



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2026-02

April 17, 2026¹

Agency Considerations in Amending a Contract under the Governmental Conduct Act

QUESTION PRESENTED²

The Commission received a request from a state agency which entered into a small purchase contract for professional services with a contractor whose spouse subsequently became an employee of another state agency. The requesting state agency explained it is in the process of amending the contract as to the contract's scope and compensation terms. As part of the amendment process, the State Purchasing Division of the General Services Department requires an Agency

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). On January 12, 2026, the Commission received a request for an advisory opinion that detailed the issues as presented herein and Commission staff issued an informal advisory opinion letter in response. *See* 1.8.1.9(B) NMAC. Commissioners Baker and Bluestone requested that advisory letter be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC. "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. This opinion is based on current law, and the conclusions reached herein could be affected by changes in the underlying law or factual circumstances presented.

Certification Form and Affidavit. The Affidavit requires the contractor verify that the contract was not awarded via a sole source or small purchase procurement method, which the vendor is unwilling to sign because the original contract was procured under a small purchase procurement method.

The request seeks guidance on whether Section 10-16-7(A) of the Government Conduct Act applies to the contract amendment given that the contractor's spouse was not a public employee until after the original contract was signed.³

ANSWER

By amending the contract to include compensation for additional work, the agency is affirmatively entering into an agreement for the provision of services with the family of a public employee. Consequently, Section 10-16-7(A) of the Governmental Conduct Act applies to the contract amendment, requiring public notice of the public employee's interest in the contract and the contract must be procured by a competitive process, particularly because the contract was not originally awarded pursuant to a competitive process and there has been no public notice of the public employee's interest.

ANALYSIS

Section 10-16-7(A) of the Governmental Conduct Act addresses contracts between a state agency and a state public employee, family of a state public employee (defined to include spouses), and businesses in which a state public employee or family of a state public employee hold a substantial interest (defined as an ownership interest that is greater than twenty percent).⁴ The Governmental Conduct Act defines a "contract" to "mean[] an agreement or transaction having a value of more than one thousand dollars (\$1,000) with a state . . . agency for . . . the rendition of services, including professional services[.]"⁵ Under Section 10-16-7(A), the Governmental Conduct Act prohibits a state agency from "enter[ing] into" such a contract "unless the public officer or employee has disclosed through

³ NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023).

⁴ § 10-16-2(E), (L).

⁵ § 10-16-2(C).

public notice the public officer’s or employee’s substantial interest and unless the contract is awarded pursuant to a competitive process[.]”⁶ Section 10-16-7 of the Governmental Conduct Act ensures that public purchases are awarded based on merit and value.

Accordingly, where a governmental entity has entered into a contract identifying the specific scope and cost of a project, if the contractor’s family member subsequently becomes an employee of the state and the entity seeks to then change the scope and cost of the project such that it constitutes a “contract” under the Governmental Conduct Act, the agency cannot do so without providing public notice and a competitive process for the additional terms of the purchase. At that point, the agency is “entering into” an agreement for the rendering of additional services for additional funds.

The Commission previously reviewed an analogous question in Advisory Opinion 2021-06, where the Commission determined that an amendment to a sole source contract required the state purchasing agent or the central purchasing office to provide the notice required of an initial sole source contract under Section 13-1-126.1 and 13-1-128.⁷ The Commission opined that “[t]he safeguards of public notice and the right to protest apply not only when a government entity enters a sole source contract but also when it amends a sole source contract.”⁸ The Commission reasoned, “the Code requires public notice of the amended contract so that the public and the potential contractors can scrutinize whether the state purchasing agent’s or central purchasing office’s sole source determination for the original contract remains applicable as to the amended contract.”⁹ Further, “notice for amended contracts prevents unfair gamesmanship in sole source procurement.”¹⁰ The Commission noted that “[b]ecause of the notice requirement,

⁶ NMSA 1978, § 10-16-7(A) (2011). The term “financial interest” includes “an interest held by an individual *or the individual’s family . . .*” § 10-16-2(F) (emphasis added).

⁷ State Ethics Comm’n Adv. Op. No. 2021-06 (Apr. 2, 2021), available at <https://nmonesource.com/nmos/secap/en/18159/1/document.do>.

⁸ *Id.* at 4.

⁹ *Id.* at 5 (footnote omitted).

