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prior to the due date of the first payment. To interpret the statute to bar imposition of a prepayment penalty in such a circumstance would not only violate this apparent legislative intent, but would also lead to absurd and anomalous results in that a bank would not be able to charge a prepayment penalty in the very case where it may be most justifiable.

For the foregoing reasons, it is our opinion that a bank may assess a prepayment penalty against a borrower when an installment loan is prepaid prior to the due date of the first payment on the loan.*

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By DENNIS R. CASALE
Deputy Attorney General

* It should be noted that P.L. 1981, c. 103 amended a variety of other consumer loan and contract statutes to permit a prepayment penalty to be imposed "if the loan [or contract] is prepaid within 12 months after the first payment is due." Such prepayment penalties may be imposed for small business loans (N.J.S.A. 17:9A-59.28); sales finance company loans (N.J.S.A. 17:16C-40.1); retail installment contracts (N.J.S.A. 17:16C-41) and home repair contracts (N.J.S.A. 17:16E-69). For the reasons stated above, it is also our opinion that prepayment penalties may be assessed against borrowers if any of these loans or contracts are prepaid prior to the date the first installment payment is due.

January 18, 1983

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

FORMAL OPINION NO. 2—1983

Dear Director Skokowski:

Several questions have been raised by local governmental entities with regard to bidding under the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.* Since the Division of Local Government Services in the Department of Community Affairs is authorized to assist local governments in all matters affecting the administration of the Local Public Contracts Law, we are providing you with advice concerning specific questions that have been identified by local governmental entities.

I

What are the criteria that are to be utilized in defining "goods contracts" from "service contracts"

The Local Public Contracts Law applies to all contracts whether or

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not the contracts involve the purchase of goods or services. N.J.S.A. 40A:11-3 states:

Any purchase, contract or agreement for the performance of any work or the furnishing or hiring of materials or supplies, the cost or price of which, together with any other sums expended or to be expended for the performance of any work or services in connection with the same immediate program, undertaking, activity or project or the furnishing of similar materials or supplies during the same fiscal year paid with or out of public funds, does not exceed the total sum of \$4,500 in the fiscal year, may be made negotiated or awarded by a contracting agent . . . without public advertising for bids. . . .

The term "materials" is defined in N.J.S.A. 40A:11-2(5) as including

goods and property subject to article 2 of Title 12A of the New Jersey Statutes, apparatus, or any other tangible thing, except real property or any interest therein.

The term "work," as defined in N.J.S.A. 40A:11-2(9), includes:

services and any other activity of a tangible or intangible nature performed or assumed pursuant to a contract or agreement with a contracting unit . . .

Therefore, under the Local Public Contracts Law, if the cost of the contract exceeds the statutory threshold of \$4,500, and involves the furnishing or hiring of materials or supplies or involves the performance of work, the public bidding requirements apply unless, as to any particular purchase or contract, the Local Public Contracts Law provides a statutory basis for waiving the requirement of open and competitive bidding.

While the distinction between "goods" and "services" does not have importance in terms of the application of the general requirement for public bidding under the Local Public Contracts Law, the distinction does have importance with respect to the ability of local contracting agencies to make purchases under contracts awarded by the State through its Division of Purchase and Property in the Department of Treasury. N.J.S.A. 52:25-16.1 states that:

The Director of the Division of Purchase and Property may include, in any such contract or contracts on behalf of the State, a provision for the purchase of such *materials, supplies or equipment* by any county, municipality or school district from such contractor or contractors. . . . [Emphasis added.]

A companion provision of the Local Public Contracts Law N.J.S.A. 40A:11-12 states:

Any contracting unit under this act may without advertising for bids or having rejected all bids obtained pursuant to advertising

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therefor, purchase any *materials, supplies or equipment* under any contract or contracts for such *materials, supplies or equipment* entered into on behalf of the State by the Division of Purchase and Property in the Department of the Treasury.

Under N.J.S.A. 52:25-16.3, the Director of the Division of Purchase and Property is to distribute a list of current contracts each year to all local contracting units so that they may determine whether to make purchases under the State contracts or proceed with their own purchases. In this regard, the Division of Local Government Service guidelines state:

The Division of Purchase and Property periodically makes information available to local officials regarding state contracts which may be utilized. This service in a number of cases has produced savings for local governments and should be considered by all local units. It is suggested that local units authorize their purchasing agents to participate in this program by ordinance or resolution.

