STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-05

August 7, 2020[1]

QUESTION PRESENTED

Two companies, which are separately registered as suppliers to the State, share the same office address. Each company separately submitted an identical twenty-item bid in response to an invitation to bid. Do the identical bids of these two companies constitute price fixing or collusion or violate the Procurement Code?[2]

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[1]This 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).

[2]The Commission will address only the Procurement Code question. Beyond their service to that inquiry, the questions regarding price fixing and collusion are beyond the Commission's remit. Under NMSA 1978, Section 10-16G-8(A), the Commission may issue advisory opinions "on matters related to ethics." Such "matters related to ethics" are both informed and circumscribed by the nine laws that the Commission currently may enforce. *See, e.g.*, NMSA 1978, § 10-16G-9(A) & (F) (providing the nine laws that the Commission may enforce). Those nine laws include the Procurement Code, NMSA 1978, §§ 13-1-28 to -199, but exclude the Antitrust Act, NMSA 1978, §§ 57-1-1 to -15. Under the later statute, "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." NMSA 1978, § 57-1-1. All contracts in violation of this provision are void. *See* NMSA 1978, § 57-1-3(A). The Attorney General has the authority to investigate and enforce violations of New Mexico's Antitrust Act. *See generally* NMSA 1978, §§ 57-1-5 to 57-1-8. The State Ethics Commission does not.

FACTS[3]

Roads inevitably crack. To prevent water from entering and causing further damage, cracked roads must be sealed. The New Mexico Department of Transportation (DOT) sought to procure and to establish a price agreement for the sealing of cracks and joints in hot mix asphalt and concrete pavements.

The price agreement contemplated twenty separate items, including materials, labor, and equipment related to crack sealing. DOT divided the twenty items into two groups: Items one through fifteen, relating to routed and non-routed joint and crack sealing, comprised one group; items sixteen through twenty, relating to sealing of concrete pavement, comprised the other. DOT sought to award the price agreement to multiple, but at most three, vendors for each group of items. DOT's multiple awards were subject to the final approval of the State Purchasing Agent.

Once a vendor entered the price agreement with DOT, DOT would establish a purchase order utilizing the awarded vendor's price information. A DOT district engineer could then select the vendor to perform specific crack-sealing projects, subject to myriad DOT specifications. The price agreement had a one-year term with an option to extend for up to three additional one-year periods by mutual agreement.

To establish the price agreement, DOT issued an invitation to bid. Bidders had to submit prices for all items in a group. Five vendors submitted bids for the first group of items: Dismuke Construction Company, GM Emulsion LLC, GME General Building LLC, Interstate Pavement Resurfacing LTD (IPR), and Sunland Asphalt. The first four vendors also submitted bids for the second group. After tabulating and analyzing the bids, DOT awarded a price agreement, No. 00-80500-20-16825, to Dismuke Construction Company, GM Emulsion LLC, and GME General Building LLC. IPR was the next lowest bidder; however, given DOT's limitation that the price agreement would be awarded to three vendors at most, DOT did not select IPR for an award. IPR formally protested DOT's award of a contract

[3]The 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 July 8, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. 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).

to GM Emulsion and GME General Building, alleging that the companies had colluded in their bids.

GM Emulsion and GME General Building submitted identical bid amounts, across all twenty items. Each company figured that it could supply, for example, 60,000 pounds of routed joint and crack sealing type I at $2.00 per pound. Each figured that it could supply 20,000 pounds of routed joint and crack sealing type II at $2.25 per pound and 100,000 pounds of the same at $1.75 per pound. Each calculated it could supply 600 hours of nighttime traffic control at $100 per hour. And so on, across twenty distinct items.

Further, while GM Emulsion and GME General Building are separately registered as suppliers to the State, and while the Internal Revenue Service (IRS) issued them separate employer identification numbers (EINs), both IRS records and the procurement documents attached to the request show that the two companies share the same physical address. They have the same telephone number. To some extent, their back-office operations are consolidated: the same staff member, having a GM Emulsion email address, accessed the IRS letters indicating each company's respective EIN and provided those letters to the State upon request. The request for an advisory opinion also states that both companies are "allegedly owned" by the same individual.[4]

ANSWER

Under the facts presented, and assuming there are no other relevant facts, the bids that GM Emulsion and GME General Building submitted would violate the Procurement Code.

