

Questions and Answers #3 to RFP #VCR-FY18-011
Hospital/24 Hour Emergency Healthcare Facility

1. Amendment 5, Section IV, Item B.13 (page 19) has added a new mandatory requirement and associated evaluation points. For those interested in submitting a bid for the RFP, please provide the legal analysis to confirm:

Amendment 5, Section IV, Item B.13 does not add a new mandatory requirement. It is completely within an Offeror's discretion whether to offer to subsidize the cost of inmate medical and mental health care. To the extent that an Offeror elects to do so, they will be awarded points as set forth in the solicitation.

a. That the inclusion of a requirement and evaluation criteria related to the payment of a dollars directly to the County, specifically where the dollars are separate and distinct from the content requested in the remainder of the RFP is legally permissible under New Mexico law, and federal law (if applicable).

As reflected by the attached Attorney General's Opinion, soliciting proposals from potential offerors to subsidize the provision of medical and mental health care of inmates is permissible under New Mexico law.

The New Mexico Procurement Code, NMSA 1978, Sections 13-1-1 through 13-1-199, as amended, governs purchases by public entities in New Mexico. The purposes of the Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. NMSA 1978, Section 13-1-29(C). The County may be as creative as practicable in obtaining the best products for the best price, provided it is acting within the Code's parameters. *Planning and Design Solutions v. City of Santa Fe*, 118 N.M. 707, 710 (1994). If the County acts within the Code's parameters, the Court presumes that it is acting in good faith and for the public good. See *id.*

The Attorney General has had occasion to consider whether the State is permitted to solicit prebate offers in conjunction with a solicitation, whereby potential offerors would provide remuneration to the State to defray the cost of the procurement and the administrative and transition costs involved in establishing a new contract. The Attorney General, acknowledging "the Code's clear mandate to the Department to maximize the purchasing value of public funds," determined the prebate offer to be a reasonable factor in achieving the Code's purposes. Specifically, the Attorney General concluded that the practice of soliciting prebate proposals from potential offerors and considering the proposals in the evaluation of a procurement is not the same as soliciting bribes, gratuities, or kickbacks in violation of New Mexico law.

The Attorney General reasoned that the unlawful solicitation of a bribe by a public officer or employee consists of a public officer or employee soliciting, accepting, directly, or indirectly, anything of value, with the intent to have his decision or action on any question influenced thereby, and which by law is pending or might be brought before him in his official

capacity. NMSA 1978, Section 30-24-2. A public officer or employee may be found guilty of soliciting or receiving a kickback if he knowingly solicits or receives any remuneration, directly or indirectly, overtly or covertly, in cash or in kind from another person in return for referring an individual to that person for the provision of any item or service which may be paid in whole or in part with public funds. NMSA 1978, Section 30-41-1. The Attorney General recognized that, in each instance, the law contemplates that the public officer or employee demand or receive some kind of benefit in exchange for his service or influence.

Much as with the solicitation for pre-bates, soliciting proposals from potential offerors to subsidize the provision of medical and mental health care of inmates do not provide anything of value to any public officer or employee. Rather, any benefit obtained through such subsidy goes directly to the County, and benefits the taxpayers of the County. Additionally, it promotes the Code's purpose of ensuring the maximum benefit to the County taxpayers; requiring prospective offerors sharpen their pencils to ensure the maximum return for the County.

The Federal Anti-Kickback Statute ("Anti-Kickback Statute") is wholly inapplicable, as that statute prohibits the exchange (or offer to exchange), of anything of value, in an effort to induce (or reward) the referral of federal health care program business. See 42 U.S.C. Section 1320a-7b. The County is not referring federal health care program business, but rather making available mill levy funding for the maintenance and operation of the hospital.

b. How this inclusion of a requirement and evaluation criteria related to the payment of a dollars directly to the County meets the requirements of the Hospital Funding Act.

The award of points to an offeror that proposes to subsidize the provision of medical and mental health care to the County's inmate population not only meets the requirements of Hospital Funding Act, but further advances the purposes and goals of the Act, to provide flexibility in identifying how to address the serious health care needs of among the most vulnerable and in need of the County's sick and indigent population.