It is important to emphasize that the ability of the local contracting unit to make purchases under a State contract turns upon the inclusion in the State contract of a provision allowing such purchases. The plain language of N.J.S.A. 52:25-16.1 makes clear that the Director of the Division of Purchase and Property may include provision for local government purchases when the contract involves *only* the acquisition of materials, supplies or equipment. Similarly, the language of N.J.S.A. 52:25-16.1 indicates that contracts which involve *only* the performance of work are not subject to extension for local government purchasing. The authority of the Director of the Division of Purchase and Property under N.J.S.A. 52:25-16.1 is less clear with regard to local government purchasing under contracts which provide for the acquisition of materials, supplies and equipment as well as related personal services.

As indicated above, the term "materials" is defined in N.J.S.A. 40A:11-2(5) and this definition incorporates the definition of goods in Article 2 of the Uniform Commercial Code, N.J.S.A. 12A:1-101 *et seq.* In N.J.S.A. 12A:2-105, the term "goods" is defined as items that are movable at the time of identification to the contract." In *Meyers v. Henderson Construction Co.*, 147 N.J. Super. 77 (Law Div. 1977), the Court held that a contract to furnish all labor, materials, tools and equipment to install over-head doors was a contract for the sale of goods governed by the Uniform Commercial Code. The Court in *Meyers* applied the test set forth by the Court in *Bonebrake v. Cox*, 499 F. 2d 951 (8th Cir. 1974) and approved in *Pittsburgh-DesMoines Steel Co. v. Brookhaven Manor Water Co.*, 532 F. 2d 572 (7th Cir. 1976).

The test for inclusion or exclusion is not whether they are mixed [contracts], but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale, with

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labor incidentally involved (e.g. installation of a water heater in a bathroom. [*Bonebrake v. Cox, supra*, 499 F. 2d at 960.]

A determination as to whether the service component or goods component predominates in an overall contract involving the provision of materials, supplies and equipment and personal services related thereto must be made on a case by case basis based upon the terms of a particular contract. If any local contracting unit has specific questions in this regard as to any particular contract whereunder the Director of the Division of Purchase and Property has provided for local government purchases, these questions should be brought to the attention of the Director of the Division of Purchase and Property. These questions may then be referred to the Attorney General for an appropriate legal opinion.

II

How should governmental purchases be aggregated for purposes of determining whether the statutory threshold of \$4,500 has been reached?

As stated above, the Local Public Contracts Law requires public bidding when the contract price exceeds the threshold of \$4,500. See N.J.S.A. 40A:11-3. The question has been raised as to the manner in which it is to be determined whether the statutory threshold has been reached. N.J.S.A. 40A:11-7 generally provides that, for purposes of determining whether particular purchases or contracts fall below the statutory threshold of \$4,500, contracts are not to be divided. This statute states:

No purchase, contract or agreement, which is single in character or which necessarily or by reason of the quantities required to effectuate the purpose of the purchase, contract or agreement, includes the furnishing of additional work, shall be subdivided, so as to bring it or any of the parts thereof under the maximum price or cost limitation of \$4,500.00 thus dispensing with the requirement of public advertising and bidding therefor, and in purchasing or contracting for, or agreeing for the furnishing of, any services, the doing of any work or the supplying of any materials or the supplying or hiring of any materials or supplies, included in or incident to the performance or completion of any project, program, activity or undertaking which is single in character or inclusive of the furnishing of additional services or buying or hiring of materials or supplies or the doing of additional work, or which requires the furnishing of more than one article of equipment or buying or hiring of materials or supplies, all of the services, materials or property requisite for the completion of such project shall be included in one purchase, contract or agreement.

The principle is well established in New Jersey that bidding statutes are enacted for the benefit of the taxpayers. Their purposes are to guard against favoritism, improvidence, extravagance and corruption. The goal of the bid laws is to secure for the public the benefits of unfettered competition. *Terminal Construction Corp. v. Atlantic City, Sewerage Auth.*,

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67 N.J. 403, 409-410 (1975). The public bidding laws are to be interpreted with sole reference to the public good. The general rule of strict construction of the bid laws is reflected in the observation of Justice Francis in *Hillside Tp. v. Sternin*. 25 N.J. 317, 326 (1957):

In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way.

