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OPINION
OF
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Opinion No. 08-05

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TO: The Honorable Leonard Lee Rawson
New Mexico State Senator
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QUESTIONS

1. Does Executive Order No. 2007-49 ("Order") regarding health benefit provisions in state contracts, issued by Governor Bill Richardson on October 25, 2007, exceed the executive branch's authority under the New Mexico Constitution or state law?

2. If the Order was an appropriate exercise of authority, may contractors account for health coverage benefits as part of the prevailing wage?

CONCLUSIONS

1. The Order is an appropriate exercise of the Governor's authority and is consistent with the state constitution and laws; however, the Order does not have the force of law.

2. The health benefits provided pursuant to a valid, enforceable contract may be accounted for as part of the prevailing wage.

FACTS

The Order, issued on October 25, 2007, is titled "State of New Mexico Contractor Health Coverage Requirement." In pertinent part, it directs executive branch state agencies that solicited and awarded a contract after January 1, 2008 to require prospective contractors to offer health care coverage to their New Mexico employees as part of their procurement submittal. The Order does not mandate any type or amount of health coverage that must be offered. Vendors covered by the Order are determined by the expected annual value of their contracts with an agency and whether the contracts were "solicited" and "awarded." The Order also requires that agency solicitations going forward contain language requiring prospective contractors to agree to offer health coverage to their New Mexico employees. The Order limits "solicitations" to those contracts awarded pursuant to the New Mexico Procurement Code, NMSA 1978, Sections 13-1-21 through 13-1-199.

ANALYSIS

1. Validity of Executive Order

The Governor's authority to issue executive orders is necessarily limited by the state constitution. Specifically, under Article V, Section 4, the "supreme executive power of the state" is "vested in the governor." The exercise of the supreme executive power is limited by Article III, Section 1, which provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

Under Article III, Section 1, each branch of government "maintains its independent and distinct function." State ex rel. Taylor v. Johnson, 125 N.M. 343, 349, 961 P.2d 768 (1988). In general, "[t]he Legislature makes, the executive executes, and the judiciary construes, the laws." State v. Fifth Judicial Dist. Ct., 36 N.M. 151, 153, 9 P.2d 691 (1932). While the separation of powers mandated by the constitution is not absolute, each branch of government is prohibited from "unduly encroach[ing] or interfer[ing]" with the authority of the others. State ex rel. Taylor v. Johnson, 125 N.M. at 350. Thus, action by the Governor, including an executive order, will violate separation of powers if it infringes on the legislature's exclusive authority to make laws; i.e., if the order purports to create new law, rather than execute existing statutes or case law, or attempts to appropriate public funds. Id. See also Clark v. Cuomo, 486 N.E.2d 794, 797-98 (N.Y. 1984) (an executive order that implements or enforces legislation without usurping the legislature's prerogatives does not violate separation of powers principles).

There is little New Mexico case law addressing the effect of executive orders. An often-cited Pennsylvania case reviewing the issue divides executive orders into three types. See Shapp v.

Butera, 348 A.2d 910 (Pa. Commw. Ct. 1975). First are "formal, ceremonial and political orders, which are usually issued as proclamations. The usual purpose of a proclamation is to declare some special day or week in honor of or in commemoration of some special thing or event." This type of executive order "usually has no legal effect." Id. at 913.

Second, executive orders may be "intended for communication with subordinate officials in the nature of requests or suggested directions for the execution of the duties of the Executive Branch of government." Shapp, 348 A.2d at 913; New York Citizens Util. Bd. v. Pataki, 659 N.Y.S. 2d 933, 935 (N.Y. App. Div. 1997) ("[e]xecutive orders are simply voluntary arrangements or directions to implement a current interpretation of legislative policy"), appeal denied, 688 N.E. 2d 1382 (N.Y. 1997). These orders also are "not legally enforceable," and "carry only the implication of a penalty for noncompliance, such as a possible removal from office, an official demotion, restrictions on responsibilities, a reprimand, or loss of favor." Shapp, 348 A.2d at 913; Stein v. James, 651 S.W. 2d 624, 629 (Mo. Ct. App. 1983) (citing Shapp in support of its holding that "[a]bsent some constitutional or statutory basis for an executive order, it cannot be considered more than a directive from the governor to his subordinates ... " and does "not create a legal cause of action").

The third type of executive order "serve[s] to implement or supplement the Constitution or statutes," and has "the force of law." Shapp, 348 A.2d at 913. The difference between this type of executive order and the second type "is based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication." Id.

The Order is more than a ceremonial order, but it was not required or otherwise expressly or necessarily authorized by the New Mexico Constitution or state statutes. Instead, it directs the executive branch agencies to implement a program requiring contractors with substantial state contracts to offer employee health coverage. This order falls into the second category of executive orders discussed above. It is permissible as long as it is consistent with constitutional principles and consistent with existing state law.

