

January 6, 2011 Advisory Letter---State Use Act Application

Mr. Andy Winnegar
Division of Vocational Rehabilitation
435 St. Michael's Drive, Bldg. D
Santa Fe, New Mexico 87505

Re: Opinion Request – State Use Act

Dear Mr. Winnegar:

You have requested our advice regarding the application of the State Use Act to a county's procurement of certain services. More specifically, you have asked: (1) whether Bernalillo County must purchase scanning and indexing services in accordance with the State Use Act and (2) whether the State Use Act is consistent with Article IV, Section 26 of the New Mexico Constitution. Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude the state and local public bodies, such as Bernalillo County, are required to procure scanning and indexing services in accordance with the State Use Act. We conclude that the State Use Act is consistent with Article IV, Section 26 of the New Mexico Constitution.

Applicability of State Use Act

It is our understanding that Bernalillo County procured scanning and indexing services for its Juvenile Detention and Youth Services Department in accordance with the State Use Act in 2009. It is also our understanding that Bernalillo County is planning to procure scanning and indexing services for all of its municipal departments, but disputes whether the State Use Act applies to this procurement.

There are two rules of statutory construction that explain how to apply the State Use Act to Bernalillo County's procurement process. First, under the plain meaning rule, we give statutory language its ordinary and plain meaning unless the Legislature indicates a different interpretation is necessary. See Cooper v. Chevron, 2002-NMSC-020, 132 N.M. 382, 388. Second, in construing a statute, our goal is to give primary effect to legislative intent, which intent is evidenced primarily through the statute's language. See Souter v. Ancae Heating and Air Conditioning, 2002-NMCA-078, 132 N.M. 608, 611.

The Legislature adopted the State Use Act in 2005. See NMSA 1978, §§ 13-1C-1 through -7 (2005). The Legislature wrote that the Act's purpose is "to encourage and assist persons with disabilities to achieve ... useful and productive employments by ensuring an expanded and constant market for services delivered by persons with disabilities...and minimizing their dependence on welfare and entitlements." NMSA 1978, § 13-1C-2. The Act created a nine-person New Mexico Council for Purchasing from Persons with Disabilities Council ("Council") and gave it authority to publish a list of services "provided by persons with disabilities [that] are suitable for sale to state

agencies and local public bodies.” *Id.* § 13-1C-5(A)(1)-(2). The Council has the authority to “establish a procedure to certify eligible community rehabilitation programs and qualified individuals that have services suitable for procurement by state agencies and local public bodies that will be placed on the list...” *Id.* § 13-1C-5(A)(4).[1] The Council must ensure that prices offered by the community rehabilitation programs and qualified individuals on its list are “fair market prices.” *Id.* § 13-1C-5(A)(3).

Section 13-1C-7(A) of the Act reads:

[A] state agency or local public body intending to procure a service on a list published by the Council *shall . . . procure* the service at the price established by the Council if the service is available within the period required by the state agency or local public body.

(Emphasis added.) The plain language of Section 13-1C-7(A) demonstrates the Legislature’s intent that state and local public bodies must procure services from community rehabilitation programs and qualified individuals on the list. Generally, the use of the word “shall” imposes a mandatory, not discretionary, requirement unless there are indications in the statute that the mandatory reading is repugnant to the manifest intent of the Legislature. *See* NMSA 1978, § 12-2A-4(A) (1997) (explaining that “‘shall’ and ‘must’ express a duty, obligation, requirement or condition precedent”). As used in Section 13-1C-7(A), the words “*shall . . . procure*” impose a duty on state and local public bodies to procure services appearing on the Council’s published list at the price established by the Council if the service is available within the period it is needed by the agency.

It is also helpful to look at the stated purpose of the State Use Act to determine the Legislature’s intent. The Legislature enacted the State Use Act to encourage and assist persons with disabilities to achieve useful and productive employment. *See* NMSA 1978, § 13-1C-1 (2005). To fulfill its goal, the Legislature viewed state and local agencies as potential participants in the “expanded and constant market for services delivered by persons with disabilities.” *Id.* § 13-1C-1. To further induce state and local agencies to procure services from persons with disabilities, the Legislature exempted procurements made under the State Use Act from the competitive bidding and other requirements of the Procurement Code. *See* NMSA 1978, §§ 13-1C-7(A) and 13-1-98(Z) (2005).

Based on the statutory language, we conclude that the Legislature intended to require state and local public bodies, such as Bernalillo County, to procure services, including scanning and indexing services, in accordance with the State Use Act.

Article IV, Section 26

According to the supporting materials submitted with your letter, there has been some written discussion between Bernalillo County and the Division of Vocational Rehabilitation regarding the constitutionality of the Act since it grants “community

rehabilitation programs” and “qualified individuals” the exclusive right to sell certain services and products. Article IV, Section 26 of the New Mexico Constitution, in pertinent part, states that “no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.” Its goal is “to ensure that any rights, franchises or privileges granted by the state or a municipality are equally available to all similarly situated persons.” N.M. Attorney General’s Op. No. 00-04 (2000).

The State Use Act appears to be constructed to follow this model. It is aimed at a group of workers who are all similarly situated (persons with disabilities) and gives all of them the opportunity to participate in the program. They can either be a “qualified individual” or be part of a “community rehabilitation program.” According to your letter’s supporting materials, twenty-eight states have adopted a State Use Act and these laws have not been overturned on constitutional grounds. In light of these considerations, we conclude that the Act is permissible because it affords a scheme that is fair and equally available to all similarly situated persons to compete for these services.

Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you 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 public.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

[1] According to your letter, scanning and indexing services are on the list.