

Opinion No. 75-15

February 19, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: C. R. Sebastian State Purchasing Agent Lamy Building Santa Fe, New Mexico
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QUESTIONS

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1. Has the legislature passed a law permitting so-called lease-purchase transactions?
2. May a state agency enter into a lease-purchase agreement for the acquisition of equipment covering a period of three to five years?
3. What provisions have been made for the payment of interest on lease-purchases?
4. In bidding a lease-purchase, would the rate of interest be considered with the cost of the item or commodity?
5. May this type of transaction be handled through financing or leasing companies other than the vendor of the equipment?
6. Are there "truth-in-lending" laws which should be considered?

CONCLUSIONS

See analysis.

OPINION

{*54} Question No. [1]

The legislature has not enacted any law which specifically prevents the State of New Mexico from entering into lease agreements for equipment. Indeed, Section 6-5-31, NMSA, 1953 Comp. specifies that:

"Any lease agreement for personal property of one thousand dollars (\$ 1,000) or more annually shall be subject to the provisions of the Public Purchases Act . . ."

With the enactment of this provision, the legislature has, by implication, determined that it is proper for the State of New Mexico to lease personal property.

Moreover, there is no statute which precludes the State from entering into a lease with the **option to purchase**; therefore, as will be discussed further, we conclude that the State may lease personal property with an option to purchase.

Question No. [2]

Although the legislature has given the State authority to lease personal property, Section 6-5-31, **supra**, we must examine Article IX, Section 8 of the New Mexico Constitution to determine whether the leasing of personal property would create an unconstitutional "debt". Article IX, Section 8 specifies:

"No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object . . ."

The question that arises is whether a State agency which has entered into a lease-purchase agreement for personal property has contracted a "debt". Of course, if the agency is authorized by the legislature to lease certain property then there will be no violation of Article IX, Section 8, **supra**.

In **State ex rel. Capitol Addition Building Commission v. Connelly**, 39 N.M. 312, 46 P.2d 1097 (1935) the court, quoting from the case of **Seward v. Bowers**, 37 N.M. 385, 24 P.2d 253 (1933), defined "debt" as:

"The idea of a debt in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitled the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency."

In answering the question of whether it was a violation of the debt limitation of Article IX, Section 10 of the New Mexico Constitution for certain counties to lease heavy equipment, the Tenth Circuit Court of Appeals, in the case of **Allstate Leasing Corporation v. Board of County Commissioners, Rio Arriba County, New Mexico**, 450 F.2d 26 (10th Cir. 1971), said:

"Under the decision of the New Mexico Supreme Court in **Seward v. Bowers**, 37 N.M. 385, 24 P.2d 253, 'a debt' in the constitutional sense is an **unconditional obligation..** .

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Thus the question is whether a 'debt' was created by the contract in issue, that is, whether there was an **unconditional {55} obligation** to pay." (Emphasis added)

The court concluded that the leasing of chattels by a county is a "contingent obligation", and therefore not a "debt".

In **Opinion to the Governor**, 308 A.2d 802 (R.I. 1973), the court considered whether it was a violation of a similar constitutional provision on state debts for a state agency to lease property. The Supreme Court of Rhode Island concluded that lease payments made by state agencies do not create a debt against the state since they are recurring obligations and are to be paid out of current revenues. **Hall v. City of Baltimore**, 252 Md. 416, 250 A.2d 233 (1969); **Jefferson School Township v. Jefferson Township School Building Company**, 212 Ind. 542, 10 N.E. 2d 608 (1937); **Walinske v. Detroit-Wayne Joint Building Authority**, 325 Mich. 562, 39 N.W.2d 73 (1949); **Kelly v. Earl**, 325 Pa. 337, 190 A. 140 (1937); Annot. 145 A.L.R. 1362.

The mere fact that the State enters into a lease agreement with an **option to purchase the property** in the future does not violate Article IX, Section 8, **supra**. An "option" to purchase does not obligate the State to purchase the property; therefore, no "debt" for the purchase price of the equipment will arise. Since a lease-purchase agreement entered into by the State would be a contingent obligation paid out of current revenues, it would not violate Article IX, Section 8, **supra**.

Nevertheless, a word of caution is necessary. If the lease-purchase agreement creates a full and complete liability upon its execution, or if the lease is actually a **conditional sales contract** in which the rentals are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability arises, the lease will be void unless there has been compliance with the provisions of Article IX, Section 8, **supra**. **Los Angeles v. Offner**, 19 Cal. 2d 483, 122 P.2d 14 (1942).

It is our conclusion that, since the State has authority to purchase property and to lease property, Section 6-5-31, **supra**, it can enter into a lease with an option to purchase the property subject to the caveats outlined above. Opinion of the Attorney General No. 72-30, issued June 28, 1972.

Although it is permissible for the State to enter into a lease agreement with the option to purchase, the Supreme Court of New Mexico has restricted the length of time that the State may obligate itself to pay lease payments. The Supreme Court, in the case of **National Building v. State Board of Education**, 85 N.M. 186, 510 P.2d 510 (S. Ct. 1973), declared:

"A public agency may not enter into a lease for a period of time which would extend beyond the period for which legislative appropriations are made."

State Office Building Commission v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941). The court seemed to indicate that if the terms of a lease purport to bind future legislatures to appropriate funds to pay under the terms of the lease, that the lease will be held to be in violation of public policy.

Therefore, it is our opinion that, in the absence of express statutory provision otherwise providing, a state agency, department, bureau or commission may enter { *56 } into a lease of personal property only for such period of time as there exists legislative

appropriations or other funds which are available to cover lease payments which will become due under the provisions of the lease contract.

Question No. [3]

The State may not pay interest on the balance of the outstanding lease payments because such payments would indicate that the outstanding lease payments are fixed obligations rather than contingent liabilities. The State will only be obligated to pay the specific lease payments.

Question No. [4]

Since we have expressed the opinion that the State cannot pay interest on outstanding lease payments owing under a lease, there is no need to answer this question.

Question No. [5]

It is permissible for a vendor that is leasing goods to the State to assign this lease contract to a bank, trust company or other financing institution. Section 27-1-54, NMSA, 1953 Comp. should be examined by the State Purchasing Agent since it specifies certain restrictions which the legislature has placed on a vendor's right to assign contracts to banks, trust companies or financing institutions.

Although the vendor may assign his lease to a bank, trust company or other financial institution, we would advise that the State Purchasing Agent ensure that the vendor is obligated under the original lease contract to provide the necessary repairs and maintenance after the lease has been assigned to a financial institution.

Question No. [6]

There is no need to discuss provisions relating to truth-in-lending.

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