June 4, 2004: Graduation Supplies and Competitive Bidding

Senator Richard M. Romero

President Pro Tempore

New Mexico State Senate

907 Silver SW

Albuquerque, NM 87102

RE: Opinion Request on Graduation Supplies and Competitive Bidding

Dear Senator Romero:

You requested our advice on whether a school district would violate New Mexico law by entering into an exclusive, multi-term agreement with a company to provide high school graduation supplies (e.g., rings, announcements, caps and gowns) without first entertaining competitive bids. Your question requires us to consider the practices of school districts in entering into such agreements, the agreements themselves, and the laws that requires public entities to utilize competitive bidding.

Your letter did not ask us to consider in any detail the factual context of such arrangements, but we found it necessary to do so in order to address to your question. We understand the typical practice to be this: Several vendors compete to sell graduation supplies in New Mexico. A school district typically selects one of these vendors and grants it exclusive (or nearly so) access to the high school student body, allowing only that vendor to present its merchandise and services to the assembled students. Depending on the district, competitors may or may not be allowed to leave promotional material at the high school. Students and their families typically purchase any supplies they want from the selected vendor, though they are not required to do so. The district does not pay for the supplies; sales takes place only between the vendor and the parents. Nor does the district pay a fee to the vendor. In some instances, a district may receive compensation from the vendor in the form of a donation to the school or even a percentage of the proceeds (this, too, varies with the district). Arrangements typically have a term of several years. Some districts voluntarily use a competitive bidding process prior to selecting a vendor, and others do not. We base the opinion that follows on these facts.1

In some circumstances, the Procurement Code, NMSA 1978, § 13-1-21 through 172 (1984, as amended through 2003) (“Procurement Code”), obligates a public entity such as a district to entertain competitive bids. Generally, the Procurement Code requires a government agency to solicit competitive sealed bids (or, in some instances, competitive sealed proposals) before expending public funds, unless the expenditure falls within one of the law’s exceptions. The Procurement Code’s purpose, in pertinent

part, is “to maximize the purchasing value of public funds. . . ,” § 13-1-29 (emphasis added), and it applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services, construction. . . .” § 13-1-30 (emphasis added). Such a clear emphasis on the expenditure of public funds largely resolves your question. Under the facts as we understand them, the district spends nothing for the goods or the services provided. Absent a public expenditure, the Procurement Code simply does not apply.

It should be noted that the Procurement Code explicitly applies only to concession contracts at the New Mexico state fair. § 13-1-30. The situation about which you inquired probably does constitute a concession (though not one, obviously, involving the state fair). When a statute refers to specific items, the usual interpretation is that any items to which it does not refer were omitted intentionally. See e.g., U.S. v. State of New Jersey, 194 F.3d 426, 429 (3rd Cir. 1999) (the interpretative maxim expressio unis est exclusio alterius means that the expression of one thing is the exclusion of the other). There is no case on point in New Mexico.2 However, based on the foregoing, it appears that the legislature intended the Procurement Code to apply only to those concessions at the state fair. If so, the Procurement Code would not encompass the concession about which you inquired.

A contrary conclusion is arguable, but not persuasive. The Procurement Code’s purpose does include “the fair and equitable treatment of all persons involved in public procurement,” § 13-1-29; and the definition of “procurement” does include “purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction . . . .” § 13-1-74 (1984) (emphasis added). Given that equitable treatment underlies the question you raised, and that a vendor’s provision of graduation supplies (at no expense to the district) might be considered a service that the district is “otherwise acquiring,” one might argue that the Procurement Code is implicated. However, we believe this is a strained reading of the statute. The Procurement Code clearly emphasizes safeguarding public funds, and your situation clearly lacks any such public expenditure. Therefore, the Procurement Code is not implicated. To conclude otherwise would require extending the Procurement Code beyond its reach, which we think a court is unlikely to do.

The Procurement Code aside, it is possible that a plaintiff might challenge a district’s practice on equal protection grounds. Equal protection derives from the 14th Amendment to the U.S. Constitution, which states “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.3 Equal protection is not usually associated with competitive bidding; however, if a district’s practice were challenged on equal protection grounds, the use of competitive bidding could be an effective defense. In other words, though equal protection does not require competitive bidding, such bidding may be one way of satisfying equal protection requirements. Any plaintiff bringing such a challenge, however, would face a formidable obstacle. Under the law of equal protection, if state action does not affect a “suspect class” of persons (and the practice you question does not), then courts require only that

the action demonstrate “a reasonable relationship to a legitimate governmental purpose.” Marrujo v. New Mexico State Highway Transp. Dept., 118 N.M. 753, 758, 887 P.2d 747, 752 (1994). This “rational basis” test is an easy one to meet, and few government practices are overturned based on it. In your case, as long as a district had some reasonable basis for choosing one vendor over another – and almost any plausible reason would do – a court would not strike down the district’s practice for the failure to use competitive bidding. Only a district that could point to no reasonable basis would be vulnerable.

We believe that neither the Procurement Code nor equal protection require a district to use competitive bidding before entering into an agreement with a vendor to sell graduation supplies, assuming no public funds are expended and the district can demonstrate some reasonable basis for its choice of vendor. It should be emphasized, however, that compliance with competitive bidding is permissible, and may even be desirable, considering the goal of equitable treatment advanced in the Procurement Code and the clear interest on the part of a district in providing competitively priced supplies for its students.

We hope this response is helpful. If we may be of further assistance, please let us know. You requested a formal Attorney General’s Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General 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,

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cc: Stuart M. Bluestone, Chief Deputy Attorney General

1 In this letter, we refer to the party to the transaction as the *district*, not the *high school*. However, we are informed that high school principals routinely sign agreements with vendors. While you did not ask about the propriety of that practice, arguably contracting authority is vested in school *districts*, not school *principals*. NMSA 1978, § 22-5-4 (1967, as amended through 2003).

2 Note that this office has expressed the opinion that NMSA 1978, § 16-2-9 (1935, as amended through 1987) authorizes the Secretary of Energy, Minerals and Natural Resources to enter into concession contracts for state parks and recreation areas

without competitive bidding. This further supports the proposition that concession contracts are not necessarily subject to the Procurement Code. 1959-60 Op. Att'y Gen. No. 60-12.

3 A recent advisory letter from this office to Rep. Moore, dated January 30, 2004 and concerning school districts' cash balances, discussed equal protection in considerable detail. It is available on our website.