



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2021-06**

April 2, 2021<sup>1</sup>

### **QUESTION PRESENTED<sup>2</sup>**

At least thirty days before the state purchasing agent or a central purchasing office awards a sole source procurement contract, NMSA 1978, Section 13-1-126.1(A) (2013, as amended 2019) requires the state purchasing agent or central purchasing office to post notice of its intent to award the contract on their website, identifying the parties to the proposed contract; the nature and quantity of the service, construction, or item of tangible personal property being contracted for; and the contract amount. Similarly, under NMSA 1978, Section 13-1-128 (1984, as amended 2013), before awarding a sole source procurement contract, the state purchasing agent or central purchasing office must provide information about the contract to the Department of Information Technology (“DoIT”) for posting on the sunshine portal. Where the state purchasing agent or central purchasing office has

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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)). ). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On February 12, 2021, the Commission received a request for an informal advisory opinion that detailed the issues 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). The executive director provided an informal advisory opinion in response to the request on February 25, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

allowed a state agency to enter a sole source procurement contract, the state agency has entered a sole source contract, and the state agency and the contractor subsequently seek to amend the terms of the sole source contract, do the notice provisions of sections 13-1-126.1 and 13-1-128 apply to the amended contract? In other words, when a sole source contract is amended, does notice of the amendment need to be posted on the state purchasing agent's or central purchasing office's website and the sunshine portal?

## ANSWER

Yes.

## ANALYSIS

The Procurement Code generally requires government entities to procure goods and services through a competitive, sealed process. *See* NMSA 1978, §§ 13-1-102 (1984, as amended 2007) & 13-1-111 (1984, as amended 2007). The Code allows an exception to this requirement for sole source procurement. § 13-1-102(C). If there is only one vendor capable of supplying needed construction, goods or services, then a government entity need not conduct a competitive, sealed process before contracting with that vendor. *See* NMSA 1978, § 13-1-126(A) (1984, as amended 2013). Because sole source procurement offers an alternative to the competitive sealed process, and because sole source procurement necessarily allows a government entity to select the vendor without using a competitive process, it is subject to the potential for abuse. With respect to some vendors, therefore, sole source procurement is not allowed. *See, e.g.*, NMSA 1978, § 10-16-9(A) (1967, as amended 2007) (prohibiting a sole source procurement contract between a state agency and “a legislator, the legislator’s family or with a business in which the legislator or the legislator’s family has a substantial interest”). Where sole source procurement is allowed, the Procurement Code imposes a system of checks to ensure that sole-source procurement is not abused and satisfies the Code’s purposes “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) (1984). Two of those checks are prominent:

First, the Procurement Code requires the state purchasing agent or a central purchasing office to play an independent role in sole source procurement. After “reviewing available sources and consulting with” the government entity seeking the

sole source procurement, either the state purchasing agent or a central purchasing office must make a written determination that a sole source procurement is necessary. *See* § 13-1-126(A).<sup>3</sup> Specifically, the state purchasing agent or central purchasing office must decide:

- (1) there is only one source for the required service, construction or item of tangible personal property;
- (2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and
- (3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract.

*Id.* When deciding whether or not “there is only one source” for the required service, construction, or good, § 13-1-126(A)(1), the state purchasing agent or central purchasing office may not “narrowly draft[] specifications so that only one predetermined source would satisfy those specifications,” § 13-1-126(E). In other words, the officials charged with independently overseeing procurement may not yield to a government agency’s desire to select a specific vendor, where other vendors could supply the goods or service on terms more favorable to the agency and, by extension, the public. *See id.* Moreover, those officials may take over the contract negotiations with the sole-source vendor to ensure favorable terms. *See* § 13-1-126(C) (“The state purchasing agent or a central purchasing office shall