[4]The request for an advisory opinion does not say that GM Emulsion and GME General Building are owned by the same individual, only that they "allegedly owned" by the same individual. Indeed, IPR makes that allegation in its protest, which the requester attached to the request for an advisory opinion along with other documents relating to the procurement. In this advisory opinion, we will not assume that the companies are jointly owned; however, we will indicate how the allegation of shared ownership, if true, would impact our analysis. We presume not only that GM Emulsion and GME General Building are separate legal entities, but also that, as distinct legal entities, they are each separate from their owners or shareholders. *See Scott v. AZL Resources, Inc.*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897 ("A basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders. . . . A subsidiary and its parent corporation are also viewed as independent corporations.") (citation omitted).

ANALYSIS

I.

The Procurement Code establishes default rules by which state agencies can procure goods and services. These default rules are found at sections 13-1-102 through 13-1-110, and they define and control several steps of the procurement process, including the invitation to bid, public notice, bid opening, bid evaluation, and the award of the contract. The statutory provisions are supplemented by regulations promulgated by the General Services Department's State Purchasing Division (SPD) and, for highway construction procurements, DOT. *See* 1.4.1 NMAC (SPD's procurement code regulations); 18.27.5 NMAC (DOT's contractor prequalification regulation).

While the Procurement Code and related regulations can be technical, procurement law begins with a simple and clear requirement: "[a]ll procurement shall be achieved by *competitive* sealed bid . . . ." NMSA 1978, § 13-1-102 (emphasis added). This requirement is subject to several exceptions not at issue here, *see* § 13-1-102(A)-(G), but where it applies it matters: A bid that is not "competitive" cannot be the basis for a procurement.

While the Procurement Code does not define the terms "competitive" or "competitive sealed bid," it instructs us to apply its terms "to promote its purposes and policies." NMSA 1978, § 13-1-29(A). Those purposes 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).[5] There is no interpretive struggle. The ordinary, dictionary meaning of "competitive" reflects the Procurement Code's purposes. "Competitive" means "relating to, characterized by, or based on competition." *Merriam-Webster's Collegiate Dictionary* 235 (10th ed. 1999). "Competition," in turn, means "the effort

[5]New Mexico courts have confirmed and amplified these goals. *See, e.g.*, *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."); *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)) (concluding that the Procurement Code "protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts.").

of two or more parties acting independently to secure the business of a third party by offering the most favorable terms." *Id.*

A bid is "competitive" under section 13-1-102, therefore, if the bid is the bidder's *independent* effort to offer the most favorable terms. Independence is the key. To be competitive, a bidder must formulate and submit its bid independently of the decisions and actions of other companies. *See, e.g.*, Department of Justice, "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For: An Antitrust Primer" ("DOJ Antirust Primer"), at 1, https://tinyurl.com/yclqkpeq (last accessed July 11, 2020) ("Public and private organizations often rely on a competitive bidding process . . . . The competitive process only works, however, when competitors set prices honestly and independently.").

There are countless ways in which bids can fail to be independent and, thus, competitive. A bid is not competitive if it is the result of an agreement between two or more bidders, as to either the price offered or which bidder will or will not submit a bid.[6] Nor is a bid "competitive" under section 13-1-102 if it is submitted by a

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[6]Such agreements are often referred to as "bid-rigging." *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989) ("Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1.") (citations omitted); *but cf. United States v. Heffernan*, 43 F.3d 1144, 1149-50 (7th Cir. 1994) (Posner, J.) (interpreting the reference in U.S.S.G. § 2R1.1, the federal antitrust sentencing guideline, to "bid-rigging" to mean bid rotation as opposed to simple price-fixing among bidders). Bid-rigging agreements are per se illegal under the Sherman Antitrust Act, 15 U.S.C. § 1, *Mobile Materials, Inc.*, 881 F.2d at 869, and are likely also per se illegal under New Mexico's Antitrust Act, *see* NMSA 1978, § 57-1-15 ("Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretation of the federal antitrust laws."). Commonly understood, bid-rigging amounts to the noncompetitive formulation and submission (or nonsubmission) of bids, and it can take many forms. For example, Pennsylvania's Antibid-Rigging Act, 62 Pa. Stat. and Cons. Stat. Ann. §§ 4501–4509, provides a useful, nonexhaustive definition of "Bid-rigging" to include:

