

August 27, 2024

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2024-12

To: Amanda Getchell Stevenson, Youth Conservation Corps Commission Chair

Re: Opinion Request – The Youth Conservation Corps Commission and the New Mexico Procurement Code

Question

Is the Youth Conservation Corps Commission (the Commission) subject to the New Mexico Procurement Code (the Code) when implementing contracts to distribute funds to competitively selected recipients to carry out public projects for training corps members?

Answer

Yes. The Commission is administratively attached to a state agency and is therefore generally subject to the Code. The implementation of contracts to distribute funds to competitively selected recipients to carry out public projects for training corps members is considered “services” under the plain language of the Code. Further, the legislature history indicates the Legislature did not intend to exempt Commission expenditures from the Code or designate Commission fund distributions as grants. However, the distribution of Youth Conservation Corps (YCC) program (the Program) funds to other state agencies or local public bodies may be exempt from the Code.

Background

The Commission has requested an opinion regarding whether certain of its activities are subject to the Code. The Commission is “administratively attached to” the New Mexico Energy, Minerals and Natural Resources Department. NMSA 1978, §§ 9-5B-3, -5 (1992). The Commission “provide[s] a process to employ young persons in public projects that conserve New Mexico’s natural resources and provide community benefits of lasting value.” NMSA 1978, § 9-5B-2 (1992). Both public and private non-profit entities are eligible to receive Program funds. To date, the YCCC has followed the New Mexico Procurement Code and has requested an opinion from the Attorney General regarding whether YCC Program activities are in fact subject to the Code for the

transfer of funds from the State to competitively selected recipients to carry out public projects with Corps members.

Analysis

Our analysis begins with the language of the Code, which provides: “*Except as otherwise provided in the Procurement Code, 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 . . .*” NMSA 1978, § 13-1-30(A) (2005) (emphases added). Exemptions to the Code are extensive, but they are limited to specific and detailed instances. *See generally* NMSA 1978, § 13-1-98 (2023). The Code does not provide an exemption for the Youth Conservation Corps Commission’s activities and distribution of funds.

It is the position of this Office that the distribution of YCCC funds is a “service” under the Procurement Code. “Services,” as defined in the Code,

means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. “Services” includes the furnishing of insurance but do not include construction or the services of employees of a state agency or a local public body.

NMSA 1978, § 13-1-87 (1984). The “services” that YCCC is procuring include the development, administration, and management of public projects from a third party for its Youth Corps members through a formal selection process.

The YCC Program, by regulation, follows a formal proposal and agreement process. Specific guidelines for proposals must be followed. “At least annually, the commission will request proposals for YCC projects. The Commission’s announcement will include where to obtain proposal information and the date by which proposals must be submitted.” 11.2.171.8 NMAC. Additionally, award agreements are regulated by the Commission. “Successful applicants shall enter into a formal agreement with the commission for the expenditure of awarded funds.” 11.2.171.16 NMAC. The language of the YCC Program regulations regarding “expenditure” of awards, 11.2.171.16 NMAC, is consistent with the application of the Code to “every expenditure” of a state agency or local public body, Section 13-1-30(A), further supporting our conclusion that the YCCC is subject to the Code.

Generally, competitive sealed bids are required for all procurements. NMSA 1978, § 13-1-102 (2022). However, competitive sealed proposals are allowed in limited circumstances, including “when a state agency or a local public body is procuring professional services or a design and build project delivery system, or when the state purchasing agent, a central purchasing office *or a designee of either officer [office] makes a written determination that the use of competitive sealed bidding for items of tangible personal property or services is either not practicable or not advantageous* to the state agency or a local public body, a procurement shall be effected by competitive sealed proposals.” NMSA 1978, § 13-1-111(A) (2007) (emphases added).

In the case of the YCC Program, public projects administered and implemented by a third party for the employment of Corps members are identified by the third party and then proposed to the

YCCC in the proposal process. The YCC Program's regulations, as currently issued by the Commission, comply with the Code so long as the proposal process follows the procedure outlined in the Code. Expenditures of YCC Program funds to competitively selected recipients to hire Corps members for specific public projects are contracts for services subject to the Code.

