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TRANSPORTATION SERVICES DIVISION
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February 8, 2019

Clinton Nicley, Director
Risk Management Division
1100 St. Francis
Santa Fe, NM 87502

Re: RMD 2.6.19 Procurement Determination Request Regarding Legal Services Contracts

Dear Mr. Nicley:

State Purchasing Division (SPD) received Risk Management Division's (RMD) February 6, 2019 letter requesting the State Purchasing Agent's determination of a potential procurement violation. This matter began with the procurement of professional legal services from various law firms under RMD's 2014 Request for Proposal (RFP). On June 30, 2018, four years after the RFP award, all of RMD's professional legal services contracts expired. RMD attempted to extend the term of these contracts by amendment on two occasions using an improper interpretation of Section 15-7-10 NMSA 1978 which provides automatic extension renewals for ongoing litigation matters. In the first extension period through September 30, 2018, RMD submitted professional legal services contract amendments which were approved by the Department of Finance and Administration (DFA). During this extension period, RMD assigned more than 24 *new* cases to defense firms under the amended contracts. However, RMD's *new* cases assignments were not already "in litigation" and not "referred to the law firm prior to the contract termination date" under the statutory exception, Section 15-7-10 NMSA 1978. RMD's extended contracts incorrectly stated the amendments were "authorized by NMSA Section 15-7-10."

RMD initiated an RFP for professional legal services contracts before the contracts expired on June 30, 2018. This RFP closed after the service contracts expired. Moreover, the RFP did not result in awards to all of RMD's previously retained law firms. Because some of RMD's law firms were not awarded under the RFP, RMD requested a second amended contract extension period from DFA through November 30, 2018 for these non-awarded firms. Under these proposed contract extensions, RMD continued to make *new* case assignments to firms not awarded under the RFP. However, DFA did not approve RMD's second set of amendments to extend the contract terms. RMD proceeded without DFA approval to make *new* case assignments to these unawarded law firms under expired service contracts. RMD relied on a misinterpretation of Section 15-7-10 NMSA 1978 in making *new* assignments to the unawarded law firms under expired service contracts. RMD now seeks clarification from SPD regarding the procurements made for professional legal services under this fact pattern, and submits the following questions for response:

1. Were the assignments of new litigation matters during the period of July 1, 2018 through September 30, 2018 violations of the New Mexico Procurement Code or other applicable law? If so, should the assignments be construed in the aggregate as a singular procurement violation or is every assignment made during that period its own individual procurement violation?
2. Were the assignments of new litigation matters during the October 1, 2018, and through the present, violations of the New Mexico Procurement Code or other applicable law? If so, should the assignments be construed in the aggregate as a singular procurement violation or is every assignment made during that period its own individual procurement violation?
3. If procurement violation(s) occurred, what is the appropriate next step for the Risk Management Division and the General Services Department?
4. Are payments made against invoices submitted for new litigation matters during the above referenced periods violations of law, within the New Mexico Procurement Code itself or otherwise? If so, what is the appropriate next step for the Risk Management Division and the General Services Department?

June 30, 2018, RMD's professional legal services contracts expired after the statutory four year maximum term permissible under Section 13-1-150(B) NMSA 1978. An RFP was the appropriate procurement method for obtaining new professional legal service contracts. However, RMD extended the expired contracts beyond the 4 year maximum by using contract amendments. An exception exists outside Procurement Code, specifically Section 15-7-10 NMSA 1978, which allows for an automatic extension of any existing valid contract between RMD and any law firm, for the purpose of continuing the defense of ongoing litigation claims for cases previously assigned before the contract expiration date. New post-expiration date assignments are not permitted. Under this exception, RMD's legal contracts are automatically extended for the purpose of, as long as necessary for completing and concluding any matter already in litigation, including appeals, referred to the firm for defense prior to the termination date stated in the contract. This limited exception eliminates any requirement for RMD to take action to amend existing legal services contracts for the purpose of continuing the defense of ongoing litigation matters by a law firm. The test to be used for each assigned law firm is whether ongoing litigation existed before the professional legal services contracts' June 30, 2018 expiration date, and whether there was a referral to the law firm prior to the contract termination date. Once the subject litigation matter is concluded, any contract extension under Sec. 15-7-10 NMSA 1978 automatically expires. No *new* litigation matters shall be assigned to the firm until such time a new procurement and contract is awarded.

