



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2026-03**

April 17, 2026<sup>1</sup>

### **Governmental Conduct Act Considerations for Local Public Officials Holding Local Government Contracts**

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

The request presented scenarios related to three different municipal public officials who hold significant financial interests in companies contracting with the municipality and seeks guidance on the applicability of the Governmental Conduct Act.<sup>3</sup>

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<sup>1</sup> 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).

<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[.]” NMSA 1978, § 10-16G-8(A)(2) (2019). On September 12, 2025, 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. Commissioner Bluestone requested that this 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.” N.M. 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.

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

First, a new public official on the governing body of a municipality currently holds a subcontract with a contractor to the municipality. The municipality owns a property and currently uses Company A to manage the property. The public official owns Company B which holds a subcontract with Company A to manage the property. Next year the municipality will issue a new request for proposals for the property management contract, and Company B has expressed a desire to submit a proposal.

Second, another new public official on the governing body has a firm which is the only one in the area to provide certain services. The official's firm is used in a vast majority of the contracts with the municipality as well as a vast majority of contractors and general business owners. It is often practice for this public official to speak before the commission to advocate for the company's clients and explain zoning changes. Prior to taking office, the public official frequently participated in municipal committee meetings to work through either the municipality's or client's proposals. The request also asks whether other employees of the firm would be able to present at municipal meetings on behalf of the clients, even though the public official still benefits financially should they succeed.

Third, there is another public official on the governing body who is often a subcontractor on bids for municipal contracts.

The request explains that currently, to comply with the procurement requirements, local requirements, and Governmental Conduct Act requirements, the municipality requires potential contractors bidding on any municipal contract to state in writing whether or not they are using the services of an elected public servant (local ordinance requires financial interests be disclosed in writing), having that public official announce that they have a financial interest in a public meeting, recusing themselves from the decision involving that bid, and using the competitive process for all the municipality's bids. The request asks whether there is anything else the

municipality needs to do to ensure compliance with the Governmental Conduct Act for these three officials.<sup>4</sup>

## ANSWERS

1. The first public official's company is permitted to bid for a contract with the municipality under the Governmental Conduct Act, provided the public official's substantial interest is disclosed through public notice, the contract is awarded pursuant to a competitive process, the public official does not take any official acts concerning the contract, and the public official does not participate in the preparation of the criteria for the contract.
2. The second public official is also permitted to contract with the municipality, but similarly must comply with the recusal and disqualification provisions of Section 10-16-4, any contract with the public official must be the product of a competitive process and the commissioner's substantial interest in the contract must be disclosed, and the public official may not both be involved in the creation of the criteria for a certain bid or proposal as well as submit a bid or proposal on the same project. Further, the second public official must be careful not to misuse the powers and resources of public office in any participation before the municipality's governing body or its committees on behalf of the public official's company or clients.

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<sup>4</sup> The request also inquired as to applicable requirements under the Procurement Code. NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2023). The New Mexico Procurement Code complements the ethical restrictions contained in the Governmental Conduct Act by barring participation in any procurement in which a public officer or their business has a financial interest. Section 13-1-190 prohibits such participation. The municipality here, however, operates under a home-rule charter and has adopted its own Purchasing Ordinance to govern municipal procurement. "The provisions of the Procurement Code shall not apply to . . . municipalities having adopted home rule charters and having enacted their own purchasing ordinances[.]" NMSA 1978, § 13-1-98(K) (2023). As the Procurement Code does not apply to the municipality and the State Ethics Commission does not have authority over municipal ordinances, we will not address the applicability of that ordinance here, other than to note that it must be followed where applicable.

3. The municipality's current practices to ensure written disclosure by contractors employing the services of a public officer, public announcement by the public officer of the financial interest at a public meeting, recusal from the decision involving a potential contractor's bid, and adherence to the competitive bid process for all bids incorporate the requirements of the Governmental Conduct Act in addition to being good practices that encourage disclosure, competitive bidding processes, and prudent recusals.

