

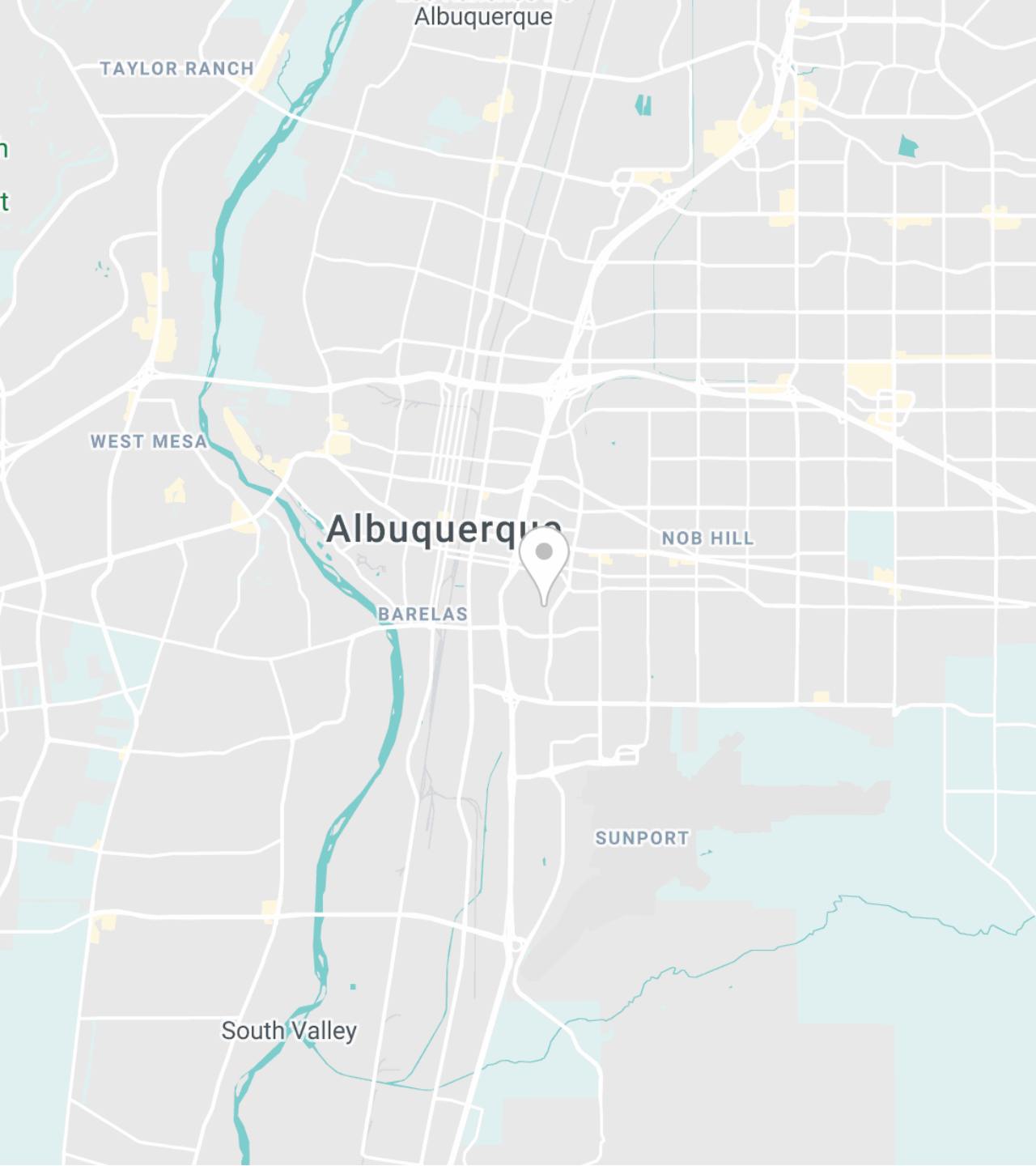
ETHICS LAW & COUNTY GOVERNMENT

New Mexico Counties | 2022 Legislative Conference – County Attorneys
January 19, 2022 (4:00pm) | Santa Fe, SFCCC – Tesuque Boardroom

Jeremy Farris, Executive Director
Walker Boyd, General Counsel



STATE ETHICS COMMISSION



STATE ETHICS COMMISSION

7 COMMISSIONERS

- Hon. William Lang (ABQ)
- Hon. Garrey Carruthers (LC)
- Jeffrey Baker (ABQ)
- Hon. Celia Foy Castillo (SF)
- Stuart Bluestone (SF)
- Dr. Judy Villanueva (Carlsbad)
- Ronald Solimon (ABQ)

