



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-04

June 5, 2020¹

QUESTIONS PRESENTED

1. Does the Procurement Code prohibit a person involved in a procurement award decision from discussing the contents of a proposal submitted in response to request for proposals prior to the award?
2. Does the Procurement Code prohibit a person involved in a procurement from applying a local vendor preference to a procurement over and above the resident business preference set forth in NMSA 1978, Section 13-1-21(D)?
3. Does the Procurement Code prohibit a person involved in a procurement from having *ex parte* communications with potential offerors outside the context of public notice, pre-proposal conferences, or written questions?

FACTS²

A local school district's Chief Procurement Officer (CPO) issued a request for proposals for cleaning services. Two proposals were received. The CPO

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." See NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at *1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On April 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. While the facts concern a local school district's officials and employees, for which the Commission lacks

disqualified one of the proposals as nonresponsive.³ The CPO determined that the remaining proposal was responsive and that it was in the interests of the school district to contract with the offeror. Under the school district's procurement regulations, the school board must approve the CPO's recommended award; accordingly, the CPO asked the school district's board of directors to approve the CPO's recommendation.

The school district's finance committee, consisting of two members of the school district's board of directors, met to discuss the procurement. One member voiced opposition to the CPO's recommendation. The board member asked the CPO to provide copies of the request for proposals and the names of all vendors who received notice. After receiving this information, the board member contacted local vendors to discuss the cost of the cleaning services requested and asked whether they had received notice of the request for proposals.

The board of directors held a public meeting to discuss the CPO's recommended award. The board member already opposed to the contract identified the sole responsible offeror, stated that "he would have preferred a local vendor," and discussed the proposal that the CPO had disregarded as nonresponsive. The board tabled a vote on the CPO's recommendation and deferred further consideration of an award to its next meeting. Believing that the board member had violated the Procurement Code by discussing the contents of the offerors' proposals at a public meeting, the CPO canceled the procurement without award.

ANSWERS

1. Yes.
2. Yes.
3. As a general matter, no; however, certain *ex parte* communications could violate the Procurement Code or other regulations issued under the Procurement Code.

jurisdiction, the request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

³A responsive offer is "an offer which conforms in all material respects to the requirements set forth in the request for proposals." NMSA 1978, § 13-1-85.

ANALYSIS

We begin with an overview of the Procurement Code. “The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C); *see also Morningstar Water Users Ass’n, Inc. v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, ¶ 41, 120 N.M. 307, 901 P.2d 725 (“The purpose of the Procurement Code is to insure [sic] fairness when a public entity makes a purchase from a private entity.”). It has also been said that the Procurement Code “protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts.” *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 8, 118 N.M. 707, 885 P.2d 628 (citing *John J. Brennan Constr. Corp. v. City of Shelton*, 187 Conn. 695, 448 A.2d 180, 184 (1982)).

Subject to certain exceptions not relevant here, the Procurement Code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30(A). In general (and again, subject to certain exceptions not relevant here), a government body’s purchase of goods or services under the Procurement Code must proceed in one of two ways: (1) solicitation of competitive sealed bids, *see* NMSA 1978, § 13-1-102; or (2) an invitation for sealed proposals, *see* NMSA 1978, § 13-1-111. The default rule is that all procurements must take place through competitive sealed bids. *See* NMSA 1978, § 13-1-102 (providing both the default rule and the exceptions thereto). Procurement of services that are not deemed to be professional services may be accomplished through a request for proposals only when the agency finds “that the use of competitive sealed bidding for . . . [nonprofessional] services is either not practicable or not advantageous to the state agency or a local public body.” *See* NMSA 1978, § 13-1-111(A); *see also* NMSA 1978, § 13-1-76 (defining “professional services”).

