

Opinion No. 87-35

July 28, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Leonard T. Valdes, Executive Secretary, Public Employees' Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

QUESTIONS

Whether the Public Employees' Retirement Board's administrator's agreement with PEBSCO, which expires in October, 1987, must be let for proposals pursuant to the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978.

CONCLUSIONS

See analysis.

ANALYSIS

Section 13-1-30(A) NMSA 1978 states: "Except as otherwise provided in the Procurement Code [13-1-28 to 13-1-199 NMSA 1978], that Code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction." Section 13-1-29(C) NMSA 1978 states that a purpose of the code is to "maximize the purchasing value of public funds." When a state agency procures professional services, it must do so by competitive, sealed proposals. Section 13-1-111 NMSA 1978.

PEBSCO provides professional services to PERA by administering and marketing the state's deferred compensation program. PEBSCO's contract with the State of New Mexico provides that it shall not receive compensation from the state for performing services under the agreement. Rather, PEBSCO's sole compensation for performing its services derives from "its right to receive from the underwriter the usual sales commissions, marketing allowances, expense reimbursements to the Administrator, administrative fees, or other considerations legally permitted to be paid resulting from the sale and placement of investment products in funding the deferred compensation plan." See Administrator's Agreement /P8. Section 10-7A-10 NMSA 1978 provides: "Any expenditure necessary to implement the Deferred Compensation Act [10-7A-1 to 10-7A-10 NMSA 1978] shall be charged to participating employees or to companies operating an approved deferred compensation plan."

Section 457 of title 26 of the United States Code requires that an eligible state deferred compensation plan provide that "all amounts of compensation deferred under the plan,

all property and rights purchased with such amounts, and all income attributable to such amounts from property or rights, shall remain (until made available to the participant or other beneficiary) solely the property and rights of the state." In Opinion of the Attorney General No. 80-33 (issued Oct. 15, 1980), Attorney General Jeff Bingaman concluded that funds credited to an employee's account under deferred compensation plans established by counties were subject to state laws governing the deposit and investment of public funds. This conclusion rested on Section 457 of the Internal Revenue Code. The opinion states: "Because the funds credited to an employee's deferred account must be owned by the county and will be subject to claims of county creditors, they are not distinguishable from public funds of the county and, accordingly, are governed by state laws relating to the deposit and investment of public funds."

The legislature altered this conclusion somewhat when it enacted the Deferred Compensation Act, Laws 1981, chapter 155, sections 1 through 12, codified as Sections 10-7A-1 to 10-7A-10 NMSA 1978. Specifically, section 11 of chapter 155 amended a related statute, upon which Attorney General Bingaman had opined, pertaining to salary reduction agreements with public employees, Section 10-7-8 NMSA 1978, to provide: "Any funds deducted from an employee's salary or wages pursuant to any such deferred compensation plan shall not be subject to any state law regulating or restricting the deposit or investment of public funds." The legislature did not, however, wholly exempt such deducted amounts, which are public funds according to the rationale of this opinion, from all laws regulating public funds, including the Procurement Code.

Thus, while Section 10-7A-10 NMSA 1978 may suggest that PEBSCO's contract would be excluded from the Procurement Code's competitive proposal requirements, the cited attorney general opinion suggests otherwise. In keeping with that opinion and Section 13-1-29 NMSA 1978, requiring a liberal interpretation of the Procurement Code, we conclude that, to the extent the administrator receives as compensation an amount exceeding \$20,000 see Laws 1987, chapter 348, section 8, the administrator's services must be competitively procured.

Respectfully submitted,

ATTORNEY GENERAL

HAL STRATTON Attorney General