

Opinion No. 70-66

July 17, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Lee Berkheimer Business Manager New Mexico School for the Visually Handicapped Alamogordo, New Mexico 88310

QUESTIONS

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May the New Mexico School for the Visually Handicapped purchase, without bid, push-brooms and whisk-brooms that are manufactured at La Tuna Federal Penitentiary in Texas?

CONCLUSION

Yes, but see analysis.

OPINION

{*112} ANALYSIS

With the exception of certain specified {*113} organizations and bodies, all state agencies and local governing bodies are required by law to make purchases in accordance with the Public Purchases Act, Section 6-5-17 through 6-5-35, N.M.S.A., 1953 Compilation. In seeking to assure that the state will acquire necessary goods and services at the most economical price, the Act requires most purchases to be made only upon the receipt by the purchasing agency of competitive bids.

Exceptions do exist, however, to the general requirement for bids. Section 6-5-27, N.M.S.A., 1953 Compilation, permits emergency purchases to be made provided that a **bona fide** emergency exists and further provided that a full description of the emergency necessitating the purchase, the item purchased, the price, and the name and address of the supplier, is submitted to the State Purchasing Agent. Attorney General Opinion 67-107 issued September 8, 1967. Section 6-5-34 provides an extended list of exceptions to the general bidding requirement, and Section 6-5-33, N.M.S.A., 1953 Compilation, provides an exception to the bid requirement when the United States Government or any agency or department thereof is the vendor of goods wished to be acquired. That Section provides:

6-5-33. Federal property or equipment -- Acquisition by central purchasing agent. -- A. A central purchasing office may enter into any contract with the United States Government, or with any agency or department thereof, for the purchase, lease,

receiving as a loan or gift, or any other means of acquisition, of any real or personal property without regard to provisions of law which require:

- (1) the posting of notices or public advertising for bids;
- (2) the inviting or receiving of competitive bids; and
- (3) the delivery of purchases before payment;

B. A central purchasing office may designate a representative of a user to enter a bid or bids at any sale of any real or personal property owned by the United States government or any agency or department thereof and may authorize that person to make payment required in connection with such bidding.

La Tuna Penitentiary is a federal penitentiary and the brooms manufactured there are produced under the authority of the Federal Prison Industries Act, 18 U.S.C. 4121 through 4128. Though no explicit mention of the fact is made, it would appear proper to assume that the brooms are the property of the United States Government, within the meaning of Section 6-5-33, **supra**, on at least three bases. First, materials used in prison manufactures may be exchanged and transferred between federal agencies without the necessity of exchange of funds. 18 U.S.C. 4122(e). Next, the financial support for industrial installations is drawn from the "support for United States prisoners" appropriation. 18 U.S.C. 4125(c). Finally, all monies received from the sale of prison produced goods are required to be deposited into the Treasury of the United States, to the credit of the Prison Industries Fund, and subject to the supervision of the federal General Accounting Office and Comptroller General. 18 U.S.C. 4126.

There remains, however, the possibility that the School may not be regarded by the United States Government as an eligible purchaser of prison manufactures. While the Act permits federal agencies to purchase such goods, 18 U.S.C. 4122 specifically declares that prison manufactures may not be sold "to the public in competition with private enterprise." It would appear that any final determination of the legality of the transaction contemplated herein must depend on the authority of the Penitentiary to sell the brooms to an agency of the State of New Mexico. Provided that the proper federal authorities do not consider such a sale in violation of 18 U.S.C. 4122, the New Mexico School for the Visually Handicapped may purchase brooms produced at La Tuna Penitentiary without the necessity of the School's receiving competitive bids to supply those goods.

By: Richard J. Smith

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