



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2023-04

June 2, 2023¹

QUESTION PRESENTED²

A municipality is considering purchasing a fire truck. The fire truck would be procured under statewide price agreement #10-00000-21-00101 AF, a National Association of State Procurement Officials (“NASPO”) contract led by the State of Mississippi, which the State of New Mexico has followed that covers purchases of fire trucks and fire apparatuses.

The cost of the truck is over \$2 million. The vendor offers a discount if the municipality prepays for the truck. The time of delivery of the truck does not significantly depend on whether the municipality pays in advance of

¹ This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On April 5, 2023, the Commission received a request for an advisory letter that detailed the issues as presented herein. See 1.8.1.9(B) NMAC. Commissioner Bluestone requested that the advisory letter be converted into a formal advisory opinion. See 1.8.19(B)(3) NMAC. See generally NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

delivery. (The estimated delivery following the order is approximately 24 months.) The vendor will provide the municipality a 100% performance bond following the receipt of any prepayment. Once the municipality places the order, the municipality's employees will meet with the manufacturer to ensure the fire truck is built to the municipality's desired specifications. The municipality will have the option of not accepting the truck if it does not meet specifications; however, it is unsaid whether in the event of non-acceptance, the municipality would be entitled to a refund (and in what amount) if the municipality had prepaid. May the municipality prepay for the fire truck?

ANSWER

No.

ANALYSIS

Section 13-1-158 of the Procurement Code addresses payments for purchases. See NMSA 1978, § 13-1-158 (1997). Subsection A of that Section provides:

No warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications or unless prepayment is permitted under Section 13-1-98 NMSA 1978 by exclusion of the purchase from the Procurement Code.

§ 13-1-158(A).

Under Subsection 13-1-158(A), where a purchase is subject to the Procurement Code, there is a general rule against prepayment. This statute makes clear that the municipality's central purchasing office may not issue payment for the purchase of any items of tangible personal property, unless that office certifies that the property has been received and meets the specifications that the

municipality bargained for. *See id.*; *see also* NMSA 1978, § 13-1-37 (2013) (defining “central purchasing office” in the Procurement Code).³ While the Procurement Code’s general rule against prepayment might frustrate state agencies and local public bodies in securing a better deal in certain instances, overall, the rule operates as a safeguard to protect the public’s funds. In the past, state agencies have taken special precautions to ensure they were not making unlawful prepayments. *See, e.g.*, N.M. Att’y Gen. Adv. Ltr., No. 86-17, 1986 WL 220349 (June 18, 1986) (advising that a state agency establish an escrow account with an authorization to an escrow agent to transfer funds to a contractor as the contractor periodically provides maintenance services following delivery of the desired product).

Subsection 13-1-158(A) contains an exception to the general rule against prepayment. Prepayment is permitted for those purchases that are excluded from the Procurement Code’s scope, either by Section 13-1-98, which exempts specific purchases from the Code’s application, or by the operation of some other law. *See* NMSA 1978, § 13-1-98 (2020); *see also* § 13-1-98(HH) (exempting from the Code’s application “procurements exempt from the Procurement Code as otherwise provided by law”). Section 13-1-98, however, does not exempt the purchases of fire trucks from the Code’s application.

The only potentially relevant exemption under Section 13-1-98 is for purchases by “municipalities having adopted home rule charters and having enacted their own purchasing ordinances.” § 13-1-98(K). This request, however, does not involve a home rule municipality. *See generally* N.M. Const. art. X, § 6 (home rule amendment); NMSA 1978, §§ 3-15-1 to -16 (1971, as amended through 2018) (municipal charter act). As such, the municipality’s powers, including its powers with respect to purchasing, are defined by the New Mexico Legislature and, with respect to purchasing, the Procurement Code. *See, e.g.*, NMSA 1978, § 13-1-30(A) (2005) (providing that, “[e]xcept as otherwise provided in the Procurement Code, the code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services or construction”); *see also State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶ 10, 114 N.M. 627 (explaining that, absent municipal home rule, the

³ Fire trucks are “tangible personal property” under the Procurement Code, which defines “tangible personal property” as “tangible property other than real property having a physical existence, including but not limited to supplies, equipment, materials and printed materials.” NMSA 1978, § 13-1-93 (1984).

state exercises plenary control over municipal government and a municipality must look to state statutes for express or implied grants of authority).

The municipality cannot prepay for the fire truck for another reason. The plans to purchase the fire truck are under an existing contract between the State of New Mexico and Pierce Manufacturing, Inc. *See generally* NMSA 1978, § 13-1-129 (1991) (authorizing local public bodies to procure items and services under existing contracts, including statewide price agreements). The price agreement that the municipality is using to procure the fire truck itself prohibits prepayment for goods. The State of New Mexico has entered into Statewide Price Agreement #10-00000-21-00101AF with Pierce Manufacturing, Inc. *See* General Services Department Statewide Price Agreement #10-00000-21-00101AF, *available at* <https://www.generalservices.state.nm.us/state-purchasing/statewide-price-agreements>. This New Mexico statewide price agreement follows and incorporates the terms and requirements of a NASPO contract, led by the State of Mississippi, with Pierce Manufacturing, Inc. for the purchase of fire trucks and fire apparatuses. *See* Master Agreement #8200060944 with Pierce Manufacturing Inc. for Fire Trucks and Fire Apparatus (The State of Mississippi on behalf of NASPO ValuePoint Cooperative Purchasing Organization), *available at* <https://naspovaluepoint.org/portfolio/fire-trucks-and-fire-apparatus/pierce-manufacturing-inc/>. The Master Agreement—and therefore New Mexico’s Statewide Price Agreement—expressly provides, “No advance payment shall be made for the Products and Services furnished by Contractor pursuant to this Master Agreement.” *See* Master Agreement #8200060944, § 6.1. Therefore, under the existing contract by which the municipality seeks to purchase a fire truck from Pierce Manufacturing, Inc., prepayment is not allowed.

Last, the availability of a performance bond does not allow the municipality to prepay for the fire truck. According to the request, the municipality is being offered a 100% performance bond in exchange for prepayment. Generally, a central purchasing office may require a performance bond for contracts for items of tangible personal property, where the central purchasing office deems a performance bond necessary to protect the interests of the state agency or a local public body. *See* NMSA 1978, § 13-1-148(A) (1987). But the availability of a performance bond does not operate as an exception to the Code’s general rule against prepayment. *See* § 13-1-158(A). Subsection 158(A) specifies those exceptions when prepayment is allowed, and the statute does not include an exception for prepayment of purchases for which the procuring entity has obtained a performance bond. Nor does the availability of a performance bond alter the contract term in the New Mexico Statewide Price Agreement, which the

municipality is using to purchase the fire truck, that “[n]o advance payment shall be made for the Products and Services” furnished by Pierce Manufacturing, Inc. under the agreement.

CONCLUSION

For the foregoing reasons, under the Procurement Code, the municipality may not prepay for the firetruck and may only pay for the truck after the municipality’s central purchasing office certifies that the truck has been received and meets the specifications that municipality bargained for. *See* § 13-1-158(A).

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RON SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner