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April 2, 2008

The Honorable Stuart Ingle
New Mexico State Senator
2106 West University Drive
Portales, NM 88130

Re: Opinion Request – Procurement Code Applicability to Municipal Solid Waste Contracts

Dear Senator Ingle:

You requested our advice regarding the applicability of the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2007), to municipal contracts for solid waste collection and hauling. According to your request and accompanying documentation, municipalities in the state are entering into multiple-year, exclusive contracts with private businesses for the provision of solid waste collection and disposal services. The contracts are awarded without following the provisions of the Procurement Code, including competitive bidding requirements and limitations on multi-term contracts. As discussed in more detail below, we believe that, except for home rule municipalities, municipal contracts with private businesses for solid waste collection and hauling are subject to the Procurement Code.

"Except as otherwise provided in the Procurement Code," the Code applies "to every expenditure by state agencies and local public bodies for the procurement of tangible personal property, services and construction." NMSA 1978, § 13-1-30. In pertinent part, "procurement" means "purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction." *Id.* § 13-1-74(A). Accordingly, the Procurement Code applies to a municipality's purchase of solid waste collection and hauling services, unless the Code provides otherwise.

Of the exceptions listed in the Procurement Code, two might apply to a municipality's purchase of solid waste collection and hauling. First, the Code does not apply to "municipalities having adopted home rule charters and having enacted their own purchasing ordinances." NMSA 1978, § 13-1-98(K). Under this exception, a home rule municipality's contract for solid waste collection and hauling services would not be covered by the Procurement Code, provided the municipality had adopted a purchasing ordinance under which it procured the services.

The second applicable exception covers “purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services.” NMSA 1978, § 13-1-98(D). According to your request, municipalities have relied on this exception to procure solid waste collection and hauling services without complying with the Procurement Code. Based on pertinent New Mexico cases and other legal authorities, we do not believe that refuse collection services a municipality purchases from a private business are either “publicly provided” or “publicly regulated” within the meaning of Section 13-1-98(D).

The New Mexico Supreme Court has interpreted Section 13-1-98(D) in the context of a school district’s contract with a municipality for the provision of water services. See Morningstar Water Users Ass’n v. Farmington Mun. Sch. Dist., 120 N.M. 307, 901 P.2d 725 (1995) (“Morningstar I”). According to the Court, “the Procurement Code applies only when a private entity is selling goods or services to a public entity.” 120 N.M. at 310. The exemption in Section 13-1-98(D) applies “when the seller is a governmental rather than private entity.” Id.¹ The Court held that the school district’s contract with the municipality fell within the exemption because “the School District was purchasing ‘publicly provided’ water, that is, water supplied by a local public body.” Id. at 317. When the services described in Section 13-1-98(D) are provided to a municipality by a private business, like the refuse collection and hauling services described in the opinion request, they are not “publicly provided” for purposes of Section 13-1-98(D).

Morningstar I did not directly address the meaning of the term “publicly regulated” in Section 13-1-98(D) and the Procurement Code does not define the term. Under the rules of statutory construction, the words used in a statute are given their ordinary meaning, unless the legislature indicates otherwise. See New Mexico Indus. Energy Consumers v. New Mexico Pub. Regulation Comm’n, 2007-NMSC-053, ¶ 20, 168 P.3d 105, 112. It also is presumed that the legislature does not use “any surplus words in a statute; each word is to be given meaning.” State ex rel. Helman v. Gallegos, 117 N.M. 346, 355, 871 P.2d 1352 (1994).

As ordinarily used, the term “publicly regulated” refers to a business or service that is treated as a public utility. Public utilities devote their private property and resources to the provision of necessary services to the public and operate under extensive government regulation and oversight. See Black’s Law Dictionary (8th ed. 2004) (definition of “public utility”); First Fed. Sav. & Loan Ass’n v. East End Mut. Elec. Co., 735 P.2d 1073 (Idaho Ct. App. 1987) (nonprofit electric cooperatives owned by and serving a limited group of customers were not “publicly regulated” utilities, because the state legislature “evidently has determined that this type of service provider ... merits a lesser degree of public intrusion upon its freedom of contract”); Roadrunner Inv., Inc. v. Texas Util. Fuel Co., 578 S.W.2d 151, 154 (Tex. Civ. App. 1979) (corporation that sold natural gas to electric utilities and whose gas was subject to allocation by the Texas Railroad Commission was a public utility). See also NMSA 1978, § 62-3-1 (1967)

¹ The Court determined the contract for water services also was excepted from the Procurement Code under Section 13-1-98(A), which applies to a procurement from one local public body to another public body. Morningstar I, 120 N.M. at 317-18.

(declaring that a substantial portion of the business and activities of public utilities covered by the Public Utility Act involves rendering “essential public services” to the general public and that the public interest requires regulation and supervision of public utilities).

Two New Mexico Supreme Court cases appear to interpret and apply Section 13-1-98(D)’s exception for certain “publicly regulated” services consistent with the usual meaning of the term. In one case, the Court reviewed a tariff approved by the Public Regulation Commission (“PRC”) that allowed Public Service Company of New Mexico (“PNM”) to recover costs incurred in complying with local ordinances to place utility systems underground. City of Albuquerque v. New Mexico Pub. Regulation Comm’n, 2003-NMSC-028, 79 P.3d 297. While holding the tariff invalid for other reasons, the Court rejected the plaintiffs’ claim that the tariff violated the Procurement Code because it did not “provide for the seeking of bids by local governments.” Id. at ¶ 28, 79 P.3d at 310. According to the Court, the tariff fell within Section 13-1-98(D)’s exception for “purchases of ... publicly regulated” gas and electricity. Id.

The other pertinent case is Morningstar I. As discussed above, that case did not directly determine whether a service is “publicly regulated” but, in the course of discussing Section 13-1-98(D)’s applicability to the municipality’s water services at issue, noted that whether the municipality operated a “publicly regulated utility” would be addressed in a subsequent opinion. See 120 N.M. at 310, n. 2. In the subsequent opinion, which arose from the same dispute at issue in Morningstar I, the Supreme Court held that the municipality was not a utility covered by the Public Utility Act or subject to the jurisdiction of the Public Utility Commission (a predecessor to the PRC). Morningstar Water Users Ass’n v. New Mexico Pub. Util. Comm’n, 120 N.M. 579, 904 P.2d 28 (1995) (“Morningstar II”). In effect, the Court held that the municipal water services at issue in Morningstar I and Morningstar II were not “publicly regulated” because they were not subject to oversight by a public body, like the PRC, with authority to regulate core aspects of the service and provider, including rates, service areas and competition with other providers. See Morningstar II, 120 N.M. at 581 (referring to the municipality as “an unregulated utility” without a service area or territory certified by the Public Utility Commission).

In light of the usual meaning of the term “publicly regulated” and the case law discussed above, refuse collection and hauling are not “publicly regulated” services for purposes of the exception from the Procurement Code in Section 13-1-98(D). Of course, refuse collection and hauling must be conducted in accordance with applicable state laws and local ordinances.² However, like the municipal water services in Morningstar I and Morningstar II, and in contrast to PNM and other public utilities covered by the Public Utility Act, refuse collection services and

² The New Mexico Environmental Improvement Board (“EIB”) oversees and regulates solid waste management programs under the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -43 (1990, as amended through 2001). The Act focuses primarily on the disposal of solid waste in landfills and other facilities that meet the Act’s requirements. The Act prohibits the disposal of solid waste at any place other than a facility with a permit issued by EIB and requires commercial haulers to pay a solid waste assessment fee if they dispose of solid waste that was generated outside the district in which the solid waste facility is located. Id. §§ 74-9-31, 74-9-39. Although these and other provisions of the Solid Waste Act may affect the business of refuse collection, that business is not subject to the manner and extent of regulation imposed on public utilities under the Public Utility Act.

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providers are not closely regulated and supervised by a government agency like the PRC with statewide authority to regulate rates, certify service areas and adjudicate disputes among providers.

In sum, the Procurement Code states that, unless it provides otherwise, services provided to a municipality by a private business are subject to the competitive bidding and other requirements of the Code. See NMSA 1978, § 13-1-30. As discussed above, the Code does not appear to except refuse collection services from its coverage, unless they are procured by a home rule municipality under its own purchasing ordinance.³

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.

Sincerely,


ELIZABETH A. GLENN
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

³ We also have reviewed statutes authorizing municipalities to provide refuse collection services. See NMSA 1978, § 3-48-3 (2003) (authorizing a municipality to adopt an ordinance providing for the collection and disposal of refuse by the municipality, by contract or by any other manner the municipality deems suitable). We have not found anything in those laws that would exempt a non-home rule municipality from the Procurement Code's requirements when those services are procured from a private business.