STATE ETHICS COMMISSION

# ADVISORY OPINION NO. 2023-07

November 3, 2023[1]

## QUESTION PRESENTED[2]

"Several public bodies, including state agencies and state institutions, have adopted the practice of merely issuing a contract for legal services without compliance with the provisions of the Procurement Code when the legal firm is to be paid through contingency fees only in the event there is recovery of funds by the public body for the issue giving rise to the contract. The philosophy appears to be that since no money is being paid out by the public body and since there is no compensation unless the attorney succeeds in recovering funds for the public body for which the attorney is paid on a continency basis only, that the Procurement Code does not apply.

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[1] This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C) (2019).

[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[.]" 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 Adv. Op. No. 2020-01, at 1-2 (Feb. 7, 2020), *available at* https://nmonesource.com/nmos/secap/en/item/18163/index.do (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 October 5, 2023, the Commission received a request for an advisory opinion that detailed the issues as presented herein.

Does the Procurement Code apply to [the procurement of contracts for] legal services provided to a public body when the attorney is not guaranteed any payment and is paid exclusively through contingency fees?"

## ANSWER

Yes.

## ANALYSIS

We are asked to opine on whether the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2023), applies to a state agency's or local public body's procurement of contingent-fee contracts for legal services. The request indicates that "state agencies and state institutions" have entered into contingent-fee contracts with law firms.[3] Whether the agencies and political subdivisions of the State of New Mexico have either constitutional or statutory authority to enter into contingent-fee agreements for legal services is a question that the State Ethics Commission cannot opine on.[4] We observe, however, that the highest courts of other jurisdictions, when interpreting their respective state

[3] *See, e.g.*, Daniel Fisher, *New Mexico pays its opioid lawyers $150 million, almost triple national rate*, LEGAL NEWSLINE (June 19, 2023), https://legalnewsline.com/stories/644287456-new-mexico-pays-its-opioid-lawyers-150-million-almost-triple-national-rate (noting that from the State's $453 million settlement with Walgreens, the Office of the Attorney General paid a "$148 million contingency fee charged by law firms Baron & Budd, Robles Rael Anaya and Levin Papantino" and that "[f]ees in the New Mexico [case] represent a far higher percentage than lawyers typically earn in settlements over $100 million").

[4] *See* NMSA 1978, § 10-16G-8(A) (2019) (providing that "[t]he commission may issue advisory opinions on matters related to ethics"); NMSA 1978, § 10-16G-9(A)(1)–(10) (2021) (enumerating the laws for which the Commission has subject matter jurisdiction). We note in passing that state agencies and local public bodies may not enter into contingent-fee agreements with law firms for *lobbying* services. *See* NMSA 1978, § 2-11-8 (1977) ("No person shall accept employment as a lobbyist and no lobbyist's employer shall employ a lobbyist for compensation contingent in whole or in part upon the outcome of the lobbying activities before the legislative branch of state government or the approval or veto of any legislation by the governor."). Under the Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to -10 (1993, as amended through 2023), "lobbying" does not include a lawyer's advocacy to influence a decision of a court. *See* NMSA 1978, § 2-11-2(D), (G) (1994).

constitutions, have issued conflicting opinions regarding whether a state agency can enter into a contingent-fee contract for legal representation.[5] Aware of these opinions, for the purposes of this advisory opinion we assume *arguendo* that at least some New Mexico state agencies and local public bodies have (or could be granted) the authority to enter into contingent-fee agreements for legal services. With that assumption in mind, we consider whether the Procurement Code constrains *how* state agencies and local public bodies select the attorneys with whom they enter contingent-fee contracts.

I.

"A 'contingent fee' arrangement occurs when a law firm does not bill or expect payment until and unless the contingency is achieved."[6] Contingent-fee agreements typically have two components: first, a client's obligation to pay a lawyer is contingent on the outcome of the representation; second, the lawyer's fee is a percentage of the client's recovery.[7] Contingent-fee contracts between a

[5] *Compare Meredith v. Ieyoub*, 700 So.2d 479, 481 (La. 1997) (holding that because Louisiana's legislature had exclusive control over state finances, the Attorney General had no authority "to pay outside counsel contingency fees from state funds" unless the Attorney General had been expressly granted the power in the constitution "or the Legislature has enacted such a statute"), *with State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998) (holding that North Dakota's Attorney General has inherent authority "to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute"), *and Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 785–787 (Ky. 2019) (holding that the Kentucky Attorney General's authority to enter into a contingency-fee contract with outside counsel is subject to the overriding authority of the Kentucky General Assembly); *cf. also In re Paschal*, 77 U.S. 483, 486 (1870) (observing a Texas statute empowering Texas's Governor to enter into a contingent-fee agreement with an attorney to recover federal bonds for Texas's school fund); *Button's Estate v. Anderson*, 28 A.2d 404, 405 (Vt. 1942) (observing a Vermont statute empowering Vermont's Governor to enter into a contingent-fee contract with attorneys to recover from the United States Vermont's expenditures for military purposes in the war of 1812 with Great Britain).