POWERS AND RESPONSIBILITIES SPECIFIC TO LOCAL GOVERNMENT:

- PROVIDE TRAINING ON ETHICS LAWS
- PROVIDE ADVICE TO LOCAL OFFICIALS/EMPLOYEES
- ENFORCE APPLICABLE ETHICS LAWS

COMMISSION POWERS & DUTIES (1/2)

Quasi-Judicial Functions:

Adjudicate administrative complaints and issue advisory opinions

Adjudicate administrative complaints alleging violations of the laws under the SEC's jurisdiction. *Complainant v. Respondent* (State Ethics Comm'n)

Issue formal and informal (letter) advisory opinions on laws that Commission oversees.

Executive Functions: Civil enforcement actions, recommendations to Legislature and Governor, and trainings

Investigate alleged violations and initiate civil litigation in state courts to enforce selected provisions of ethics statutes. *State Ethics Comm'n v. Defendant* (2nd Jud. Dist. Ct.)

Provide recommendations on amendments to New Mexico's ethics laws.

Offer ethics trainings and guides, and "other duties as assigned" (e.g., redistricting committee appointments)

Legislative Functions: Delegated rulemaking powers (NMAC)

Promulgate rules of procedure for administrative adjudication. (1.8.3 NMAC)

Promulgate proposed code of ethics (1.8.4 NMAC)

COMMISSION POWERS & DUTIES (2/2)

Personal Jurisdiction (as an adjudicatory body)

- All Executive Officials and Legislators
- All Executive and Legislative Employees
(~17,000 in filled positions)
- Lobbyists and lobbyists' employers
(725)
- Candidates and entities subject to Campaign Reporting Act
(700)
- State government contractors and seekers of state government contracts
(~40,000 active outside suppliers)

Subject-Matter Jurisdiction and Civil Enforcement Authority

- Campaign Reporting Act*
- Financial Disclosure Act
- Gift Act
- Lobbyist Regulation Act†
- Voter Action Act
- Governmental Conduct Act*
- Procurement Code*
- State Ethics Commission Act
- Article 9, Section 14 of the Constitution (Anti-Donation Clause)*
- Revised Uniform Law on Notarial Acts (2022)



STATE ETHICS COMMISSION'S
OCTOBER 1, 2021 REPORT ON
JURISDICTION:

Review and Recommendations

To: New Mexico Legislature
&
Gov. Michelle Lujan Grisham

STATE of NEW MEXICO

Commission's Recommendations on its Quasi-judicial Functions: October 1, 2021

- Recommend *no* changes that would include officials and employees of local governments into the personal jurisdiction of the Commission as an adjudicatory body
- Recommend including state-agency entities (and not only their officials and employees) within the Commission's personal jurisdiction
- Recommend expanding subject-matter jurisdiction to include other ethical provisions of the New Mexico Constitution—e.g., the legislative interests in contracts clause, extra compensation clause, emoluments clause.
- Recommend allowing local officials and employees to request Commission advisory opinions

*Special thanks to NM Counties for helping to coordinate the Commission's survey of county views on these questions.

ADVISORY OPINIONS

- [Advisory opinions](#). § 10-16G-8. May only be requested by person subject to the Commission's personal jurisdiction.
- [Advisory letters](#). 1.8.1.9(B) NMAC. May be requested by county officials and employees, because subject to GCA.

Must be requested in writing:
ethics.commission@state.nm.us

Requests for advisory opinions are confidential by law.

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TWO ORGANIZING IDEAS

1 Government belongs to the public

The property, powers, and prerogatives of government office *belong to and are for* the benefit of the public only, not the officials. See NMSA 1978, § 10-16-3(A).