An agency’s decision to procure by inviting bids or requesting proposals determines the amount of discretion the agency has over an award. When a procurement is accomplished through an invitation for bids, the procuring government agency is required to award a contract to the lowest responsible bidder. *See* NMSA 1978, § 13-1-108.⁴ In other words, the agency may decline to award a

⁴We are aware of a 1954 Attorney General Advisory Opinion that opined that a county board of education could award a contract to a higher bidder. *See* N.M. Att’y Gen. Op. 54-5959

contract to the lowest bidder only when the bidder is not “responsible.” *See also Planning and Design Solutions*, 1994-NMSC-112, ¶ 15 (“[a]n award to other than the lowest bidder is prima facie erroneous and illegal.”) (quoting 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29.73, at 496-97 (3d ed. 1990)).

In contrast, a request for proposals permits the agency to accept the offer that is “most advantageous . . . [after] taking into consideration the evaluation factors set forth in the request for proposals.” NMSA 1978, § 13-1-117. An agency conducting a procurement through a request for proposals must “state the relative weight to be given to the factors in evaluating proposals” in the request. NMSA 1978, § 13-1-114. This requirement gives a measure of predictability to proposal-based procurements, ensuring that the agency does not introduce additional evaluation factors mid-procurement to tip the scales in favor of an offer that is otherwise less advantageous. *See Planning and Design Solutions*, 1994-NMSC-112, ¶ 14 (“The [Procurement] Code indicates that, in evaluating [responsive] proposals, [an agency is] required to apply the factors listed in the [r]equest [for proposals]—and no others.”); *cf. also* 10 U.S.C. § 2305(b)(1) (“The head of an agency shall evaluate . . . competitive proposals and make an award based solely on the factors specified in the solicitation.”).

The Procurement Code is based on the American Bar Association’s 1979 Model Procurement Code for State and Local Governments, and the commentary to the model code explains the distinction between bid- and proposal-based procurements in this way:

Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate competing proposals. The effect of this different use of judgmental evaluation is that under competitive sealed bidding, once the judgmental

(1954) (“[I]t is our opinion that the board, if it has accurate figures at its disposal showing the lowest bid not to be the best bid because of such matters as operating expense, may award the contract to the highest bidder.”). We believe the Legislature’s 1984 enactment of Section 13-1-108 supplants the 1954 Attorney General opinion, such that the latter no longer carries any persuasive authority. *See* § 13-1-108 (“A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder.”).

evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation), Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

Model Procurement Code for State and Local Governments § 3-203 cmt. (3)(a) (1979) (bracketed material in original).

Relatedly, any agency’s choice to invite bids or request proposals also dictates the process the agency uses to reach its award decision. When a governmental entity procures through competitive sealed bidding, unless the lowest responsive bid contains a mistake, it must be “unconditionally accepted for consideration for award without alteration or correction.” NMSA 1978, § 13-1-105(A). As noted, the procuring agency is generally required to accept the lowest responsive bid; however, the lowest bidder and the procuring agency can engage in further negotiations over the price of the bid if the bidder is already otherwise qualified, there is no change in the original terms and conditions of the procurement, and negotiation is needed “in order to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds.” NMSA 1978, § 13-1-105(B).

In a procurement through request for proposals by contrast, a government agency’s award decision is based on application of factors set by the procuring agency—and not based on the cost alone. *See Planning and Design Solutions*, 1994-NMSC-112, ¶ 14; *cf. also PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 536 (Fed. Cl. 2010) (“It is beyond peradventure that the government may not rely upon undisclosed evaluation criteria in evaluating proposals. . . . Moreover, agencies must apply the stated evaluation factors in a fair and evenhanded manner across competing proposals. . . . Nevertheless, a solicitation need not identify criteria intrinsic to the stated evaluation factors, and agencies retain great discretion in determining the scope of a given evaluation factor.”) (internal quotations, citations and alterations omitted).

