



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2022-01**

February 4, 2022<sup>1</sup>

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

A Member of the House of Representatives is contracted to do project work through his local Soil and Water Conservation District. The project is funded with federal funds and is located on federal land. As a Member of the House of Representatives, he has no voice in determining project funding or other project details. Yet, the Member would like to be certain that no conflict of interest exists in regards to his position as a member of the House of Representatives. Please provide your opinion on this matter.

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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 November 17, 2021, the Commission received a request for an advisory letter 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 advisory letter in response to the request on November 18, 2021. Commissioner Bluestone subsequently requested that the advisory letter be converted into an advisory opinion. *See* 1.8.1.9(B)(3) NMAC. The Commission now issues the guidance as an advisory opinion. *See id.*

## ANSWER

Subsection 10-16-9(A) of the Governmental Conduct Act applies to the award of any contract between a Soil and Water Conservation District (“SWCD”) and a Member of the House of Representatives. Under that statute, to receive the contract, (i) the Member must disclose his interest in the contract to the SWCD; and (ii) the SWCD must award the contract following the Procurement Code, without resorting to the Procurement Code provisions allowing for the award of sole-source or small-purchase contracts. If the Member happens to also be a supervisor on the SWCD, then he must also recuse from any decision the supervisors take on the award of the contract.

## ANALYSIS

### 1. Section 10-16-9(A) of the Governmental Conduct Act

A legislator has inquired whether his membership in the House of Representatives creates a disabling conflict that would prevent him from entering a contract with a SWCD. SWCDs are independent subdivisions of the State authorized by the Soil and Water Conservation District Act, NMSA 1978, §§ 73-20-25 through 73-20-48 (1965, as amended 2009), and as such are “state agencies” under the Governmental Conduct Act. *See* NMSA 1978, § 10-16-2(K) (1967, as amended 2001) (defining state agency as “any branch, agency, instrumentality or institution of the state”). Accordingly, the Member’s inquiry is governed by the provisions of Subsection 10-16-9(A) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019). This subsection governs contracts between legislators and state agencies. It 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.

§ 10-16-9(A) (2007).

Subsection 10-16-9(A) imposes two requirements on the contract described in the Member's request. First, for a SWCD to contract with the Member for services, goods or construction, the Member must disclose to the SWCD that he has a substantial interest in the contract. Based on the request's description of the contract between the SWCD and the Member personally, it appears that the SWCD is aware of the Member's interest in the contract. If, however, the contract is between the SWCD and a business in which Member (or his immediate family) has a substantial interest, then the Member should disclose his substantial interest in the business to the SWCD before the execution of the contract.

Second, under subsection 10-16-9(A), the SWCD must award the contract "in accordance with the provisions of the Procurement Code." Furthermore, to award a contract to the Member (or a business in which the Member is substantially interested) the SWCD may not rely on the provisions of the Procurement Code authorizing sole source contracts, NMSA 1978, § 13-1-126 (1984, as amended 2013), or small purchase contracts, NMSA 1978, § 13-1-125 (1984, as amended 2019).

The request does not provide information as to the nature of the contract; consequently, we do not opine whether the contract is exempted from the provisions of the Procurement Code under Subsections 13-1-98(A)-(HH) (1984, as amended 2019). The request notes, however, that "the project is funded with federal funds . . . ." Accordingly, we observe that the Procurement Code applies to a state agency's expenditure of all funds, including funds the state agency received from the federal government.

The Code applies "*to every expenditure* by state agencies" including expenditures by state agencies of federal grant funds. *See* NMSA 1978, § 13-1-30(A) (1984, as amended 2005) (emphasis added). And the Code expressly speaks to when a state agency expends federal funds. *See* NMSA 1978, § 13-1-30(B) (1984, as amended 2005). In that event, the state agency must abide by both the provisions of the Procurement Code and any "mandatory applicable federal law and regulations." *See id.* If there is an inconsistency between the Procurement Code and an applicable federal procurement rule, then "compliance with federal law or regulations shall be compliance with the Procurement Code." *Id.*

Similarly, the constraints that Subsection 10-16-9(A) impose on a state agency's award of a contract to a legislator apply, even where the contract is funded by federal dollars, unless applicable federal law expressly allows the state agency to award sole source contracts or small-purchase contracts to a sitting state legislator. *See, e.g., Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 30, 68 P.3d 909 (“Federal law may preempt state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2, by ‘express provision, by implication, or by a conflict between federal and state law.’”). While the request did not cite the federal grant agreement or the federal statute or regulation authorizing the funds at issue, we doubt the existence of such language. If there is language that would suggest federal preemption of Subsection 10-16-9(A), then this opinion is subject to revision.

Based on the foregoing analysis, the SWCD may award a contract, funded by federal dollars, to the Member; however, unless applicable federal law says otherwise, the SWCD: (i) must award the contract pursuant to the requirements of the Procurement Code; and (ii) in awarding the contract, the SWCD cannot rely on those provisions of the Procurement Code allowing for noncompetitive sole-source or small-purchase contracts.

## **2. Sections 10-16-3 and 10-16-4 of the Governmental Conduct Act**

The request also refers to the Member's “local Soil and Water Conservation District.” If the Member happens to be a supervisor for this SWCD and if the supervisors, as the SWCD's governing body, have the final authority to award the contract, then sections 10-16-3 and 10-16-4 of the Governmental Conduct would impose additional requirements on the Member.

Subsection 10-16-3(A) requires that legislators, public officers and public employees “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.” NMSA 1978, § 10-16-3(A) (2011). Relatedly, subsection 10-16-4(A) prohibits a public officer or employee from taking “an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position.” NMSA 1978, § 10-16-4(A) (2011). Further, Section 10-16-3(C) provides that “[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct.” NMSA 1978, § 10-16-3(C) (2011).

In view of these provisions, if the Member is a supervisor on the SWCD, then, as a supervisor, he should (i) recuse from any action the supervisors take in the award of a contract to himself or any business in which he is substantially interested; and (ii) disclose that interest to the other supervisors before any action on the award of the contract. *See* NMSA 1978, §§ 10-16-4(B) (1967, as amended 2011); 10-16-3(A), (B) (1967, as amended 2011); *see also generally* NMSA 1978, §§ 73-20-37(A) (1965, as amended 2018) (providing that the governing body of a SWCD is comprised of five supervisors). These requirements apply in addition to the procurement-related requirements that Section 10-16-9(A) imposes on the SWCD's award of a contract to a Member of the House of Representatives.

### **CONCLUSION**

Under Subsection 10-16-9(A) of the Governmental Conduct Act, to receive a contract that a SWCD awards, (i) the Member must disclose his interest in the contract to the SWCD; and (ii) the SWCD must award the contract following the Procurement Code, without resorting to the Procurement Code provisions allowing for the award of sole-source or small-purchase contracts. Subsection 10-16-9(A)'s requirements apply even where the SWCD's contract is funded with federal dollars. If the Member happens to also be a supervisor on the SWCD, then he must recuse from any decision the supervisors take on the award of the contract.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**  
**JEFFREY L. BAKER, Commissioner**  
**STUART M. BLUESTONE, Commissioner**  
**HON. GARREY CARRUTHERS, Commissioner**  
**HON. CELIA FOY CASTILLO, Commissioner**  
**RONALD SOLIMON, Commissioner**  
**JUDY VILLANUEVA, Commissioner**