

Opinion No. 87-57

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OPINION OF: HAL STRATTON, Attorney General

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TO: Representative John J. McMullan, 1512 California, NE, Albuquerque, New Mexico 87110

QUESTIONS

Does the Procurement Code or other relevant state law, rule or regulation require the State Fair Commission to use a bid or request for proposal process when extending leases beyond the term of an existing contract?

CONCLUSIONS

No.

ANALYSIS

The New Mexico State Fair is "a body politic and corporate and separate and confirmed as a governmental instrumentality" under state law. Section 16-6-14 NMSA 1978. The Fair by law is given certain express powers, among these, the power to "acquire by purchase, gift or the exercise of the right of eminent domain, and hold and dispose of real or personal property or rights or interests therein..." Section 16-16-15 NMSA 1978. The granting or extension of a lease falls among the enumerated powers of the Fair as a disposition of an interest in real property. See *Chase v. Aetna Rubber Co.*, 75 N.E.2d 637 (Mass. 1947) (a "lease" of land conveys an interest in land). Moreover, Section 13-6-2 NMSA 1978 states: "Any state agency or local public body ... is empowered to sell or otherwise dispose of real or personal property belonging to the state agency or local public body." Hence, the State Fair Commission has the authority to lease portions of its grounds. See Opinion of the Attorney General No. 67-58 (1967); Opinion of the Attorney General No. 64-92 (1964).

The Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978, applies to "the procurement of items of tangible personal property, services and construction." Section 13-1-30. "A lease creates a possessory estate in land," see *W. Burby*, *Real Property* § 43, at 111 (3d ed. 1965), and is not "tangible personal property, services [or] construction." Thus, the Procurement Code does not regulate leases of real property.

However, Sections 13-6-2 and 13-6-3 NMSA 1978 impose conditions on a state agency's authority to lease its real property. If the transaction involves real property with a current resale value of five thousand dollars or more, the State Budget Division of the

Department of Finance and Administration must approve the lease. Section 13-6-2. Furthermore, the legislature must approve any lease of real property for a term exceeding twenty-five years, with consideration of one hundred thousand dollars or more. Section 13-6-3.

Extension of a lease constitutes a continuation of an initial disposition of real property. See *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798, 802 (Tex. 1984) ("extension" of lease generally means prolongation or continuation of term of existing lease); *Chalkley v. Ward*, 166 S.E.2d 748, 750 (Ga. 1969). If the current resale value of the property leased exceeds five thousand dollars, the Department of Finance and Administration must approve any extensions. Unless, however, a lease is extended so that it extends beyond the twenty-five year period specified in Section 13-6-3, legislative approval is not required. Thus, state law does not require the State Fair Commission to use a bid or request for proposal when extending leases beyond the term of an existing contract.

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