¹⁰ *Id.*

state agencies may not notice and receive approval for a sole source contract that has a comparatively insignificant compensation term and then, hidden from the scrutiny of the public and competing contractors, amend the contract to considerably increase the scope of work and compensation terms.”¹¹ As the Commission explained:

Nor is public notice of an original sole source contract necessarily sufficient to provide notice of an amended contract, particularly where the amended contract contains a considerably larger compensation term. For example, where state agencies propose to enter sole source procurements, notice of a \$70,000 sole source contract reasonably would not generate the same scrutiny and potential protest of the state purchasing agent’s sole source determination as would notice of a \$7,000,000 contract.¹²

The Commission concluded, “[a]ccordingly, it is fair neither to the public, nor to the state purchasing agent or central purchasing office, for a state agency to receive approval for and notice a sole source contract at a lower compensation term, only then, having received the sole source determination, to turn around and amend the contract to increase the scope and compensation terms considerably.”¹³

Here, by amending the contract, the agency is affirmatively entering into an agreement¹⁴ for the provision of additional services where public notice of the

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ See, e.g., *Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶ 14, 119 N.M. 136 (“The parties to a written contract *may modify that contract by express or implied agreement* as shown by their words and conduct.” (emphasis added)); *A Mountain Professional Construction, LLC v. ARborunda, Inc.*, 2018 WL 3336425, at *6 (D.N.M., 2018) (“A modification occurs when the parties intend to continue the contractual relationship but wish to change one or more of the terms of the contract. In order for a modification to the contract to be effective, there must be ‘mutual assent’ by the parties for the modification. ‘For there to be a mutual assent, the parties must have had the same understanding of the material terms of the agreement.’” (citing NMRA, Civ. UJI 13-817; quoting NMRA, Civ. UJI 13-816)).

financial interest of the public employee's family member in the contract has never been provided, and the contract was not procured through a competitive process. The request provides that the state agency is seeking to "amend[] the contract to add funds based on an increased workload." While the request does not indicate what the additional funds will be or the extent of the increased workload, assuming it meets the one-thousand-dollar threshold,¹⁵ the contract amendment is an agreement with a state agency for the rendition of professional services, and therefore is a contract requiring public notice and a competitive process.

This conclusion contrasts with, for example, a situation where an initial contract met the terms of Section 10-16-7(A) and the state agency enters into a subsequent amendment which is fairly within the scope of the original procurement. In that circumstance, public notice of the public employee's interest has already been provided, and the contract is the result of a competitive process. Or, for example, where a state agency and a contractor are simply fulfilling an already-agreed-upon contract, in which case the parties are not affirmatively entering into an agreement. At its core, the concern here is that the state agency is entering into an agreement for professional services without the public notice and competitive process required under Section 10-16-7(A).

This determination is in keeping with the purposes of Section 10-16-7. Where a public employee's family member holds a preexisting contract with a state agency, the agency should not be able to avoid the requirements of Section 10-16-7(A) by entering into an amended contract with an extended scope and additional compensation. The purpose of Section 10-16-7(A) is to safeguard against public employees using the powers and resources or influence of their public employment to sway the award of a contract in favor of themselves or their family members, and to ensure that contracts between public agencies and their employees and employees' family members are entered into after full disclosure and a merits-based process.

If a state agency subsequently amends a contract with a contractor (to, for example, increase the contractor's compensation, scope, and term) after the contractor's family member becomes an employee of the state without going through the notice and required competitive process, then the public might suspect

¹⁵ See § 10-16-2(C).

self-dealing or insider advantage—a suspicion that works to erode the public’s trust in its public offices. Here, there is no indication in the facts presented that the intention of the proposed amendment is to avoid any requirements or that the public employee’s family member is misusing their position (particularly given that the family member is employed by a separate state agency). Nevertheless, we interpret Section 10-16-7(A) in light of its purpose to guard against self-dealing and insider advantage in the award of state agency contracts, including in circumstances, as here, where there are changes to both the contract and the contractor’s relationship with the state.

CONCLUSION

Under the facts provided, in order to amend the contract to include additional funds and services, Section 10-16-7(A) requires public notice of the public employee’s interest in the contract (including the contract amendment), and the contract (again, including the contract amendment) must be awarded through a competitive process.

SO ISSUED.

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