

## **Opinion No. 87-47**

August 21, 1987

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Carol A. Baca, Assistant Attorney General

**TO:** The Honorable Roman Maes, The New Mexico State Senate, c/o 402 Graham, Santa Fe, NM 87501

### **QUESTIONS**

1. Whether section 2 of SB 282 amended 13-1-98 of the Procurement Code to permit local public bodies to enter into contracts with an independent contractor for construction and operation of a jail facility without competitive bidding.
2. Whether section 2 of SB 282 amended 13-1-98 of the Procurement Code to exempt the financing and design of a jail facility provided under sections 33-3-26 and 33-3-27 NMSA 1978 from the Code.

### **CONCLUSIONS**

1. Yes.
2. Yes, as long as the local public body will not have a direct contractual relationship with the parties responsible for designing and financing the facility.

### **ANALYSIS**

Except as otherwise provided in the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978, the Code applies to procurements by state agencies and local public bodies of items of tangible personal property, services, and construction. Section 13-1-30(A) NMSA 1978. The Code's definition of "tangible personal property" excludes real property and includes, but is not limited to, supplies, equipment, materials and printed materials. Section 13-1-93 NMSA 1978. The Code defines "services" generally as the furnishing of labor, time, and effort. Section 13-1-87 NMSA 1978. The term "professional services" is a subset of "services" and includes expressly the services of such persons as architects, planners, and engineers. Section 13-1-76 NMSA 1978. The Code broadly defines the term "construction," which includes the building of any "building, stadium or other structure." Section 13-1-40(A)(2) NMSA 1978.

Section 2 of SB 282 amended section 13-1-98 of the Procurement Code to state, among other things: "The provisions of the Procurement Code shall not apply to...contracts entered into by a local public body with a private independent contractor for the operation, or provision and operation, of a jail pursuant to Sections 33-3-26 and

33-3-27 NMSA 1978." As can be seen, the amendment to section 13-1-98 does not fit neatly within the nomenclature that the Procurement Code has established. The Code does not define the terms "operation" or "provision."

The law firm's letter that you submit for our consideration concludes that section 2 of SB 282 excludes contracts for the construction and operation of a jail from the Procurement Code's requirements. The letter reasons that section 2 of SB 282 must be read in conjunction with sections 33-3-26 and 33-3-27. Section 33-3-26 generally authorizes counties and municipalities to enter into agreements to "operate or provide and operate" jail facilities for the care and housing of prisoners. Section 33-3-27 sets forth a number of specific conditions that such agreements must satisfy. Although sections 33-3-26 and 33-3-27 do not define an agreement to "provide and operate a jail," subsection 33-3-27(A) states the following:

No agreement with a private independent contractor for the operation of a jail or for the incarceration of prisoners therein shall be made for a period of more than three years. **Agreements** binding on future governing bodies **for construction**, purchase, or lease of a jail facility for not more than fifteen years are hereby authorized.

(emphasis added.)

The letter concludes that the reference to construction agreements in subsection 33-3-27(A) indicates that an agreement for "operation and provision" of a jail under sections 33-3-26 and 33-3-27 can include as one of its components an agreement to construct a jail facility. The letter finds additional support for this conclusion in subsection 33-3-27(B), which requires a performance bond and the submission of a proposed plan with agreements for the operation, or provision and operation, of a jail. The letter states that a performance bond and proposed plans are concepts associated with construction.

We are not persuaded that any reliance should be placed on subsection 33-3-27(B) for the proposition that construction is a component of an agreement for the provision and operation of a jail. The Procurement Code plainly states that a performance bond may be required in contracts for tangible personal property or services as well as in contracts for construction. Section 13-1-148 NMSA 1978. In addition, the Code uses the term "specifications" rather than "proposed plan" with the invitation-to-bid procedure used to procure construction. Section 13-1-103 NMSA 1978.

We agree, however, that the amendment to section 13-1-98 must be read with sections 33-3-26 and 33-3-27. *Fort v. Neal*, 79 N.M. 479, 481, 444 P.2d 990, 992 (1968); *Allen v. McClellan*, 75 N.M. 400, 402, 405 P.2d 405, 406 (1965). We also agree it is correct to conclude that subsection 33-3-27(A) indicates that an agreement calling for construction of a jail facility can be a component of an agreement for the operation and provision of a jail under sections 33-3-26 and 33-3-27. Therefore, a construction agreement that is entered into as part of an overall agreement for operation and provision of a jail pursuant to sections 33-3-26 and 33-3-27 is, in our opinion, exempt from the Procurement Code's requirements. We emphasize that an agreement between a local

public body and an independent contractor for construction purposes only is not exempt from the Code.

You also have asked whether the "financing and design" of a jail facility provided under sections 33-3-26 and 33-3-27 are exempt from the Code. You have not given us any facts or specific project to examine, but we have two general observations. Where design and financing would be provided through subcontracts between the contractor who is constructing the project, and the financing and designing entities, we do not believe that the local public body is acquiring services or professional services for Procurement Code purposes. See Section 13-1-30(A). If, on the other hand, the local public body will have a separate, direct contractual relationship with the parties responsible for designing and financing the construction, the Code's provisions will apply.

**ATTORNEY GENERAL**

HAL STRATTON Attorney General