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<sup>3</sup>For a state agency’s sole source procurement contracts, whether the state purchasing agent or the agency’s own central purchasing office makes this determination likely depends on the scope of the state purchasing authority over procurement under NMSA 1978, Section 13-1-99 (1984, as amended 2007). That provision “exclude[s] from the requirement of procurement through the state purchasing agent but not from the requirements of the Procurement Code” more than a dozen different categories of procurement, including, for example, the procurement of professional services, procurement by the board of regents of state educational institutions, and procurement by all local public bodies. *See* § 13-1-99(A), (G) & (J); *see also generally* NMSA 1978, § 13-1-97(A)–(B) (1984, as amended 2013) (regarding the division of authority between the state purchasing agent and central purchasing offices). So, for example, if a state agency seeks a sole source procurement of professional services, then that agency’s own central purchasing office likely makes the written determination under Section 13-1-126(A) that a sole source procurement is necessary. *See also generally* NMSA 1978, § 13-1-37 (1984, as amended 2013) (defining “central purchasing office” as “that office within a state agency or a local public body responsible for the control of procurement of items of tangible personal property, services or construction”).

conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the state agency or a local public body.”).

Second, before the state purchasing agent or a central purchasing office awards a sole source contract, it must notice the intent to award the sole source contract on their respective websites, providing basic information about the parties to the proposed contract; the nature and quantity of the service, construction or goods contracted for; and the contract amount. § 13-1-126.1(A). It also must provide this information, plus information concerning the contract term and the justification for the sole source contract to DoIT for posting on the sunshine portal, <http://sspn.nm.gov>. Public notice of this contract information enables other vendors to check (and contest) the accuracy of the state purchasing agent’s or central purchasing office’s determination that there is only a single source of the services, construction, or goods sought. *See* § 13-1-126.1(B). Indeed, “[a]ny qualified potential contractor that was not selected for a proposed sole source contract may protest the selection in writing, within fifteen calendar days after the notice of intent to award the contract was posted by the state purchasing agent or central purchasing office . . . .” *Id.*; *see also generally* NMSA 1978, §§ 13-1-172 to 13-1-176 (regarding protests). Upon receiving a timely submitted protest, the state purchasing agent or central purchasing office generally “shall not proceed further with the procurement” until they resolve the protest. § 13-1-173. Protest decisions are subject to judicial review. NMSA 1978, §§ 13-1-175(B) (1984) & 13-1-183 (1984, as amended 1999).

By requiring that sole source contracting be available to public scrutiny and contestation by qualified potential contractors not selected for a sole source contract, the Procurement Code imposes “safeguards for maintaining a procurement system of quality and integrity.” § 13-1-29(C); *see also* §§ 13-1-126.1(A) & 13-1-128. This safeguard is especially important where a state agency’s own central purchasing office makes the written determination that the agency’s desire for a sole source procurement is consistent with law, as for example when a state agency seeks a sole source procurement of professional services. *See* § 13-1-99(A). In that instance, because the state purchasing agent does not independently determine that a sole source procurement is justifiable, public notice and the right of protest are necessary to maintain “a procurement system of quality and integrity.” § 13-1-29(C).

The safeguards of public notice and the right to protest apply not only when a government entity enters a sole source contract but also when it amends a sole source contract. In the former case of a proposed sole source contract, a qualified contractor can protest the section 13-1-126(A) determination made by the state purchasing agent or central purchasing office. *See* § 13-1-126.1(B). In the latter case of an

amended contract, a potential contractor can protest that the state purchasing agent's or central purchasing office's section 13-1-126(A) determination does not apply to the amended contract. *See* NMSA 1978, § 13-1-172 (1984, as amended 1987); *see also* § 13-1-126.1(B). The state purchasing agent or central purchasing office has "the authority to take any action reasonably necessary to resolve a protest of an aggrieved bidder or offeror," including termination of the sole source contract. *See* NMSA 1978, § 13-1-174 (1984, as amended 1987); *see also* 1.4.1.88 NMAC.<sup>4</sup>

The notice (and availability of protest) provisions apply also when a state agency amends a sole source contract for two basic reasons. First, the contract amendment might affect the applicability of the state purchasing agent's or central purchasing office's previously-issued section 13-1-126(A) determination. In view of the amendment, it might no longer be true that "there is only one source," that the service, construction or good is "unique," or that other "similar . . . [services, construction or goods] cannot meet the intended purpose of the contract." § 13-1-126(A)(1)–(3). Accordingly, the Code requires public notice of the amended contract so that the public and the potential contractors can scrutinize whether the state purchasing agent's or central purchasing office's sole source determination for the original contract remains applicable as to the amended contract.<sup>5</sup>