When using requests for proposals, the procuring agency and responsible offerors may engage in pre-award negotiations. *See* NMSA 1978, § 13-1-115. Thus, while an agency’s power to select a proposal is constrained in key respects (i.e., the agency must select proposals based only on the evaluation factors set forth in the request for proposals), the agency may negotiate with offerors “who submit

proposals found reasonably likely to be selected for award,” and the agency may permit revisions “for the purpose of obtaining best and final offers.” *Id.*⁵

In view of this background, the school district in this matter chose to procure cleaning services through a request for proposals. We turn to the questions presented.

1. The Procurement Code prohibits public discussion of proposals from the receipt of proposals until the award of the contract.

The request for an advisory opinion asks the Commission to determine if the local school board member violated the Procurement Code by discussing the contents of the CPO-recommended proposal at a public meeting. Specifically, the request inquires whether the local board member may have violated Section 116, which provides: “[t]he contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.” NMSA 1978, § 13-1-116. We conclude that the facts presented in the request establish a violation of Section 116, because the board member disclosed the contents of proposals “during the negotiation process.” *Id.*

We read Section 116’s reference to “during the negotiation process” to refer to the period that extends from the submission of proposals until the award of the contract to the selected offeror. § 13-1-116. In this matter, “the negotiation process” began with the submission of proposals and would have concluded with the school board’s award of a contract to the selected offeror in an open meeting. Between those two points, a duty of confidentiality applies; consequently, public officials and employees involved in the procurement decision may not “disclose[] the contents of any proposal” such that competing offerors could learn of their competitors’ proposals. *Id.*

We find support for this reading of Section 116 in New Mexico’s statutes, the laws of other jurisdictions, and the purposes that confidentiality serves in public procurement conducted through requests for proposals.

⁵Although the Procurement Code permits negotiation of best and final offers with offerors whose proposals are likely to be selected, the State Purchasing Division of the General Services Division “strongly discourage[s]” executive state agencies from seeking best and final offers, directing to state agencies that “[a]n offeror’s best offer should be included in that offeror’s original proposal.” 1.4.1.41 NMAC. The Procurement Code regulations contained in 1.4.1 NMAC apply to executive branch agencies of the State and only scattered sections of those regulations apply to local public bodies or school districts.

First, Section 115 of the Procurement Code supports our reading of the statutory phrase “during the negotiation process.” Section 115, entitled “Competitive sealed proposals; negotiations,” provides:

Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted *after submissions of proposals and prior to award* for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award.

§ 13-1-115 (emphasis added). Under Section 115, procuring agencies may permit offerors to revise proposals and negotiate with offerors “after submissions of proposals and prior to award.” § 13-1-115. Given Section 115’s framework, Section 116’s duty of confidentiality attaches “during the negotiation process” that Section 115 permits. Looking to Section 115’s language, that period extends “after submissions of proposals and prior to the award.” Once the procuring agency awards a contract to a responsible offeror, the duty of confidentiality no longer applies.

Second, our understanding of when Section 116’s duty of confidentiality applies is supported by the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4. There, the statutory requirements of open meetings and public inspection of meeting minutes do not apply to “that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process.” NMSA 1978, § 10-15-1(H)(6). But the “final action regarding the selection of a contractor [i.e., the award] shall be made in an open meeting.” *Id.* As such, the Open Meeting Act exempts its requirements for the discussion of proposals but applies those same requirements when the procuring entity takes final action on the selection of the contractor.⁶ In parallel, Section 116’s duty of confidentiality applies from submission until the procuring entity awards a contract.

