

September 14, 2004: Use of “Prebates” in Public Procurement

The Honorable Kent L. Cravens

10717 Richfield Avenue NE

Albuquerque, New Mexico 87122

Re: **Opinion Request – Use of “Prebates” in Public Procurement**

Dear Senator Cravens:

This office has reviewed the question raised in your April 21, 2004 opinion request to Attorney General Patricia Madrid regarding the use of prebates as a requirement in requests for proposals (“RFPs”) issued by the Purchasing Division of the New Mexico General Services Department (the “Department”).¹ More specifically, you have asked whether the solicitation of a prebate is a lawful practice with regards to contracts issued by the Department. The short answer is yes, prebate solicitations may be used along with other appropriate factors to obtain the best products for the best price.

The New Mexico Procurement Code, NMSA 1978, §§ [13-1-1](#) through [13-1-199](#), as amended (the “Code”), governs purchasing by public entities in New Mexico. The Code applies to all nonfederal expenditures “by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 710 (1994) (quoting NMSA 1978, § 13-1-30).

The purposes of the 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. NMSA 1978, § [13-1-29\(C\)](#). The State may be as creative as practicable in obtaining the best products for the best price, provided it is acting within the Code’s parameters. *See Planning & Design Solutions*, 118 N.M. at 710. If they act within the Code’s parameters, we may presume that state officers are acting in good faith and for the public good. *See id.*

NMSA 1978, Section [13-1-114](#) requires that the Department’s requests for proposals identify the factors it will use to evaluate each proposal and their relative weights. The Code does not otherwise prescribe the criteria the Department may use for evaluating bids. In RFP #40-000-00-00083, the Department defines “prebate offers” as offers made by potential offerors to the State to defray the cost of the procurement and the administrative and transition costs involved in establishing a new contract. Given the Code’s clear mandate to the Department to maximize the purchasing value of public funds, prebate offers appear to be a reasonable factor for achieving the Code’s purposes when used in conjunction with the other factors identified in the RFP, such as

service, account management, experience with other government entities, resident business and cost. See RFP #40-000-00-00083, at 31.

Moreover, the Department informed us that the submission of prebate proposals was optional, not a new financial requirement as characterized in your letter. The Department considered all bids submitted under RFP #40-000-00-00083, even those bids that did not contain prebate proposals, provided the bids were otherwise responsive to the RFP. Bids containing a prebate offer were allotted up to ten (10) of one thousand (1000) total evaluation points. Only two of the seven vendors awarded contracts under RFP #40-000-00-00083 made prebate offers. August 16, 2004 electronic message from Uday Ayyagari, State Purchasing Division. One other vendor, ultimately awarded eight percent (8%) of the contract amount, made a prebate offer contingent upon sole award of the contract. Id. 2 The vendor awarded the largest percentage of the contract amount (35%) offered no prebate at all. Id.

The practice of soliciting prebates proposals from potential offerors and considering the proposals in the evaluation of a procurement is not the same as soliciting bribes, gratuities, or kickbacks in violation of New Mexico law. The unlawful solicitation of a bribe by a public officer or employee consists of a public officer or employee soliciting or accepting, directly or indirectly, anything of value, with the intent to have his decision or action on any question influenced thereby, and which by law is pending or might be brought before him in his official capacity. NMSA 1978, § 30-24-2. A public officer or employee may be found guilty of soliciting or receiving a kickback if he knowingly solicits or receives any remuneration, directly or indirectly, overtly or covertly, in cash or in kind from another person in return for referring an individual to that person for the provision of any item or service which may be paid in whole or in part with public funds. NMSA 1978, § 30-41-1. In each instance, the law contemplates that the public officer or employee demand or receive some kind of benefit in exchange for his service or influence.

Unlike bribes, gratuities or kickbacks, prebate offers do not provide anything of value to any public officer or employee. Rather, any benefit obtained through prebate offers goes directly to the State by defraying the State's procurement costs and reducing the administrative costs of establishing a new contract. Thus, based on these facts and the current status of the law, we conclude that prebate offers are a lawful practice with regards to contracts issued by the Department.

If we may be of further assistance, please let us know. 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.

Very truly yours,

Sally Malavé

Assistant Attorney General

Cc: Stuart M. Bluestone, Deputy Attorney General

Donald Trigg, Civil Division Director

Hyun-Joo Laws, State Purchasing Division

1 In connection with your request, we reviewed GSD's RFP #40-000-00-00083 dated February 27, 2004 for Office Supplies, Toner and Paper, as amended, and including the appendices referred to in your letter.

2 The Department estimates that annual statewide spending on the new contracts under RFP #40-000-00-00083 will be approximately \$6.64 million, with sixty-one percent (61%) of this amount going to New Mexico-based vendors.