



STATE ETHICS COMMISSION

Hon. William F. Lang, Chair
Jeff Baker, Member
Stuart M. Bluestone, Member
Hon. Garrey Carruthers, Member
Ronald Solimon, Member
Dr. Judy Villanueva, Member
Frances F. Williams, Member

August 7, 2020, 9:00 a.m. to 2:00 p.m.

Zoom Meeting

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/89205033496?pwd=SzN6cWxZaHAxVWJ3MW82bDc1cktXdz09>

Join Zoom meeting telephonically: 1-669-900-9128

Meeting ID: 892 0503 3496

Meeting Passcode: 1GsXpc

COMMISSION MEETING & PUBLIC RULE HEARING

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of June 5, 2020 Commission Meeting

Commission Meeting Items

Action Required

- | | |
|---|-----|
| 4. Oath for Commissioners Baker and Solimon
(Boyd) | Yes |
| 5. Advisory Opinion 2020-005 | Yes |

(Farris)

6. Advisory Opinion 2020-006

Yes

(Farris)

Beginning of Public Rule Hearing

NMSA 1978, § 14-4-5.3 & 1.24.25.13 NMAC

7. General Counsel presents (i) any written public comments received regarding amendments to Rules 1.8.1.9-10 (informal advisory opinions) and 1.8.1.16 (Commission meetings) and proposed Rule 1.8.4 (code of ethics); and (ii) Commission staff recommended amendments to proposed rules No
8. Public comment on amendments to Rules 1.8.1.9-10 (informal advisory opinions) and 1.8.1.16 (Commission meetings) and proposed Rule 1.8.4 (code of ethics) No

End of Public Rule Hearing & Continuation of Commission Open Meeting for Actions on Rules and Other Matters

1.24.25.14(D) NMAC

Upon applicable motion, Commission goes into Executive Session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney client privilege pertaining to litigation)

9. Discussions regarding Administrative Complaints
(Farris & Boyd)
1. Administrative Complaint No. 2020-007
 2. Administrative Complaint No. 2020-015
 3. Administrative Complaint No. 2020-016 & 2020-017
 4. Administrative Complaint No. 2020-018
 5. Administrative Complaint No. 2020-020
 6. Administrative Complaint No. 2020-029
10. Discussion regarding referral by Secretary of State of arbitrator's award in
The Matter of the Arbitration of the Office of the Secretary of State and Cowboys for Trump
(Farris & Boyd)

Upon applicable motion, Commission returns from Executive Session

13. Actions on Administrative Complaints
(Farris) Yes
1. Administrative Complaint No. 2020-007
 2. Administrative Complaint No. 2020-015
 3. Administrative Complaint No. 2020-016 & 2020-017
 4. Administrative Complaint No. 2020-018
 5. Administrative Complaint No. 2020-020
 6. Administrative Complaint No. 2020-029
14. Action on referral by Secretary of State of arbitrator's award in
*The Matter of the Arbitration of the Office of the Secretary of State
and Cowboys for Trump*
(Farris) Yes
15. Frequency of Commission meetings
(Williams) Yes
16. Determination of next meeting
(Lang) No
17. Public comment No
18. Adjournment

*For inquires or special assistance, please contact Sonny Haquani at
Ethics.Commission@state.nm.us*



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-05

August 7, 2020¹

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

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 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.

FACTS³

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

³The 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.

⁴The 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

⁵New 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 Antitrust 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

⁶Such 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

(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 Antitrust Primer, <https://tinyurl.com/yclqkpeq> (last accessed July 11, 2020).

⁷It 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

⁸We 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



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-06

August 7, 2020¹

QUESTION PRESENTED

Under the Governmental Conduct Act, may a cabinet secretary or another state employee work remotely from outside of the state on a permanent or near-permanent basis, when their job duties are ordinarily based in New Mexico?

FACTS²

The Secretary of Education has worked from Philadelphia, Pennsylvania for most of the past four months. *See* Dillon Mullan, *New Mexico's education secretary working from out of state*, Santa Fe New Mexican, Jul. 20, 2020, <https://tinyurl.com/y2ydqsd1> (last accessed July 29, 2020). During that period, the Secretary worked out of Santa Fe for a few weeks in March and, then, during the five-day special legislative session in June. *See id.* In view of the State's response to the Covid-19 pandemic, like many state employees, the Secretary has carried out his many duties remotely, using web-based video conferencing products and services. *See id.* He can telework equally from Philadelphia as from his apartment

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 July 8, 2020, the Commission received a request for an advisory opinion that referenced news reports detailing facts as presented herein. The request was submitted by a public employee who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

or office in Santa Fe. *See id.* As a consequence, a public school district superintendent had not noticed—and would have no way of knowing absent the Secretary’s candor—that the Secretary was working from out of state. *See id.*

Years before the current pandemic, a Public Information Officer (PIO) with the Department of Finance and Administration (DFA) worked remotely from Chicago, Illinois for several of the waning months of Governor Richardson’s administration. Like a cabinet secretary, the PIO position was also exempt from the Personnel Act. And, like the current Secretary of Education, the New Mexico news media also covered the story, but with more editorial skepticism about the propriety of the accommodation. *See* KRQE Larry Barker Investigative Report (July 2, 2010), <https://tinyurl.com/yxeyor3b> (last accessed July 29, 2020).

According to the request, these two cases are not isolated incidents; they are simply two incidents that the news media covered. It is the Commission’s understanding that a not insignificant number of state employees have requested out-of-state telework accommodations, both during and before the current health crisis.

ANSWER

Subsection 10-16G-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits a state employee’s duties or otherwise obstructs the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

ANALYSIS

After the Governor declared a public health emergency on March 11, 2020, the Secretary of Health ordered all public and private employers, including all State agencies, to “limit operations to the greatest extent possible and minimize employee contact.” Public Health Emergency Order Limiting Mass Gatherings and Implementing Other Restrictions Due to COVID-19, ¶ 4, at p. 3 (Dept. of Health, Mar. 19, 2020); *see also* Governor’s Executive Order 2020-004 (Mar. 11, 2020). State agencies have implemented that order, making use of amended telework policies, portable technologies, and web-based video conferencing, and accounting for teleworked hours through the State’s enterprise resource planning system.

