



Attorney General of New Mexico

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September 5, 2007

Mr. Arturo L. Jaramillo, Cabinet Secretary
NM General Services Department
PO Drawer 26110
Santa Fe, NM 87502-0110

Re: Opinion Request – Applicability of State Procurement Code to Expenditures from State Interlock Device Fund

Dear Secretary Jaramillo:

You have requested our advice regarding whether the State Procurement Code, NMSA 1978, Sections 13-1-1 through 13-1-199, as amended, applies to expenditures made from the Interlock Device Fund (the "IDF") established by NMSA 1978, Section 66-8-102.3. The short answer is no. Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, the Code does not apply to expenditures made from the IDF to pay for the costs of installation, removal and leasing of ignition interlock devices ("IID").

The Legislature established the IDF in the state treasury "to cover the costs of installing and removing and one-half of the cost of leasing ignition interlock devices for indigent persons who are required [by law]...to install those devices in their vehicles." NMSA 1978, § 66-8-102.3 (C) (2007). All monies in the IDF are appropriated to the Department of Transportation's traffic safety bureau ("DOT") for this purpose. See id. The IDF is funded by fees collected from persons, other than indigent persons, convicted of driving while under the influence of intoxicating liquors or drugs pursuant to NMSA 1978, Section 66-8-102; adjudicated as delinquents on the basis of NMSA 1978, Section 32A-2-3(A)(1)(a); or whose driver's licenses have been revoked pursuant to the provisions of the Implied Consent Act. See NMSA 1978, § 66-8-102.3(A) (2007). DOT by rule has set the amount to be collected from each person, based on the number of years a person is required to operate vehicles equipped with IID. See id.; 18.20.12.10 NMAC. IID vendors collect the fees from the persons to whom they provide IIDs and remit the fees collected to DOT for deposit in the IDF. See NMSA 1978, § 66-8-102.3(A) (2007).

In practical terms, a convicted offender is responsible both for procuring installation of the IID and related services from vendors and for paying all costs associated with the services provided, unless the sentencing court, parole board or probation officer determines that the convicted offender is indigent. See N.M. Laws 2007, ch. 322, § 1 and ch. 324, § 2. Like other convicted offenders, indigent offenders are responsible for procuring installation of the IID from licensed vendors but, because of their indigent status, are not required to pay for the services provided to them.¹ Instead, vendors submit to DOT requests for reimbursement for the services provided to indigent offenders. After verifying that the vendors are licensed to install IID and provide related services, DOT reimburses the vendors for the services provided to the indigent offenders from the IDF. See 8.20.12.9 NMAC. At no time does DOT, for itself or on behalf of indigent offenders, procure or receive any services from IID vendors.

The Procurement Code generally applies to all expenditures by state agencies for the procurement of items of tangible personal property, goods, services, and construction. See NMSA 1978, § 13-1-30 (2006). The Code provides detailed requirements that a state agency must follow when contracting for services. According to your letter, the State Purchasing Division has opined that IDF funds must be expended in accordance with the Procurement Code in part because “[w]hen the fund was being appropriated to the Department of Finance and Administration a contract was established via the Procurement Code.”²

Our review of that contract, Price Agreement No. 40-341-80-0001, dated December 17, 2003, as amended by Price Agreement Amendments numbered 1 through 4, between six vendors and the State Purchasing Division of the General Services Department, reveals that it created no more than a legal fiction between the parties. Neither GSD nor DFA, the “using agency” identified by the Price Agreement, actually procured or received any services from the approved vendors pursuant to the Price Agreement.³ “Procurement” generally means purchasing or acquiring items or services. See NMSA 1978, § 13-1-74 (1984). As stated earlier, DOT is not procuring, receiving, or otherwise contracting for services. Rather, those persons identified in Section 66-8-102.3(A) contract for IID and related services directly from licensed vendors. DOT simply is paying the IID vendors for the services they provide to indigent persons. Under these circumstances, we believe DOT’s expenditures from the IDF are similar to those expenditures made from other funds authorized by law for the maintenance of indigent persons. See, e.g., NMSA 1978,

¹ DOT licenses vendors to provide IIDs and related services. See 18.20.12.7.C NMAC; see also “Ignition Interlock Providers Approved in New Mexico until June 30, 2008,” www.transportation.unm.edu/lic/approvedproviders.

² Before it was amended in 2006, see N.M. Laws, ch. 20, § 1, Section 66-8-102.3(C) conferred administrative authority for the IDF on DFA.

³ The Price Agreement has since expired, but we understand that both GSD and DFA believed that the Price Agreement was necessary in order to make payments from the IDF to IID vendors for the services they provided to indigent offenders.

Secretary Arturo L. Jaramillo

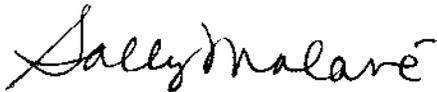
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§ 27-2-7 (1992) (state-funded general assistance payments may be made directly to qualified recipient or to the vendor of goods and services provided to the recipient).

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: Albert J. Lama, Chief Deputy Attorney General
Javier López, DOT General Counsel