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December 24, 2008

The Honorable Luciano "Lucky" Varela
New Mexico State Representative
1709 Callejon Zenaida
Santa Fe, NM 87501

Re: Opinion Request - Procurement Code & Statewide Behavioral Health Services Contract with ValueOptions

Dear Representative Varela:

You have requested our advice regarding the application of the Procurement Code to the 2005-2008 Statewide Behavioral Health Services contract between the Behavioral Health Purchasing Collaborative ("Collaborative") and its contractor, ValueOptions. It is our understanding that the 2004 legislature in NMSA 1978, Section 9-7-6.4 mandated more than a dozen state agencies to form the Collaborative in order to issue a Request for Proposals ("RFP") for a single entity to work as the coordinator for the delivery of behavioral health care services for New Mexicans. The RFP process culminated with the award to ValueOptions of a multi-phase contract (Phase I: July 2005 to June 2006; Phase II: July 2006 to June 2008; Phase III: July 2008 to June 2009). It is our understanding that several of the Collaborative's agencies, such as the New Mexico Human Services Department ("HSD"), contributed budgetary dollars to fund the contract. Your letter specifically asks whether the Procurement Code applies to payments from HSD to ValueOptions. Your letter also asks about the effect of the 2008 legislature's passage of House Bill 181, codified in NMSA 1978, Section 9-7-6.4(G), which expressly subjects the Collaborative's contracts to the Procurement Code. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that the 2005-2008 Statewide Behavioral Health Services contract is subject to the Procurement Code. We also conclude that House Bill 181 expressly requires that any prospective contracts entered into by the Collaborative be subject to the Procurement Code.

The Procurement Code, NMSA 1978 Sections 13-1-28 to -199, creates a comprehensive structure for the procurement and implementation of state agency contracts. The Procurement Code "shall apply to every expenditure by state agencies for the procurement of items of tangible personal property, services, construction." NMSA 1978, § 13-1-30 (2005). The general rule is that state agencies must work in conjunction with the New Mexico General Services Department's State Purchasing Agent in

express language in the RFPs and the contracts regarding the role of the State Purchasing Agent and applicability of the Procurement Code.

The legislature has provided for two standard exceptions from the general rule: (1) *certain agencies* must follow the Procurement Code processes but have an exception from working in conjunction with the State Purchasing Agent and (2) agencies may enter into *certain types* of contracts that are exempt from the Procurement Code processes. See NMSA 1978, §§ 13-1-98, -99 (amended through 2007). There is also a specific exemption for *certain types of health care* contracts. That exemption provides that the Procurement Code does not apply to a state agency's or local public body's procurement of goods or services through an agreement creating "a network of health care providers or jointly operating a common health care service" provided the state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs, improve quality of care or improve access to care. NMSA 1978, § 13-1-98.1(B) (1988).

It is our understanding that the 2004 RFP in Section 1.1 expressly stated: "All services provided pursuant to this Agreement are subject to the Procurement Code ... unless specifically provided otherwise."¹ The initial contract, which referenced work for Phase I, II and III, stated in Section 3.1: "The Collaborative shall make payments to the Single Entity (SE) for the behavior health service programs described in the RFP."² The contract provided, in Section 1.2: "All services provided pursuant to this Agreement are subject to the Procurement Code...."³ The contract for Phase II, also in Section 1.2, stated: "All services provided pursuant to this Agreement are subject to the Procurement Code...."⁴ Thus, it appears that the general rule is applicable to the ValueOptions contract and that the Collaborative and ValueOptions agreed, from the beginning of their contractual relationship, to follow the Procurement Code. See Gross, Kelly & Co. v. Bibo, 19 N.M. 495, 517, 145 P. 480 (1914) (a contract is the meeting of the minds by the parties).

We also believe that the standard exceptions in Section 13-1-99 and Section 13-1-98 are inapplicable to the ValueOptions contract. The legislature has listed approximately ten agencies in Section 13-1-99 that do not have to consult with the State Purchasing Agent on procurement matters. The listed agencies include the judicial branch, state educational institutions and health care institutions that provide direct patient care, but do not include the Collaborative or the HSD. The legislature has also listed approximately thirty types of contracts in Section 13-1-98 that are exempt from the Procurement Code. The listed contracts include the procurement of professional entertainers, investment advisors and livestock food, but do not include a contract for the procurement of a coordinator of behavioral health care services.

According to your letter, there has been a long-standing dispute between the State Purchasing Agent and HSD regarding the applicability of the health care exemption under Section 13-1-98.1 to the contract. As discussed above, Section 13-1-98.1(B) creates an exception to the Procurement Code for a state agency's or local public body's procurement of items of tangible personal property or services "through an agreement" with another state agency or other entity "for the purpose of creating a network of health care providers or jointly operating a common health care service, if the

¹ www.bhc.state.nm.us/pdf/RFP2008/Collaborative/BH_RFP11-3-04Final.pdf

² www.bhc.state.nm.us/pdf/Bhfinalcontract040105.pdf

³ www.bhc.state.nm.us/pdf/Bhfinalcontract040105.pdf

⁴ www.bhc.state.nm.us/pdf/FY07VOCContractFinal062306.pdf

The Honorable Luciano Varela

December 24, 2008

Page 3

state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs." The State Purchasing Agent believes that this provision is inapplicable to an analysis of the ValueOptions contract because the term "arrangement" refers to the relationship among the state agencies (i.e. the creation of a collaborative reduces costs) and has nothing to do with the contractual relationship with a contractor. HSD believes that the provision does apply because the term "arrangement" refers to the relationship between the state agencies and the contractor (i.e. the creation of the contract between the Collaborative and ValueOptions reduces costs) and thus the procurement and the terms of the contract are exempt from the Procurement Code. The state Supreme Court has stated that disputes over statutory language should be resolved by looking to the "agency that ... applies that statute" and "the court will begin by according some deference to the agency's interpretation." Morningstar Water Users v. Pub. Util., 120 N.M. 579, 583, 904 P.2d 28 (1995). The State Purchasing Agent's interpretation, as the state agency in charge of procurement matters, should be entitled to deference in this matter and therefore the exception is understood to be inapplicable.

Notwithstanding past disagreements between HSD and GSD, the legislature has now decisively resolved this matter. The 2008 legislature's passage of House Bill 181 impacts contracts the Collaborative enters into after the law's effective date. The law reads: "Any contract proposed, negotiated or entered into by the collaborative is subject to the provisions of the Procurement Code." NMSA 1978, § 9-7-6.4(G) (2008) (emphasis added). The most prudent reading of the law is a prospective application due to the constitutional principle that States may not enact laws that impair or alter existing contracts. See U.S. Const. art. I, § 10. It is our understanding that the Collaborative is currently in the process of issuing a new RFP for the "Statewide Behavioral Health Services" contract. This process falls under the ambit of House Bill 181 and the Collaborative must follow the structure provided in the Procurement Code.

In conclusion, the Procurement Code does apply to payments from HSD to ValueOptions for 2005-2008 contract and House Bill 181 expressly requires that any prospective contracts entered into by the Collaborative should be subject to the Procurement Code.

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,



ZACHARY A. SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General