The Commission's opinion does not turn on whether the State's response to the current public health emergency is appropriate. The Commission's own staff has transitioned to a default telework arrangement, and the Commission has conducted three "virtual" public meetings. At present, working from home is not only allowed but also necessary for public health. Telework arrangements may well persist after the public health crisis abates. *See, e.g., The Economist*, "What will be the new normal for offices?" (May 9, 2020).

The question, then, is whether a state employee, whose job is ordinarily based in New Mexico, may telework from outside the state on a permanent or near-permanent basis. Working from home is allowed, but is it allowed when the employee's home is in, say, Chicago or Los Angeles? The request poses this question as an ethics matter and, to the extent it implicates the Governmental Conduct Act, it is.³ To interpret that Act, we survey other ways that the law regulates the residency of public employees.

There is no generally applicable residency requirement for all public officials and employees. Once, there was. In 1933, the Legislature enacted a statute requiring all employees of the State of New Mexico, including all political subdivisions thereof, to reside in the State and, moreover, to have resided in the State for at least one year prior to the commencement of their employment. 1933 N.M. Laws, ch. 68, § 1. This statute stood unamended for forty-six years, until the Legislature repealed it in 1979. *See* 1979 N.M. Laws, ch. 54, § 1 (repealing NMSA 1978, § 10-1-5).⁴ Clear reasons favored repeal: the statute preventing residents of border-state metropolitan areas (e.g., El Paso, Texas) from working as state or local government employees in New Mexico. The statute's requirement of one year of residency prior to government employment also restricted the ability of state and local governments to recruit beyond state borders. By 1979, the Legislature concluded that the 1933 residency restrictions, on balance, no longer worked to New Mexico's advantage.

³Under 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 Governmental Conduct Act, NMSA 1978, §§10-16-1 to -18.

⁴We observe that NMSA 1978, sections 10-1-6 to 10-1-9 are vestigial. These provisions served the residency requirement and, now inert, should also be considered for repeal.

While no law generally requires public employees and officials to reside within New Mexico, several laws impose specific requirements. To begin, the state Constitution reflects a clear preference for the residence of public officials, requiring hundreds of state and local government officials to reside in New Mexico.⁵ In addition, the Legislature specifically requires residence for many state officials and employees.⁶ Neither the Constitution nor any statute expressly requires all cabinet secretaries to reside in New Mexico; however, the Senate must approve these officers' appointments, and the hearing procedures involved in Senate approval might work to ensure that the various cabinet secretaries reside in New Mexico.⁷ So, while no law generally requires residency for all public officials and employees, many laws specifically impose that requirement for certain offices and, for others, Senate confirmation makes residency likely.

The request asks us to advise whether the Governmental Conduct Act contributes anything to this subject. The Act does not specifically address residency; rather, it requires public officers and employees to treat their "government

⁵*See, e.g.*, N.M. Const. art. IV, § 3 (Senators and Representatives); N.M. Const. art. V, § 1 (Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Commissioner of Public Lands); N.M. Const. art. V, § 13 (all municipal officers, county commissioners, school board members, and municipal governing body members); N.M. Const. art. V, § 14 (members of the State Transportation Commission); N.M. Const. art. VI, § 24 (District Attorneys); N.M. Const. art. VI, § 8 (Supreme Court Justices); N.M. Const. art. VI, § 14 (District Court Judges); N.M. Const. art. VI, § 26 (Magistrate Court Judges); N.M. Const. art. VI, § 28 (Court of Appeals Judges); N.M. Const. art. VI, § 36 (members of the district court judges nominating committees); N.M. Const. art. VI, § 36 (members of the metropolitan court judges nominating committees); N.M. Const. art. X, § 6(B) (municipal representatives); N.M. Const. art. X, § 7 (county commissioners); N.M. Const. art. X, § 10(D) (urban county representatives); N.M. Const. art. XII, § 6 (members of the Public Education Commission); N.M. Const. art. XII, § 15 (local school board members).

⁶An incomplete survey is illustrative. *See, e.g.*, NMSA 1978, § 6-21-4(B) (certain members of the New Mexico Finance Authority); § 6-24-5(B) (directors of the New Mexico Lottery Authority); § 10-16G-4(A)(1) (members of the State Ethics Commission); § 15-3B-5 (staff architect in Facilities Management Division of the General Services Department); § 18-2-1 (members of the State Library Commission); § 18-3A-5(A) (trustees of the New Mexico Museum of Natural History and Science); § 18-13-4(A)(4)-(5) (trustees of the Historic Landscape Trust).

⁷N.M. Const., art. IV, § 42 (hearings on confirmation of gubernatorial appointees); N.M. Const., art. V, § 5 (providing for the Senate's advice and consent power); *see also, e.g.*, NMSA 1978, § 9-24-5 (requiring Senate confirmation for the secretary of public education).

position[s] as a public trust,” meaning that they may use “the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16G-3(A). Furthermore, public officers and employees must conduct themselves “in a manner that justifies the confidence placed in them by the people” § 10-16G-3(B). Does working remotely from out of state subvert an employee’s treatment of a government position as a public trust? Does it strain the public’s confidence?

The public might reasonably expect state employees to live here, in New Mexico; to contribute to a local tax base here; to send their children to school here; and to have knowledge of public affairs in ways that depend on the thick relation of living in a community, as opposed to the increasingly thin relation of having an employment contract with it. Even so, subsection 10-16G-3(B) does not require state officials and employees to reside in New Mexico. The Legislature expressly requires residency when it sees fit, *see* n.5, *supra*, and we hesitate to read subsection 10-16G-3(B)’s public-confidence provision to imply a duty that the Legislature ordinarily imposes expressly, *see, e.g., State v. Lindsey*, 2017-NMCA-048, ¶ 19, 396 P.3d 199 (“[W]e assume that ‘[t]he Legislature knows how to include language in a statute if it so desires[.]’”) (second alteration original) (citation omitted).

