



**GENTNER DRUMMOND
ATTORNEY GENERAL**

October 2, 2024

Via Email

The Honorable Ryan Walters
State Superintendent of Public Instruction
2500 N. Lincoln Boulevard
Oklahoma City, OK 73105-4599
Ryan.Walters@sde.ok.gov

Re: Attorney General Opinion Request – tracking number AGO24-11

Dear Superintendent Walters:

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following questions:

- 1. What procurement options exist to satisfy the 2023 legislative line-item appropriation of \$250,000.00 for “inhalers for all schools?”**
- 2. May the State Department of Education (the “Department”) award the \$250,000 to the McLarty Foundation as a sole source supplier for the purchase of the inhalers?**
- 3. Must the Department pay for emergency inhalers before or after the goods or services have been received?**

This office answers your questions by letter of counsel instead of an official Attorney General Opinion because (1) the legal principles are clear, but the application of those principles to your request requires findings of fact; and (2) it appears that you have elected to require school districts to directly purchase inhalers and be refunded rather than procuring inhalers directly.

As detailed below, funding for the emergency inhalers became available on July 1, 2023; however, the Department did not issue a Request for Information (“RFI”) to examine potential suppliers of the inhalers until February 9, 2024—more than seven months after the funds were appropriated and available. *See* RFI, www.sde.ok.gov/ev00000398. The RFI expressly states that the Department will use it to “gather information only” on suppliers’ ability to provide emergency stock inhalers. *Id.* The RFI further provides that the Department will create a list of suppliers from

whom school districts can purchase the inhalers. *Id.* According to your request, only the McLarty Foundation responded to the RFI.¹

Despite the language in the RFI, the Department did not use the RFI to establish a list of approved suppliers. Instead, your inquiry identifies an unsuccessful attempt to convert the RFI into an RFP.² *See* Request (stating the Department attempted to convert the RFI into an RFP but did not separately issue an RFP for the inhalers). Regardless, the Department has not issued an RFP for the inhalers.

More than a year after receiving the appropriations to procure the inhalers, the Department now asks whether it must issue an RFP or, alternatively, whether it can utilize another procurement vehicle to obtain the inhalers. Days after asking this office for assistance, the Department informed school districts that the Department will not procure the inhalers. Instead, the Department requires school districts to purchase the inhalers and then request reimbursement from the Department. *See* “Funding Guidance for Inhalers in Schools,” <https://sde.ok.gov/newsblog/2024-08-22/announcement-funding-guidance-inhalers-schools> (last visited Sept. 30, 2024). Notwithstanding the Department’s lengthy and unsuccessful history of procuring emergency inhalers for all schools, which it now will affirmatively not directly procure, this office provides an overview of the statutory provisions governing agency acquisitions.³

To begin, at least twice in the last five years, the Legislature has supported access to inhalers in public schools. First, in 2019, the Legislature authorized school districts to stock inhalers for health emergencies. 70 O.S.Supp.2019, § 1-116.3. Governor Stitt signed the bill into law on April 23, 2019, and at that time, the Senate author of the measure stated:

¹The McLarty Foundation is currently in more than three hundred and fifty school districts in Oklahoma, providing more than 2,000 emergency inhalers to school districts since 2019. <https://kfor.com/news/local/funding-for-emergency-inhalers-in-schools-hits-possible-roadblock/>; <https://www.brendonmclartyfoundation.org/impact>. Furthermore, since at least 2022, the Foundation has “worked in partnership” with the Department to get asthma resources into public schools. <https://www.ssmhealth.com/newsroom/2022/11/foundation-leads-effort-save-children-with-asthma> (announcing a “first-in-the-nation partnership to help save the lives of Oklahoma K-12 public school students who experience asthma attacks at school). And, the Department website lists *only* the McLarty Foundation as the provider of “Asthma Awareness” training. <https://sde.ok.gov/school-safety-and-security>. Additionally, under the “Asthma Awareness” button on its website, the Department links directly to the McLarty Foundation website for “Stock Inhaler for Schools Enrollment Form.” *Id.*

²Further clouding this claim are the Department’s words in the RFP, expressly disclaiming intent to use the RFI for an RFP. *Id.* (stating that the RFI is “not an Invitation to Bid or a Request for Proposal... No contract award will be made by the Oklahoma State Department of Education based on the results of this process.”).

³In addition to your questions concerning available procurement methods, you separately ask whether the Department can allocate funds to a supplier without proof that the entity has supplied the goods or services. Because the Department is not allocating funds to any supplier for the inhalers but is instead requiring school districts to purchase the inhalers, this office does not analyze this question. However, see generally the provisions of 74 O.S. § 85.44B.

