any person, corporation, institution or community, not under the absolute control of the state.”). This prohibition, however, is not applicable if the appropriation is made directly to the county. See N.M. Att’y Gen. Op. 81-5 (1981) (an appropriation violates the Constitution only when it goes to an entity not under the absolute control of the state); N.M. Att’y Gen. Op. 79-9 (1979) (appropriation does not violate the constitution if made to a state agency which controls the expenditure of the appropriation).

The Constitution poses several additional limitations on the legislature’s authority to appropriate money to a county and to designate a private organization to which the county must lease the property. For example, a general appropriations bill “shall embrace nothing but appropriations” and thus cannot provide language that will trump practices required in existing substantive law, such as the Procurement Code. See N.M. Const. art. IV, § 16. This means language in an appropriations bill cannot evade the requirements of the Procurement Code. In addition, practices required in those types of laws that have broad application, such as the Procurement Code, are favored over individual laws crafted for certain circumstances/industries and especially over those laws that may create advantages in violation of equal protection issues. See N.M. Const. art. IV, §§ 24, 26; see also Board of Trustees v. Montano, 82 N.M. 340, 343, 481 P.2d 702 (1971).

In conclusion, the legislature has the authority to appropriate money to a county for the purchase of real property and personal property even if a private organization ends up as the lessee of the property, but state constitutional requirements favor an open procurement process and generally preclude the legislature from pre-designating or pre-selecting a specific private organization as the lessee.

Procurement Code

A county’s transaction with a private organization is dependent on what is being solicited or offered by the parties. The Procurement Code applies when there is an expenditure of public money to obtain goods and services. The Procurement Code does not apply when a public body is just leasing its property to a private organization. Your letter, however, refers to a transaction where the county agrees to lease real or personal property to a private organization in exchange for the organization providing services to the county residents. The county agrees to value these services as equivalent, and in lieu, of monetary lease payments. In other words, the county has decided that it wants to provide certain services to its residents, but has decided to enter into a contract with a provider to provide these services, where the county will pay the provider for the services by allowing the provider to use the county’s property.

As characterized, this blended type of transaction would be subject to the Procurement Code, unless the legislature has provided otherwise. The Code “shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30 (1994) (emphasis added); see also NMSA 1978, § 13-1-67 (2003) (a county is subject to the Procurement Code). The State Supreme Court has explained: “Through competitive bidding the ... [government] hopes to obtain the best product at the best price.” Planning & Design v. City of Santa Fe, 118 N.M. 707, 710, 885 P.2d 628 (1994).

In addition to the above-mentioned constitutional obstacles regarding pre-designating or pre-selecting a specific private organization, the Code has customarily been interpreted to limit favoritism towards or direct participation with a specific private organization in the procurement process. Id. The Code provides: “All specifications shall be drafted so as to ensure maximum practicable competition and fulfill the requirements of state agencies and local public bodies.” NMSA 1978, § 13-1-164 (1984). It is our understanding that the Department of Finance and Administration has customarily read an appropriation naming a specific private organization only as a method to provide for the expected “standard of quality.” The Code provides: “Where a [known name or] brand-name ...is used... the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition.” NMSA 1978, Section 13-1-168 (1984).

This interpretation has also been applied to the preparation of a request for proposals or solicitation of bids. At the state level, “[n]o state agency shall accept any bid from a person who directly or indirectly participated in the preparation of specifications on which the competitive bidding was held.” NMSA 1978, § 10-16-13 (1967). Furthermore, the State Purchasing Division’s rules provide a solicitation will be canceled if “there is reason to believe that the ... proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.” 1.4.1.70.B(1)(g) NMAC.

The above-mentioned considerations provide there should be an open procurement process when a county desires to contract with a private organization. Having the legislature or a legislator require or request that the county involve a private organization that lobbied for or benefits from an appropriation in the development of purchase specifications is contrary to the open and competitive procurement process mandated by the Procurement Code.

Contracts for the Use of County Buildings and Property under NMSA 1978, Section 4-38-13.1

NMSA 1978, Section 4-38-13.1 generally permits a county to contract with certain entities for the use of county property or buildings in exchange for services provided by those entities to county residents. Section 4-38-13.1(A) provides, in relevant part:

Notwithstanding any other provision of the law, the board of county commissioners of any county except a class A county may contract for the use of county equipment or property for the benefit of community ditch associations, mutual domestic water associations or other public entities providing services to significant groups of county residents, which services could legally be provided by a governmental entity....

(Emphasis added.) You asked whether this provision absolutely bars a class A county from contracting for the use of county equipment or property with the specified entities.

We do not believe that Section 4-38-13.1(A) absolutely bars a class A county from contracting for the use of county equipment or property for the benefit of the listed entities or other entities providing services to county residents. A board of county commissioners generally has the “power at any session to make such orders concerning the property belonging to the county as they may deem expedient.” NMSA 1978, § 4-38-13 (1953). However, a class A county, in contrast to other counties, cannot rely on the authority provided in Section 4-38-13.1(A) to contract for the use of its county property in exchange for services to county residents. A class A county may enter into such a contract only to extent allowed under the Procurement Code, as discussed above, and other applicable laws.