[6] 7 Am. Jur. 2d Attorneys at Law § 249.

[7] *See id.*; *see also* Restatement (Third) of the Law Governing Lawyers § 35 cmt. A (Am. Law Inst. 2000) ("A contingent-fee contract is one providing for a fee the size or payment of which is conditioned on some measure of the client's success.").

lawyer and his or her client are generally valid.[8] In New Mexico, Rule 16-105(D) of New Mexico's Rules of Professional Conduct expressly allows contingent-fee contracts, so long as they are in writing; signed by the client; and state the method by which the fee is to be determined, that litigation and other expenses will be deducted from the client's recovery, and whether such expenses will be deducted before or after the contingent fee is calculated.[9]

Contingency-fee contracts are agreements "to measure an attorney's fee by the value of what is recovered[.]"[10] Yet, they can be more than that; depending on the contract language, a contingency-fee agreement can create an equitable lien—often called a "charging lien"—on the proceeds of the representation, such that the attorney can look directly to the fund that the attorney recovers for the client for payment of the attorney's fees.[11] The attorney's lien does not attach until the client has recovered the fund, including when the lawyer receives the fund and holds it,

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[8] *See* 7 Am. Jur. 2d Attorneys at Law § 249 n.1 (citations omitted); Restatement (Third) of the Law Governing Lawyers § 35.

[9] *See* Rule 16-105(D) NMRA.

[10] *Landrum*, 599 S.W.3d at 789 (quoting *First Nat. Bank of Louisville v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226, 230 (Ky. 1974)) (internal quotation marks omitted).

[11] *See Thompson v. Montgomery & Andrews, P.A.*, 1991-NMCA-086, ¶ 10, 112 N.M. 463 (citing *Prichard v. Fulmer*, 22 N.M. 134, 140 (N.M. 1916)) (explaining that a charging lien, which attaches upon recovery, "recognizes the right of an attorney to recover his fees and costs on behalf of his client from a fund recovered as a result of his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of that right, and also to prevent or set aside assignments or settlements made in fraud of that right"); *see also generally, e.g.*, *McKee-Berger-Mansueto, Inc. v. Board of Educ. of City of Chicago*, 691 F.2d 828, 836 (7th Cir. 1982) (observing that contingent fee agreements can create an equitable lien "if phrased so that the attorney can look directly to the fund for payment of his or her fees"); Restatement (Third) of the Law Governing Lawyers § 43(2) & cmts. a, e–h (permitting contractual charging liens on the proceeds of a matter to secure a lawyer's compensation for services rendered in that matter); W.W. Allen, *Terms of attorney's contingent-fee contract as creating an equitable lien in his favor*, 143 A.L.R. 204 (originally published in 1943, updated weekly) ("The majority of the cases dealing with the effect of an agreement 'to pay' a lawyer's contingent fee 'from,' or 'out of,' the proceeds of the litigation support the proposition that a stipulation in that form is at least some indication of an intent which will give rise to an equitable lien, if not to an equitable assignment.") (citations omitted).

as the client's agent, in trust for the client.[12] When handling a matter on a contingent-fee basis, so long as the client agrees, a lawyer may receive the payment of a judgment or settlement, calculate the lawyer's fee under the contingent-fee agreement, withdraw the fee and costs from the recovered fund, and remit the balance to the client.[13] This practice is not only permissible, but also ordinary and well-established in American legal practice.[14]

Yet, it is important to be precise about the respective rights of the client and the attorney in contingency-fee agreements. The client, not the attorney, is the owner of the right being enforced.[15] Any money paid to satisfy a judgment of the client's claim and any money paid to settle the client's claim also belong to the client.[16] The client has the legal title to the judgment or settlement proceeds, even if a third party pays those proceeds to the client's lawyer.[17] In contingent-fee

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[12] *See id.*; *see also Thompson*, 1991-NMCA-086, ¶ 10 (citing *Prichard*, 22 N.M. at 140).

[13] *See* Rule 16-105(D) NMRA ("Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.").