Third, our reading of Section 116’s duty of confidentiality is consistent with the procurement law of other jurisdictions. *See, e.g.*, 41 U.S.C. § 2102(a)(1) (“Except as provided by law, a person . . . shall not knowingly disclose contractor

⁶The American Bar Association’s 1979 and 2000 Model Procurement Codes have a similar structure, providing that “[p]roposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation” and that “[a] Register of Proposals shall be . . . open for public inspection after contract award.” Model Procurement Code § 3-203(4) (1979); *see also* Model Procurement Code § 3-203(4) (2000).

bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”); *see also Michaelis, Montanari & Johnson v. Superior Court, et al.*, 136 P.3d 194, 195 (Cal. 2006) (“[C]onsistent with analogous federal law and the majority of statutes and decisions in other states, we conclude that public disclosure of such proposals properly may await conclusion of the agency’s negotiation process, occurring before the agency’s recommendation is finally approved by the awarding authority.”); *cf. Shermco Indus. v. Secretary of Air Force* 613 F.2d 1314, 1317–1318 (5th Cir. 1980) (disclosure of bid competitor’s cost proposals exempt under federal Freedom of Information Act until final award of contract).

Last, Section 116’s confidentiality requirement best serves its purposes when that requirement extends from the submission of proposals to the award of a contract. So read, the confidentiality requirements protect the procuring agency’s interests. As the Supreme Court of California has noted, disclosure of an offeror’s terms jeopardizes a procuring agency’s ability to obtain the most favorable terms; once an offeror becomes aware of the content of competing proposals, the offeror would no longer be in doubt about its relative bargaining position. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199. During negotiations, offerors may adjust their terms—presumably to the detriment of the procuring agency—if they have knowledge of other, competing offers. *See id.* Furthermore, disclosure of any significant gap between the terms of a finalist offeror and its competitors could induce that offeror “to resist the [procuring agency’s] requests for even more favorable terms, or lead to an amended proposal that offers less attractive terms.” *Id.* Finally, nondisclosure from the time of submission to the award “tends to reduce the possibility of collusion, price-fixing, or bid-rigging tactics.” *Id.*

The confidentiality requirement also protects the interests of competing offerors. The requirement ensures that “negotiations [are] conducted in accordance with ethical business standards” and that the procuring agency does not deploy “[a]uction techniques” to play offerors against one another in a deleterious race to the bottom. Model Procurement Code § 3-203(6) cmt. (1) (1979). Such “[a]uction techniques” could induce an offer that the offeror cannot, in the end, meet—leaving the state with incomplete work and the need for a subsequent procurement. *Id.* Furthermore, over time, such auction techniques might disincentivize firms from proposing to do business with the State or other public procuring agencies, thereby diminishing their business opportunities and the range of services available to the public.

We recognize that our reading of “during the negotiation process” to mean the period from the submission of proposals to the award of the contract is not the only

available reading of the statutory phrase. In the matter presented, the CPO received only two proposals. § 13-1-116. The CPO unsealed the proposals and determined whether each was “responsive”—i.e., whether the proposals “conform[ed] in all material respects to the requirements set forth in the request for proposals.” § 13-1-85. One proposal was disqualified because it was not responsive, leaving only one responsive proposal to be considered by the school district’s board of directors for award. As the only other competing offeror had been disqualified, at the board meeting, the relevant question was whether to adopt the CPO’s award recommendation. In these circumstances, it might be objected that Section 116’s confidentiality requirement did not apply because, at the time of the board member’s disclosure, there were no ongoing negotiations (and, thus, no “negotiation process”); moreover, the board member’s disclosure of proposal information could not have been “available to competing offerors,” because, at that moment, there were none. § 13-1-116.

We doubt this alternative reading is sound. Disclosure of proposals at any point from the time of submission to the selection of an award undermines the procuring agency’s ability to secure advantageous terms. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199. So too in this matter: If, after the board member’s disclosure, the school board did not approve the CPO’s recommendation and instead directed the CPO to renegotiate the terms, the offeror might reasonably stand firm, knowing that it submitted the only responsive proposal. Alternatively, if the school board directed the CPO to reissue a new request for proposals, competing offerors could participate in the procurement with access to the details of competitors’ proposals. But Section 116’s confidentiality requirement exists to prevent offerors from submitting, revising, or standing firm on proposals in light of their competitors’ proposals—whether on the first or subsequent rounds of negotiation or procurement. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199 (observing that disclosure of proposals particularly jeopardizes a procuring agency’s ability to negotiated favorable terms in “second-round situations”) (internal quotation marks omitted). Section 116’s confidentiality requirement, therefore, does not apply only when the procuring agency is, as a matter of contingent fact, engaged in negotiations with an offeror; rather, it applies from submission of proposals right through to the final action awarding a contract.