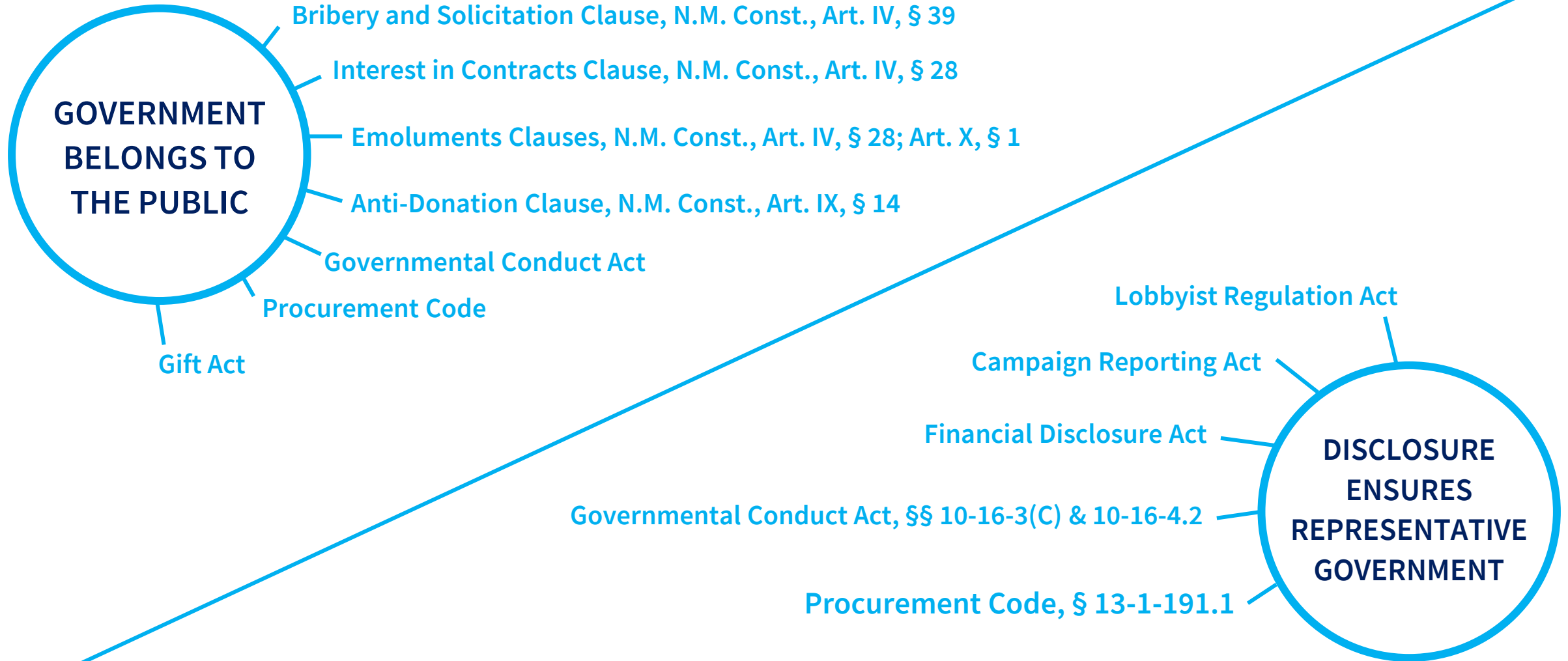
Nota bene: State v. Gutierrez, et al., No. S-1-SC-38367, consolidated with No. S-1-SC-38368 (Oral arguments: Jan. 14, 2022) (considering constitutionality of criminal charges for violations of subsections 10-16-3(A)-(C)); *see also* § 10-16-3(A) (“The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.”).

TWO ORGANIZING IDEAS

2 Disclosure ensures representative government

- (a) Disclosure of who and what might influence an elected official allows constituents to check that the uses of government office are for the benefit of the public and not the official.
- (b) Disclosure helps to justify commonplace departures from the ideal theory of representation that representatives reflect the voices of the constituent members of their districts.

THESE TWO IDEAS ORGANIZE NM'S ETHICS LAWS



LOBBYIST REGULATION ACT

§ 2-11-6: filing requirements: expenditure reports or statements of no activity, to be filed either by the lobbyist or lobbyist employer (so, make sure your lobbyist is filing appropriate disclosures with the SOS).

§ 2-11-8: prohibition on contingent fees: lobbyist employers cannot condition a lobbyist's compensation on the outcome of lobbying activities before legislative branch or with respect to a gubernatorial veto

City of Farmington

Compliant

Type Lobbyist Employer	Address 800 Municipal Dr. Farmington, NM, 87401 USA	Phone (505) 599-1100	Email rmayes@fmtn.org	Registration Year 2021
Status Active	Address While Lobbying	Phone	Email	Authorizing Officer Mr. Robert Mayes Business Interest Governmental Affairs

SUMMARY **LOBBYISTS** FILINGS FINES DOCUMENTS

2021 ▼

Lobbyist	Address	Email	Phone Number	Compensated	Source of Funds	Lobbying Efforts	Date Employed	Date Terminated
Scanland, Scott	P.O. Box 32616, Santa Fe, NM 87594	lobbyist@swcp.com	(505) 280-2122	Yes	General Fund	All matters of governmental affairs	01/01/2021	

GOVERNMENTAL CONDUCT RULES

**Selected provisions of the Governmental Conduct Act relevant to
county government**

Prohibited Political Activities

Coercing others to make contributions (§ 10-16-3.1(A) & (B)):

County official or employee cannot

- (a) coerce another public officer or employee to make a contribution to a candidate, committee, or other person for a political purpose;
- (b) threaten to deny a pay increase to employee depending on how they vote;
- (c) require an employee to contribute percentage of their pay to a political fund; or
- (d) influence a subordinate employee to purchase a ticket to a political fundraising dinner.