[14] *See, e.g.*, 143 A.L.R. 204; Rule 16-115 NMRA cmt. [3] ("Lawyers often received funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed."); *see also, e.g.*, *Novinger v. E.I. DuPont de Nemours & Co., Inc.*, 809 F.2d 212, 218 (3d Cir. 1987) (explaining Pennsylvania law of contingent-fee contracts, including charging liens that give an attorney the right to be paid from a fund which resulted from their services and is in their possession); *Hagerty*, 580 N.W.2d at 144 (quoting the Attorney General's argument that "[u]nder a traditional contingent fee arrangement, only the net proceeds of the recovery remaining after payment of the attorneys' fees are paid to the client—in this case the client State Agencies").

[15] *See Goldman v. Home Mut. Ins. Co.*, 126 N.W.2d 1, 5 (Wis. 1964) ("[I] t is not against public policy for a client to settle his claim with the tortfeasor or his insurer without participation and consent of the attorney before action is commenced even though the client has retained counsel. We agree with this portion of the opinion for obvious reasons. *The claim belongs to the client and not the attorney*; the client has the right to compromise or even abandon his claim if he sees fit to do so.") (emphasis added); *see also* Rule 1-017(A) NMRA ("Every action shall be prosecuted in the name of the real party in interest[.]").

[16] *See* Rule 16-115 NMRA.

[17] *See Landrum*, 599 S.W.3d at 789 (emphasis and alterations in original) (quoting *First Nat. Bank of Louisville*, 517 S.W.2d at 230) ("It is customary for insurance companies, as well as others against whom claims for money are asserted, to make a settlement draft payable to the

agreements where an attorney and client have agreed that the attorney has a charging lien against any recovered fund, the attorney's charging lien, like any lien, is an interest in *another's* (*i.e.*, the client's) property.[18]

The question presented here contemplates a contingency-fee arrangement in which "no money is being paid out by the public body" to compensate the attorney for the services rendered.[19] In other words, we are asked to consider a contingency-fee arrangement in which the attorney and the government body agree that the attorney may take his or fee from the recovered fund. In view of our above observations about the respective rights of the client and the attorney in contingency-fee arrangements, we are uncertain that a state agency could legally enter into such an agreement, without an express authorization from the Legislature creating a suspense fund and authorization disbursements therefrom.[20]

Again, when a fund is recovered to pay a judgment or a settlement, the fund belongs to the client. Where the client is a state agency, the recovered fund would be public money. As such, it would appear that any monies the lawyer recovers for

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claimant and his attorney. That is for the protection of the lawyer and for the protection of the payor against a claim by the lawyer that he was dealt around and divested of his lien. *It gives him no real ownership interest, since he is not entitled to a fee for money collected until he delivers it over to his client. Only then does the client owe him anything.* And it is no answer to say that [the attorney] had a lien on the proceeds of the draft. The bank had no more of a right to pay him off separately than would [the losing party] . . . . The stubborn fact is that *[the attorney] did not have any ownership or other interest in these drafts that would entitle him to collect upon them independently of his clients, who were the owners.*").

[18] LIEN, *Black's Law Dictionary* (11th ed. 2019) ("A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied.").

[19] *See supra*, at Question Presented.

[20] We are aware of at least two instances in which the Legislature has specifically authorized state agencies to enter contingent-fee agreements for legal services under which the lawyers are paid from the recovered fund—namely, the State Investment Council and the Educational Retirement Board. *See* NMSA 1978, § 6-8-23 (2011) (creating a "state investment council suspense fund" in the state treasury and authorizing disbursements of "contingent attorney fees due to the legal services contractor"); NMSA 1978, § 22-11-6(B)(2) (2011) (authorizing the educational retirement board to enter into contracts for legal services on a contingent-fee basis, "subject to the provisions of the Procurement Code"); NMSA 1978, § 22-11-11 (2011) (creating an "educational retirement suspense fund" and authorizing disbursements for attorneys' fees).

a state agency should be "paid into the state treasury[,]" and any payments of the lawyers' fees from public money should be made pursuant to legislative appropriation and further "made upon warrants drawn by the secretary [of the Department of Finance and Administration] upon the [state] treasury[.]"[21] Absent an express grant of statutory authority that supersedes the provisions of Chapter 6, Article 10, we therefore are uncertain whether state agencies may enter into a contingency-fee agreement in which the lawyer could take his or her fee from (or otherwise exercise a charging lien against) the recovered fund.[22] Given the Legislature knows how to make this authorization, and because the question presented contemplates contingent-fee contracts that provide for an attorney to be paid from the recovered fund, we consider whether the Procurement Code would apply to the award of such contracts.

II.