Your letter also asks whether NMSA 1978, Section 4-38-13.1(B) limits a county’s authority to contract with a private organization for the use of county buildings or equipment. This provision, in relevant part, reads that all counties:

may contract for the use of county buildings for the benefit of nonprofit organizations demonstrating a consistent history of service to sick and indigent persons in the county, which service could legally be expected to be provided by a governmental entity, at rates these organizations can be reasonably expected to pay while maintaining their full service commitment to their respective constituencies....

A contract entered into under this provision is exempt from the Procurement Code. See NMSA 1978, § 4-38-13.1(B), § 13-1-98.2(D) (2009) (providing that “[t]he provisions of the Procurement Code do not apply to contracts entered into by a local public body ...for the use of county buildings pursuant to Section 4-38-13.1 NMSA 1978”).

We do not believe that Section 4-38-13.1(B) limits a county’s authority to contract with private organizations for the use of county buildings. The plain language of the provision describes a contract for the use of county buildings by certain nonprofit organizations that provide services to sick and indigent persons. If a county enters into a contract covered by Section 4-38-13.1(B), it does not have to comply with the Procurement Code. Otherwise, a county must adhere to the requirements of the Procurement Code when it enters into a contract with a private organization for the use of county buildings.

Anti-Donation Clause

The antidonation clause of Article IX, Section 14 of the New Mexico Constitution reads, in pertinent part: “Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....” By its terms, the clause prohibits the state, counties, school districts and municipalities from giving public money or property to a private party without adequate consideration in exchange.

The antidonation clause generally prohibits a county from donating property to a private organization and removing the property from its inventory. The clause also is implicated when a county wishes to lease real or personal property to a private organization in exchange for the organization providing services to the county residents and agrees to value these services as equivalent to, and in lieu of, monetary lease payments.

There are three methods to determine the application of the anti-donation clause. First, the clause provides: “Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.” N.M. Const. art. IX, § 14(A). This language has been interpreted to mean that a county does not have to receive services or other direct consideration in exchange for public money or property that is used by a private organization to provide care to sick and indigent persons directly. See N.M. Att’y Gen. Op. No. 58-135 (1958). However, the sick and indigent exception does not permit the state or a local government to make donations to a private or nonprofit organization that are used for the organization’s operating expenses. See id. Therefore, to avoid a violation of the anti-donation clause, a county may lease buildings or property that are used for a private organization’s operations in exchange for the organization’s services only if the value of the services is adequate consideration for the use of the county’s property. The same limitation applies to outright donations of county property to a private organization that provides services to the sick and indigent.

Second, the legislature has provided guidance regarding the anti-donation clause for certain transactions. NMSA 1978, Section 4-38-13.2 reads:

The legislature finds that without the daily contributions and efforts of the thousands of worthwhile nonprofit organizations dedicated to serving sick and indigent persons in communities throughout New Mexico, the state would be inundated with constant requests for health, human and social services that it does not have revenue or resources to provide. The legislature finds that it is in the best interests of that population, as well as for all residents and taxpayers, that consideration be extended as real value recognition of the indispensable part these services contribute to the fabric of life in New Mexico.

These legislative findings have been implemented in Section 4-38-13.1(B), discussed above, which creates a methodology for determining the adequate value of transactions entered into under that provision. The law states that when a county is contracting for use of its buildings with a nonprofit organization that provides services to sick and

indigent persons, the basis of the bargain may be set “at rates these organizations can be reasonably expected to pay while maintaining their full service commitment to their respective constituencies.” NMSA 1978, § 4-38-13.1(B). The law further provides: “These contracts shall set forth the respective value of services being provided to county residents and the relative value of the use of property provided by the county.” Id. Therefore, a lease of a county-owned building at below, but reasonable, market rates to a private organization demonstrating a consistent history or service of providing services directly to sick and indigent persons in the county, which services could legally be expected to be provided by a governmental entity, may be deemed a permissible transaction and consistent with the antidonation clause.

Third, for transactions involving the lease or use of county buildings that are not covered by Section 4-48-13.1(B), we understand that the Department of Finance and Administration has customarily required a county to ask for comparable transactions to conduct its anti-donation clause analysis. This is akin to a methodology employed by a real estate appraiser for establishing market prices for real estate and property. The goal of obtaining these comparables is to ascertain the fair market of the transaction and assist government officials in determining whether the proposed transaction demonstrates sufficient adequate consideration to the county.

Fiscal Agent

Your letter asks whether a state agency, such as the Department of Health, the Aging and Long Term Services Department or the Department of Finance and Administration, may serve as the fiscal agent and remove the local government from the process. It appears that your letter is asking whether these agencies may take on a larger role in the procurement process. It is our understanding that a fiscal agent typically has a limited role. It is statutorily defined in other contexts as “the ... governing body that administers grants from the fund for a given locality or region by agreement.” NMSA 1978, § 63-9D-3(M) (2005). Its role is to receive payments from the state and disburse the money on behalf of the local entity. See NMSA 1978, §§ 30-40-6 (2003); 58-11-18 (2006). A fiscal agent does not appear to have a role in procurement issues or in the contract process. Therefore, while a county may use a state agency as a fiscal agent in the procurement process, the county cannot expand the state’s role, absent any other provision of law, and cannot remove itself from its obligations as the contracting party and its obligations under the Procurement Code.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

Zachary Shandler
Assistant Attorney General

cc: Dave Matthews, Sandoval County Attorney