

## **Opinion 14-03**

### **OPINION OF GARY K. KING, Attorney General**

April 1, 2014

**BY:** Joseph M. Dworak, Assistant Attorney General

**TO:** The Honorable Linda M. Lopez, New Mexico State Senator, 9132 Suncrest Rd. SW, Albuquerque, NM 87121

#### **QUESTIONS:**

- 1) Does the Educational Products and Services Agreement (the “Agreement”) between the New Mexico Virtual Academy (the “School” or “NMVA”) and K12 Virtual Schools LLC (“K12”) violate the Charter Schools Act (the “Act”), NMSA 1978, Ch. 22, Art. 8B (1999, as amended through 2011), which prohibits the management of a charter school by a for-profit entity?
- 2) Is the Agreement between NMVA and K12 subject to the requirements of the state’s Procurement Code, NMSA 1978, Sections 13-1-28 to -199 (1984, as amended through 2013)? If so, did NMVA violate the law’s bidding requirements or term restrictions when it awarded a sole-source contract to K12?
- 3) Did allocations from \$2 million of proceeds appropriated for books and instructional materials to public schools under the 2010 Capital Projects General Obligation Bond violate state law or the purpose of the bond when funds were not proportionately distributed among all public schools in the state?

#### **CONCLUSIONS:**

- 1) Yes. The administrative and managerial involvement by K12, a for-profit entity, constitutes “management” under Section 22-8B-4(R) of the Act. The Act’s prohibition against for-profit management in charter schools was enacted with a purpose to prevent the kind of association created between NMVA and K12—an affiliation with a for-profit organization that places a school in a position of dependency regarding issues of regular operation and control.
- 2) NMVA, as a public entity, is subject to the state’s Procurement Code. On its face, the Agreement does not necessarily violate the Procurement Code’s competitive bidding requirements, provided the School complied with the Code’s requirements for sole source contracts. The term of the Agreement complies with the Code’s requirements.
- 3) No. The Secretary of Public Education has explicit power under the New Mexico Constitution to administer and distribute funding to New Mexico schools. Neither

state law nor the 2010 General Obligation Bond provided direction or limitation as to the specific distribution of funds authorized to purchase school books and instructional materials statewide. The Secretary had the authority to distribute the funds as she deemed appropriate, so long as the bond proceeds were used to purchase books and instructional materials for public schools throughout the state.

### **ANALYSIS:**

#### 1. Do K12's Services Constitute "Management" Under the Charter Schools Act?

The New Mexico Virtual Academy is a virtual charter school chartered by the Farmington Municipal School District. As with all charter schools, NMVA is a public school and a public entity. As a virtual charter school, NMVA functions as an educational organization that offers primary school courses through internet and computer-based methods, often serving students at their homes or outside of a traditional classroom setting. In the fall of 2012, NMVA entered into a contract with K12 Virtual Schools LLC, a for-profit company, for services and program support related to its virtual education curriculum.

Our analysis focuses on the issue of whether K12 services to NMVA constitute "management of the charter school" under the Charter Schools Act. The Act expressly prohibits for-profit entities from managing charter schools:

A charter school is a public school that may contract with a school district or other party for provision of financial management, food services, transportation, facilities, education-related services or other services. The governing body shall not contract with a for-profit entity for the management of the charter school.

NMSA 1978, Section 22-8B-4(R) (emphasis added). Since the Act does not define "management," we must apply the rules of statutory construction to determine whether K12's services constitute "management of the charter school," as contemplated by the Act.

Generally, the "plain language of a statute [is] the primary indicator of legislative intent." State v. Willie, 2009-NMSC-037, ¶ 9 (citations omitted). However, if the plain meaning of a statute is ambiguous or doubtful courts will examine the statute as a whole and "construe the law according to its obvious spirit or reason." Id. The New Mexico Supreme Court recently cautioned that "ambiguity may be lurking in even seemingly plain words if they conflict with the overall legislative intent." Barker v. Hedstrom, 2013-NMSC-043, ¶ 22 (citations omitted). This tenet of analyzing legislative intent emphasizes that "[l]egislative enactments are to be interpreted to accord with common sense and reason." Padilla v. Montano, 1993-NMCA-127, ¶ 23 (citations omitted).