> (1) Agreeing to sell items or services at the same price.
> (2) Agreeing to submit identical bids.
> (3) Agreeing to rotate bids.
> (4) Agreeing to share profits with a contractor who does not submit the low bid.
> (5) Submitting prearranged bids, agreed-upon higher or lower bids or other complementary bids.
> (6) Agreeing to set up territories to restrict competition.

bidder who formulates and submits the bid based on knowledge of other bids. (Hence, section 13-1-102 also requires that bids be "sealed.") Nor is a bid competitive if a public official or employee has preselected the bidder for an award or otherwise manipulates the bid-evaluation process to favor the bidder. In each example, the procurement would not result from the bidder's independent effort to offer the best terms; accordingly, in each example, the Procurement Code would prohibit the procurement. § 13-1-102.

II.

Under the request's facts (and assuming there are no other relevant facts), are the bids of GM Emulsion and GME General Building "competitive" under section 13-1-102? We think not. Together, the facts establish sufficient circumstantial evidence to conclude that GM Emulsion and GME General Building did not independently formulate and submit their respective bids.

The request posits that GM Emulsion and GME General Building submitted bids that were identical across twenty items. Although identical bids are not necessarily collusive,[7] the identity of the two twenty-part bids raises concerns. In a small procurement with few bidders, it is unlikely that two companies separately and

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(7) Agreeing not to submit bids.

62 Pa. Stat. and Cons. Stat. Ann. § 4502. While New Mexico lacks an antibid-rigging statute, section 13-1-102 of the Procurement Code impliedly prohibits procurements based on non-competitive bids, including bids that are the result of bid-rigging (and simple price fixing). We acknowledge that it is often difficult for procurement managers to detect noncompetitive bids. To instruct procurement managers on how to evaluate suspicious bidding behavior (including bid rigging and price fixing) and to determine when to notify government authorities, the Department of Justice has developed a helpful primer. *See* DOJ Antirust Primer, https://tinyurl.com/yclqkpeq (last accessed July 11, 2020).

[7]It is possible for bidders to independently formulate and to submit identical bids. As such, section 13-1-110 establishes the options available to the state purchasing agent or a central purchasing office "[w]hen competitive sealed bids are used and two or more of the bids submitted are identical in price." But this provision in no way implies identical bids are permissible bases for procurement; far from it. Section 13-1-110 applies only when independently formulated bids happen to offer the same price. *See id*. (assuming, as a condition for its application, that "*competitive* sealed bids are used"). If identical bids are not independently formulated and submitted, then section 13-1-110 does not apply.

independently formulated bids that, by pure coincidence, offered identical prices for twenty separate items.

A simple thought experiment is illustrative. Suppose each company had to submit, not a list of twenty prices, but merely a twenty-item list where, for each item, each company had to select one of two letters, "A" or "B." The likelihood that each company would submit the same twenty-part list is $1/2^{20}$, or 1/1,048,576—a one in a million chance. The companies' selection of prices, of course, entails many more possibilities than two ("A" or "B"), further diminishing the odds that the identical twenty-part bids are the coincidental product of chance. Now, prescinding from the thought experiment and acknowledging the countervailing considerations that more than two firms submitted bids, that firms in the same market confront similar cost constraints, and that pricing of related items involves related decisions, the likelihood that two firms would independently submit identical twenty-item bids remains very slight. A probability model that estimates how unlikely is not necessary. The identity of the twenty-item bids creates the common-sense inference that they were not independently formulated and submitted.

This inference is strengthened where, as here, the two companies share the same physical office address and at least some back-office operations. These facts increase the likelihood that each company had access to and knowledge of the other's bid. *See* DOJ Antitrust Primer, at 5 ("Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.").

The inference that the companies colluded on their bids would be further strengthened *if* the two companies submitting the identical bids were owned by the same individual. Shared ownership of two small, closely held companies increases the likelihood that one company knew of the contents of the others' bid (and vis-versa). Furthermore, in the context of the DOT procurement at issue, shared ownership also supplies a motive to submit identical bids in the attempt to garner two of the three available contract awards and, consequently, a larger share of DOT's crack-sealant purchases.

In sum, the request present facts that GM Emulsion and GME General Building not only submitted identical twenty-part bids but also share a physical office and, to some extent, administrative operations. If admitted by a hearing officer, these facts would be sufficient circumstantial evidence to show that GM Emulsion and GME General Building did not independently propose, but rather

purposefully coordinated, their bids.[8] Their bids were not "competitive" as section 13-1-102 requires; accordingly, the Procurement Code prohibits a procurement based on them.