The provision of N.J.S.A. 40A:11-7 must be read in light of the general principles stated above. This statute reflects a considered legislative statement that there be no evasion of the bidding requirements by division of contracts so as to avoid the statutory threshold of \$4,500. N.J.S.A. 40A:11-7 indicates in the plainest terms that the nature or character of the purchase, contract or agreement must be looked to in deciding whether the \$4,500 limit has been reached. If a project or undertaking is single in character, then its component parts must be aggregated for purposes of applying the requirement of public bidding. The \$4,500 limitation is, as stated in N.J.S.A. 40A:11-3, based upon the total expenditures during the fiscal year. Therefore undertakings which are singular in character, and which involve purchases during the course of an entire fiscal year, should be aggregated and not divided as stated in N.J.S.A. 40A:11-7. As the Division of Local Government Services has stated in its advisory guidelines:

The spirit and intent of the law is that contracting units should anticipate and aggregate their needs for various articles and services, consolidating their needs into bulk for various articles and services, consolidating their needs into bulk purchasing specifications which can be periodically advertised rather than making repeated purchases throughout the year on an as-needed basis.

Additional advisory guidelines have been provided by the Division of Local Government Services and should be looked to by local contracting officers in meeting their statutory obligations. The Division guidelines state:

1. The law does not refer to \$4,500 *per vendor* as the criterion.
2. All expenditures for equipment, materials and supplies, work and services (excluding force account) must be added together if they are for the same project, program, activity or undertaking. This places the emphasis on the purchases being added up according to what they are spent for rather than who they are bought from or the individual nature of the various components. The law defines "project" as "any work, undertaking, program, activity, development, redevelopment, construction or reconstruction of any area or areas," but does not define "program, activity or undertaking."
3. Materials and supplies used regardless of departmental lines should be grouped together if:
 - a. They are commonly made, stocked or sold by the same sources.

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- b. They are all used on the same project.
- c. They are normally needed over the course of a fiscal year. The figure is to be projected for the full fiscal year, and not year-to-date.

These guidelines are not meant to cover all contracting situations. Indeed it would be difficult to provide general guidelines that would have application to the myriad contracting situations faced by the municipalities and other contracting units. The public bidding laws must be applied practically and sensibly with the understanding that the important public policies served by the bid laws are best carried out by favoring the utilization of the bid process.

III

Treatment of travel costs and costs of conferences under the Local Public Contracts Law

Several questions have been raised with regard to costs incurred by public officials in the attendance of conferences related to their official responsibilities. These conferences may entail expenditures for travel, meals and lodging. The question raised is whether all of these costs should be aggregated or whether they may be divided consistent with N.J.S.A. 40A:11-7. The question has also been raised as to whether attendance at a conference is an item that may be purchased without advertisement for bids.

In this regard it should be noted that N.J.S.A. 40A:5-16.1 states:

[T]he governing body of any local unit may, by resolution, provide for and authorize payment of advances to officers and employees of the local unit toward their expenses for authorized official travel and expenses incident thereto. Any such resolution shall provide for the verification and adjustment of such expenses and advances and the repayment of any expenses and advances and the repayment of any excess advanced by means of detailed bill of items or demand and the certifications or affidavit required by N.J.S.A. 40A:5-16 which shall be submitted within 10 days after the completion of the travel for which an advance was made.

This statute suggests that official travel and expenses incident thereto are costs that are to be borne initially by the public official either out-of-pocket or with funds advanced for this purpose. The public body reimburses the public official for these incurred costs and does so in a manner consistent with the provisions of N.J.S.A. 40A:5-16.1. Thus according to the statutory scheme, it would appear that the purchases of, for example, transportation or lodging would be purchases made by the affected public officials rather than by the local governing body. Whereas the local governing body does ultimately bear the cost of these expenses, it does so pursuant to the statute and in a manner of reimbursement to the public officers.