The meaning of the term "management" in conjunction with the language of the statute is not entirely clear. A review of both the Act and the variety of products and services described in the Agreement shed light on the complexity of operating a virtual school,

but what responsibilities or services amount to “management” under Section 22-8B-4(R) is not spelled out.

Because we are not provided with a definition of “management” in the statute, we look to the plain and usual meaning of the term. The dictionary definition of “management” is: “the act, art or manner of managing, or handling, controlling, directing, etc.” Webster’s New World College Dictionary 871-872 (4<sup>th</sup> ed. 2002). Looking beyond the general meaning of “management” we explore the root of the word, “manage,” and its definition, which includes: “to control the movement or behavior of; handle[,] to have charge of; direct; administer” and “to conduct or direct affairs; carry on business.” Id. at 871. This description offers greater context into what constitutes management, including one’s level of “control,” the definition of which is: “[t]o direct the management and policies of [an] . . . entity, whether . . . by contract, or otherwise; the power or authority to manage, direct, or oversee.” Black’s Law Dictionary 146 (3<sup>rd</sup> pocket ed. 2006). In a different context, K12’s Agreement defines “control” as: “the possession, directly, or indirectly, of the power to direct or cause the direction of the management policies of an entity, whether through the ownership of securities, by contract or otherwise.” Agreement, Definitions 1.1, at 1 (under term “Affiliates”). Based on these definitions, the plain meaning of the term “management” suggests that the legislature intended to prohibit for-profit entities from operating schools directly or indirectly through a management contract.

Restrictions placed on for-profit entities by the Act elucidate legislative intent, explicitly limiting potential relationships between for-profit entities and charter schools. There is only a pair of references to for-profit entities outside of Section 22-8B-4(R). Under Section 22-8B-6(F) of the Act, “for-profit business entities are not eligible to apply for or receive a charter.” This prohibition on for-profit charter schools further illustrates the legislature’s intent to limit the role that for-profit entities have in New Mexico’s public school system.

Whether services provided by K12 constitute “management,” as that term is commonly understood, is a fact-specific issue that may be determined only once the relationship with NMVA is examined and services provided under the Agreement are considered in their entirety.

K12’s contracted authority to integrate into nearly every aspect of the administration of the school is obvious and raises questions over the extent of its future duties within the School.<sup>1</sup> The Agreement provides that K12 may assist in obtaining insurance, identify the location of school facilities, prepare a proposed budget and conduct future financial planning for the School. K12 is also intimately involved in the maintenance of the School’s student records and business administration, providing counsel and advice on everything from student discipline and privacy laws to identifying funding opportunities and providing administrative staff to the school. Although the Agreement leaves certain responsibilities to the School (i.e. payroll services and benefit plans), and purports to give NMVA a degree of ultimate oversight, the Agreement allows K12 to have significant influence on general personnel management. For example, although the Agreement

states that NMVA shall employ and “be ultimately responsible” for staff NMVA assigns to the online educational program, K12 is responsible for advertising positions, identifying and interviewing candidates and making recommendations to NMVA’s governing body. Agreement, § 7.4. NMVA employs all teachers “[u]nless otherwise agreed by K12 and the School . . . .” Id. § 7.9.

K12’s administrative and managerial responsibilities under the Agreement are significant and the Agreement’s allowance for K12 to assume additional responsibilities creates uncertainty and leaves questions about the ultimate extent of involvement that the company may exert within the School. The Agreement allows for seemingly limitless additions to the services and responsibilities provided by K12 if agreed to by both parties.<sup>2</sup> Despite any ambiguity of the term “management,” the Agreement’s explicit use of the word “manage” in reference to K12’s services is striking: “For each school year . . . . K12 will provide a license for and access to[,]” among other services, “any third party curriculum K12 generally offers its managed virtual schools . . . .” Agreement, Exhibit A, Section I.1 (emphasis added). This suggests an acknowledgement by the parties to the Agreement that K12 serves in a management capacity for its contracted virtual schools.