## ANALYSIS

### I. Relevant law

The Governmental Conduct Act applies to elected officials and employees of state and local government. The Governmental Conduct Act defines "public officer or employee" to "mean[] any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators[.]"<sup>5</sup> "[L]ocal government agency' means a political subdivision of the state or an agency of a political subdivision of the state[.]"<sup>6</sup>

Section 10-16-4 of the Governmental Conduct Act provides:

A. It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. A public officer or employee shall be disqualified from engaging in any official act directly affecting the public

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<sup>5</sup> NMSA 1978, § 10-16-2(I) (2011).

<sup>6</sup> NMSA 1978, § 10-16-2(G), (K).

officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

The Governmental Conduct Act defines a "financial interest" to include "an ownership interest in business or property."<sup>7</sup> "Official act" includes "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority."<sup>8</sup> (defining "official act" as). A "substantial interest" is considered to be "an ownership interest that is greater than twenty percent."<sup>9</sup>

Section 10-16-7(B) of the Governmental Conduct Act includes specific requirements where a local government agency contracts with a public officer or employee:

Unless a public officer or employee has disclosed the public officer's or employee's substantial interest *through public notice and unless a contract is awarded pursuant to a competitive process*, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.<sup>10</sup>

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<sup>7</sup> See NMSA 1978, § 10-16-2(F).

<sup>8</sup> § 10-16-2(H).

<sup>9</sup> § 10-16-2(L).

<sup>10</sup> NMSA 1978, § 10-16-7(B) (2011) (emphasis added).

Other provisions of the Governmental Conduct Act may also be relevant. Section 10-16-6 prohibits a public employee from using or disclosing confidential information acquired by virtue of the employee's position with their public employer for the "employee's or another's private gain."<sup>11</sup> Similarly, Section 10-16-13 would prohibit the municipality from "accept[ing] a bid or proposal 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. A person accepting a bid or proposal on behalf of a state agency or local government agency shall exercise due diligence to ensure compliance with this section."<sup>12</sup>

## **II. Application to facts presented in the request**

### **A. Scenario One: Public Official who Owns Company B**

The first situation involves a public official who owns Company B, a private business currently subcontracted by Company A, which manages a property owned by the municipality. The municipality's payments to Company A indirectly fund Company B's operations. The public official has indicated that Company B intends to submit a proposal when the municipality reissues the property management contract for bid next year. The public official will have voting privileges related to the contract.

This situation involves two sets of considerations. First, limitations on a public officer's actions related to the existing subcontract. Second, a public officer's bidding on a municipal contract.

The Governmental Conduct Act does not prohibit or impose additional requirements on a public official or employee entering into a subcontract under a primary contract with the local agency for which they are an officer or employee.<sup>13</sup> Section 10-16-7(B) addresses contracts between a local government agency and an officer of that agency, the officer's family, or a business in which the officer or the

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<sup>11</sup> NMSA 1978, § 10-16-6 (2011).

<sup>12</sup> NMSA 1978, § 10-16-13 (2011).

<sup>13</sup> *See, e.g.*, State Ethics Comm'n Adv. Op. 2025-05 (Oct. 10, 2025), available at <https://nmonesource.com/nmos/secap/en/item/19146/index.do> (concluding the same in reviewing Section 10-16-7(A), the comparable provision for contracts between state employees and agencies).

officer's family has a substantial interest. By its text, Section 10-16-7(B) does not extend, however, to a subcontract between a public officer (or the officer's business) and a contractor who holds a primary contract with a local government agency.

This is not to say that a public officer can use a subcontract to skirt the requirements of the Governmental Conduct Act where this Section would otherwise apply (if for example, the public officer or the officer's company has an agreement with the prime contractor under which the public officer will perform all work under the prime contract) or otherwise violate other ethical requirements of the law in the making of such a contract (for example, a *quid pro quo* arrangement with a prime contractor related to the officer's official public duties).<sup>14</sup> But as a general matter, the Governmental Conduct Act does not restrict a public officer from entering into a subcontract for a primary contract with the public agency in which they hold office.