B. The New Mexico Legislature did not intend to exempt YCCC expenditures from the Procurement Code or designate YCCC fund distributions as grants.

If the Legislature intended the YCCC to be exempt from the Code it would have included such an exemption under Section 13-1-98; within the language of the Youth Conservation Corps Act (YCCA), NMSA 1978, §§ 9-5B-1 to -11 (1992, as amended through 2020); or in the YCC Program regulations, 11.2.171 NMAC (12/17/2019, as amended through 9/15/2020). Because the Legislature has not done so, YCCC expenditures are subject to the Code.

Indeed, the Legislature has expressly chosen *not* to designate YCCC activities as grants or similar funding mechanisms. The legislative history of the YCCA is instructive. In 2019, a new section of the New Mexico Youth Conservation Corps Act titled "Outdoor Equity Grant Program Fund – Created" was enacted as follows:

- A. The "outdoor equity grant program fund" is created in the state treasury. All appropriations, gifts, devises, grants and donations received shall be deposited in the fund. Money in the fund is appropriated to the commission for the purpose of carrying out the outdoor equity grant program pursuant to the provisions of the New Mexico Youth Conservation Corps Act. Any money appropriated to the fund or accruing to it through gifts, grants, bequests or interest shall remain in the fund. Money in the fund shall not revert at the end of a fiscal year.
- B. The fund shall be administered by the department. Disbursements from the fund shall be made only upon warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the chair of the commission or the chair's designee for the purpose of carrying out the outdoor equity grant program pursuant to the provisions of the New Mexico Youth Conservation Corps Act.

2019 N.M. Laws, ch. 117, § 8.

However, just a year later, the Legislature recompiled the "Outdoor Equity Grant Program Fund – Created" as part of the Economic Development Department Act (EDDA) and removed this section from the YCCA. 2020 N.M. Laws, ch. 65, § 5 (codified as NMSA 1978, § 9-15-14.5 (2020)). Section 9-5B-10.1, which was also enacted in 2019 and was titled "Outdoor Equity Grant Program – Created – Administration – Grant Criteria," was also recompiled as part of the EDDA and removed from the YCCA. 2020 N.M. Laws, ch. 65, § 4 (codified as NMSA 1978, § 9-15-14.4 (2020)). Programs carried out under the YCCA are funded by a general "New Mexico youth conservation corps fund" created in the state treasury, where all appropriations, gifts, devises,

grants and donations received are deposited. NMSA 1978, § 9-5B-10(A) (1992). In sum, because provisions creating a “grant program fund” for the YCC were specifically removed, and where no other provision of the Code or the YCCA otherwise exempts YCCC activities, we conclude that the Legislature intended YCCC expenditures to be subject to the Code.

C. The distribution of YCC Program funds to state agencies and local public bodies may be exempt from the Procurement Code.

While we have concluded that the YCCC is generally subject to the Code in its expenditures of funds, if the Commission procures services from a state agency, local public body, or other external procurement unit, these expenditures may be exempt from the Code. The Code expressly does not apply to “procurement of items of tangible personal property or services by a state agency or a local public body from a state agency, a local public body or external procurement unit except as otherwise provided in Sections 13-1-135 through 13-1-137” § 13-1-98(A). As such, the distribution of YCC Program funds to state agencies and local public bodies may be exempt from the Procurement Code, except as otherwise prohibited therein.

Conclusion

Because the YCCC does not fall under any exemption of the Procurement Code, it is generally subject to the Code. Specifically, the YCCC’s distribution of funds to third parties is the procurement of “services” for the administration and implementation of public projects for Youth Corps members. That the YCCC is subject to the Code is consistent with the Code’s purpose to “provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C). Further, the legislative history demonstrates that the Legislature did not intend to exempt the YCCC from the Code. However, we note above that procurements between the YCCC and certain public bodies may fall within the exemption to the Code found at Section 13-1-98(A).

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ Seth C. McMillan
Seth C. McMillan
Deputy Solicitor General