Control explicitly granted to K12 over NMVA’s administration and educational program, and the possibility of K12’s assumption of greater responsibility through NMVA’s consent pursuant to the Agreement, conflict with legislative intent under the Charter Schools Act to limit for-profit involvement in the daily functioning of charter schools. Accordingly, we conclude that the services provided by K12 and the relationship created under the Agreement constitute “management of the charter school” under Section 22-8B-4, a violation of the Charter Schools Act.

## 2. Compliance with the Procurement Code

New Mexico’s Procurement Code creates a framework of regulations for the procurement and implementation of contracts executed by public entities. The Procurement 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.” Section 13-1-30. NMVA, as a public entity, is required to comply with the provisions of the Procurement Code.

The legislature has provided certain exclusions to the applicability of the Procurement Code, including the use of the state purchasing agent.<sup>3</sup> “Excluded from the requirement of procurement through the state purchasing agent” are “procurement[s] by charter schools . . . .” Section 13-1-99(L). Although certain public entities do not have to consult with the state purchasing agent on procurement matters, the exception does not exclude entities from the other requirements of the Procurement Code. Id.

### a. Competitive Bidding Requirements

The Agreement is a sole source contract. Generally, a public entity must entertain competitive bids or proposals unless it is demonstrated that a sole-source contract by a

single vendor is warranted. See NMSA 1978, §§ 13-1-102; 13-1-111; 13-1-126. Section 13-1-126(A) provides:

A contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the state purchasing agent or a central purchasing office determines, in writing, that:

- (1) there is only one source for the required service, construction or item of tangible personal property;
- (2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and
- (3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract.

Provided NMVA met the Code's requirements for sole source contracts, the Agreement does not violate the Code simply because it was awarded without competitive sealed bids or proposals.

#### b. Term Requirements

The Procurement Code provides that “[a] contract for professional services may not exceed four years” except under certain conditions. Section 13-1-150(B). The executed Agreement's term commences on July 1, 2012 and terminates on June 30, 2016. See Agreement, Section 5.1. There are no other stipulations in the Agreement as to additional terms or renewals. The four-year term of the Agreement is within the accepted parameters of the Procurement Code and does not violate state law.

### 3. Expenditures of 2010 Bond Proceeds

The 2010 Capital Projects General Obligation Bond Act, Chapter 3, Section 10 of New Mexico Laws of 2010 (2nd Spec. Sess.) (“2010 GO Bond Act”), was approved in a special session of the legislature and voted on by New Mexico voters during the 2010 general election. Among the purposes of the bond was “public school facility improvements acquisitions, bus acquisitions and books and instructional materials acquisitions, to the public education department” including the amount of “two million dollars (\$2,000,000) to purchase school books and instructional materials statewide . . . .” Id. § 10(C)(2). The applicable ballot question contained the following language:

The 2010 Capital Projects General Obligation Bond Act authorizes the issuance and sale of public school facility improvement and public school books and instructional materials acquisition bonds. Shall the state be authorized to issue general obligation bonds in an amount not to exceed five million one hundred thousand dollars (\$5,100,000) to make capital expenditures for pre-kindergarten

classrooms and facilities at public schools and for public school books and instructional materials and provide for a general property tax imposition and levy for the payment of principal of, interest on and expenses incurred in connection with the issuance of the bonds and the collection of the tax as permitted by law?

Id. § 11(B)(3). The bond issue for the purpose stated in the question was approved by over sixty-percent of the state's voters who voted on the question.

Article XII, Section 6 of the New Mexico Constitution grants the Secretary of Public Education authority as provided by law, including the discretion to administer and distribute state funding.

Section 6(D) states:

The secretary of public education shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.

This authority has been construed somewhat liberally to allow the Secretary the capability to execute his or her responsibilities. See generally Skowronski v. N.M. Public Educ. Dep't, 2013-NMCA-034 (acknowledging that the New Mexico Constitution and legislature, through the Public Education Department Act, grant broad authority and administrative power to the Secretary of Public Education), cert. granted, 300 P.3d 1181 (N.M. 2013). Under Article XII, Section 6, the Secretary has the authority to allocate funding so long as it does not conflict with state law, or any directives or restrictions placed on the appropriation.