[b]y allowing school districts to provide inhalers on site, hopefully tragedies like Brendon’s [McLarty] death won’t happen...I appreciate everyone’s support of this life-saving legislation.⁴

Then, in 2023, the Legislature directed \$250,000 of the funds appropriated in House Bill 1004x for the State Board of Education, by and through the Department, to procure “[I]nhalers for all schools.” See Senate Bill 36x (2023). As an executive branch agency, the Department must ensure that the laws are executed and that appropriations are used as legislatively directed. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 12, 163 P.3d 512, 521 (“the executive department is invested primarily with the function of executing the law.”); see also 75 O.S. § 250.2 (Article VI of the Oklahoma Constitution charges executive branch agencies with the responsibility to implement all legislative measures and appropriations). Thus, as of July 1, 2023, the Department was responsible for procuring the emergency inhalers for all schools and the Department’s procurements must be consistent with the requirements of the Central Purchasing Act (the “Act”).⁵

The Act aims to protect Oklahoma citizens by promoting economy in government and reducing the likelihood of fraud. *Indiana Nat’l Bank v. State*, 1993 OK 101, ¶ 12, 857 P.2d 53, 60. The Act also “insures [sic] that government officials are accountable to the public and are discharging their duties competently and responsibly.” *Id.*; see also *Westinghouse Electric Corporation v. Grand River Dam Authority*, 1986 OK 20, ¶ 16, 720 P.2d 713, 717 (“Government agencies are uniquely endowed with the power to implement the public will, and as such, are subject to the highest levels of scrutiny by the people whom they serve.”). To accomplish these purposes, the Act establishes the position of the State Purchasing Director, who has “sole and exclusive authority and responsibility for all acquisitions by state agencies,” among other things. 74 O.S.2021, § 85.5(A). Furthermore, the Act sets forth standardized procedures governing state agency acquisitions, subject to certain exceptions. Considering you ask about expending \$250,000, at least the following three procurement methods are available under the Act: 1) statewide mandatory and non-mandatory contracts designated by the Office of Management and Enterprise Services (“OMES”); 2) competitive bidding through sealed solicitations (i.e., RFP); and 3) sole source or sole brand.

First, the Act authorizes the State Purchasing Director to “designate certain contracts for state agencies as statewide contracts and mandatory statewide contracts.” 74 O.S.2021, § 85.5(G)(5). If inhalers are available on a non-mandatory statewide contract, the Department may procure the inhalers under this contract. *Id.*; see also Oklahoma Administrative Code 260:115-7-3. Alternatively, if the inhalers are available on a mandatory statewide contract, the Department *must* procure the inhalers through that contract unless the Purchasing Director provides otherwise. *Id.*

⁴<https://oksenate.gov/press-releases/governor-signs-school-inhaler-legislation-protect-students> (Senator Kay Floyd authored the measure at the request of constituents who lost a family member to a severe asthma attack at school.). According to its website, since 2019—the same year schools were authorized to stock emergency inhalers—the McLarty Foundation has provided over 2,000 inhalers to 359 school districts in Oklahoma. <https://www.brendonmclartyfoundation.org/impact>.

⁵74 O.S.2021, §§ 85.1–85.44E.

Second, if an acquisition exceeds \$50,000 and the good or service is not available through a statewide contract, the state agency must procure the good or service through competitive bidding. 74 O.S.2021, § 85.7(A)(1)(b).⁶ The competitive bidding process begins with the agency requesting OMES to issue a solicitation for suppliers to submit competitive bids. *Id.* Following the close of the bid submission window, the agency recommends that OMES award the contract to the supplier providing the lowest and best or best value bid, as evaluated by the agency. 74 O.S. § 85.7.

Finally, the Department may procure the inhalers from a “sole source” supplier of the inhalers. 74 O.S.2021, §§ 85.7(A)(6), 85.44D.1. Notably, a “sole source” acquisition is not subject to the timelines and procedures associated with competitive bidding. For an agency to use the sole source exception, the agency’s chief administrative officer complete and sign a certification affirming that the supplier is the sole source or sole brand of the good or service. 74 O.S.2021, § 85.44D.1.⁷ The question of whether a particular good or service may be lawfully procured through one or more of these methods involves questions of fact, which cannot be answered by this office. 74 O.S. 18b(A)(5).

As noted herein, it appears that the Department has decided to direct school districts to purchase emergency inhalers and then seek reimbursement from the Department rather than procure the inhalers for schools. If the Department desires to change course again and directly procure the inhalers as the Legislature directs, it should follow the guidance provided in this letter. The funds were available in 2023 and appropriated to prevent a tragedy like the loss of Brendon McLarty. The Department must determine, in consultation with OMES, how to procure the emergency inhalers, but regardless of the method, speed is of the essence. Waiting more than a year to ask for guidance, changing procurement methods multiple times, and now requiring school districts to individually procure emergency inhalers is neither speedy nor responsible. Candidly, failing to implement legislative directives and installing roadblocks to potentially life-saving medicines at the expense of kids reflects a lack of understanding of basic purchasing procedures, at a minimum, and perhaps a disingenuous unwillingness to act.

Respectfully


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Attorney General

⁶The law authorizes the State Purchasing Director to increase an agency’s ability to acquire goods or services under its internal competitive procedures, never to exceed \$250,000. However, the Governor issued an executive order prohibiting the Purchasing Director from authorizing agency increases. Executive order 2023-04.

⁷Notably, a chief administrative officer who certifies a supplier as a sole source and knows the information to be false may incur significant penalties. *Id.* (knowingly certifying false information may result in forfeiture of office and ineligibility to hold office for an additional five years after such forfeiture).