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August 30, 2006

Deborah Grant  
Northeast Metro 916  
Intermediate School District  
2540 East County Road F  
White Bear Lake, MN 55110

Re.: Cooperative Purchasing Questions

Dear Ms. Grant:

I am writing in response to questions you asked the State Auditor's Office regarding cooperative purchasing opportunities available to Minnesota political subdivisions. You asked specific questions about the National Joint Purchasing Alliance and U.S. Communities.

The enclosed letter to James Mulder, Executive Director of the Association of Minnesota Counties, answers your questions about U.S. Communities, an entity sponsored by the National Association of Counties and the National League of Cities.

This letter addresses your questions about the National Joint Purchasing Alliance (NJPA). You asked about the NJPA contract for Office and Classroom Related Supplies. You question whether the contract was awarded through a competitive bid process consistent with Minnesota legal requirements.

The NJPA is a service cooperative organized under Minnesota law.<sup>1</sup> It was formerly called the North Central Service Cooperative. Service cooperatives were created by the Minnesota legislature to perform planning on a regional basis, and to provide programs for local governments that are better provided by a cooperative than by individual governmental units.<sup>2</sup> Specified units of government, including public school districts, cities, counties, and "governmental units" as defined in the joint powers act, can become full members of a service cooperative.<sup>3</sup> Nonpublic school administrative units and other

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<sup>1</sup> Minn. Stat. § 123A.21 (2004).

<sup>2</sup> See Minn. Stat. § 123A.21, subs. 1 and 2.

<sup>3</sup> Nonvoting membership in the service cooperatives is available to nonpublic schools, and other partnership agencies or organizations within the service cooperative. See Minn. Stat. § 123A.21, subd. 3.

partnership agencies or organizations within the service cooperative can become nonvoting members.<sup>4</sup>

Despite the regional character of service cooperatives, the law allows local governments to belong to more than one service cooperative. The NJPA website indicates the service cooperative also serves governmental units outside Minnesota.<sup>5</sup> Inclusion of these out-of-state entities may be based on the definition of “governmental unit” in the joint powers law, which includes governmental units outside Minnesota.<sup>6</sup>

Service cooperatives are governed by a board of directors, with participating school board members comprising a majority of the board.<sup>7</sup> Examples of programs and services provided by service cooperatives include staff development programs, student academic challenges, services for students with special talents and special needs, and cooperative purchasing services.<sup>8</sup>

The NJPA website states:

All NJPA bid contracts have been competitively solicited, reviewed and awarded by the NJPA Board of Directors in accordance with Minnesota public purchasing rules and regulations under the Municipal Contracting Laws, M.S. 471.345. Each solicitation and Invitation for Bid (IFB) contains language which includes all qualified customers in all 50 states. The IFB advises all IFB responders that the response must apply to all qualified customers in all 50 states and in some cases the provinces and territories of Canada. All IFB respondents understand that these contracts shall be used by member governmental, educational and non profit agencies throughout the United States. This consideration is based on the Minnesota "Joint Exercise of Powers Authority", M.S. 471.59, which is similar to Joint Powers Statutes in most states. This Joint Powers Authority allows for participation under NJPA's qualifying criteria and guidelines. Although each governmental agency may have different policies and purchasing procedures to follow, applying our competitive solicitation meets the requirements of most states.<sup>9</sup>

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<sup>4</sup> Minn. Stat. § 123A.21, subd. 3 (2004).

<sup>5</sup> <http://www.ncscmn.org> (“We serve political subdivisions in all fifty states as well as agencies of the United States and any instrumentality of this nation or any other nation.”)

<sup>6</sup> See Minn. Stat. §471.59, subd. 1 (“The term ‘governmental unit’ as used in this section includes every city, county, town, school district, other political subdivision of this or another state, another state . . .”). At this time, the State Auditor’s Office takes no position on whether a Minnesota service cooperative can be considered a “national municipal association” under Minn. Stat. § 471.345, subd. 15.

<sup>7</sup> See Minn. Stat. § 123A.21, subd. 4 (a).

<sup>8</sup> See Minn. Stat. § 123A. 21, subd. 7.