Therefore, SPD's responses to RMD's four questions are as follows:

Response 1. Assignments of *new* litigation matters during the period July 1, 2018 through September 30, 2018 are violations of the New Mexico Procurement Code if the litigation was not ongoing at the time of contract expiration and was not "referred to the law firm prior to the contract termination date". Extending expired 4 year professional legal services contracts is not permissible under Section 13-1-150(B) NMSA 1978. However, services for ongoing litigation matters are a valid legal exception under Section 15-7-10 NMSA 1978 and therefore not a Procurement Code violation. Because these violations all arose out of RMD's continued misinterpretation and

misapplication of Section 15-7-10 NMSA 1978, the invalid assignments shall be construed in the aggregate as a singular procurement violation.

Response 2. Assignments of *new* litigation matters during the October 1, 2018 through the present are violations of the New Mexico Procurement Code if the litigation was not ongoing at the time of contract expiration and was not "referred to the law firm prior to the contract termination date". Extending expired 4 year professional legal services contracts is not permissible under Section 13-1-150(B) NMSA 1978. However, services for ongoing litigation matters are a valid legal exception under Section 15-7-10 NMSA 1978 and therefore not a Procurement Code violation. Because these violations all arose out of RMD's continued misinterpretation and misapplication of Section 15-7-10 NMSA 1978, the invalid assignments shall be construed in the aggregate as a singular procurement violation.

Response 3. As a result of RMD's procurement violation, SPD directs RMD to take the action as further outlined below in this letter.

Response 4. Payments made in violation of the New Mexico Procurement Code shall be canceled or rescinded as further outlined below in this letter.

RMD's procurements appear to violate several sections of DFA's Model Accounting Practices ("MAP" July 1, 2018) because RMD's violations involve expired contracts with invalid term extension amendments, and the contracts also appear to involve expenditures above DFA's \$5,000 limit. DFA requires professional services contract approved by DFA's Contract Review Bureau prior to retaining a law firm and assigning new litigation cases (as required under FIN 4.9). Accordingly, no valid contract was in place because of RMD's misinterpretation and misapplication of Section 15-7-10 NMSA 1978, and no valid purchase order was authorized prior to the commencement of vendor work (as required under FIN 4.4 "Encumbrances"). However, this office is neither authorized nor qualified to make such determinations on behalf of DFA. Therefore, I am referring this matter back to you to resolve any appropriate action that DFA may determine regarding MAP Standards and Policies that may have been violated.

Following my review of the facts and law, it is my determination there were two separate violations involved. First was a procurement code violation because there was no valid procurement method and awarded contract in place before vendor work commenced under Section 13-1-102 NMSA 1978. Secondly, there was a Section 6-5-3 NMSA 1978 statutory encumbrance violation because funds were not properly encumbered with a purchase order before vendor services were initiated.

In view of the foregoing, I am referring this matter back to you to resolve both violations. In order to proceed with RMD's vendor payments for expenses incurred without a valid contract in place, and consistent with Section 13-1-182 NMSA 1978 as well as DFA's Manual of Model Accounting Practices, RMD is directed to take the following actions:

- 1) RMD must cancel or rescind the action implementing the procurement (i.e. invalid payments to law firms) in violation of the Procurement Code and MAPs;