As compared to subsection 10-16G-3(B), subsection (A) is more focused in its application. *See State v. Gutierrez*, 2020-NMCA-___, --- P.3d. ---, 2020 WL 2830581, at *9-*10 (N.M. Ct. App. May 29, 2020) That statute directs attention to whether the powers and resources that accompany public offices are being used to advance the public interest, or whether they are being used for other ends. The statute’s application requires an analysis of the power or resource at issue and its use.

Remote work implicates the “resources of public office,” §10-16G-3(A), in at least two respects: (i) the public pays for the technologies that enable telework accommodations; and (ii) the public pays for the office space and other resources that are not used as a result of remote work. A public officer or employee can run afoul of subsection (A) by abusing a telework accommodation to further a personal interest at the expense of the public interest. For example, an employee might claim to be working from home (and collect pay) when in fact the employee is attending to personal matters.

At present, teleworking accommodations indubitably advance the public interest; such arrangements allow state employees to continue to discharge their responsibilities while reducing the spread of SARS-CoV-2. The request does not

ask for an opinion about teleworking *tout court*, but teleworking from out of state. It is conceivable that an out-of-state telework accommodation could advance the public interest because, in rare cases, the accommodation might enable the State to employ singular talents that it might not otherwise; accordingly, subsection 10-16G-3(A) cannot be read to flat prohibit out-of-state telework. But, if teleworking from out of state specifically impedes a state official's or employee's ability to complete their job duties, then the accommodation does not advance the public interest. Whether an accommodation for a state official or employee to telework from out of state subverts the public interest depends on a fact-based assessment whether their job duties can be completely discharged remotely and from afar.

While the request adverts to the Secretary of Education and a former PIO as examples of this specific accommodation, the request does not present enough facts to conclude whether or not the Secretary of Education can discharge his job duties and exercise the powers of his office while predominantly teleworking from Philadelphia. We observe, however, that the Secretary's statutorily established duties and powers are legion. *See* NMSA 1978, § 9-24-8 (enumerating the Secretary of Education's duties and powers); § 22-2-1(A) ("The secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law."); *see generally* NMSA 1978, §§ 22-1-1 to 22-35-5 (relating to the operation of public schools). The Secretary oversees a commensurately large percentage of the State's total expenditure. *See, e.g.*, State of New Mexico Comprehensive Annual Financial Report for FY18, at 16 & 18 <https://tinyurl.com/y52dt4o3> (last accessed July 29, 2020) (showing that education, excluding higher education institution expenditures, approximated \$3.17 billion, or nearly 17% of the State's total expenditures in fiscal year 2018). The Secretary's statutorily defined duties and the expenditure of public funds appropriated for education comprise, at least in part, "the public interest" as it relates to public education. § 10-16G-3(A).

We also observe that, given the pandemic and the public health order requiring a two-week quarantine for individuals entering New Mexico from out of state, *see* Governor's Executive Order 2020-054 (issued July 1, 2020), <https://tinyurl.com/yynbqofc> (last accessed July 29, 2020), the Secretary cannot readily attend any events where his physical attendance might be required (such as an emergency that could not be addressed virtually or telephonically) or beneficial to the public (such as a press briefing). For example, the secretaries of the Department of Health and the Human Services Department routinely accompany the Governor in her press briefings concerning the State's response to the pandemic. While a similar showing from the Secretary of Education might assist press briefings

regarding public school openings and school health measures, the Secretary's out-of-state telework accommodation and the two-week quarantine order prevent his in-person attendance.

The requests' factual presentation and our few additional observations, however, are not enough to form an opinion that the Secretary's out-of-state telework accommodation either accords with or obstructs the public interest. The same applies to an analysis of the PIO position the request also mentioned. Subsection 10-16G-3(A) imposes a duty on public officials and employees to use public resources to advance the public interest only and not to obtain personal benefits. That duty has implications for telework accommodations: if the telework accommodation obstructs, rather than advances, the public interest, then subsection 10-16G-3(A) prohibits it. Without a richer factual description regarding how an out-of-state telework accommodation informs that analysis, we cannot provide further advice on how subsection 10-16G-3(A) applies.

CONCLUSION

Subsection 10-16G-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits the performance of statutorily defined duties or otherwise obstructs the advancement of the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

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

New Mexico Register

The official publication for all official notices of rulemaking
and filing of proposed, adopted and emergency rules.

Volume XXXI - Issue 12 - June 23, 2020

New Mexico Register

Volume XXXI, Issue 12

June 23, 2020

Table of Contents

Notices of Rulemaking and Proposed Rules

ADMINISTRATIVE HEARING OFFICE

Amended Notice of Public Hearing For Repealing and Replacing 22.600.3 NMAC, Rules of Procedures For Tax Protests.....	458
--	-----

AGRICULTURE, DEPARTMENT OF

Notice of Proposed Rulemaking.....	458
------------------------------------	-----

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

ENERGY CONSERVATION AND MANAGEMENT DIVISION

Notice of Proposed Rulemaking.....	459
Notice of Public Hearing and Rulemaking.....	460

HEALTH, DEPARTMENT OF

Notice of Public Hearing.....	461
-------------------------------	-----

PUBLIC EDUCATION DEPARTMENT

Notice of Proposed Rulemaking.....	462
------------------------------------	-----

PUBLIC REGULATION COMMISSION

Notice of Proposed Rulemaking Case No. 19-00286-UT.....	462
---	-----

REGULATION AND LICENSING DEPARTMENT

CONSTRUCTION INDUSTRIES DIVISION

Notice of Public Rule Hearing.....	463
------------------------------------	-----

STATE ETHICS COMMISSION

Notice of Rulemaking and Public Rule Hearing.....	464
---	-----

SUPERINTENDENT OF INSURANCE, OFFICE OF

Notice of Proposed Rulemaking.....	471
------------------------------------	-----

TAXATION AND REVENUE DEPARTMENT

Notice of Hearing and Proposed Rules.....	472
---	-----

Adopted Rules

A = Amended, E = Emergency, N = New, R = Repealed, Rn = Renumbered

HEALTH, DEPARTMENT OF

7 NMAC 28.2	R/E	Requirements For Home Health Agencies.....	480
7.34.4 NMAC	R	Licensing Requirements For Producers, Couriers, Manufacturers and Laboratories.....	480
7.28.2 NMAC	N/E	Requirements For Home Health Agencies.....	480
7.34.4 NMAC	N	Licensing Requirements For Producers, Couriers, Manufacturers and Laboratories.....	493

On the day of the hearing a division representative shall be stationed at the each of the division offices: Toney Anaya Building, Santa Fe; 5500 San Antonio NE- Suite F Albuquerque and 505 S. Main St – Suite 103 Las Cruces commencing 8:00 a.m. through 9:30 a.m. to receive written comments and to provide for the comments to be admitted into the record during the public hearing. Those desiring to participate in the public video/telephonic hearing process may do so by remote participation through livestreaming the meeting or becoming a participant by following these instructions:

Join via Video:

<https://nmrld.webex.com/nmrld/onstage/g.php?MTID=e31ab358d6ef0f6f289075011347ea0a2>

Once you join through the above link you will be provided instructions for accessing the meeting. Event password not required.