The New Mexico Procurement Code was enacted to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. See NMSA 1978, § 13-1-29 (1984). In furtherance of these goals, the Procurement Code establishes statutorily defined procedures for the competitive procurement of goods and services by agencies. See Planning and Design Solutions v. City of Santa Fe, 118 N.M. 707, 710, 585 P.2d 628 (1994). The Code sets forth defined procedures for soliciting prospective contractors and it grants broad discretion to the procuring agencies to define their needs and contractual conditions with respect to the procurement of goods and services.

The legislature, in the Procurement Code, has given broad discretion to agencies to determine what requirements, specifications and conditions will be required of agency contractors. Section 13-1-103 requires that all Invitations to Bid (ITB's) issued by agencies include the specifications for the goods or services requested but does not otherwise define or legislatively mandate any

particular specifications or contractual terms. See NMSA 1978, § 13-1-104 (2005). Similarly, Section 13-1-112 requires that all Requests for Proposals (RFP's) include the specifications of the goods or services requested, but does not otherwise define or mandate the inclusion of any particular specifications or contractual terms. Section 13-1-89 defines "specification," but does not mandate that any particular specifications be included or excluded from ITB's or RFP's. The Code leaves the formulation of specifications and contractual terms to the discretion of the procuring agency.

Section 13-1-114 requires that an agency disclose the evaluation criteria and relative weights to be used in the evaluation of goods and services, but does not mandate any specific evaluation criteria or assigned weights. The Code also gives the procuring agency the discretion to accept or reject all or parts of offers, cancel and reissue procurements and award contracts based upon what is most advantageous for the procuring agency.

With respect to contracts, Section 13-1-170 permits an agency with rulemaking authority to promulgate rules requiring that certain uniform contract clauses be present, "as appropriate," in the agency's contracts. However, the statute leaves the type and content of these uniform terms and conditions to the discretion of the agency.

The Order's requirement that certain state contractors offer health coverage to employees is a condition of the procurement contract, similar to requirements for liability insurance, costs, and education or experience levels. The Procurement Code leaves such conditions to the discretion of the procuring agency. The Order is an executive directive to agencies within the executive branch regarding the conditions to be met by prospective contractors participating in competitive procurements issued pursuant to the Code on an item that is already commonly part of the employer-employee marketplace. The Order does not address the creation or administration of health plans or interfere with legislative authority to enact substantive health care legislation.

In light of the pertinent state statutes, case law and other legal authority discussed above, we do not believe that the Order unconstitutionally creates new law or otherwise improperly impinges on the legislature's lawmaking function. We further conclude that, absent any indication of a different legislative intent, the Executive Order is consistent with existing state law. We note, however, that the Order does not carry the same bundle of rights as a law. By itself, the Order does not give employees of vendors that bid for or are awarded substantial contracts with the state any legally enforceable right to benefits. See Citizens Util. Bd. v. State, 700 N.Y.S. 2d 297, 298 (N.Y. App. Div. 1999) ("promulgation of an Executive order does not ... give rise to a vested right"), appeal denied, 734 N.E.2d 1212 (N.Y. 2000); Pagano v. Pennsylvania State Horse Racing Comm'n, 413 A. 2d 44 (Pa. Commw. Ct. 1980) (absent constitutional or statutory authority, an executive order did not create a property interest in employment that was capable of judicial enforcement), aff'd, 452 A.2d 1015 (Pa. 1982). In addition, unlike a law, the Order may be withdrawn or rescinded at the Governor's or his successors' discretion, see New York Citizens Util. Bd. v. Pataki, 659 N.Y.S.2d at 935 (governor was well within his authority to revoke an executive order issued by his predecessor "if he felt it was not in keeping with current legislative policy"), and it may be superseded by subsequent legislation.

2. *Health Coverage as Fringe Benefit Included in the Prevailing Wage*

With regard to your question of whether the benefits required by the Order may be accounted for as fringe benefits that are a part of the prevailing wage, there are relevant statutes and regulations governing this matter. The legislature has determined that in addition to the rate of pay, the prevailing wage may include:

> the rate of costs to a contractor ... that reasonably may be anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program that was communicated in writing to the laborers and mechanics affected for: 1) medical or hospital care ... 11) other bona fide fringe benefits; but only where the contractor ... is not required by other federal, state or local law to provide any of the foregoing or similar benefits.

NMSA 1978, § 13-4-12 (A)(2)(b)(emphasis added).

See also 11.1.2.11(B)(2)(e) NMAC (N.M. Department of Labor regulation providing that the type of fringe benefits that can be accounted for as wages for purposes of determining the prevailing wage are those fringe benefits that are defined in Section 13-4-12(A) (2)(b)). Under Section 13-4-12(A)(2)(b), fringe benefits that are not required by law, but are provided pursuant to an enforceable commitment may be included in determinations of the prevailing wage.

As discussed above, the Order issued by the Governor is not a law. Therefore, the health benefits contracted as a result of the Order, are not "required by ... state ... law under Section 13-4-12(A)(2)(b)." A valid contract between a state agency and the contractor is generally an enforceable commitment, as is a contract between a contractor and an employee or a fund, plan, program or trustee. Health benefits provided pursuant to an "enforceable commitment" can be accounted for as fringe benefits that are a part of the prevailing wage.

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