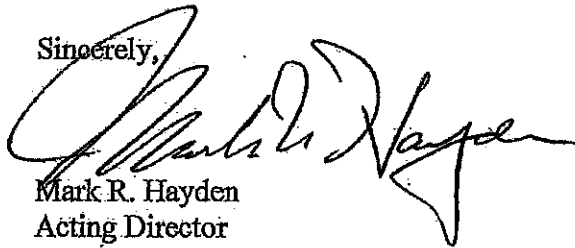
- 2) RMD must issue a "determination," as that term is defined in Section 13-1-52 NMSA 1978, documenting the action taken pursuant to #1 above to include a finding the businesses performing services have not acted fraudulently or in bad faith;
- 3) RMD must send a letter, accompanied by a determination referenced in #2 above, to the Director of DFA's Financial Control Division requesting the business be compensated for actual expenses incurred. The letter shall also include RMD's finding to support why payment to the businesses are in the best interest of the state and your agency;
- 4) RMD must strongly remind Department staff of Section 13-1-199 NMSA 1978, which states any business or person who willfully violates the Procurement Code is could be found guilty of a misdemeanor (where the amount is less than \$50,000) or a fourth degree felony (where the amount exceeds \$50,000) and is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement in violation of the code and of any provision of the code pursuant to Section 13-1-196 NMSA 1978;
- 5) RMD must identify to both DFA's Financial Control Division and to the State Purchasing Agent within one week of the date of this letter, the individual or individuals who are responsible for the handling of this matter. The individuals who were involved with this procurement matter, including RMD's CFO and CPO at that time, if they are currently employed by the State, will be required to attend both a single day SPD sponsored procurement training class and a single day DFA contracts training class. The agency must report back to the State Purchasing Agent 30 days following the date of this letter confirming when each individual is registered to take the training classes. No later than 60 days following the date of this letter, the agency must report back to the State Purchasing Agent and the State Controller to confirm these employees have successfully completed the required classes. A copy of the Certificates of Completion for each affected employee must be sent to the State Purchasing Agent. Because DFA's training schedule may vary, registration and reporting completion of the DFA contracts class shall be handled directly through the State Controller. Failure to follow these requirements may result in the CPO's loss of signature authority and will be reported to DFA. Registration for SPD's Procurement Code 101 classes scheduled through 2019 can be found at the SPD website:
<http://www.generalservices.state.nm.us/statepurchasing/trainingregistration.aspx>;
- 6) Audits are necessary for all procurement violations in excess of \$100,000. The total amount of the transactions related to this procurement violation appears to involve an amount exceeding \$100,000. Consistent with directives from the Financial Control Division, I require a complete assessment of this incident by your internal auditor to be provided to me in a report with supporting attachments. If you do not have an internal auditor to review this incident and produce the report to me with detailed specifics of the root causes, operational recommendations, and corrective action, then the required assessment must be performed by an external auditor. RMD shall implement those necessary changes to improve its process and procedures prevent incidents of this nature from occurring in the future. RMD shall send me a copy

of the complete audit report, along with RMD's implemented procedural changes intended to prevent incidents of this nature from occurring in the future.

After completing the foregoing actions, RMD will then need to coordinate with DFA concerning any relevant MAP standards and policies that may have been violated. I look forward to your completing the remaining requirements outlined in this letter and promptly reporting back to me.

If, upon RMD's continued investigation and review of this matter, new facts are discovered that suggest I reevaluate this determination, I ask you to send them to me immediately. I appreciate your cooperation in this regard, and please feel free to contact me should you have any questions regarding this matter.

Sincerely,



Mark R. Hayden
Acting Director

Enc.: RMD February 6, 2019 Procurement Determination Request

Cc: Ron Spilman, Director, Financial Control Division, Department of Finance & Administration

Cc: Ken F. Ortiz, GSD Cabinet Secretary

FIRMS RECEIVING IMPROPER ASSIGNMENTS AND COMPENSATION

Allen Law Firm (2) - \$621.36
Allen, Shepherd, Lewis & Syra (1) - \$2,036.68
Butt, Thornton & Baehr (1) - \$3,407.77
Carrillo Law Firm (1) - \$00.00
Conklin, Woodcock & Ziegler (2) - \$17,167.76
Harwood, Rip (1) - \$3,136.03
Hatcher Law Group (1) - \$7,353.15
Holt, Babington, Mynatt, & Martinez (1) - \$3,248.12
Jarmie & Associates (1) - \$1,476.15
Keleher & McLeod (2) - \$3,624.60
Kennedy, Moulton & Wells (2) - \$7,299.28
Long, Komer & Associates (1) - \$4,316.90
Robles, Rael & Anaya (2) - \$3,441.75
Saucedo Chavez (2) - \$24,184.50
Stiff, Keith & Garcia (1) - \$2,132.15
Torres, Mary (2) - \$5,007.93
Wiggins, Williams & Wiggins (2) - \$20,582.45