The Legislature explained that the purpose of the Hospital Funding Act is, in part, "to encourage and enable counties and other political subdivisions to provide appropriate and adequate hospital facilities for the sick of the counties [.]" The Act further explicitly authorizes the County to "make agreements with state or county agencies or other agencies for the care of sick and indigent persons." Our Court of Appeals has further recognized the purpose of the act is to "provide flexibility in financing construction, operation and maintenance of necessary hospital facilities." *Cordova v. Bd. of County Com'rs of Valencia County*, 2010-NMCA-039, ¶ 8, 148 N.M. 460, 463, 237 P.3d 762, 765 (quoting NMSA 1978, Section 4-48B-2(B)).

The Hospital Funding Act further expressly authorizes the County to "contract with the state, another county or counties, the federal government or its agencies, another political subdivision or a public or private corporation, organization or association for the care of the sick of the county[.]" "to enter into a health care facilities contract with one or more hospitals that agree to provide facilities to the sick of the county[.]" and "to distribute the proceeds of the mill levy authorized by the Hospital Funding Act to one or more county hospitals and one or more contracting hospitals or any combination thereof that provide facilities for the sick of the county,

whether located within or without the county wherein the mill levy is collected." NMSA 1978, Section 4-48B-5. The Act does not differentiate between inmates and non-inmates, presumably recognizing that inmates are constitutionally entitled to medical and mental health care. See, e.g., *Mata v. Saiz*, 427 F.3d 745, 759 (10th Cir. 2005) (recognizing Government's responsibility to address its inmates serious medical needs). The proposed amendment affords Offerors an opportunity to earn additional points by offering to subsidize services to the sick of the County. Accordingly, the subsidy of inmate health care advances the purposes of the Hospital Funding Act.

2. Would Valencia County consider deleting this Amendment 5, Section IV, Item B.13?

The Board of County Commissioners plainly expressed its support for Amendment at its duly-noticed Commission workshop on June 26, 2018. The Procurement Code affords offerors aggrieved in connection with a solicitation or award of a contract a mechanism by which to obtain review of that grievance. Specifically, NMSA 1978, Section 13-1-172 (1984) provides that "[a]ny bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest." The County anticipates that any party that alleges to be aggrieved in connection with the solicitation will file a timely protest in accordance with the Code's requirements, which will be resolved in accordance with the provisions of the Code. As this amendment was issued June 27, 2018, any offeror that claims to be aggrieved in connection with this additional evaluation criteria set forth in Amendment 5 would have until July 12, 2018, to lodge a protest, which will trigger the statutory process set forth in NMSA 1978, Sections 13-1-173 to -176.

3. Appendix B, Section 3.3 Annual Audit (page 29): This section requires the provision of specific financial documents and copies of the annual audit. If the new facility is part of a larger organization with the fiscal management provided at a consolidated level, will you require the production of these financial documents specific to this facility or will the provision of the audited financial statements of the larger organization suffice?

The form of Health Care Facilities Contract, included as Appendix B to the solicitation, provides that

3.3 Annual Audit: PROVIDER hereby agrees to provide the County on an annual basis, within thirty (30) days of receipt, complete copies of its audited financial statements, detailing the financial condition of PROVIDER. PROVIDER shall provide the County with an annual balance sheet, personal and real property inventories, profit and loss statements, accounts receivable, accounts payable records, and other financial records bearing on the operation of the Hospital Project. The financial information shall be in sufficient detail to allow the County to appropriately analyze the fiscal status and management practices of the Hospital Project. The financial information shall be deemed a "public record" under the New Mexico Public Records Act (Section 14-3-1 et seq., NMSA 1978) and the Inspection of Public Records Act (Section 14-2-1 et seq., NMSA 1978).

As reflected in the contract, the specific financial documents and audit need to be sufficiently specific so as to permit the County to appropriately analyze the fiscal status and management practices of the Hospital Project.