Using county property for political purpose (§ 10-16-3.1(C)):

County official or employee cannot use county property, or allow its use, “for other than authorized purposes” – i.e., as an in-kind contribution to a candidate or political campaign.

*This provision also prohibits more mundane unauthorized uses of county property for a personal benefit. (e.g., using a county truck for a personal vacation)

Note: These provisions prevent public officials from using the public powers and resources at their disposal to finance their own campaigns or to support their political party. The statutory provisions also protect core First Amendment rights of public employees with respect to their decisions about voting and political contributions. As such, these laws keep separate the government, as an entity, and the political parties that vie for leadership positions in government.

Prohibited Sales

Sales to employees (§ 10-16-13.2(A)):

County official or employee cannot sell goods, services, or construction to an employee, unless the employee initiates the sale.

Sales to persons under regulatory authority (§ 10-16-13.2(B)-(C)):

County official or employee cannot sell goods, services, or construction to a person over whom they have regulatory authority.

Governmental Conduct Act & Procurement

Contracts involving public officials or employees (§ 10-16-7(B)):

No contract between county and a public officer or employee, their family, or a business in which they have > 20% ownership interest, unless:

- (a) The public officer or employee disclosed their interest; and
- (b) The contract is awarded pursuant to a competitive process (RFP or ITB)

*Does not apply to employment contracts with county

Prohibited bidding (§ 10-16-13):

County cannot accept a bid or proposal from a person who participated in the preparation of the specifications, qualifications or evaluation criteria on which the bid or proposal was based.

Note: These rules, and rules about contemporaneous outside employment, severely constrain the ability of a county official or employee to be on both sides of a transaction involving county funds.

Revolving Door

Permanent ban on representation (§ 10-16-8(B))

A former official or employee cannot represent a person with the person's dealings with "the government" on a matter in which the former official or employee "participated personally and substantially" while a public official or employee

Ban on revolving door contracts (§ 10-16-8(C))

County cannot enter contract with a business who is represented by a person who, within the preceding year, was a county official or employee if:

- (a) The contract is for more than \$1000; and
- (b) The contract is a "direct result of an official act" of the former county official or employee

Cooling-off period (§ 10-16-8(D))

For a period of one year after leaving government service or employment, a former public official or employee shall not represent "for pay" a person before the local government agency at which the former public official or employee worked

Nota bene: State Ethics Commission v. Vargas & Double Eagle Real Estate LLC, D-202-CV-2021-06201 (2d Jud. Dist. Ct. Oct. 27, 2021) (civil action to enforce GCA revolving door provisions in subsections 10-16-8(B) and (D), pursuing civil fines, corporate vicarious liability and disgorgement).

Contemporaneous Outside Employment

Disclosure of outside employment (§ 10-16-4.2):

County officer or employee can accept outside employment that does not relate to the performance of their official duties, but they must “disclose in writing” the outside employment to their respective county office.

Honoraria prohibited (§ 10-16-4.1):

County officer or employee cannot request or receive an honorarium for a speech or a service rendered that relates to the performance of their public duties. An honorarium is cash or any thing of value greater than \$100, but excludes reimbursement for personal costs incurred in making the speech or rendering the service.

Prohibited employment with contracting businesses (§ 10-16-4.3):

County officer or employee who is participating in county contracting process with a business cannot, while a county employee, accept outside employment with the business contracting with the county.

See also Procurement Code, § 13-1-193.

Prohibited employment with regulated businesses (§ 10-16-13.2(D)):

County officer or employee cannot, while a county officer or employee, accept an offer of employment or independent contract from a business over whom the county officer or employee has regulatory authority.

Also about prohibited employment: the old nepotism statute, § 10-1-10 (1925), prevents a county official or employee from employing a deputy, clerk or assistant who is a relative within the third degree (i.e., first cousins or closer), unless first approved by a higher officer, board, or council.

General Duties under the GCA

Prohibited use of public powers (§ 10-16-3(A)):

County officer or employee “shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests”

**State v. Gutierrez, 2020-NMCA-045 (holding that this provision survived constitutional challenge)*

Disqualification for conflicts of interest (§ 10-16-4(B)):

County official or employee is disqualified and must recuse from taking any official act directly benefiting their financial interest, where the benefit to their financial interest is proportionately greater than the benefit to the general public.

