



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-01

February 5, 2021¹

FACTS AND QUESTIONS PRESENTED²

A newly-elected legislator owns a construction company. Before the legislator was elected to office, the state purchasing agent awarded two statewide price agreements to the construction company. The statewide price agreements with the construction company will expire within the year after the legislator assumes legislative office.

1. May state agencies purchase goods and services from the construction company under the current statewide price agreement?
2. May the state purchasing agent enter another statewide price agreement with the construction company while the legislator holds legislative office?

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 December 14, 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).

ANSWERS

1. Yes, but only if the legislator first discloses to the procuring state agency the legislator's ownership interest in the construction company.
2. Yes, but only if the legislator first discloses to the state purchasing agent the legislator's ownership interest in the construction company.

ANALYSIS

Price agreements are a well-established procurement vehicle. The state purchasing agent may enter a price agreement with a contractor, providing that the contractor will furnish items of tangible personal property, services or construction to a state agency at an established price. *See* NMSA 1978, §§ 13-1-71 (1984); NMSA 1978, § 13-1-95(E) (1984, as amended 2015); *see also generally* General Services Department, Statewide Price Agreements, <https://tinyurl.com/ybvpo5m2> (last accessed December 17, 2020) (providing a searchable database of all statewide price agreements in New Mexico). Price agreements are entered into based on competitive bids or proposals. *See* NMSA 1978, § 13-1-102 (1984, as amended 2007). Once the state purchasing agent has entered a price agreement with a contractor, then any state agency may, under the terms of the price agreement, procure services, construction, or items of tangible personal property from the contractor without the use of competitive sealed bids or competitive sealed proposals. *See* NMSA 1978, § 13-1-129 (1984, as amended 1991); NMSA 1978, § 13-1-102(E) (1984, as amended 2007). By contracting at scale, the state purchasing agent secures a better price than would ordinarily be available to state agencies contracting independently and for lesser quantities. Price agreements, therefore, promote the Procurement Code's purpose "to maximize the purchasing value of public funds . . ." NMSA 1978, § 13-1-29 (1984).

Both price agreements and state agency procurements relying on price agreements are contracts. Thus, if a legislator, a legislator's family member, or a legislator's business seeks to enter either a price agreement with the state purchasing agent or a contract with a state agency relying on a price agreement's terms, then the Governmental Conduct Act applies. In pertinent part, subsection 10-16-9(A) of that Act provides:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

NMSA 1978, § 10-16-9(A) (1969, as amended 2007).

Under subsection 10-16-9(A), if a state agency seeks to contract with the legislator's construction company under the terms of an existing price agreement, then the legislator must disclose their ownership interest in the construction company to the state agency. Ordinarily, the legislator should make this disclosure before the contract is executed. If, however, a state agency enters a purchase order to the construction company based on the price agreement before the legislator has disclosed the ownership interest, the legislator should make the disclosure to the procuring agency as soon as possible after the purchase order is executed.

Also, if the legislator's construction company seeks to enter a subsequent price agreement with the state purchasing agent, the legislator must also disclose their ownership interest to the state purchasing agent before the price agreement is executed. The disclosure should be part of the bid or proposal made in response to an invitation for bids or request for proposals. *See* 1.4.1.16(D) NMAC (referring to "all other necessary submissions" that accompany a bid form submitted in response to an invitation for bids).

When disclosing the interest, the legislator should simply state that the legislator has an ownership interest in the business that exceeds twenty percent and that the legislator is a member of the New Mexico Legislature. *See* NMSA 1978, § 10-16-2(L) (1967, as amended 2011); § 10-16-9(A). Beyond this straightforward disclosure, the legislator should not take any additional action in terms of representing or assisting the construction company before the state agency. *See* NMSA 1978, § 10-16-9(B) (1967, as amended 2007). Furthermore, the required disclosure should not be made on legislative stationary. *See id.* Nor should the

legislator refer to their legislative capacity or make any implication relating to legislative action. *See id.*; cf. NMSA 1978, § 10-16-3(A) (1993, as amended 2011) (“The legislator . . . 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.”).

Last, under subsection 10-16-9(A) of the Governmental Conduct Act, a state agency cannot enter a sole source or small purchase contract with the legislator’s construction company. § 10-16-9(A). These prohibitions are of limited relevance to the facts presented in this advisory opinion. Where a state agency relies on a statewide price agreement to procure tangible personal property, services or construction from the legislator’s construction company, the state agency would have no need to resort to a sole source or small purchase contract. The price agreement is the procurement vehicle and, moreover, is subject to a competitive procurement. Accordingly, where the state purchasing agent has entered a price agreement with a vendor, a state agency has no need to bypass a competitive procurement by using a sole source or small purchases contract.

CONCLUSION

State agencies may procure tangible personal property, services or construction, based on the terms of a price agreement, from the legislator’s construction company, so long as the legislator discloses their ownership interest in the construction company to the procuring state agency. The state purchasing agent may also award a subsequent price agreement to the legislator’s construction company, provided that the legislator discloses their ownership interest in the construction company to the state purchasing agent when the company submits its bid or proposal.

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