Join via telephone:

+1-415-655-0002

Access Code: 146 632 4326

No password required.

You may also access the division's website at <http://www.rld.state.nm.us/> construction the day of the hearing to locate instructions for participating in the hearing. All persons desiring to make public comment during the hearing shall do so through the webex process notifying the host who shall then ensure the ability for recorded comment. If you have any issues you may contact Kimberly Salazar at (575) 621-8351.

All public comments and documentation will be entered into the record during the public rules hearing. If you require special accommodations to attend the hearing, please notify CID by phone, email, or fax, of such needs as soon as possible to ensure adequate accommodations. Telephone: (505) 476-4616. Email: mary.james2@state.nm.us; Fax No. (505) 476-4702.

STATE ETHICS COMMISSION

NOTICE OF RULE MAKING AND PUBLIC RULE HEARING

Notice of Rulemaking: The State Ethics Commission [the commission] will hold a public hearing on the proposed adoption of certain rules, as detailed below in the description of Proposed Rules, establishing procedures for requests for advisory opinions and for commission responses; giving notice of and conducting meetings, including virtual meetings, of the commission; and creating a proposed model code of ethics for state officers and employees. These new rules are proposed pursuant to Sections 10-16-11 and 11.1, NMSA 1978; Subsection C of Section 10-15-1, NMSA 1978; Section 10-16G-8, NMSA 1978; and Paragraph 4 of Subsection B of Section 10-16G-5, NMSA 1978. No technical scientific information was consulted in drafting these proposed rules.

Copies of all the proposed rules may be found at the Commission's website, <https://www.sec.state.nm.us>, or at the commission's main office in Albuquerque: the New Mexico Ethics Commission, University of New Mexico Science and Technology Park, 800 Bradbury Drive SE, Suite 215, Albuquerque, NM, 87106. The proposed rules are also provided in this notice.

Notice of Public Rule Hearing:

The public rule hearing is currently scheduled to occur on Friday, August 7, 2020 at 9:00 am in UNM's Science and Technology Park's Executive Board Room, 851 University SE, Suite 200, Albuquerque, NM 87106. It is possible that, pursuant to the Public Health Emergency declared by Governor Michelle Lujan Grisham in Executive Order 2020-004, as extended, and in light of the current pandemic, the Commission will decide to conduct this meeting remotely at that time and date rather than in person. In that case,

instructions for public participation will be posted on the Commission's website, <https://www.sec.state.nm.us>. Members of the public are advised to check this website before the meeting to confirm whether it will be held in person or over the internet. The public hearing will be conducted in a fair and equitable manner by the commission and shall be recorded. Any interested member of the public may attend the hearing, in person or remotely, and will be provided a reasonable opportunity to offer public comment, including presentation of data, views, or arguments, on the proposed rules during the hearing. Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Sonny.Haquani@state.nm.us. The commission will make every effort to accommodate all reasonable requests, but cannot guarantee accommodation of a request that is not received at least five calendar days before the scheduled hearing.

Notice of Acceptance of Written Public Comment:

Written public comments, including presentation of data, views, or arguments about the proposed rules, from any interested member of the public will be accepted until 5:00 p.m. on Wednesday, August 5, 2020, by submitting them via email to ethics.commission@state.nm.us with the subject line "SEC Rulemaking R20-01," or via first class mail or by hand delivery to the commission's Albuquerque office: New Mexico Ethics Commission, University of New Mexico Science and Technology Park, 800 Bradbury Drive SE, Suite 215, Albuquerque, NM, 87106.

Description of Proposed Rules: In compliance with Section 14-4-5.2 NMSA 1978, this notice includes the following summary of the proposed amendment and the new proposed rule, a short explanation of the purpose of the amendment and new rule, and specific legal authority authorizing the amendment and proposed new rule. The method and manner of public comment and notice

of public hearing on the proposed rules are listed above.

1.8.1.1 NMAC (“General Provisions”); proposed amendments:

This rule currently ensures that the state ethics commission is administered so that it works effectively, efficiently and fairly to achieve its constitutional and statutory mission. That mission is to ensure compliance with all applicable public ethics laws by all public officials, employees, candidates, contractors, lobbyists and others subject to the commission’s jurisdiction throughout their employment or dealings with New Mexico state government; and to ensure that the public ethics laws are clear, comprehensive and effective.

The first amendments to this rule proposed in this proceeding, 1.8.1.9 and 1.8.1.10 NMAC, will add two new sections describing the procedure for people to request, and for the commission to issue, advisory opinions, either official or informal. The second amendment to this rule, 1.8.1.16 NMAC, creates rules for convening and managing meetings of the commission. These include rules governing executive sessions, virtual meetings, and maintaining order during meetings.

The proposed amendments to 1.8.1 NMAC are as follows: amendments to Sections 1, 3, and renumbered 14, adding new Sections 9, 10 and 16 and renumbering subsequent existing sections, effective xx/xx/2020.

1.8.1.1 ISSUING

AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 21[7]5, Albuquerque, NM 87106.

[1.8.1.1 NMAC-N, 1/1/2020; A, xx/xx/2020]

1.8.1.3 STATUTORY

AUTHORITY: Paragraph 2 of Subsection A of Section 10-16G-5, State Ethics Commission Act, Section 10-16G-1 NMSA 1978; Subsection

(C) of Section 10-15-1, Open Meetings Act, Section 10-15-1 NMSA 1978.