For the foregoing reasons, we conclude the confidentiality requirement applies “during the negotiation process”—i.e., from the time of submission of

proposals to the award of a contract. Disclosure of a proposal's contents during this period violates Section 116.⁷

2. The Procurement Code prohibits a person involved in a procurement from stating a preference that a local vendor receive a contract.

As noted above, “[t]he [Procurement] Code indicates that, in evaluating [responsive] proposals, [an agency is] required to apply the factors listed in the [r]equest [for proposals]—and no others.” *Planning and Design Solutions*, 1994-NMSC-112, ¶ 14 (citation omitted).

In evaluating a request for proposals, the Procurement Code requires a government agency to give a preference to a resident business. *See* NMSA 1978, § 13-1-21(D). When evaluating proposals with a factor-based process, the agency is required to give “five percent of the total weight of all the factors used in evaluating the proposals to a resident business[.]” NMSA 1978, § 13-1-21(D)(1). When evaluating proposals with a point-based system, the agency is required to award “five percent of the total possible points to a resident business[.]” NMSA 1978, § 13-1-21(E)(1). To obtain resident business treatment, a prospective offeror must submit a valid resident business certificate issued by the New Mexico Taxation & Revenue Department and an affidavit from a certified public accountant establishing the business's bona fides as a resident. *See* NMSA 1978, §§ 13-1-22(A), (B).⁸

The facts and the Supreme Court's holding in *Planning and Design Solutions v. City of Santa Fe* are instructive. In that case, the city of Santa Fe issued a request for proposals for professional services to develop a mixed-use community. 1994-NMSC-112, ¶ 2. The request for proposals listed four weighted factors that the city would use to evaluate proposals. *Id.* The city's selection committee determined that *Planning and Design Solutions'* proposal was the most advantageous to the city based on the four factors set out in the request for proposals. *Id.* ¶ 3. But the city

⁷This is an advisory opinion, and we therefore do not analyze the remedies available to a complainant under the State Ethics Commission Act or the Procurement Code for a proven violation. *See* NMSA 1978, § 10-16G-12(D) (permitting a hearing officer to make “recommendations for disciplinary action against the respondent” and to “impose any fines provided for by law”); NMSA 1978, §§ 13-1-181, -182 (procurement code remedies for contracts executed in violation of the law).

⁸We understand that, because the New Mexico Taxation & Revenue Department requires the vendor to submit an affidavit to receive the resident business certificate, the State Purchasing Division of the General Services Department requires the certificate only.

elected to award a contract to the fourth-placed offeror, who was “the highest local firm on the list.” *Id.* The Supreme Court held that this was an improper because the locality factor was not disclosed in the request for proposals; in effect, the city had “changed the rules in the middle of the game.” *Id.* ¶¶ 15-17.

The request for an advisory opinion presents a similar set of facts. The CPO applied the evaluation factors to the only responsive bid received by the school district and recommended that the offeror receive a contract. If the CPO had received another responsive proposal from a local vendor who qualified as a resident business, the CPO would have been required to apply Section 13-1-21’s resident business preference to enhance the offeror’s score. But if an out-of-state offeror nevertheless received a greater score under the school district’s evaluation factors, the Procurement Code would have required the district to award a contract to the out-of-state offeror. If the school board rejected the contract with this offeror or awarded a contract to a lower-ranked vendor based on an otherwise undisclosed local vendor preference, the decision would result from an application of a factor not contained in the request for proposals and, therefore, would violate the Procurement Code.