The appropriation to the Public Education Department under the 2010 GO Bond Act does not include specific restrictions on the bond proceeds other than a directive to "purchase school books and instructional materials statewide." There is no requirement that the \$2 million in bond proceeds be distributed proportionately or otherwise.<sup>4</sup> We follow the intent of the bond's language and "must assume the legislature chose its words advisedly to express its meaning unless the contrary intent clearly appears." Diamond v. Diamond, 2012-NMSC-022, ¶ 29 (citations omitted).

The term "statewide" as used in the 2010 GO Bond Act does not appear to indicate anything other than that funding was not designated for a specific county, school district, individual school or other part of the state. Without additional evidence of legislative intent, we cannot interpret "statewide" as used in the 2010 GO Bond Act to mean any particular method of distributing the funding so long as the process is otherwise lawful, reasonable and not arbitrary.

According to a memorandum received by the Legislative Education Study Committee, the proceeds from the bonds were distributed based on student enrollment to eighty-eight "award" schools across the state, with all but three recipients designated as either

“A” or “Top Growth” schools. See Memorandum to Legislative Education Study Committee from Sarah M. Amador-Guzman re: A-F School Grading System Update (Nov. 13, 2012). Consistently with the discussion above, we do not believe this method of distributing the bond proceeds violates the 2010 GO Bond Act or other applicable state law.

Based on the text of the legislation authorizing the bond and the constitutional and statutory powers granted to the Secretary of Public Education, we conclude that, absent additional facts suggesting otherwise, the Secretary did not abuse her discretion when allocating \$2 million of the 2010 bond proceeds to New Mexico public schools for the purchase of books and instructional materials.

GARY K. KING  
Attorney General

JOSEPH M. DWORAK  
Assistant Attorney General

[1] Products and services provided by K12 and the company's involvement within the School are extensive. Many involve significant responsibilities that are fundamental to the operation of the School. Administrative services provided by K12 under the Agreement include fifteen separate capacities: 1) educational program consulting; 2) personnel assistance, such as interviewing, recommendations on hiring and firing, negotiations, background checks, employee benefits, human resource polices, and strategic staffing plans; 3) assistance in obtaining insurance for the School; 4) facility management, including assisting with site location and lease negotiations; 5) business administration of a wide array of program aspects; 6) budgeting, financial reporting, and preparing a proposed annual budget; 7) financial planning; 8) maintenance of student records and retention of such records on behalf of school; 9) recommend school policies and procedures for student discipline; 10) creation of the annual report to the chartering authority; 11) develop teacher training and faculty handbook; 12) assist in charter policies and charter renewal process; 13) provide policies and procedures for instructional property; 14) solicit and receive grants and donations from public funds subject to approval by NMVA; 15) and any other services agreed to in writing by both parties. See Agreement, Exhibit A, at 23-25. Educational products, pupil recruiting, and product related services provided by K12 under the Agreement include, but are not limited to: student recruitment; advertising; development of the school identity with letterhead, business cards, and the creation and maintenance of the School website; implementation of the School's admission policy; family services and orientation sessions; program feedback; social networking; and counseling tools for college prep and career planning. See Agreement, at 22-23.

[2] See id.

[3] The Procurement Code defines "state purchasing agent" as "the director of the purchasing division of the general services department." NMSA 1978, § 13-1-92.

[4] We understand that because of the source of the funding, money distributed under the 2010 GO Bond Act was not covered by the Instructional Material Law, NMSA 1978, Sections 22-15-1 to -14 (1967, as amended through 2011), which governs the distribution of instructional materials to students and the annual allocation of funds to school districts for instructional materials. See Memorandum to Superintendents, Business Managers and Charter School Administrators from Antonio Ortiz, Director, Student Services and Transportation Division of the Public Education Department (Nov. 1, 2012).