[1.8.1.3 NMAC-N, 1/1/2020; A, xx/xx/2020]

1.8.1.9 ADVISORY OPINIONS:

A. The commission may issue advisory opinions on matters related to ethics. Advisory opinions shall:

(1) be requested in writing by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist’s employer;

(2) identify a specific set of circumstances involving an ethics issue;

(3) be issued within sixty days of receipt of the request unless the commission notifies the requester of a delay in issuance and continues to notify the requester every thirty days until the advisory opinion is issued; and

(4) be published after omitting the requester’s name and identifying information.

B. A request for an advisory opinion shall be confidential and not subject to the provisions of the Inspection of Public Records Act.

C. Unless amended or revoked, an advisory opinion shall be binding on the commission in any subsequent commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

[1.8.1.9 NMAC-N, xx/xx/2020]

1.8.1.10 INFORMAL ADVISORY OPINIONS:

A. A person authorized to request an advisory opinion who desires a response in fewer than 60 days for the purpose of deliberation and decision making may submit the request for an informal advisory opinion to the director or general counsel, who may answer the request. An informal advisory opinion is specific to the person who requests the advice and the facts presented in

the request. The commission shall treat as confidential the request and the informal advisory opinion issued in response.

B. Any informal advisory opinion issued pursuant to this rule is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. If the commission determines that a person committed a violation after reasonably relying on an informal advisory opinion and the violation is directly related to the informal advisory opinion, the commission may consider that the person acted in good faith.

C. Before each regular meeting of the commission, the director shall review any informal advisory opinions issued since the last meeting. The director, based on any informal advisory opinion issued, may draft an advisory opinion for the commission to consider for issuance as an advisory opinion.

[1.8.1.10 NMAC-N, xx/xx/2020]

1.8.1.[12] 14 ADDRESS FOR FILING DOCUMENTS:

A. By mail: Director, State Ethics Commission, 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, NM 87106.

B. In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, NM 87106.

C. By email: ethics.commission@state.nm.us.
[1.8.14 NMAC-N, 1/1/2020; Rn & A, xx/xx/2020]

1.8.1.16 COMMISSION

MEETINGS: The commission chair, in consultation with the director, shall determine the time, place, and duration of commission meetings necessary to conduct the commission’s business.

A. Executive Session. Upon motion and vote of a quorum, the commission may enter into a closed, executive session to discuss matters that are confidential under the State Ethics Commission Act,

Section 10-16G-1 NMSA 1978, and as otherwise permitted by the Open Meetings Act, Section 10-15-1 NMSA 1978.

B. Virtual meetings.

With the consent of the commission chair, the commission may meet virtually via web or teleconference. In the event the commission meets virtually, commission staff shall ensure that the meeting occurs on a platform that allows members of the public to observe and participate. At a virtual or telephonic meeting, each commissioner participating must be identified when speaking and all meeting participants and members of the public attending must be able to hear every person who speaks during the meeting. The commission staff shall record virtual meetings and make the recordings (except for recordings of closed executive sessions) available for public inspection.

C. Virtual attendance by individual commissioners. An individual commissioner may attend a physical commission meeting virtually, through telephone phone or web conference, when it is difficult or impossible for the commissioner to attend the meeting in person, provided that each commissioner participating by conference telephone can be identified when speaking, and all meeting participants and members of the public attending can hear every person who speaks during the meeting.

D. Maintaining order. The commission chair may take reasonable steps to ensure the commission is able to fairly and efficiently conduct its business, including adopting parliamentary procedure, imposing reasonable limitations on public comment, and excluding members of the public who disrupt commission meetings. [1.8.1.16 NMAC-N, xx/xx/2020]

1.8.4.1 NMAC (“Proposed Code of Ethics”): This new proposed rule will create proposed code of ethics for public officials and public employees, to be submitted to each elected public official and public agency for

adoption, pursuant to Paragraph (4) of Subsection B of Section 10-16G-5 NMSA 1978. The proposed code of ethics will compile in a single rule the ethics provisions of state laws and rules governing the conduct of state officers and employees. Topics to be addressed in the proposed code include the definition of and restrictions on: conflicts of interest, acceptance of gifts, business relations with employees or regulated entities, procurement issues, limitations on former employees, public access to records and meetings of state bodies, allowable political activity and ethical conduct in the workplace, among other subjects.

The proposed 1.8.4 NMAC is as follows:

**TITLE 1 GENERAL
GOVERNMENT
ADMINISTRATION
CHAPTER 8 STATE ETHICS
COMMISSION
PART 4 CODE OF
ETHICS**

1.8.4.1 ISSUING
AGENCY: State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, New Mexico 87106. [1.8.4.1 NMAC-N, xx/xx/2020]

1.8.4.2 SCOPE: This part contains a proposed code of ethics for officers and employees of executive and legislative state agencies and other institutions and instrumentalities of the state. Elected statewide executive branch officers and other state agencies must consider this proposed code when adopting either a code of conduct under Subsection C of Section 11 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978, or a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, for employees subject to the adopting agencies’ control. If adopted, this code will apply to all officers and employees of the adopting agency, as well as other persons working for the agency, such

as contractors.
[1.8.4.2 NMAC-N, xx/xx/2020]

**1.8.4.3 STATUTORY
AUTHORITY:** Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978; and Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978.
[1.8.4.3 NMAC-N, xx/xx/2020]

1.8.4.4 DURATION:
Permanent.
[1.8.4.4 NMAC-N, xx/xx/2020]

**1.8.4.5 EFFECTIVE
DATE:** January 1, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[1.8.4.5 NMAC-N, xx/xx/2020]

1.8.4.6 OBJECTIVE: The objective of this part is to provide the executive and legislative branch agencies of state government and other institutions and instrumentalities of the state with a proposed code of ethics to consider when agencies adopt either a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, or a code of conduct under Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978. If adopted, this Code will furnish standards of conduct for the adopting agency’s officer’s and employees, the violation of which could form the basis for discipline by the adopting agency.
[1.8.4.6 NMAC-N, xx/xx/2020]

1.8.4.7 DEFINITIONS:
The following terms apply to this part unless their context clearly indicates otherwise:

A. “Agency” or “this Agency” means the agency that has adopted this proposed code of ethics.

B. “Business” means an entity other than this agency.

C. “Code” means this proposed code of ethics.

D. “Commission” means the State Ethics Commission.

E. “Financial interest” means an ownership interest in a business or property; or employment or prospective employment for which negotiations have already begun.

