

May 19, 2004: May a public body specify a particular brand and model of hardware in Request for Proposal?

The Honorable Leonard Lee Rawson

PO Box 996

Las Cruces, New Mexico 88004

Re: Opinion Request – Procurement Questions

Dear Senator Rawson:

This office reviewed the questions raised in your April 5, 2004 opinion request to Attorney General Patricia A. Madrid, inquiring whether a public body may specify a particular brand and model of hardware or like items in a request for proposal (RFP). The short answer is yes, under certain circumstances, a public entity may specify the brand and model of an item in its RFP.

The New Mexico Procurement Code, NMSA 1978, §§ [13-1-1](#) through [13-1-199](#), as amended (the “Code”), governs purchasing by public entities in New Mexico. The Code applies to all nonfederal expenditures “by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 710 (1994) (quoting NMSA 1978, § 13-1-30). The purposes of the Code are 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. NMSA 1978, § [13-1-29](#)(C).

The Code requires that all specifications - brand or otherwise - be drafted to ensure the maximum practicable competition and fulfill the requirements of state agencies and local public bodies. See NMSA 1978, § [13-1-164](#). However, before a brand-name specification may be used, the state purchasing agent or central purchasing office first must determine that only the identified brand-name item or items will satisfy the needs of the state agency or local public body. § [13-1-165](#). When no such determination is made, the RFP should 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. § [13-1-168](#).

In addition to the brand-name, an RFP should also include a description of the particular design, function or performance characteristics, which are required by the purchasing agency. See § [13-1-167](#). Finally, the Code requires the state purchasing agent or central purchasing office to identify sources from which the designated brand-name items can be obtained and solicit such sources to achieve whatever degree of price competition is practicable. § [13-1-166](#). Each of these requirements is designed to

ensure that the agency makes an informed decision about the items the agency believes it needs and obtains the items it needs at the most advantageous price.

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: Stuart M. Bluestone, Deputy Attorney General

Albert J. Lama, Civil Division Director