

## Opinion No. 87-67

November 2, 1987

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

**BY:** Sarah Alley, Assistant Attorney General

**TO:** Jacqueline Robbins, Chief Public Defender, Public Defender Department, 142 Lincoln Avenue, Suite 500, Santa Fe, New Mexico 87501

### QUESTIONS

May the Public Defender's Office award professional service contracts for the representation of indigent criminal defendants to State representatives?

### CONCLUSIONS

No. The Public Defender's Office may not award State representatives professional service contracts unless solicitation for competitive bids is done, in accordance with the Procurement Code. State contracts may not be awarded to state representatives based upon competitive proposals.

### ANALYSIS

Your office has requested an advisory opinion addressing the propriety of the Public Defender Department awarding contracts for the representation of indigent criminal defendants to State Legislators. The Public Defender Department awards contracts to private attorneys, who may be legislators pursuant to the Procurement Code, Sections 13-1-21 to 13-1-199 NMSA 1978. State legislators are also subject to certain provisions of the Conflict of Interest Act, Sections 10-16-1 to 10-17-1 NMSA (1978).

Section 10-16-9 NMSA provides, inter alia:

A state agency shall not enter into any contract of purchase with a legislator or with a business in which such legislator has a controlling interest, involving services or property in excess of one thousand dollars (\$1,000) where the legislator has disclosed his controlling interest, unless the contract is made after public notice and **competitive bidding**.

(emphasis added). A professional legal service contract is a "contract of purchase ...involving services". Op. Att'y. Gen. No. 79-23 (1979). Although the Conflict of Interest Act requires public notice and competitive bids from legislators, the Act does not explain the manner in which a state agency should provide notice, solicit bids, or determine to whom a bid should be awarded.

The Procurement Code provides comprehensive requirements for a state agency to contract specifically for professional services. The code applies to every expenditure of state funds when procuring professional services and would therefore apply to the contracts in issue.

Section 13-1-111 of the Code provides that a state agency may choose sealed proposals over sealed bids in procuring professional services when such sealed proposals are advantageous to an agency, and sealed bids are impracticable. In addition, Section 13-1-114 requires that an agency's published request for proposals specify the evaluation criteria an agency will use as the basis for the awarding of contracts. Section 13-1-114 NMSA (1978). Finally, Section 13-1-117 of the Code provides that the award of contracts for professional services may be made on factors such as qualification rather than solely upon the cost of the services. Section 13-1-117 NMSA (1978).

Some tension exists between the Conflict of Interest Act and the Procurement Code. The Conflict of Interest Act generally requires bids, whereas the Procurement Code distinguishes between bids and proposals. See Section 13-1-21 through 13-1-199 NMSA (1978). The rule of statutory construction well accepted in New Mexico is that statutes covering the same subject matter should be harmonized, even when one statute is in general terms and another is more specific. *State v. Rue*, 72 N.M. 212, 216, 382 P.2d 697, 700 (1963). The Conflict of Interest Act appears to be the more specific statute, because it deals directly with contracts between state agencies and legislators. On the other hand, the Conflict of Interest Act was promulgated in 1967, Law of 1967, chapter 306 § 9, before the enactment of the Procurement Code, and could be said to require generally competition in awarding state contracts to legislators. There is a presumption in statutory construction that statutory words are presumed to be used in their ordinary and usual sense. *Bettini v. City of Las Cruces*, 82 N.M. 633, 634, 485 P.2d 967, 968 (1971). Thus, it appears that the legislature did not intend to preclude completely legislators from receiving state contracts, as long as such contracts are procured through "competitive bidding".

It may be that, to require "bidding," as the term is used in the Procurement Code, for professional service contracts could have the practical effect of precluding legislators from securing professional service contracts. Most, if not all professional services contracts are awarded through the use of competitive sealed proposals. Moreover, to prohibit legislators from receiving state contracts through professional service contracts, because most if not all of such contracts are awarded pursuant to competitive proposals, while allowing state representatives to receive contracts awarded on competitive bids, imposes, arguably, an arbitrary distinction. Legislators who are attorneys with a controlling interest in a law firm may be precluded from contracting with the state, unless those contracts are procured through the use of bids. It is our understanding that the Public Defender Department always uses sealed proposals prior to contracting for the professional services of attorneys. In *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), the Supreme Court of Arizona found unconstitutional a bid system that a county used for awarding contracts for indigent defense counsel. The bid system

awarded contracts by the lowest bid. The court held that, in determining whether the accused's Sixth Amendment right to effective counsel was protected, the county's bid system should focus on the attorney's quality of performance rather than the cost of his service.

The effect of the Public Defender Department's preclusion from contracting out through bids is to disallow state representatives from ever receiving the Department's contracts however, any other result would do violence to the literal language of Section 10-16-9. The legislature, not this Office, should make any amendments if it finds the specific policy for legislators in the Conflict of Interest Act inconsistent with that now expressed in the Procurement Code for all service contracts. Accordingly, it is our opinion that, because the Procurement Code provides specific procedures that allow a state agency to comply with the general mandate of the Conflict of Interest Act, the Department may award contracts to state legislators only if such contracts originate from sealed bids.

### **ATTORNEY GENERAL**

HAL STRATTON Attorney General