No official acts to enhance financial interest (§ 10-16-4(A)):

County officer or employee shall not take an official act for the primary purpose of directly enhancing their financial interest or financial position

**The knowing and willful violation of this section is a fourth-degree felony.*

Note: the Governmental Conduct Act advances the main principle that the powers, prerogatives, and property of public office be exercised only for the public benefit by imposing duties both (1) at a high specificity (like prohibiting certain sales) and (2) at a high level of generality (like prohibiting any official act taken to promote one’s own financial interest).

PROCUREMENT

Quick overview of Procurement Code
and selected ethics provisions

THE PROCUREMENT CODE IN ONE SLIDE

(1) *The main rule:* All procurement is achieved through competitive sealed bids or proposals. (§ 13-1-102). **(2) But there are *many exemptions and exceptions.***

Purchases of tangible items from other government agencies (state and local)

Procurements under existing contracts (e.g., GSA or statewide price agreements)

Travel, meals and lodging

Public school transportation services

Prepayment for conferences, magazine subscriptions, etc.

Jail and hospital operation contracts

Advertising

Purchases of services provided by disabled workers (State Use Act)

Small purchases (\$60,000 for professional services; \$20,000 for other services and goods)

The Procurement Code as a governmental ethics statute

And §§ 13-1-190 to -195 are the core, traditional ethics provisions of the Code

§ 13-1-190(A)

A government employee cannot participate directly or indirectly in a procurement when the employee knows that they or their immediate family member has a financial interest in the business seeking to obtain a contract.

(Subject to a waiver under § 194)

§ 13-1-195

A current or former government employee cannot knowingly use confidential information for the actual or anticipated personal gain for any other person.

§ 13-1-193

A government employee who is participating directly or indirectly in the procurement process cannot become or be, while a government employee, also the employee of any person or business contracting with that same government agency. (Subject to a waiver under § 194)

See also §§ 10-16-6, -7, -13

Remember that certain sections of New Mexico's Governmental Conduct Act also apply to procurement by state and local government (e.g., regarding use of confidential information, self-dealing, prohibited bidding).

Nota bene: If you encounter a suggestion that a county official or employee is on both sides of a procurement, go reread sections 190 through 195 of the Code.

State Ethics Commission Advisory Opinions on the Code (1/2)

Bidding

- 2020-05 (collusive bidding) (concluding that two identical twenty-item bids for two of three available state contracts, which were submitted by two companies that, while separately registered as suppliers to the state, share the same office address, and have consolidated back-office operations, are not “competitive” bids under § 13-1-102) *A procurement cannot be grounded on a noncompetitive bid.

Award

- 2020-04 (confidentiality) (concluding that § 13-1-116 prohibits a person involved in a procurement award decision from discussing the contents of a proposal submitting in response to an RFP before the award of a contract) *Interprets “during the negotiation process” to run from the submission of proposals through the award of a contract.
- 2020-04 (application of preferences) (procuring entity cannot award a contract to a lower-ranked vendor, after the application of all statutory preferences simply because the procuring entity prefers a local vendor, following *Planning and Design Solutions v. City of Santa Fe*, 1994-NMSC-112). *Awards cannot be based on an undisclosed local vendor preference: the RFPs must contain all the relevant factors to be used in evaluating preferences, and the Code expressly speaks to the allocation of a resident business preference.

State Ethics Commission Advisory Opinions on the Code (2/2)

Relating to the exceptions to competitive procurement

- 2020-08 (small purchase) (concluding that a school district may procure professional 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 GRT, and the procurement is consistent with the professional-service-procurement rules promulgated by the school district's central purchasing office)
- 2021-06 (notice of amendments to sole source contracts) (concluding that where the state purchasing agent or central purchasing officer has allowed a state agency to enter a sole source procurement contract and the state agency and contractor subsequently seek to amend that contract, the notice provisions of §§ 13-1-126.1 and 13-1-128 apply to require notice of the amended contract on the state purchasing agent's website or the central purchasing office's website and the sunshine portal)

State Use Act

- 2020-07 (self-dealing) (concluding that neither the Code nor the GCA prohibits non-state-employee members of the Council for Purchasing from Persons with Disabilities from participating in the Council's vote to award State Use Act contracts to themselves or companies that they own, but that the Council can and should take its own actions to ensure its members do not engage in such acts of self-dealing)

QUESTIONS AND COMMENTS

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WITH
THE SEC**

- www.sec.state.nm.us
- ethics.commission@state.nm.us



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