F. “Gift” has the same meaning as defined by Subsection B of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, any donation or transfer without commensurate consideration of money, property, service, loan, promise or any other thing of value, including food, lodging, transportation and tickets for entertainment or sporting events, but does not include:

(1) any activity, including but not limited to the acceptance of a donation, transfer or contribution, or the making of an expenditure or reimbursement, that is authorized by the Campaign Reporting Act or the Federal Election Campaign Act of 1971, as amended;

(2) a gift given under circumstances that make it clear that the gift is motivated by a family relationship or close personal relationship rather than the recipient’s position as a state officer or employee or candidate for state office;

(3) compensation for services rendered or capital invested that is:

(a) normal and reasonable in amount;

(b) commensurate with the value of the service rendered or the magnitude of the risk taken on the investment;

(c) in no way increased or enhanced by reason of the recipient’s position as a state officer or employee or candidate for state office; and

(d) not otherwise prohibited by law;

(4) payment for a sale or lease of tangible or intangible property that is commensurate with the value of the services rendered and is in no way increased or enhanced by reason of the recipient’s position as a state officer or employee or candidate for state office;

(5) a commercially reasonable loan made in the ordinary course of the lender’s business on terms that are available to all similarly qualified borrowers;

(6) reimbursement for out-of-pocket expenses actually incurred in the course of performing a service for the person making the reimbursement;

(7) any gift accepted on behalf of and to be used by the state or a political subdivision of the state, including travel, subsistence and related expenses accepted by a state agency in connection with a state officer’s or employee’s official duties that take place away from the state official’s or employee’s station of duty;

(8) anything for which fair market value is paid or reimbursed by the state officer or employee or candidate for state office;

(9) reasonable expenses for a bona fide educational program that is directly related to the state officer’s or employee’s official duties; or

(10) a retirement gift.

G. “Indirectly” means in a roundabout manner; coming about or resulting otherwise than directly or immediately, as effects or consequences.

H. “Market value” means the amount for which a good or service can be sold on the relevant market.

I. “Official act” means any act or omission to act that would not be possible but for the actor’s official position or state employment.

J. “Public officer or employee” means any elected or appointed official or employee of a state agency who receives compensation in the form of salary or is eligible for per diem or mileage, but excludes legislators.

K. “Restricted donor” has the same meaning as defined by Subsection D of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, a person who:

(1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;

(2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee’s official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;

(3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee’s official duties or employment within the regulatory agency; or

(4) is a lobbyist or a client of a lobbyist with respect to matters within the donee’s jurisdiction.

L. “Shall” means must, and “must” means shall.

M. Any other terms shall be defined for purposes of this rule as they are defined in Section 2 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978. [1.8.4.7 NMAC-N, xx/xx/2020]

1.8.4.8 STRUCTURE OF THIS CODE AND CORRESPONDING COMMENTARY:

A. This Code is organized by subject area rather than by the statutes that concern the various subject matters of this code.

B. The Commission publishes and updates extensive commentary and examples corresponding to this Code on the Commission’s website. An official or employee of this agency dealing with an ethical issue should identify and consult the relevant sections of this Code. If this Code does not resolve the issue, further guidance might be found in the Commission’s separately

published commentary.

[1.8.4.8 NMAC-N, xx/xx/2020]

1.8.4.9 PRINCIPLES OF PUBLIC ETHICS: This Code is based on, and should be interpreted to advance, the following principles of public ethics:

A. Honest services.

An officer or employee shall conduct government functions in accordance with the law and free from conflicts of interest. Public office is a public trust; as such, an official or employee must take care to ensure that every official act and decision affecting the rights or interests of individuals is based in law and the public interest.

B. Proportionality.

When committing an official act or making a decision, an officer or employee shall ensure that the action taken is proportional to the goal being pursued. The officer or employee shall avoid restricting the rights of New Mexicans or imposing burdens on them when those restrictions or burdens are not justified by a public interest.

C. Impartiality and fairness. The conduct of an officer or employee shall never be guided by:

(1) personal, family or financial interests;

(2) a motivation to benefit or empower an elected official, a candidate for office, or a political party or its members; or

(3) a motivation to disadvantage or disempower an elected official, a candidate for office, or a political party or its members.

D. Consistency. Like cases shall be treated alike. An officer or employee shall behave consistently with the agency's normal practices, unless there is a legitimate basis for departing from those practices in an individual case and that basis is documented in writing. An officer or employee shall respect the reasonable expectations of the public that the agency will continue to act as it has acted in similar circumstances unless there is a rational basis for the change.

E. Diligence. An officer or employee shall ensure that

every decision on a matter is made with care and adequate understanding of the issue, within a reasonable time, and without unnecessary delay.

F. Respect. An officer or employee shall be courteous and accessible to members of the public, co-workers, and their colleagues.

G. Transparency. The official acts and decisions of officers and employees shall be made openly and with adequate opportunity for public review and comment.

H. Fallibility and reversibility. Individuals not only err in judgment but also act in ways that unconsciously benefit some and burden others; accordingly, an officer or employee shall endeavor to take official acts and make decisions in ways that are deliberative, open to review and, where appropriate, reversible.

[1.8.4.9 NMAC-N, xx/xx/2020]

1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST

A. Outside employment.

(1) **Duty** to avoid conflicts from outside employment. An officer or employee of this agency engaged in paid employment for a business shall ensure that the employment does not conflict with the duties of state employment.

(2) **Disclosure** of outside employment. An officer or employee having permissible outside employment shall:

(a) file with the employee's supervisor, or other officer or employee that this agency designates, a signed statement explaining the outside employment and why it does not create a conflict;

(b) the disclosure statement shall include the name of the officer or employee, the name and general nature of the business, the hours that the officer or employee will work, and the reasons why the work does not create a conflict of interest with the officer's or employee's public duties;

(c) in the disclosure statement, the officer or employee shall additionally commit to disclose any potential conflict of interest that may arise during the officer or employee's work with the business.

