

ATTORNEY GENERAL

July 22, 1976

HON. RICHARD C. LEONE  
*State Treasurer*  
Department of the Treasury  
State House  
Trenton, New Jersey 08625

FORMAL OPINION NO. 21 - 1976

Dear Treasurer Leone:

The Divisions of Purchase and Property and Budget and Accounting in the Department of the Treasury have requested advice concerning the legality of disbursements of State funds commonly known as "U.A. payments". This term is used to signify disbursements from the State Treasury to satisfy obligations directly incurred by the several agencies of State government (the "using agencies"), as distinguished from those made to satisfy obligations incurred on behalf of the State by the Division of Purchase and Property (the "purchase agency"), which are designated as "P.A. payments". The legal question presented, therefore, is the determination of the conditions under which the State agencies may, in the course of their operations, incur direct obligations to be satisfied by U.A. payments without resort to the procedures of the Division of Purchase and Property.

This question necessarily entails, at the outset, a definition of the proper responsibilities of the Division of Purchase and Property as the State's central purchasing agency, as set forth in the Division's governing statutes. The Division was first established within the former Department of Taxation and Finance by the act which created that department (L. 1944, c. 112). N.J.S.A. 52:27B-3. Its powers and organization are set forth in that statute, as subsequently amended, at N.J.S.A. 52:27B-53 through 27B-68. By virtue of N.J.S.A. 52:27B-55, the Division is specifically vested with the powers of the former State Purchasing Department, which are in turn described in N.J.S.A. 52:25-1 *et seq.* The Division was transferred to the Treasury Department by the Department of the Treasury Act of 1948 (L. 1948, c. 92), which also deals with the agency's substantive operations. N.J.S.A. 52:18A-16 through 18A-19. Finally, the Director of the Division is responsible for the administration of the State's general purchase statute, N.J.S.A. 52:34-6 *et seq.*

The jurisdiction of the Division of Purchase and Property must be discerned within this statutory frame of reference. As successor to the State purchasing department, it exercises "the exclusive authority and duty to purchase all articles used or needed by the state and its using agencies."\* N.J.S.A. 52:25-6. Under N.J.S.A. 52:27B-56, the Director is charged with the "efficient operation of a centralized State purchasing service." N.J.S.A. 52:34-6 establishes the procedural method and the substantive standards according to which the Director shall conclude "all purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds."

A close review of these statutes demonstrates that the function of the Division of Purchase and Property is to protect the purchase interest of the State as a consumer of goods and services provided by vendors and necessary for the orderly operation of State government. The term "purchases, contracts or agreements" occurring in N.J.S.A. 52:34-6 must be understood in this sense, as is evident from its context. The purchase statutes and the responsibilities they impose upon the Director apply only

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to those transactions in which the State contracts for the delivery of goods and services for its own consumption — to those transactions, in other words, to which the full application of all of the statutory provisions was intended. With respect to those transactions (where the purchase price exceeds \$2500), the Division is responsible to design specifications describing the terms and conditions of the purchase contract for public advertisement, to evaluate vendors' responses to the advertisement, and to award and execute a contract in acceptance of that vendor's proposal which is "most advantageous to the State, price and other factors considered." N.J.S.A. 52:34-12. *Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539 (1966); *Motorola Communications and Electronics v. O'Connor*, 115 N.J. Super. 317 (App. Div. 1971). See also N.J.S.A. 52:18A-19, 52:27B-61. In the limited circumstances described in N.J.S.A. 52:34-8, 9 and 10, the Director is authorized to negotiate certain purchases directly with vendors and to forego competitive advertisement, upon specific approval of the State Treasurer (commonly referred to as a "waiver of advertisement"). However, the waiver of advertisement can in no way divest the Division of the responsibility to determine and approve all the substantive matters regarding selection of vendor and the price, quantity and quality of goods and services to be provided under the negotiated contract; the Division remains responsible for all aspects of the negotiated contract, with the waiver merely providing the authority to proceed without competitive advertisement.

In short, the Division of Purchase and Property is intended by statute to function exclusively as a procurement agency. With respect to those transactions where the State has an identifiable purchase interest as a consumer of goods and services to be obtained from a variety of potential suppliers on terms established pursuant to N.J.S.A. 52:34-6, *et seq.*, the Division must exercise its proper responsibilities.\*\* As to any other transaction involving a disbursement from the State Treasury, the Division simply has no role to perform and should not be involved simply for purposes of fiscal or budgetary control. This is so regardless of whether the particular transactions occur pursuant to contracts or agreements which condition the use of State funds by the recipient. Several transactions of this variety are readily apparent. They would appear to include grant payments to public or private recipients for the accomplishment of a particular purpose or program, subsidy payments for the performance of specific services which the Legislature has chosen to allow an agency of State government to fund, in whole or in part, to advance a public purpose, and payments to third party providers in reimbursement for services to private individuals who are eligible for public assistance to defray the cost thereof. In these circumstances and in all others where the transaction does not involve an identifiable purchase interest of the State itself as a consumer of goods or services, we are convinced that the statutory law provides for no involvement of the Division of Purchase and Property, but instead allows the direct obligation of State funds by the agency whose appropriated funds are to be expended.

A using agency may, therefore, in a variety of circumstances, directly create obligations to be satisfied from the State Treasury without resort to the procedures of the Division of Purchase and Property. This is not to say, however, that fiscal and budgetary control over such transactions is lacking. Although the requirement for an encumbrance request by the Division of Purchase and Property for funds to satisfy a purchase obligation (N.J.S.A. 52:18A-19, 52:27B-61) would be inapplicable to using agency obligations, the Division of Budget and Accounting has independent statutory authority to require directly from the using agency a similar encumbrance request. N.J.S.A. 52:18A-9, 10; N.J.S.A. 52:27B-35. The Director of the Division of Budget

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and Accounting is authorized by these statutes to prescribe any notice requirements he deems necessary to prevent the using agencies from incurring obligations in excess of the funds appropriated to them.

In conclusion, the determination, in any particular instance, of whether obligational authority exists in the purchase agency or the using agency depends upon the presence or absence of an "identifiable purchase interest" of the State as a consumer of goods and services which involves the selection of the supplier, and the determination of the price, quantity, and quality of the subject matter of the agreement. The existence of such a purchase interest is, in substantial measure, a question of a factual character which is presented in varying context. Accordingly, it is primarily the responsibility of the Division of Purchase and Property to examine the particulars of any given transaction in coordination with the using agency and the Division of Budget and Accounting, and to determine those areas in which the presence of an identified purchase interest requires the exercise of the totality of purchase responsibilities which its governing statutes vest in that agency.

Very truly yours,

WILLIAM F. HYLAND

*Attorney General*

PETER D. PIZZUTO

*Deputy Attorney General*

\* The terms "articles" and "using agencies" are defined in N.J.S.A. 52:25-1 as follows:

" 'Articles' mean and include any and all materials, supplies, furniture, equipment, printing, stationery, live stock and all other chattels, goods, wares and merchandise whatsoever.

'Using agencies' mean and include all institutions, boards, commissioners and officers of the State receiving legislative appropriations, or grants of money from the United States of America or any agency or department thereof."

\*\* Where such an identifiable purchase interest exists, contracting authority is vested in the Division of Purchase and Property, except in two circumstances: *first*, where the statutes governing the operation of the using agency clearly and unequivocally exhibit the legislative intent that the using agency also function as purchase agency; and *second*, where the Director has, in the strictly limited areas permitted by N.J.S.A. 52:25-23, expressly delegated purchase authority to the using agency.