



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2020-08**

October 2, 2020<sup>1</sup>

#### **QUESTION PRESENTED**

Where a school district has awarded contracts for legal services to three law firms based upon competitive sealed proposals, does the Procurement Code allow a school district to procure legal services in excess of \$40,000 from a law firm that was not awarded a contract through the school district's competitive-sealed-proposal process?

#### **FACTS<sup>2</sup>**

In 2019, a school district issued a request for proposals to establish professional services contracts for legal services. On July 18, 2019, after evaluating competitive sealed proposals, the school district awarded legal services contracts to three firms: Firm A, Firm B, and Firm C.

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<sup>1</sup>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).

<sup>2</sup>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).

A week after awarding these contracts, the school district created a purchase order in the amount of \$7,500 to secure legal services from Firm D, which was not awarded a contract based on the request for proposals. Firm D employed an attorney who, while practicing law at Firm A, had represented the school district regarding a personnel issue. During the course of the representation, this attorney left Firm A and joined Firm D, and the school district chose to continue with the attorney's representation in regard to the limited personnel matter.

On March 30, 2020, the school district superintendent's office directed the school district's buyer to increase the purchase order for Firm D by \$10,000. The buyer requested the billing detail and was informed that the increase related to Firm D's work on the personnel matter. The buyer increased the purchase order at the superintendent's direction.

In April 2020, the superintendent's office again directed the buyer to increase the purchase order. Because the Firm D attorney had appeared at open board meetings, seemingly acting as legal counsel to the board, the school district's buyer questioned whether the increase related to the original, limited personnel matter or to other legal services. Again, the buyer was informed that the billing detail was confidential, and the buyer increased the purchase order based on the chief financial officer's approval.

In June 2020, after the superintendent's office changed leadership, the acting superintendent and school board president requested another increase to the purchase order for Firm D. Although the school district's purchasing department did not approve the increase, the purchasing department implemented the increase at the acting superintendent's and president's direction. By the end of fiscal year 2020, the school district had paid \$32,861.53 to Firm D. According to the request, this payment was compensation for legal services relating to the limited personnel matter as well as other legal services to the school board.

At a July 21, 2020 school board meeting, a school board member inquired why the school district had paid Firm D, considering that Firm D had not been awarded a contract under the request for proposals. The school district's chief financial officer and chief procurement officer explained that the payment was made upon a purchase order that had been established to cover attorney services relating to the limited, personnel matter.

On August 18, 2020, the school board approved an \$11,000 increase to the purchase order for Firm D for a total of in excess of \$42,000. During discussion on

the motion to increase the purchase order, a board member noted that the purchase order was created in fiscal year 2020 and that the purchase order and corresponding services are “rolling into” fiscal year 2021.

### ANSWER

Yes. Under the Procurement Code, a school district can procure legal services from a law firm without using a competitive-sealed-proposal process, so long as the total contract amount does not exceed \$60,000 (excluding applicable state and local gross receipts taxes) and the procurement accords with the professional services procurement rules promulgated by the school district’s central purchasing office.

### ANALYSIS

The Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended 2019), controls how school districts and local school boards may purchase legal services. The Code applies “to every expenditure . . . for the procurement of items of tangible personal property, services [whether professional or non-professional], and construction” made by “every political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts and local school boards and municipalities, except as exempted by the Procurement Code.” NMSA 1978, § 13-1-30(A) (1984, as amended 2005); NMSA 1978, § 13-1-67 (1984, as amended 2003).