B. Disclosure of potential conflicts of interest and disqualification.

(1) **Disclosure** of financial interests.

(a) Mandatory financial disclosure by officers and agency heads. An officer or head of this agency must disclose financial interests to the Secretary of State on the form provided by the Secretary of State.

(b) **Disclosure** of financial interests: contents; when filed. The disclosure required by 1.8.4.10.B(1)(a) NMAC shall be filed within thirty days of taking office and each January thereafter and shall disclose the following financial interests of the filing individual and the filing individual's spouse, for the prior calendar year:

(i) current employer and the nature of the business or occupation;

(ii) all sources of gross income over \$5,000, identified by category;

(iii) real estate owned in the state other than the personal residence;

(iv) other business interests of \$10,000 or greater value;

(v) memberships on for-profit boards;

(vi) New Mexico professional licenses held;

(vii) sales to state agencies exceeding \$5,000 for the prior year; and

(viii) state agencies before which clients were represented or assisted during the prior year.

(c) Officers and employees required to disclose potentially conflicting financial interests; when filed. An

officer or employee of this agency must file a disclosure of financial interests when the officer or employee believes, or has reason to believe, that their financial interest may be affected by their official acts or actions of the state agency that employs them. The disclosure must be filed before entering state employment or within ten days of the date when the officer or employee knows, or should know, that a potential conflict has arisen and thereafter each subsequent January, so long as the conflict or potential conflict continues to exist.

(d)

Financial disclosure statements are public records. All disclosures required under this subsection are public records.

(2)

Disqualification from acts affecting financial interests.

(a)

An officer or employee of this agency may not take official acts for the purpose of enhancing their financial interests. An officer or employee must be disqualified from any matters that could directly enhance or diminish the officer's or employee's financial interest. If disqualified, then the officer or employee shall refrain from acting on a matter involving the disqualifying financial interest.

(b)

An officer or employee of this agency is not disqualified from taking an official action under 1.8.4.10(B)(2)(a) NMAC if the benefit of the official act to the officer's or employee's financial interest is proportionately equal to or less than the benefit to the general public.

C. Business with

regulated entities.

(1) Sales

to regulated persons. An officer or employee of this agency may not directly or indirectly sell goods or services to, or profit from a transaction with, a business or individual over whom this agency has regulatory authority.

(2) No

acceptance of job or contract offers from regulated entities. An officer or employee of this agency may not

accept an offer of employment from, or a contract to provide goods or services to any entity that this agency regulates. An officer or employee shall disqualify themselves from any official act or decision involving a business in which an immediate family member is employed or in which the officer or employee seeks employment.

(3) Ordinary

transactions at market rates allowed. Nothing in this rule prevents an officer or employee from purchasing or contracting for services or goods from a regulated entity on the same bases that are available to other members of the public.

D. Accepting or Giving Gifts.

(1) Gifts

from restricted donors. An officer or employee of this agency may not, directly or indirectly, solicit a gift from, and shall decline any gift offered by, a restricted donor or by any person who gives a gift because of the donee's status as an officer or employee of this agency.

(2) Gifts and

business from subordinates. An officer or employee of this agency may not, directly or indirectly:

(a)

accept a gift from an employee having a lower rank or receiving less pay, unless the donor and donee are not in a subordinate-superior relationship and there is a personal relationship between the donor and recipient that would justify the gift.

(b)

solicit business from a supervised employee where the business redounds to the financial interest of the officer or employee or an immediate family member.

(3) Soliciting

gifts for charities. An officer or employee of this agency may not solicit or require a charitable donation from any business, or an agent of any business, regulated by or contracting with this agency; nor from any employees that the officer or employee supervises.

(4) Declining

permissible gifts. An officer or

employee of this agency shall consider declining an otherwise permissible gift, if they believe that a reasonable person with knowledge of the relevant facts would question the officer or employee's integrity or impartiality as a result of accepting the gift. Among other relevant factors, the officer or employee shall take into account whether:

(a)

the gift has a high market value;

(b)

the timing of the gift creates the appearance that the donor is seeking to influence an official action;

(c)

the gift offered by a person or business entity who has interests may substantially affect the performance or nonperformance of the officer or employee's duties; and

(d)

acceptance of the gift would provide the donor with significantly disproportionate access.

(5) Disclosure

of offers of gifts from restricted donors. If a restricted donor offers a gift of any value to an officer or employee of this agency, or if an officer or employee of this agency unintentionally receives a gift from a restricted donor, the officer or employee shall report to their supervisor: the date the offer or gift was made or received, the name of the donor and the donor's relationship to the agency, the nature and value of the gift, and whether the officer or employee accepted or refused the gift.

(6) Certain

donations of private funds prohibited. No officer or employee of this agency may give:

(a)

a gift from their own funds to any person with whom their agency is doing business, or considering doing business, under circumstances which may appear to favor the recipient over other similarly situated persons; or

(b)

a gift to any other state officer or employee when the gift may be, or may appear to be, intended to influence any official decision by the recipient.

(7) Certain donations of public funds prohibited. No officer or employee of this agency may give to any person any gift from public funds, unless the gift:

(a) is a service appreciation award of de minimis value; or

(b) does not violate the Anti-Donation Clause, N.M. Const., Article IX, Section 14.

E. Honoraria; no solicitation or acceptance of honoraria permitted for speaking or writing.

(1) An officer or employee of this agency may not request or receive honoraria for a speech or service that relates to the performance of public duties; provided that an officer or employee of this agency may accept reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service.

(2) An officer or employee of this agency may accept payment for services rendered in the normal course of a private business pursuit.

F. Timekeeping, reimbursement, and use of state property.

(1) An officer or employee of this agency must work during the hours required and report time accurately.

(2) An officer or employee of this agency shall not claim reimbursement in excess of what is necessary and incidental to an official duty or action.

(3) An officer or employee of this agency shall limit personal use of state office supplies and assigned equipment, such as computers and telephones, and otherwise shall not use state property or expend state funds for private purposes.