3. The Procurement Code does not prohibit a person involved in a procurement from having an *ex parte* communication with potential offerors.

Under the Procurement Code, public notice of a request for proposals must be provided to potential offerors pursuant to the requirements set forth by NMSA 1978, Section 13-1-104. *See* NMSA 1978, § 13-1-113. The purpose of the public notice requirements is to give potential offerors enough time to prepare and submit offers in a timely manner. *See* Model Procurement Code § 3-202(3) cmt. (1979). Many procurement managers require potential offerors to submit questions in writing to avoid any contention that the manager provided some potential offerors with insider information. *See, e.g.*, New Mexico Human Services Department, Request for Proposals for the Provision of HHS 2020 Medicaid Enterprise Financial Services, RFP # 20-630-8000-0001, at 26, *available at* <https://tinyurl.com/ybjb3fkh> (setting forth process for submission of written questions by potential offerors). But the Procurement Code does not specifically prohibit oral communications between a purchasing office and prospective offerors outside the context of public notice, written questions, or negotiations. Indeed, the only specific prohibition related to *ex parte* communications is found in procurement regulations issued by the State Purchasing Division of the General Services Department, which prohibit “[submission], *ex parte*, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.” *See* 1.4.1.92(B)

NMAC. This regulation does not apply because this matter does not involve a protest.

In the absence of facts showing that the contents of the school board member's communications were otherwise in violation of the Procurement Code (for example, facts showing that the board member was telling potential offerors of the contents of other proposals or that their proposals would be improperly favored), the Commission concludes that *ex parte* communications with potential offerors alone do not violate the Procurement Code.⁹

4. Other laws

The Commission was also asked whether the facts presented by the request establish a violation of any other laws in addition to the Procurement Code. But the facts presented are not detailed enough for the Commission to provide an answer. The request does not identify who the school board member discussed the CPO-recommended proposal with or identify the "local vendor" the board member stated he would have preferred the cleaning services contract be awarded to. That said, the Governmental Conduct Act (GCA) specifically prohibits taking an official act "for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position." NMSA 1978, § 10-16-4(A). The GCA further provides:

Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the

⁹Such communications might violate other applicable regulations that a local entity issues under the Procurement Code. The Procurement Code authorizes local public body to adopt specific regulations governing procurement. *See, e.g.*, NMSA 1978, §§ 13-1-80 (defining "regulation"); 13-1-117.1(A) (authorizing local public bodies to issue regulations for the selection and award of professional service contracts). The Commission does not address the applicability of local purchasing regulations to *ex parte* communications. We note, however, that regulations that bar *ex parte* communications align with the express "purposes of the Procurement Code"—namely, the purposes "to provide for the fair and equitable treatment of all persons involved in public procurement . . . and to provide safeguards for maintaining a procurement system of quality and integrity." § 13-1-29(C).

public officer or employee or the family of the public officer or employee has a substantial interest.

NMSA 1978, § 10-16-7(B). These provisions would likely be violated if the local school board member holds, or is a close family member of someone with, an interest in an entity seeking to sell goods or services to the school district. The facts presented in the request for an advisory opinion, however, do not suggest any such relationship.

Furthermore, the GCA prohibits public officers and employees from “disclos[ing] confidential information acquired by virtue of . . . [their] position with . . . [a] local government agency for the . . . public officer’s or employee’s or another’s private gain.” NMSA 1978, § 10-16-6. The facts presented in the request do not establish a violation of this GCA provision.

CONCLUSION

The Procurement Code prohibits disclosure of the contents of a sealed proposal during the negotiation process—i.e., from the time the proposals are submitted to the award of the contract. The Procurement Code does not allow a procuring agency to apply an undisclosed local business preference over and above the application of the resident business preference. The Procurement Code does not prohibit *ex parte* communications with potential offerors about a procurement where the procurement is not the subject of a protest.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner