

Opinion No. 2013-031

July 12, 2013

The Honorable Mike Holcomb  
State Representative  
9108 Sulphur Springs Road  
Pine Bluff, Arkansas 71603-0904

Dear Representative Holcomb:

You have requested my opinion concerning the purchase of certain buses by the City of Pine Bluff, Arkansas in February, 2010. You have asked, specifically:

Did Pine Bluff Transit violate the State of Arkansas purchasing laws by “piggybacking” off of an out-of-state municipality by failing to place an advertisement in an Arkansas paper of general circulation?

You report the following background facts as having prompted your question:

1. City of Brownsville, TX, solicited bids for buses on March 29, 2009, in local newspapers in Texas, nationally with trade publications (BusRide, CTAA, APTA) and electronically at <http://purchasing.cob.us/openbids.asp>.
2. The purchase was listed in the Arkansas Highway and Transportation Department program of projects published in the Arkansas Democrat Gazette.
3. The City of Pine Bluff and City of Brownsville councils entered into an Interlocal Agreement for the purchase on September 29, 2009.

4. The City issued a purchase order on February 18, 2010 for the purchase of four buses through the “piggyback” arrangement.
5. There were and are no commercial bus manufacturers in Arkansas.

## **RESPONSE**

For the reasons explained below, the answer to your question turns on whether the City of Brownsville’s procurement system substantially met the requirements of the Arkansas Procurement Law. That determination lies with the State of Arkansas’s Procurement Director. While I therefore cannot definitively opine on your question, the discussion below provides a general framework for evaluating the issue at hand.

## **DISCUSSION**

According to the information you have provided concerning the purchase in question, the City of Pine Bluff appointed the City of Brownsville, Texas as its purchasing agent for the purchase of transit buses.<sup>1</sup> This type of agreement appears to fall within the “cooperative purchasing” provisions of the Arkansas Procurement Law (A.C.A. § 19-11-201 *et seq.* (Repl. 2007 and Supp. 2011)). Specifically, A.C.A. § 19-11-249 (Repl. 2007) authorizes “cooperative purchasing agreements” as follows:

Any public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the acquisition of any commodities or services with one (1) or more public procurement units or external procurement activities in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multiparty contracts between public procurement units and open-

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<sup>1</sup> *Interlocal Agreement Between City of Brownsville [Texas] and the City of Pine Bluff, Arkansas* (City of Brownsville, TX Resolution No. 2009-069, Sept. 21, 2009); *see also A Resolution Authorizing Inter-Local Agreement Between the City of Brownsville, Texas and the City of Pine Bluff, Arkansas* (City of Pine Bluff, AR Resolution No. 3210, Sept. 21, 2009).

ended state public procurement unit contracts which are made available to local public procurement units.

The definitions pertaining to the type of agreement contemplated by this statute are found in A.C.A. § 19-11-206. That section defines “cooperative procurement” as “procurement conducted by, or on behalf of, more than one (1) public procurement unit *or by a public procurement unit with an external procurement activity.*”<sup>2</sup> “Public procurement unit” means “either a local public procurement unit or a state procurement unit.”<sup>3</sup> A “local public procurement unit” is further defined to include, *inter alia*, “[a]ny county, city, town, state agency, and any other subdivision of the state or public agency thereof[.]”<sup>4</sup> “External procurement activity” means “any buying organization not located in this state which, if located in this state, would qualify as a public procurement unit.”<sup>5</sup>

The City of Pine Bluff is plainly a “local public procurement unit” under A.C.A. § 19-11-206’s definition of that term. It seems equally clear that the City of Brownsville, Texas is an “external procurement activity,” having agreed to be Pine Bluff’s purchasing agent. Although section 19-11-206 does not define the term “buying organization,” I believe it is reasonable to assume that Brownsville facilitates the purchase such that it fits that designation. It reasonably follows, in my estimation, that the Interlocal Agreement entered between the City of Brownsville and the City of Pine Bluff, *supra* n. 1, is a “cooperative purchasing agreement” authorized by A.C.A. § 19-11-249, *supra*.<sup>6</sup>

With regard to the applicable procurement requirements, and your specific question as to advertising the purchase, I must echo my predecessor’s

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<sup>2</sup> A.C.A. § 19-11-206(1) (Repl. 2007) (emphasis added). “Procurement” is defined separately as “the buying, purchasing, renting, leasing, or otherwise obtaining of any commodities or services.” A.C.A. § 19-11-203(20)(A) (Supp. 2011). The definition also includes “all functions that pertain to the obtaining of any public procurement, including description of requirements, selection and solicitation of sources, preparation and award of contract, disposal of commodities, and all phases of contract administration[.]” *Id.* at (B).

<sup>3</sup> A.C.A. § 19-11-206(4).

<sup>4</sup> *Id.* at (3)(A).

<sup>5</sup> *Id.* at (2)(A).

<sup>6</sup> *Compare* Ark. Op. Att’y Gen. Nos. 2006-042 (opining that A.C.A. § 19-11-249 authorizes an Arkansas education service cooperative’s participation in a purchasing agreement with a Texas education service center); Op. 2005-296 (same).

determination that “A.C.A. § 19-11-249 appears to stand as independent authority for engaging in ‘cooperative purchasing’ as contemplated therein.”<sup>7</sup> As my predecessor further observed:

This provision was enacted in 1979 as part of the original Arkansas Purchasing Law (A.C.A. § 19-11-201 *et seq.*), and there is no indication that any law other than the Purchasing Law governs with respect to “cooperative purchasing agreements” entered under § 19-11-249.<sup>8</sup>

In my opinion, therefore, the statutes that would otherwise govern the City of Pine Bluff’s purchasing procedures are inapplicable when the City participates in cooperative purchasing under A.C.A. § 19-11-249. This includes A.C.A. § 14-58-303, which in relevant part requires the mayor to “invite competitive bidding ... by legal advertisement in any local newspaper.”<sup>9</sup> The specific authority for “cooperative purchasing” under the Arkansas Procurement Law renders that requirement inapplicable, in my view.<sup>10</sup>

Reference must be made, instead, to A.C.A. § 19-11-256, wherein it provides as follows regarding “external procurement activity” that is not subject to the Arkansas Procurement Law:

When a public procurement unit or external procurement activity not subject to this subchapter administers a cooperative purchase for a public procurement unit subject to this subchapter, then the State Procurement Director must determine in writing that the procurement system and remedies procedures of the public procurement unit or external procurement activity administering the procurement substantially meet the requirements of this subchapter.<sup>11</sup>

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<sup>7</sup> Op. Att’y Gen. 2006-042 at 8.

<sup>8</sup> *Id.*

<sup>9</sup> A.C.A. § 14-58-303(b)(2)(A)(i) (Supp. 2011).

<sup>10</sup> *Accord* Op. 2005-296.

<sup>11</sup> A.C.A. § 19-11-256(b) (Repl. 2007).

I consequently am not situated to determine whether the City of Brownsville's procurement procedures "substantially [met]" the requirements of the Arkansas Procurement Law. You may wish to contact the Office of State Procurement in that respect. This opinion of necessity is limited to a review of the generally applicable statutory requirements.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/EAW:cyh