When procuring legal services, a school district or a local school board generally must use competitive sealed proposals. *See* NMSA 1978, § 13-1-111(A) (1984, as amended 2007) (“[W]hen . . . a local public body is procuring professional services . . . a procurement shall be effected by competitive sealed proposals.”); NMSA 1978, § 13-1-76 (1984, as amended 1997) (defining “professional services” to include the services of lawyers). If, however, the school district or local school board seeks to procure legal services having a value not exceeding \$60,000, exclusive of gross receipts tax, then the Procurement Code does not require the school district or board to use competitive sealed proposals to award the contract. *See* NMSA 1978, § 13-1-125(B) (1984, as amended 2019).<sup>3</sup> Instead, the school

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<sup>3</sup>Section 13-1-102(B) of the Procurement Code provides the basis for this small-purchase exception to Section 13-1-111(A)’s requirement that professional services be procured by competitive sealed proposals. While Section 13-1-102(B) expressly excepts small purchases from procurement “by competitive sealed *bid*,” § 13-1-102 (emphasis added), both the Office of the Attorney General and the State Purchasing Division of the General Services Department have

district or board may procure the legal services “in accordance with professional services procurement rules promulgated by the general services department or a central purchasing office with authority to issue rules.” *Id.*

Before turning to the local rules for the procurement of professional services that the Procurement Code requires local public bodies to issue,<sup>4</sup> we make two observations about Section 13-1-125(B)’s \$60,000 limit on small-purchase professional services contract that are exempt from a competitive proposal process. First, reasons of administrative efficiency justify the exemption of small purchases of professional services from a competitive sealed bidding process. *See* Model Procurement Code for State and Local Governments § 3-204 cmt. (Am. Bar Ass’n 2000) (“This Section recognizes that certain public purchases do not justify the administrative time and expense necessary for the conduct of competitive sealed bidding. Streamlined procedures, to be set forth in regulations, will make small purchases administratively simpler to complete and yet ensure competition.”). Second, under Section 13-1-125(D), procurements of professional services “shall not be artificially divided so as to constitute a small purchase . . . .” § 13-1-125(B). Consequently, a governmental entity may not execute two or more professional service contracts (regardless of whether the contracts are executed at the same time or in different fiscal years), the aggregate value of which exceeds the \$60,000 (exclusive of applicable gross receipts taxes) limit, for the same or similar work with the same contractor. *See* § 13-1-125(B).

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interpreted the Procurement Code to except small purchases of professional services from procurement by competitive sealed *proposals* also, *see* 1.4.1.52 NMAC (providing that purchases of professional services shall comply with the provisions for professional-service-contract approval as stated in 2.40.2 NMAC); N.M. Att’y Gen. Advisory Ltr. (June 14, 2011), 2011 WL 7070175, at 2 (“Section 13-1-125 requires that a public body must issue a Request for Proposals when the contract amount exceeds \$50,000.”); N.M. Att’y Gen. Advisory Ltr. (June 14, 2011), 2011 WL 7070176, at 3 n.1 (“At the time of the original contract, the Procurement Code treated professional services having a value of \$30,000 or less as a small purchase exempt from the requirements for competitive sealed proposals.”); N.M. Att’y Gen. Advisory Ltr. (December 1, 2010), 2010 WL 5494052, at 1 (“Were the services contracted actually “professional services” totaling over \$50,000, they would have been procured through a competitive sealed proposal process.” (citing NMSA 1978, §§ 13-1-102 and 13-1-125)); *see also* Laws 2013, ch. 70, § 7 (increasing the maximum threshold for small purchases of professional services from \$50,000 to \$60,000).

<sup>4</sup>Section 13-1-117.1(A) provides that “each local public body shall adopt regulations regarding its selection and award of professional service contracts,” and Section 13-1-125(B) requires the central purchasing offices of local public bodies to procure small purchases of professional services in accordance with those rules. *See* §§ 13-1-117.1(A) & 13-1-125(B).