The Procurement Code applies "to every expenditure by state agencies and local public bodies for the procurement of tangible personal property, services and construction." NMSA 1978, § 13-1-30(A) (2005). The answer to the question presented, that is, whether the Procurement Code applies to contingent-fee agreements for the provision of legal services, depends on whether a state agency

[21] *See* NMSA 1978, § 6-10-3 (2011) ("All public money in the custody or under the control of any state official or agency obtained or received by any official or agency from any source, except as in Section 6-10-54 NMSA 1978 provided, shall be paid into the state treasury. It is the duty of every official or person in charge of any state agency receiving any money in cash or by check, draft or otherwise for or on behalf of the state or any agency thereof from any source, except as in Section 6-10-54 NMSA 1978 provided, to forthwith and before the close of the next succeeding business day after the receipt of the money to deliver or remit it to the state treasurer[.]"); NMSA 1978, § 6-10-46 (2003) ("All payments and disbursements of public funds of the state shall be made upon warrants drawn by the secretary upon the treasury of the state based upon itemized vouchers in a form approved by the secretary."); *see also* N.M. Const. art. IV, § 30 ("Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature.").

[22] This is not to suggest that contingency-fee agreements between state agencies and law firms are necessarily of dubious validity. A state agency may agree that the *measure* of the lawyer's fee is based on the amount that the lawyer recovers. Rather, what seems uncertain is whether, absent an express grant of authority, a state agency may enter into a contingent-fee contract in which, pursuant to that agreement, the lawyer receives a charging lien on the recovered fund and thus could withdraw attorneys' fees and costs before remitting the recovered fund to the State.

or local public body makes an "expenditure" upon the conclusion of a contingent-fee matter. *See id.* In other words, at the conclusion of a contingent-fee matter, when a lawyer withdraws their fee (and any costs) from the fund that the lawyer recovers for a state agency or a local public body, does the government body make an "expenditure" under Subsection 13-1-30(A)?

We believe the answer is yes. Upon the conclusion of a contingent-fee matter in which a lawyer represents a state agency or a local public body, the lawyer's fee is paid from funds belonging to the government-entity client. Where the lawyer's fee is simply measured by the amount of the recovery, the fee would be paid from some source of public funds, either the recovered fund or another. Where the contingent-fee arrangement not only measures the fee by the amount of the recovery but also provides the lawyer with a charging lien, the lawyer's fee would be paid specifically from the funds recovered to pay the judgment or settlement—funds which, we explained above, belong to the government-entity client. In either case, the lawyer's fee is paid through an expenditure from a fund belonging to the state agency or the local public body; accordingly, the lawyer's fee is an "expenditure" of that state agency or local public body.[23]

Our opinion that "expenditure" in Subsection 13-1-30(A) includes the fees that attorneys assess at the conclusion of contingent-fee matters follows the Legislature's instruction to construe the Procurement Code "liberally."[24] Our opinion also follows the Legislature's instruction to apply the Code "to promote its purposes and policies," which are "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."[25]

We see no reason why certain traditional aspects of a contingent-fee contract—*i.e.*, the existence of a charging lien, an attorney's corresponding ability to withdraw their fee before remitting the balance of the recovery to the client, and the possibility that the attorney recovers no fee—should operate to exempt the

[23] § 13-1-30(A).

[24] NMSA 1978, § 13-1-29(A), (C) (1984).

[25] *Id.*

Procurement Code from controlling how the government agency can select the attorney with whom it enters into a contingent-fee agreement for the provision of legal services.[26] To the contrary, considering both the significant representations that attorneys take under contingent-fee agreements (*e.g.*, pursuing New Mexico's recovery from the opioid-abuse epidemic in this state) and the large sums that contract attorneys may recover in these representations (*e.g.*, a $148 million fee in one opioids-related case alone), the Procurement Code should apply to constrain how state agencies select law firms both to "to maximize the purchasing value of public funds" and to "maintain a procurement system of quality and integrity."[27] The Code's constraints on agency discretion in the award of legal service contracts matter, and we turn to the most significant in the context of the award of a contingent-fee agreement.

First, the application of the Procurement Code to a state agency or local public body's selection of a contractor entails the potential application of the Code's default rule that government contracts be awarded following a competitive, sealed process.[28] For legal services, that process involves the use of a request for proposals, which "permits [an] agency to accept the offer that is 'most advantageous . . . [after] taking into consideration the evaluation factors set forth in the request for proposals.'"[29] "This requirement gives a measure of predictability to proposal-based procurements, ensuring that the agency does not introduce additional evaluation factors mid-procurement to tip the scales in favor of an offer

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[26] *See Landrum*, 599 S.W.3d at 790 ("It would seem absurd to think that the General Assembly intended for contracts entered into on a contingency basis that could be worth millions of dollars of public money to be exempted from government oversight simply because of the possibility that they could be worth nothing.").

