



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2022-03

April 1, 2022¹

QUESTIONS PRESENTED²

1. A Member of the House of Representatives has a son who is a fencing and welding contractor. Can the son legally bid on state projects like right-of-way fences for the Department of Transportation or other state projects?
2. The son of the spouse of the Member is a building contractor who holds a GB-98 license and a degree in engineering. Can the son bid on state funded jobs that are offered by schools, cities, villages, state agencies, *et al.*?

¹ 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).

² 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 January 31, 2022, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. 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); 1.8.1.9(B)(1) NMAC. The executive director provided an advisory letter in response to the request on February 1, 2022. 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.*

ANSWERS AND ANALYSIS

1. **Yes.** So long as the conditions of Section 10-16-9(A) are satisfied, the Member's son can bid on invitations to bid issued by state agencies for goods, services, and construction.

This question mainly calls for application of NMSA 1978, Section 10-16-9(A) (2007), the provision of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), governing contracts between state agencies and legislators' family members. Section 10-16-9(A) 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) (emphasis added). The Governmental Conduct Act defines "family" to mean "an individual's spouse, parents, children or siblings, by consanguinity or affinity." NMSA 1978, § 10-16-2(E) (2011). The Act also defines "substantial interest" to mean "an ownership interest that is greater than twenty percent." § 10-16-2(L).

Under these provisions, a state agency (including the Department of Transportation) can enter into a contract (for right-of-way fencing) with either the Member's son or a fencing-and-welding business in which the son has a substantial interest, so long as: (1) the Member has disclosed any substantial interest that the Member might have in the son's business; (2) the state agency awards the contract in accordance with the provisions of the Procurement Code; and (3) the state agency does not award the contract to the Member's son or the son's business as

either a sole source or a small purchase contract. If those conditions are met, the Member's son can bid on (and be awarded) a state agency contract.³

2. **Yes.** So long as the conditions of Section 10-16-9(A) are satisfied, the son of the Member's spouse can bid on invitations to bid issued by state agencies for goods, services, and construction. The above analysis that applies to the Member's son applies equally to the son of the Member's spouse.

The above analysis that applies to the Member's son (the fencing and welding contractor) applies equally to the son of the Member's spouse (the GB-98 licensed commercial building contractor). Section 10-16-9(A) governs contracts between state agencies and legislators' family members, and the Governmental Conduct Act defines "family" to mean "an individual's spouse, parents, *children* or siblings, *by consanguinity or affinity.*" § 10-16-2(E) (emphasis added); *see also Affinity, Black's Law Dictionary* (11th ed.) ("The relation that one spouse has to the blood relatives of the other spouse; relationship by marriage.").

The request also asks whether the son may seek state funded jobs that are offered by schools, cities, and villages. Section 10-16-9(A) does not constrain the ability of the son of the Member's spouse to bid on projects issued by political subdivisions, such as counties, school districts, or other local governments. Section 10-16-9(A) imposes constraints on contracts between a legislator's family and state agencies, and the Governmental Conduct Act distinguishes between state agencies and local government agencies. *Compare* NMSA 1978, § 10-16-2(K) (2011) (defining "state agency" as "any branch, agency, instrumentality or institution of the state"), *with* NMSA 1978, § 10-16-2(G) (2011) (defining "local government agency" as "a political subdivision of the state or an agency of a political subdivision of the state"). While other general procurement rules still apply, *see, e.g.,* note 2, *supra*, the Member's seat in the House of Representatives does not constrain the Member's spouse's son (or his company) from seeking contracts with political subdivisions.

³ To be sure, other statutory provisions apply to bids on state-agency contracts. For example, under NMSA 1978, Section 10-16-13 (2011), "[n]o state agency or local government agency shall accept a bid or purpose from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based." § 10-16-13. The facts presented in the request, however, do not suggest that Section 10-16-13—or other provisions that apply to conflicts of interest in procurement, *e.g.,* NMSA 1978, §§ 13-1-190 through -195 (1984, as amended 2009)—are relevant to this guidance.

CONCLUSION

The Member's son and son-in-law (and their businesses) may bid on state agency construction projects so long as: (i) the Member has disclosed any substantial interest that the Member might have in the business of the son or son-in-law; (ii) the state agency awards the contract in accordance with the provisions of the Procurement Code; and (iii) if the state agency awards the contract to the Member's son or son-in-law (or their businesses), the state agency does not award the contract as either a sole source or small purchase 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

JUDY VILLANUEVA, Commissioner