We now turn to local procurement rules that Section 13-1-125(B) authorizes. The professional service procurement rules promulgated by the General Services Department apply to state agencies, but they do not apply to school districts and local school boards. *See* 1.4.1.2(B)(7) NMAC; *see also* § 13-1-67.<sup>5</sup> Instead, school districts and local school boards are subject to the professional services procurement rules promulgated by their respective central purchasing offices. *See* § 13-1-125(B); *see also* NMSA 1978, § 13-1-37 (1984, as amended 2013) (defining central purchasing office). Under Section 125(B) of Procurement Code, therefore, so long as the school district's own rules do not require otherwise, a school district or board may procure legal services having a value not exceeding \$60,000 (excluding applicable gross receipt taxes) without using competitive sealed proposals. *See id.*

The school district at issue promulgated the following professional services procurement rule:

The services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accounts, lawyers, psychologists, planners, researchers and persons of businesses providing similar services having a value of - sixty thousand dollars (\$60,000) or more excluding applicable state and local gross receipts taxes shall be subject to competitive bid/proposal, excluding procurements for emergency (Sec. 13-1-127), sole source (Sec. 13-1-126), under existing contracts (Sec. 13-1-129), and any other procurement exemption (Sec. 13-1-98-13-1-99) per the NM Procurement Code, NMSA 1978.

The . . . Board of Education shall approve all professional service contract(s) having a value of forty thousand dollars (\$40,000) or more when such contract(s) have been authorized by the Board. When such contract(s) have been authorized by the Board, the contract may be signed by the Superintendent or his/her designee.

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<sup>5</sup>Under 1.4.1.52 NMAC, state agencies may procure professional services having a value not to exceed \$60,000 subject to the provisions of 1.4.1.52(B)-(D) NMAC and 2.40.2.1-17 NMAC, which do not require the use of competitive sealed proposals. *See* 1.4.1.52(A) NMAC.

### 3.15.2.1.1. Professional Services Contracts (citation omitted).

Under Section 13-1-125(B), this is the local rule that controls how the school district or board can procure professional services having a value not exceeding \$60,000, exclusive of gross receipts tax. While the State Ethics Commission lacks the authority to enforce this local rule, *see* NMSA 1978, § 10-16G-9(A), this local rule seems to allow the procurement of legal services having a value of less than \$60,000 without the procurement being based on competitive sealed proposals; provided that, if the legal services contract has a value of \$40,000 or more, the school board must have authorized and approved it. *See* 3.15.2.1.1. Professional Services Contracts (citation omitted; local school district identifying information omitted). Under the facts presented in the request, that approval appears to have occurred. But, again, the board's ability to forego a competitive sealed process and authorize professional service contracts of \$40,000 or more is constrained by the \$60,000 limit that the Procurement Code imposes. *See* § 13-1-125(B) & (D).<sup>6</sup>

## CONCLUSION

Under the Procurement Code, a school district can procure legal services from a law firm without using a competitive-sealed-proposal process, so long as the total contract amount does not exceed \$60,000 (excluding applicable state and local gross receipts taxes) and the procurement accords with the professional services procurement rules promulgated by the school district's central purchasing office.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**  
**JEFF BAKER, Commissioner**  
**STUART M. BLUESTONE, Commissioner**

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<sup>6</sup>The Procurement Code allows for both civil and criminal penalties to enforce this limit. *See* NMSA 1978, § 13-1-196 (1984, as amended 2019) ("Any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement in violation of any provision of the Procurement Code."); *see also* NMSA 1978, § 13-1-199 (1984, as amended 2013) (providing for criminal penalties for willful violations of the Procurement Code). The Procurement Code empowers both the appropriate district attorney and the State Ethics Commission "to bring a civil action for the enforcement of any provision of the Procurement Code." *Id.* Criminal penalties, by contrast may be pursued, as appropriate, by the Office of the Attorney General or the relevant district attorney. *See, e.g.,* NMSA 1978, § 8-5-2 (1933, as amended 1975).

**HON. GARREY CARRUTHERS, Commissioner**  
**RONALD SOLIMON, Commissioner**  
**JUDY VILLANUEVA, Commissioner**  
**FRANCES F. WILLIAMS, Commissioner**