Reading the provisions of N.J.S.A. 40A:5-16.1 with the provisions of the Local Public Contracts Law would suggest, therefore, that the reim-

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bursement of official travel expenses by a local governing body would not be the sort of purchase, contract or agreement that comes within the scope of N.J.S.A. 40A:11-1 *et seq.* As stated above N.J.S.A. 40A:11-3 imposes the public bidding requirement for the furnishing or hiring of materials or supplies, or for the performance of any work. In light of the specific provisions of N.J.S.A. 40A:5-16.1, it would appear that the reimbursement of official travel expenses are not the sort of "purchases, contracts or agreements" that the Local Public Contracts Law was intended to cover. Again, these purchases are purchases made by the officials directly. Their reimbursement is subject to review and oversight by the governing body, and any such reimbursement should be made with strict conformity to the statutory requirements of N.J.S.A. 40A:5-16.1

IV

Public Bidding on contracts for services performed at building acquired under in Rem Tax Foreclosure Act.

The question has been raised as to whether in rem tax foreclosures sever the existing contractual relationships with superintendent personnel in properties acquired by foreclosure under the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-104.29 *et seq.* Property taxes become a lien on the land for which they are assessed on or after the first day of January of the year after the taxes are assessed. N.J.S.A. 54:5-6. When the taxes remain unpaid as of July first of the year following the year in which the taxes became due, the municipality may enforce its lien by selling the property, N.J.S.A. 54:5-19, and the municipality may be the purchaser at the sale. N.J.S.A. 54:5-34. The officer conducting the sale issues a certificate of sale and delivers same to the purchaser. N.J.S.A. 54:5-46. Pursuant to N.J.S.A. 54:5-54, the owner of the property, or one with an interest therein, may redeem within six months from the time when the municipality purchased the property. The municipality may proceed under the In Rem Tax Foreclosure Act to summarily bar the right of redemption if six months have expired from the date of the tax sale. N.J.S.A. 54:5-104.34(a). A judgment entered in an in rem tax foreclosure proceeding:

shall give full and complete relief, in accordance with the provisions of this act, and in accordance with any other statutory authority, to bar the right of redemption, and to foreclose all prior or subsequent alienations and descents of the lands and encumbrances thereon, and to adjudge an absolute and indefeasible estate of inheritance in fee simple in the lands therein described, to be vested in the plaintiff.

With the entry of the final decree, the local government becomes vested with an estate in fee in the lands. *Clark v. Jersey City*, 8 N.J. Super. 33, 38 (App. Div. 1950). The municipality is collecting the rents and profits from the properties, and is charged with the duties and responsibilities that flow from ownership. Payments to superintendent personnel are payments made with public funds. Since the services performed by superintendents and other personnel constitutes the "performance of work," the contracts or agreements with these individuals is subject to the Local Public Contracts Law if the cost thereof exceeds \$4,500.

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The question has also been raised as to whether the municipality may give superintendent personnel free apartments and minimal salary in lieu of bidding. The value of the free apartment is clearly consideration flowing to the personnel. Considered along with the payment of a minimal salary, if the total yearly cost exceeds \$4,500 there is no basis to avoid public bidding. It is also important to emphasize that depending on the number and source of the personnel needed to superintend a building or buildings, aggregation of several personal service contracts might be required. In any event, the fact that use of an apartment is being offered as payment rather than cash does not bring the contract out from under the requirements of the Local Public Contracts Law.

V.

Conclusion

For the reasons stated herein, you are advised that the Local Public Contracts Law applies to all purchases of goods and services. Local governments may make purchases under contracts awarded by the Director of the Division of Purchase and Property of materials, supplies and equipment pursuant to N.J.S.A. 52:25-16.1. Local contracting units may purchase services under State contracts but only if those services are incidental to the procurement of materials, supplies and equipment. Local contracting units should aggregate all purchases in strict compliance with N.J.S.A. 40A:11-7 in order to further the purposes of the public bidding laws. Travel expenses incurred by local government officials are subject to reimbursement in accordance with N.J.S.A. 40A:5-16.1 and need not be subject to public bidding pursuant to the Local Public Contracts Law. Finally, contracts with superintendent personnel in properties acquired under the In Rem Tax Foreclosure Act are subject to the terms of the Local Public Contracts Law.

Very truly yours,
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Attorney General

By: JOSEPH L. YANNOTTI
Deputy Attorney General