Second, notice for amended contracts prevents unfair gamesmanship in sole source procurement. Because of the notice requirement, state agencies may *not* notice and receive approval for a sole source contract that has a comparatively insignificant compensation term and then, hidden from the scrutiny of the public and competing contractors, amend the contract to considerably increase the scope of work and compensation terms. This type of conduct is contrary to the Procurement Code's purposes "to provide for the fair and equitable treatment of all persons

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<sup>4</sup>The authority of the state purchasing agent or a central purchasing office to resolve protests "shall be exercised in accordance with regulations promulgated by the secretary" of the General Services Department. § 13-1-174. Under regulation, after an award of a sole source procurement, if the state purchasing agent or central purchasing office makes a written determination that an award of a contract is in violation of law, then the contract may be revised or terminated, and, if terminated, "the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus reasonable profit prior to termination." 1.4.1.88 NMAC(B)(1)(b); *accord* NMSA 1978, § 13-1-182.

<sup>5</sup>Moreover, whenever a state agency amends a sole source contract, the state purchasing agent or the appropriate central purchasing office should also review whether its sole source determination for the original contract continues to apply to the amended contract. *See* § 13-1-126.

involved in public procurement . . . and to provide safeguards for maintaining a procurement system of quality and integrity.” § 13-1-29(C). Nor is public notice of an original sole source contract necessarily sufficient to provide notice of an amended contract, particularly where the amended contract contains a considerably larger compensation term. For example, where state agencies propose to enter sole source procurements, notice of a \$70,000 sole source contract reasonably would not generate the same scrutiny and potential protest of the state purchasing agent’s sole source determination as would notice of a \$7,000,000 contract. Accordingly, it is fair neither to the public, nor to the state purchasing agent or central purchasing office, for a state agency to receive approval for and notice a sole source contract at a lower compensation term, only then, having received the sole source determination, to turn around and amend the contract to increase the scope and compensation terms considerably. Because the Procurement Code’s purposes are inconsistent with that kind of gamesmanship, the notice provisions of sections 13-1-126.1 and 13-1-128 apply not only to proposed sole source contracts but also to amendments to sole source contracts.

The application of sections 13-1-126.1 and 13-1-128 to sole source contract amendments is supported not only by the Procurement Code’s purposes but also by its text. Section 13-1-126.1(A) requires notice of a sole source “contract.” The Procurement Code defines a “contract” as “any agreement for the procurement of items of tangible personal property, services or construction.” NMSA 1978, § 13-1-41 (1984). That definition of “contract” also encompasses amended contracts, which are also “agreement[s] for the procurement of items of tangible personal property, services or construction.” § 13-1-41.<sup>6</sup>

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<sup>6</sup>The Procurement Code also defines “contract modification” as “any written alteration in the provisions of a contract accomplished by mutual action of the parties to the contract.” NMSA 1978, § 13-1-42 (1984). Section 13-1-126.1(A)’s lack of any reference to “contract modification” does not, however, entail that agencies may omit notice of sole source contract amendments. The Procurement Code uses the term “contract modification” only when referring to cost or pricing data. *See* NMSA 1978, §§ 141–143, 160 (1984). And cost or pricing data is not required for contracts based on competitive sealed bid or for professional services contracts. *See* NMSA 1978, § 139 (1984, as amended 1993). Accordingly, it is doubtful that the Procurement Code would make reference to “contract modification” whenever the Code’s provisions encompass both original and amended contracts. Section 13-1-126.1(A)’s omission of any reference to “contract modification” therefore likely does not support an inference that section 13-1-126.1(A)’s notice provisions reach sole source contracts but not sole source contract amendments.

## **CONCLUSION**

For the foregoing reasons, the notice provisions of sections 13-1-126.1 and 13-1-128 apply to amendments to sole source contracts.

**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**