G. Procurement.

(1) Fair and equitable treatment of persons involved in public procurement. An officer or employee of this agency shall treat persons involved in public procurement fairly and equitably.

(2) Maximizing the value of public funds. An officer or employee of this agency involved in procurement shall endeavor to maximize the purchasing value of public funds.

(3) Conflicts of interest prohibited; Intra-agency waiver.

(a) An officer or employee of this agency shall not participate directly or indirectly in a procurement when the officer or employee, or their immediate family member, has a financial interest in a business participating in the procurement.

(b) An officer or employee of this agency who is participating directly or indirectly in procuring goods or services for this agency shall not be concurrently employed by any person or business contracting with this agency.

(c) A conflict of interest under subparagraphs (a) or (b) this Paragraph may be waived by this agency, if the contemporaneous employment or financial interest has been publicly disclosed, the officer or employee is able to perform procurement functions without actual or apparent bias or favoritism, and the officer or employee's participation is in the best interests of this agency.

(4) Due diligence by agency.

(a) Participation by person submitting bid or proposal. An officer or employee of this agency, having responsibilities for evaluating or overseeing a bid or proposal shall exercise due diligence in ensuring that any person or parties submitting bids or proposals do not participate or contribute any knowledge, guidance or explanation in the preparation or receive any advance notice of specifications, qualifications or evaluation criteria on which the specific bid or proposal will be based.

(b) Campaign contribution disclosure and prohibition. An officer or employee of this agency who participates, directly

or indirectly, in procuring goods or services for this agency shall exercise due diligence to ensure that the prospective contractor:

(i) does not give a campaign contribution or other thing of value to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter; and

(ii) disclose all campaign contributions, where such contributions in the aggregate exceed over \$250 in the two years before the beginning of the procurement process, given by the prospective contractor or a family member or representative of the prospective contractor to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter.

H. Former officers and employees.

(1) Contracting. This agency may not contract with or take any other favorable action toward a person or business that is:

(a) represented by a person who was an officer or employee of this agency within the preceding year, if the contract or action has a value of \$1,000 or more and is the direct result of the officer or employee's official act; or

(b) assisted by a former officer or employee of this agency whose official act while in state employment directly resulted in the contract or action. This subparagraph applies regardless of the value of the contract or action, or the length of time since the officer or employee left the agency.

(2) Restrictions on former officers or employees representing a person in the person's dealings with this agency.

(a)

A former officer or employee of this agency is prohibited from representing anyone in dealings with this agency on any matter in which the officer or employee participated personally and substantially during their employment with this agency.

(b)

A former officer or employee of this agency may not, for one year after the termination of their employment with this agency, represent for pay a person on any matter before this agency, regardless of whether they were involved in that matter personally. [1.8.4.10 NMAC-N, xx/xx/2020]

1.8.4.11 OPEN GOVERNMENT AND FREEDOM OF INFORMATION:

A. An officer or employee of this agency should welcome and encourage the public to attend and participate in public meetings.

B. An officer or employee of this agency must permit members of the public to inspect this agency's records, unless the records are confidential under the law. [1.8.4.11 NMAC-N, xx/xx/2020]

1.8.4.12 POLITICAL ACTIVITY:

A. An officer or employee of this agency may not use their official position to pressure others to participate in political activities.

B. An officer or employee of this agency may not use their official position to influence an election or nomination, or otherwise engage in any partisan political activity while on duty.

C. An officer or employee of this agency may not serve as an officer of a political organization.

D. An officer or employee of this agency may not use or allow others to use state money or property to promote a political campaign, candidate for elected office, political party, or other partisan political organization.

E. An officer or

employee of this agency who becomes a candidate in a partisan election must take a leave of absence upon filing for or accepting the candidacy.

F. An officer or employee of this agency may participate in political activities while off duty, including:

(1) donating to political candidates;

(2) volunteering or working for a political campaign or political organization, so long as the officer's or employee's work does not violate any applicable conflict-of-interest provision of this rule or statute; and

(3) holding non-partisan political office, such as non-partisan county or municipal office or a seat on a local school board.

[1.8.4.12 NMAC-N, xx/xx/2020]

1.8.4.13 ETHICAL CONDUCT IN THE WORKPLACE:

A. An officer or employee of this agency with supervisory responsibility shall:

(1) manage the hiring of new employees fairly and equitably;

(2) diligently investigate allegations of misconduct;

(3) refrain from unsolicited private business dealings with supervised employees, either directly or indirectly; and

(4) ensure all visitors and staff can access this agency's services.

B. An officer or employee of this agency shall:

(1) treat colleagues with respect;

(2) learn about what behavior constitutes harassment, and make efforts to remove it from the workplace;

(3) report violations of this code of ethics or other laws to responsible authorities within this agency or to the Commission; and

(4) learn how to recognize, report and prevent

substance abuse among this agency's personnel.

[1.8.4.13 NMAC-N, xx/xx/2020]

History of 1.8.4 NMAC: [RESERVED]

SUPERINTENDENT OF INSURANCE, OFFICE OF

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Superintendent of Insurance (Superintendent), pursuant to the New Mexico Insurance Code, Sections 59A-1 -1 et seq. NMSA 1978 ("Insurance Code") and 13.1.4 NMAC, proposes to adopt amendments to rule 13.10.10 MEDICAL INSURANCE POOL PLAN OF OPERATION

PURPOSE OF THE PROPOSED AMENDEMENTS is to modify the Plan of Operation of the New Mexico Medical Insurance Pool.

STATUTORY AUTHORITY: Sections 59A-54-17 and 59A-54-5, NMSA 1978.

Copies of the Notice of Proposed Rulemaking and proposed rules are available by electronic download from the OSI website (<https://www.osi.state.nm.us/index.php/idms/>) or the New Mexico Sunshine portal.

OSI will hold a public video/ telephonic hearing on the proposed rules on July 24, 2020 at 10:00 a.m.

Join via Video:

<https://us02web.zoom.us/j/2916274744>

Join via telephone:

1-346-248-7799
Meeting ID: 291 627 4744

The Superintendent designates Bryan E. Brock to act as the hearing officer for this rulemaking. Oral comments