<sup>9</sup> [http://www.ncscmn.org/Staples/NJPA%AD\\_FAQs\\_12-05.pdf](http://www.ncscmn.org/Staples/NJPA%AD_FAQs_12-05.pdf)

The NJPA website contains links to the published request for bids, the invitation for bids and the bid acceptance and contract award for the Office and Classroom Related Supplies contract.<sup>10</sup> The request for bids on the Office and Classroom Related Supplies was published in the Star Tribune on Wednesday, June 29, 2005 and Wednesday, July 6, 2005.<sup>11</sup> The published notice indicated that the sealed bids would be opened on July 20, 2005.<sup>12</sup> The Staples Contract and Commercial, Inc. bid was accepted and the contract was awarded by NJPA on August 18, 2005.<sup>13</sup> It appears that these procedures meet the requirements of Minn. Stat. § 123B.52, which requires school districts to advertise for bids or proposals by two weeks' published notice.<sup>14</sup>

You also asked whether school districts are prohibited from purchasing from the NJPA contract for Office and Classroom Related Supplies because it is a 5-year contract. You note that under Minn. Stat. § 123B.52, the term of a school district standard requirement price contracts "must not exceed two years with an option on the part of the district to renew for an additional two years."

As noted in the enclosed letter to Mr. Mulder, individual cooperatively awarded contracts for supplies may or may not require school districts to meet their requirements by purchasing through the contract. It appears that a contract that simply locks a vendor into pricing levels, without establishing a sole-source relationship or requiring a participating school district to buy any products would not impose any 4-year obligation on the individual school districts.<sup>15</sup> While the State Auditor's Office cannot give legal advice, absent some direction from a court or the Attorney General's Office we would not say a school district is in legal noncompliance for purchasing through such a national purchasing alliance contract merely because the contract made products available for longer than four years. Individual school districts should have their legal counsel review the individual contracts.

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<sup>10</sup> <http://www.ncscmn.org/Staples/staples.asp>

<sup>11</sup> <http://www.ncscmn.org/contracts/bids/Staples-BidAffidavit.pdf>

<sup>12</sup> *Id.*

<sup>13</sup> <http://www.ncscmn.org/contracts/bids/StaplesBidAward.pdf>

<sup>14</sup> You also questioned how the pricing could have been bid, because the vendor can lower prices during the course of the contract. The Invitation for Bids indicates the contract was awarded based on a 1000-point evaluation system, with 400 points dependent on "competitive pricing line items." According to the Invitation for Bids, NJPA sought "a fixed discount off retail or published education/catalog price list(s)." In *Seimens Trans. Systems v. Metropolitan Council*, 2001 WL 682892 (Minn. App.), the Minnesota Court of Appeals upheld the bid process by which the Metropolitan Council chose light-rail vehicles. The process approved involved the consideration of technical and price components using a 100-point scale, with 40% attributed to the price score. The State Auditor's Office takes no position on how Minnesota courts might rule if a disappointed vendor challenged the NJPA Invitation for Bids evaluation system.

<sup>15</sup> The Invitation for Bids indicates that individual school districts are not required to purchase from the contract. See Invitation for Bids, p. 16 ("NJPA anticipates considerable activity resulting from this IFB award, however no commitment of any kind is made concerning actual quantities to be acquired. NJPA does not guarantee usage; usage depends on the actual needs of the NJPA customers.")

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As you know, our 2005 Best Practices Review, *Contracting and Procurement in the Public Sector*, strongly encouraged greater cooperation among political subdivisions. One of our main recommendations was to encourage all counties to join the State's Cooperative Purchasing Venture at the \$1,500 level so that all townships and fourth-class cities are able to make use of the "state contract" for free. As outlined in the report, the Cooperative Purchasing Venture (CPV) is a members-only program that enables participants to purchase goods and services under contract terms established by the state of Minnesota. Because all governmental units are eligible for CPV membership, the CPV may be a viable option for school districts that are uncomfortable with other cooperative options.

Thank you for your patience as we considered the important questions you asked about cooperative purchasing. While the State Auditor's Office cannot give legal advice, we hope this analysis is helpful.

Sincerely,

*/s/Mark F. Kerr*

Mark F. Kerr  
Assistant Legal Counsel

Cc: James Mulder, AMC  
Gary Nytes, NJPA