[27] § 13-1-29(C); *see also Landrum*, 599 S.W.3d at 790 ("Considering the potential multi-million-dollar recovery at stake, coupled with the pervasiveness of the opioid-abuse epidemic in Kentucky, forcing a competition among law firms for this contract would seem to further many of the General Assembly's purposes in enacting the MPC [Model Procurement Code]. It would seem at odds with the purposes of the MPC to exempt contingency-fee contracts from the government-review mechanism.").

[28] *See* State Ethics Comm'n Adv. Op. No. 2020-04, at 3 (June 5, 2020), *available at* https://nmonesource.com/nmos/secap/en/item/18166/index.do (discussing the general requirements of the Procurement Code and its underlying public policy).

[29] *Id.* at 4 (alterations in original) (quoting NMSA 1978, § 13-1-117 (1987)).

that is otherwise less advantageous."[30] It also creates a fair playing field and an opportunity for firms to compete to demonstrate that their services are the most advantageous to the State.

Second, the Procurement Code not only includes its central rule that government contracts be awarded following a competitive, sealed process.[31] The Code also includes several specific provisions that are designed to deter conflicts of interest and undue influence.[32] For example, the Code: (i) requires that prospective contractors disclose campaign contributions;[33] (ii) provides that a proposed contract award may be cancelled if a prospective contractor gives a campaign contribution or other thing of value to an applicable public official or employee during the pendency of the procurement process;[34] (iii) prohibits a prospective contractor from retaining another person on a contingency basis to secure a contract from a public body;[35] (iv) prohibits contemporaneous employment between a public body and a contractor to that public body;[36] and (v) prohibits government officials and employees from using confidential information to benefit a private entity.[37] When a state agency or local public body is selecting law firms to pursue claims on a contingent-fee basis, and especially where the fee could easily reach millions of dollars, these safeguards are all the more important to combat undue influence, *quid pro quo* conduct, and the appearance thereof.

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[30] *Id.* (citing *Planning & Design Sols. v. City of Santa Fe*, 1994-NMSC-112, ¶ 14, 118 N.M. 707 ("The [Procurement] Code indicates that, in evaluating [responsive] proposals, [an agency is] required to apply the factors listed in the [r]equest [for proposals]—and no others." (alterations in original)).

[31] *See* NMSA 1978, § 13-1-102 (2022).

[32] *See* NMSA 1978, § 13-1-191.1 to -195 (2007).

[33] *See* NMSA 1978, § 13-1-191.1 (2007).

[34] *See* NMSA 1978, § 13-1-191.1(F) (2007).

[35] *See* NMSA 1978, § 13-1-192 (1984).

[36] *See* NMSA 1978, § 13-1-193 (1984).

[37] *See* NMSA 1978, § 13-1-195 (1984).

Last, while the Code allows government agencies to select attorneys for legal services contracts without the use of a request for proposals so long as the value of the contracts does not exceed $60,000.00 (excluding applicable state and local gross receipt taxes),[38] Subsection 13-1-125(D) forbids government agencies from artificially dividing contracts to circumvent the $60,000 limit.[39] In the context of the foregoing analysis, Subsection 13-1-125(D) applies to constrain a government agency from entering a legal services contract where part of the attorney's fee is determined either by a flat fee or by hourly rate, and the remainder of the fee is on a contingent-fee basis, as a measure of the agency's recovery. Considering the contingent-fee part of the contract, if there is a reasonable basis to believe that the attorney's total compensation from a single, discrete representation would exceed $60,000.00 (again, excluding applicable state and local gross receipt taxes), the agency should use a request for proposals to award the contract, provided, of course, that no other exemption applies.

## CONCLUSION

For the foregoing reasons, the Procurement Code applies to a state agency's or local public body's procurement of contingent-fee contracts for legal services, assuming that the state agency or local public body has the constitutional or statutory authority to enter such contracts.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**
**JEFFREY L. BAKER, Commissioner**
**STUART M. BLUESTONE, Commissioner**
**HON. CELIA CASTILLO, Commissioner**
**HON. DR. TERRY MCMILLAN, Commissioner**
**RONALD SOLIMON, Commissioner**
**DR. JUDY VILLANUEVA, Commissioner**

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[38] *See* NMSA 1978, § 13-1-125(B) (2019); State Ethics Comm'n Adv. Op. No. 2020-08 (discussing the applicability of the small-purchase exception).

[39] *See* NMSA 1978, § 13-1-125(D) (2019) ("Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.").