

FORMAL OPINION

August 30, 1974

MR. JOHN F. LAEZZA, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 4-1974

Dear Mr. Laezza:

You have requested an opinion regarding the extent to which the Emergency Petroleum Allocation Act of 1973, P. L. 93-159 (hereafter EPAA), excuses municipalities and counties from their obligation under State law to advertise for bids for gasoline supply contracts. The answer to your inquiry requires a discussion of the applicable State and Federal regulatory schemes.

INTRODUCTION

Competitive bidding is designed to secure honest competition and protect taxpayers from unjust and extortionate contracts. *Hillside Twp. v. Sternin*, 25 N.J. 317, 322 (1957). Toward this end, the Local Public Contracts Law imposes certain obligations upon governmental units selecting gasoline suppliers. The statute requires that "[e]very contract [with certain exceptions not herein relevant] . . . for the . . . furnishing . . . of any materials or supplies, the cost . . . whereof is to be paid with or out of public funds, shall be made or awarded only after public advertising for bids" N.J.S.A. 40A:11-4.* The contract must then be awarded to the lowest responsible bidder. N.J.S.A. 40A:11-16. To receive the contract, of course, the lowest responsible bidder must offer a bid capable of satisfying the specifications for the work contemplated. *Hillside Twp. v. Sternin, supra*. A contract awarded in violation of these standards is invalid and may be set aside. *E.g., Hillside Twp. v. Sternin, supra*.

The EPAA requires the President to allocate scarce petroleum products and establishes broad goals to be achieved by this program. Such goals include the preservation of an "economically sound and competitive petroleum industry," and an equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States." P.L. 93-159 §4(b) (1). See also Federal Energy Administration Act of 1974, P.L. 93-275, §5(b).

A comprehensive regulatory scheme was promulgated to implement these goals. These regulations distinguish between an "end user" and a "wholesale purchaser-consumer" of an allocated product. An "end user" is defined as an ultimate consumer of an allocated product. An "end user" is defined as an ultimate consumer who purchased less than 84,000 gallons of product. 10 C.F.R. 211.51. A wholesale purchaser-consumer, on the other hand, is defined as a firm which in any year since 1971 received 84,000 gallons of an allocated product "into a storage tank . . . at a fixed location." 10 C.F.R. 211.51.

Under the program, a gasoline supplier must provide gasoline to any end users which it supplied as of January 15, 1974 (10 C.F.R. 211.9(b)), as well as such new end users as it would supply under "normal business practices". 10 C.F.R. 211.12(f) (1). With regard to a wholesale purchaser-consumer, "[e]ach supplier of [motor gasoline] shall supply all . . . wholesale purchaser-consumers which purchased . . . [such gasoline] from that supplier during [the corresponding month of 1972]." 10 C.F.R. 211.9

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(a) (1) (emphasis supplied); 10 C.F.R. 211.102. This relationship may be terminated only by mutual agreement or order of the FEA. 10 C.F.R. 211.9(a) (2) (n). It follows as a general rule that a wholesale purchaser must obtain its required gasoline from its 1972 supplier. *Cf.* 10 C.F.R. 211.12(b) (2). Suppliers must make their gasoline available to both "end users" and "wholesale purchaser-consumers" at the base price, *i.e.*, the "weighted average price" at which the gasoline was priced on May 15, 1973 in transactions with the same class of purchasers, plus any increased product costs incurred by the refiner. 10 C.F.R. 212.82(f); 10 C.F.R. 212.83(b); FEA Ruling 1974-1.

END USERS

In order to determine whether the Federal allocation program excuses a municipality from the bidding requirements of the Local Public Contracts Law, attention should be directed to the circumstances under which gasoline contracts will be consummated. The first such circumstance concerns a municipality which is an end user of gasoline. As noted earlier, the supplier must accept such new end users as it would supply under "normal business practices". 10 C.F.R. 211.12(f) (1). In the context of government contracts, such normal business practices include the selection of a supplier through competitive bidding. Thus, a governmental end user is free to apply to a non "base period" supplier as a new end user and to do so by competitive bidding, without interfering with the allocation program. FEA Ruling 1974-19. Therefore, the competitive bidding requirements of the Local Public Contracts Law remain in full force with respect to municipalities and counties which are classified as "end users" by the FEA.

WHOLESALE PURCHASER-CONSUMERS

As applied to wholesale purchaser-consumers, state bidding statutes are "superse- ded to the extent they are inconsistent with the allocation regulations." FEA Rul- ing 1974-19. The petroleum allocation program, as noted earlier, requires a supplier to furnish gasoline to its base period wholesale purchaser-consumers. 10 C.F.R. 211.9(a). On the other hand, the Local Public Contracts Law requires that a municip- al wholesale purchaser-consumer award such contracts to the lowest responsible bidder. N.J.S.A. 40A:11-1 *et seq.* Since a municipal wholesale purchaser-consumer may receive a low bid from a non base period supplier, these provisions appear to be incompatible.

