

**July 12, 2011 Advisory Letter---Legality of Contract Entered Into By State  
Investment Council**

June 14, 2011

The Honorable Timothy Z. Jennings  
New Mexico State Senate  
P.O. Box 1797  
Roswell, NM 88202-1797

**Re:** Opinion Request – Legality of Contract Entered Into By State Investment Council

Dear Senator Jennings,

You have requested our opinion regarding the legality of a contract that was entered into and subsequently amended by the State Investment Council (“SIC”) and the Paul Hastings Janofsky & Walker, LLP law firm (the “Law Firm”) outside of the parameters of the Procurement Code. While you ask several questions relating to specific requirements of the Procurement Code, the threshold and dispositive question is whether the contract and its amendments were subject to the Procurement Code, NMSA 1978, Sections 13-1-28 through 13-1-199 (1984, as amended through 2009) (the “Code”), and accompanying regulations. As discussed more fully below, we believe that while the original contract may not have been subject to the Code, the contract became subject to the Code once the scope of work was expanded in the fifth and sixth amendments.

Background

The SIC originally entered into the contract with the Law Firm in August 2005. Pursuant to the contract’s “Scope of Work,” the Law Firm would “[s]erve as legal counsel to the SIC for the purpose of reviewing documentation relating to direct securities investments, and advising the General Counsel [of the SIC] as to securities law matters generally” and “[c]onduct negotiations, if requested, with respect to investments or other investment management matters.” The original contract term was for one year and the compensation paid to the Law Firm during the term was not to exceed \$30,000.[1]

Since entering into the original contract, the SIC and the Law Firm have amended the contract six times. The first amendment extended the term until June 2010 and increased the compensation amount to \$100,000. The subsequent amendments also increased the compensation, up to \$5.8 million under the last amendment. In addition to the original scope, the fifth amendment provided that the Law Firm would “[p]rovide advice and assist with reviewing documentation and responding to subpoenas, requests and inquiries from regulators and other government agencies, and document requests made pursuant to public disclosure laws.” The sixth amendment added that the Law Firm would “[c]onduct, and provide advice relating to and in connection with an internal

review of issues raised in connection with the matters described [in the fifth amendment].”

### The Procurement Code

The express purposes of the Procurement Code “are 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.” Section 13-1-29(C). The Code also protects “against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts.” *Memorial Med. Ctr. v. Tatach Constr. Inc.*, 2000-NMSC-30, ¶ 25, 129 N.M. 677, 12 P.3d 431 (internal quotation marks and citation omitted). The Code provides that it “shall be liberally construed and applied to promote its purpose and policies.” Section 13-1-29(A).

“Except as otherwise provided in the Procurement Code,” the Code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” Section 13-1-30. For purposes of SIC’s contract with the Law Firm, there are two pertinent exceptions. The first exempts “contracts and expenditures for litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, *but not including attorney contracts.*” Section 13-1-98(R) (emphasis added) (hereafter referred to as “Subsection R”). The second exception, which was added to the Code in 2005, exempts “contracts for investment advisory services, investment management services or other investment-related services entered into by the . . . state investment officer.” Section 13-1-98(CC) (hereafter referred to as “Subsection CC”).

The SIC contends that its contract with the Law Firm falls within Subsection CC. According to the SIC, this exception was intended to streamline and ease the burden of meeting the requirements of the Procurement Code when attempting to invest the state permanent funds. As the SIC explains, investments require numerous services including due diligence, background checks, legal review, and negotiation of legal documentation, among others. The SIC claims that “other investment-related services” covered by the exception encompass all investment-related services, including legal services. Therefore, the SIC’s position is that legal services specifically related to investments are exempt from the requirements of the Procurement Code.

While the SIC may be correct in its interpretation of Subsection CC, the scope of the contract with the Law Firm eventually encompassed more than just investment-related legal services. Originally, the contract provided that the Law Firm would review documentation relating to direct securities investments and provide general advice on securities law. At this point, the contract presumably could be described as a contract for investment-related services and was thus potentially exempt from the Code pursuant to Subsection CC.

However, the scope of work was expanded in the fifth and sixth amendments to the contract. According to the SIC, prior to these amendments SIC staff uncovered potential issues with third party placement agents and at the same time its equity consultant was entangled in a pay-to-play scandal in New York. Subsequently, the SIC received multiple subpoenas and information requests from federal authorities. The SIC emphasizes the time sensitive nature of these requests and adverse consequences it could have faced if it did not respond accordingly. It therefore expanded the scope of its contract with the Law Firm to encompass these matters.

The expanded scope of work provided for services that are more akin to attorney litigation expenses, covered under Subsection R, and therefore not exempt from the Code. Certainly, the expansion placed the contract outside of the parameters of Subsection CC, the exception for investment-related services. The SIC itself contends that the investment-related exception was intended to provide the SIC flexibility in order to make quick investments. Responding to subpoenas and other requests from federal authorities is unrelated to the actual act of making investments.

In light of the above and taking into consideration the fact that the Code must be liberally construed and applied to promote its purposes and policies, we believe the contract fell within the parameters of the Code once the scope of work was broadened to include matters that were not investment-related. Once the scope expanded outside the parameters of Subsection CC, the SIC should have issued a request for proposals and otherwise followed the Procurement Code.

The Code provides that, if the contractor did not act fraudulently or in bad faith, a contract resulting from a solicitation or award that violated the law may be ratified or revised to bring it into compliance or terminated and the contractor compensated for its actual expenses "plus a reasonable profit." NMSA 1978, § 13-1-182 (2002). A "person, firm or corporation" that knowingly violates the Code may be subject to a civil action to enforce the provisions of the Code and the assessment of civil penalties. See NMSA 1978, §§ 13-1-196, 13-1-197 (1984).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ELAINE P. LUJAN  
Assistant Attorney General

[1] At the time of the original contract, the Procurement Code treated professional services having a value of \$30,000 or less as a small purchase exempt from the requirements for competitive sealed proposals. See 2005 N.M. Laws, ch. 214, § 2. In 2007, the maximum value of professional services qualifying as a small purchase was increased to \$50,000. See NMSA 1978, § 13-1-125(B) (2007). Even if SIC's contract with the Law Firm initially qualified as a small purchase, it no longer qualified after the first amendment, which was effective June 29, 2006 and increased the contract amount to \$100,000 as discussed in the text.