III.

There are several reasons why the law prohibits a procurement based on noncompetitive bids.

First, and most fundamentally, when companies coordinate their bids for State contracts, it deprives the public of the benefits of competition. Competition among vendors "maximize[s] the purchasing value of public funds . . . ." § 13-1-29(C). When companies that submit bids or proposals for state contracts avoid competing with each other, the public pays more for goods or services than it otherwise would.

Second, in this particular procurement, GM Emulsion's and GME General Building's identical bids unfairly diminished other companies' chances to be awarded a contract. Recall that DOT announced it would award a price agreement for road-crack sealant goods and services to, at most, three suppliers. Hence, by submitting identical bids, GM Emulsion and GME General Building knew if their identical bids were either the lowest or second-lowest, the companies could secure two of the three available contract awards and, consequently, capture a larger share of DOT's purchases of road-crack sealant goods and services. By contrast, had the companies competed—formulating and submitting independent (and therefore

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[8]We are aware that, in the context of federal antitrust cases arising under Section 1 of the Sherman Act, parallel business behavior, particularly among firms in a concentrated market that recognize the interdependence of their price and output decisions (i.e., an oligopolistic market), is not conclusive of an agreement to fix prices. *See, e.g.*, *Bell Atlantic v. Twombly*, 550 U.S. 544, 553-54 (2007). In such cases, more than conscious parallel pricing is necessary to support an inference of agreement—namely, some other "plus factor" or evidence of agreement. *See, e.g.*, *Valspar Corp. v. E.I. Du Point De Nemours & Co.*, 873 F.3d 185, 193 (3d Cir. 2017).

But this request does not concern a few dominant firms setting and following prices in an oligopolistic market. Far from it. DOT, which is the dominant buyer in the market for highway-construction goods and services, has approximately 320 prequalified suppliers. *See* New Mexico Department of Transportation, Prequalified Contractors and Subcontractors List (July 10, 2020), *available at* https://tinyurl.com/y7597ntx (last accessed July 12, 2020). Here, two of those suppliers, which share an office and some administrative operations, submitted identical twenty-part bids in an effort to secure two of three available contract awards for DOT's crack-sealant purchases. Even if the federal courts' Section 1 analysis for conscious parallelism cases applied (it doesn't), the presented facts reflect more circumstantial evidence of noncompetitive bids than mere parallel pricing.

likely different) bids—an award to either company would not have necessarily diminished other bidders' chances of also receiving a contract award. In short, by not competing against each other, GM Emulsion and GME General Building augmented their chances that each would receive a DOT contract, thereby depriving the State the benefit of their competition and diminishing the chances of other bidders to win a contract. Their noncompetitive bids frustrated the Procurement Code's purpose "to provide for the fair and equitable treatment of all persons involved in public procurement . . . ." § 13-1-29(C).

Third, in the context of highway-construction procurements, coordinated bidding by jointly operated companies frustrates DOT's purpose in awarding highway-construction contracts to multiple vendors. Ostensibly, when DOT seeks to establish a multiple award price agreement, the department intends to diversify across its supply of prequalified vendors to better ensure completion of ever-present construction projects. This diversification is upended if small, jointly operated, closely held companies are allowed to submit multiple, coordinated, and identical bids, each seeking a part of a multiple award price agreement. The result is that the State would award contracts to fewer independently operated companies (and potentially less diverse and less geographically scattered companies) than the State intended or needs.

CONCLUSION

Two companies that share a physical address and some back-office operations submit identical twenty-part bids for a procurement in which DOT would award contracts to, at most, three suppliers. These factual assumptions—and, again, assuming further that there are no other relevant facts that bear upon the question—permit the inference that the companies' bids were not independent and, therefore, not competitive. Accordingly, a procurement based on those bids would violate section 13-1-102.

We do not say that, as a matter of law, GM Emulsion and GME General Building violated the Procurement Code, or any other provision of law. That conclusion would depend upon a record of admissible evidence, which is not before us. For purposes of this advisory opinion, our view is based on those factual assumptions posited by the request; not a record of evidence that a hearing officer admitted. We do not probe the truth of the factual assumptions, and we assume there are no other relevant facts (there normally are). Our view on how the Procurement Code would apply is circumscribed by these caveats.

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

Jeremy Farris

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