Under the allocation program, a wholesale purchaser-consumer may be relieved of its obligation to obtain allocated petroleum products from a base period supplier by means of an exception from the coverage of the program on the ground of serious hardship or gross inequity. 10 C.F.R. 205.41. Such exceptions, however, appear to be granted sparingly. The FEA has declared that the allocation regulations are "in- tended to be applied equitably such that the burden of fuel shortages will be borne without regard to whether a governmental agency or a private citizen is involved." FEA Ruling 1974-19. Moreover, in a parallel area involving an assignment to a new supplier when a base period supplier is unable to provide product, "[t]he fact that a wholesale purchaser-consumer is a governmental entity required by State . . . law to procure supplies at the lowest price will not be a controlling factor . . ." FEA Ruling 1974-19. In applying for an exception, a municipality must demonstrate that "the nature of the resulting burden on the [applicant] is not significantly dif- ferent from the nature of the burden shared by other such governmental units throughout the country." *Board of Education, City of New York, CCH Federal Energy Guidelines*, par. 20, 616. The magnitude of the burden of proof resting upon a

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municipality is revealed in *Department of Purchase, City of New York, CCH Federal Energy Guidelines*, par. 20618, in which the FEA noted that:

“[a]lthough the scope of the disruptions which New York City is experiencing is greater simply because of its population size than the problems experienced by other communities, the nature of the burden which the City faces is no different from the nature of the burden shared by other communities throughout the country.”

At the present time, therefore, it is clear that the Federal allocation program is so stringently administered as to render it virtually impossible for a municipal wholesale purchaser-consumer to obtain an exception even when public bidding has produced a low priced supplier. In such an environment, to require a governmental wholesale purchaser-consumer to solicit bids for its petroleum contracts and exhaust its administrative remedies before the FEA would unnecessarily engender confusion among suppliers concerning the volume of their supply obligations and the identity of their purchasers while an application for an exception is being processed. Such uncertainty on a statewide scale could disrupt the flow of petroleum products envisioned by the allocation program. Moreover, the State's interests in avoiding extortionate contracts and collusive purchasing seem protected by the price formulae built into the allocation program and the fact that a base period supplier relationship was initially established by public bidding. Thus, the State law requirement that a contract be awarded to a low bidder directly conflicts with the allocation program, and thus the competitive bidding requirements of the Local Public Contracts Law are at the present time superseded by the regulatory provisions of the FEA.** It should be noted, however, that this conclusion may be altered if future developments reveal that an exception on the grounds of price differential may be regularly available to political subdivisions.

ASSIGNMENT TO A NEW SUPPLIER

Such a conflict does not occur when a supplier cannot fulfill a contract with a base period wholesale purchaser-consumer. In that situation, the allocation program permits a municipality to apply to the FEA for an assignment to a new supplier. 10 C.F.R. 211.12(e) (3). The regulations provide, however, that “[t]o the extent practicable, the FEA shall continue any existing supplier/purchaser relationships in making such assignments.” 10 C.F.R. 211.12 (e) (3) (i). Additional factors include

“the supplier's allocation fraction, the allocation fraction of other suppliers which could supply the wholesale purchaser-consumer, and whether an assignment will effect the competitive position of any independent marketer, or small or independent refiner or would be otherwise inconsistent with the objectives of the Emergency Petroleum Allocation Act of 1973.”
FEA Ruling 1974-19.

Bearing these criteria in mind, a municipality faced with such prospects should first attempt on its own to locate a supplier. The selection is obviously not limited to a base period supplier. Accordingly, a municipality may advertise for bids under the Local Public Contracts Law and obtain a non base period supplier without neces-

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sarily interfering with the allocation program; therefore, the competitive bidding requirements of the Local Public Contracts Law remain in full effect in such circumstances.***

CONSTRUCTION PROJECTS

Finally, under the allocation program, a municipality soliciting bids for a new construction project and desiring to assure prospective bidders that gasoline is available to complete the project "may apply to a supplier as a new end user." The volume of fuel needed to complete the job may be estimated, and upon award of the contract, transferred to the successful bidder, if that bidder does not already have a sufficient base period volume. No requirement is imposed that a supplier selected must be a "base period" supplier. Thus, when a governmental unit "applies to a supplier as a new end user" it is clear that such application may be made in compliance with this State's bidding requirements without interfering with the Federal program.

CONCLUSION

You are therefore, advised that an end user (a purchaser of less than 84,000 gallons of an allocated product) in obtaining its petroleum resources must continue to comply with the Local Public Contracts Law. However, with regard to a governmental wholesale purchaser-consumer of an allocated product (a firm which in any year since 1971 received at least 84,000 gallons of an allocated product "into a storage tank . . . at a fixed location", 10 C.F.R. 211.51), the provisions of the Local Public Contracts Law appear to conflict with the Federal petroleum allocation program. Therefore, to the extent that an exception on the ground of price differential is unavailable to a municipality, the bidding requirements of the Local Public Contracts Law are superseded.

Very truly yours,

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Attorney General

By: DOUGLASS L. DERRY

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* Parallel provisions relating to board of education contracts may be found in N.J.S.A. 18A:18-1 *et seq.*; N.J.S.A. 18A:18-5; N.J.S.A. 18A:18-6; N.J.S.A. 18A:18-19; N.J.S.A. 18A:18-20; N.J.S.A. 18A:18-21; and N.J.S.A. 18A:54-30.

** Of course, a municipality remains free in its own discretion to let a contract for gasoline by competitive bidding if it concludes that the appropriate hardship waivers can be secured from the FEA or, in the alternative, that it can terminate its relationship with its base period supplier by mutual consent, 10 C.F.R. 211.9(a) (2) (ii), and then find a new supplier through the competitive bidding process.

*** It should be noted, however, that the assignment of a new supplier continues for the duration of the allocation program or "until otherwise ordered by the FEA." 10 C.F.R. 212.12 (e) (5). Thus, if a municipality does not want to be committed to an arrangement which by its length might violate State law (see *e.g.*, N.J.S.A. 40A:11-15(1) (a)), it must anticipate repeating this procedure upon the expiration of the period for which it can legitimately enter into contracts.