

Opinion No. 88-42

June 28, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Scott D. Spencer, Assistant Attorney General

TO: Mr. Robert M. Aurbach, Executive Director, Administrative Office of the District Attorneys, P.O. Box 9470, Santa Fe, NM 87504

QUESTIONS

1. Does the Procurement Code apply to the sale of a manual by a state employee to the New Mexico State Department of Public Safety?
2. Does the initial purchase of such a manual in the amount of \$400 require any public bidding procedure, and must subsequent purchases which may amount to more than \$1,000 be publicly bid given that the item being purchased is, on its face, unique and available from only one source?
3. Do any other statutory provisions affect, limit, or prohibit the transaction contemplated?

CONCLUSIONS

1. No.
2. See analysis.
3. No.

ANALYSIS

A state employee has written a manual entitled "Police Officer Prosecutions." For purposes of this opinion, we assume the following: (1) the employee did not write the manual as part of his official duties; (2) he spent no "state time" in writing the manual; (3) the manual is copyrighted by registration; (4) the New Mexico State Department of Public Safety wants to purchase the manuals for use in its training programs at the Law Enforcement Academy; (5) the initial purchase will consist of an order of one hundred (100) manuals at a total purchase price of \$400 plus gross receipts tax; and (6) subsequent purchases may exceed \$1,000.00.

Section 13-1-98 NMSA 1978 provides in part: "The provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978] shall not apply to: . . . E. Purchases of books and periodicals from the publishers or copyright holders thereof . . ." We understand and

assume that the manual is a "book" as the term is commonly used. See *Scoville v. Toland*, 21 Fed. Cas. 863, 864 (C.C.D. Ohio 1948). *Turbedille v. State*, 56 Miss. 793, 798 (1879). As long as the Department purchases the manual from the copyright holder the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978, does not apply.

Section 10-16-7 NMSA 1978 provides as follows:

A state agency shall not enter into any contract with an employee of the state or with a business in which the employee has a controlling interest, involving services or property of a value in excess of \$1,000 when the employee has disclosed his controlling interest unless the contract is made after public notice and competitive bidding; provided that this section does not apply to a contract of official employment with the state.

(Emphasis added.) We have not reviewed a copy of any proposed contract. A contract of purchase in an amount less than \$1,000 does not require competitive bidding. The fact that the item may be unique and available from only one source is not relevant, as Section 10-16-7 does not contain such an exemption. If, in fact, any such contract involves the purchase of property of a value in excess of \$1,000,¹ it may be entered into only after public notice and competitive bidding. "Competitive bidding" requires advertisement and giving an opportunity to others to bid, and the bidding must be on the same undertaking and upon each of the same material items that the contract covers. *Wilmington Parking Auth. v. Ranken*, 34 Del. Ch. 439, 105 A.2d 614, (1954); *Sterrett v. Bell* 240 S.W.2d 516, (Tex. Civ. App. 1951). The agency must treat all bidders equally; all bidders must bid on the same terms and conditions involved in all the items and parts of the contract; and the proposals must specify as to all bids the same, or substantially similar, specifications. *Id.* This office cannot apply these principles to answer the second question without reviewing a proposed purchase contract.

Apart from the considerations set forth above, no statutory provisions would affect, limit or prohibit the described transaction.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) We caution against dividing the purchases to circumvent Section 10-16-7.