The public official should also be aware, however, should Company A's contract come before the Municipality for renewal, that Section 10-16-4(A) and (B) prohibit a public officer from taking an official act that either directly enhances the officer's financial interest or financial position, and disqualifies a public officer from taking an official act directly affects the public officer's financial interest.<sup>15</sup> If the public official's official act will directly affect a financial interest, the official is disqualified from taking that act. While Section 10-16-4(B) provides an exception where "a public officer . . . shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer . . . is proportionately less than the benefit to the general public[.]"<sup>16</sup> this provision is unlikely to apply where a public officer stands to earn a specific financial benefit compared to a general benefit for the public. Here, for example, if the public official's official act would affect the primary contract with Company A, thereby affecting the financial benefit the official receives under the subcontract (through Company B or otherwise), the public official should recuse from taking that official act.

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<sup>14</sup> See NMSA 1978, § 10-16-3(D) (2011) (prohibiting a public employee from taking an official act in exchange for something of value).

<sup>15</sup> § 10-16-4(A), (B).

<sup>16</sup> § 10-16-4(B).

As to the second consideration, that is, whether the official can submit a proposal on the contract, the municipality is permitted to enter into a contract with the public official but can only award such a contract following a competitive process and the public official's substantial interest must be disclosed through public notice.<sup>17</sup> As noted above, a "substantial interest" is an ownership interest of greater than twenty percent (20%). The public official, however, will need to be careful not to violate several Sections of the Governmental Conduct Act. Unlike the subcontract discussed above, Section 10-16-7(B) will apply to any contract between the public official and the municipality. Additionally, the disclosure component of Section 10-16-7(B) is reinforced by Section 10-16-3(C) which requires "[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct."<sup>18</sup>

In addition to the considerations discussed above under Section 10-16-4(A) and (B), Section 10-16-4(C) further prohibits a "public officer during the term for which elected . . . [from] acquir[ing] a financial interest when the public officer . . . believes or should have reason to believe that the new financial interest will be directly affected by the officer's . . . official act."<sup>19</sup> Subsection 10-16-4(C) includes an objective query as to whether a public officer, upon acquiring a financial interest, believes "*or should have reason to believe*" that the officer's official act will directly affect their new financial interest.<sup>20</sup> In other contexts, New Mexico courts have reviewed the phrase "knew or should have known" to include an objective standard of a "reasonable person" in the same position as the individual in question.<sup>21</sup> If, for example, the public official is involved in vetting criteria for

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<sup>17</sup> § 10-16-7(B).

<sup>18</sup> § 10-16-3(C).

<sup>19</sup> § 10-16-4(C).

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> In *State v. Suazo*, 2017-NMSC-011, 390 P.2d 674, for example, the court reviewed the standard for second-degree murder which requires actual knowledge ("knows") and differentiated it from an objective standard ("whether a reasonable person 'should have known'"), explaining that the standard "should have known of the risk of his or her conduct without anything more" is "essentially a civil negligence standard." *Id.* ¶ 39 (quoting also from Leo M. Romero, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. Rev. 55, 65 (1990), for

or approving the contract itself, he would be prohibited from acquiring the contract or would be required to recuse from any official acts a reasonable person would have reason to believe would directly affect the contract. This is further supported by Section 10-16-13, which also prohibits a local government agency from “accept[ing] a bid or proposal 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.”<sup>22</sup>

Taken together, under the Governmental Conduct Act, the public official’s company is permitted to bid for a contract with the municipality, provided the public official’s substantial interest is disclosed through public notice, the contract is issued pursuant to a competitive process, the public official does not take any official acts concerning the contract, and the public official does not participate in the preparation of the criteria for the contract.

As a final note, the Governmental Conduct Act requires that “[a] public officer or employee shall disclose in writing to the officer’s or employee’s respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local

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the proposition that “[t]o say that a person should have known of the risk imposes a negligence standard based on an objective test of what the reasonable person would have known under the circumstances”). *See also First Nat’l Bank v. Diane, Inc.*, 1985-NMCA-025, ¶¶ 18–19, 102 N.M. 548 (determining in a legal malpractice case that whether an “attorney has reason to believe, or should have reason to believe that there could be adverse consequences” to the client and therefore should advise the client of those consequences, is analyzed as to whether, based on the facts in that case, “a lawyer possessing and exercising ordinary skill and capacity would have found it prudent” to so advise the client); *Martinez-Sandoval v. Kirsch*, 1994-NMCA-115, ¶ 21, 118 N.M. 616 (determining the discovery rule for the statute of limitations where the standard is “knew or should have known” begins running when an individual in the same position as the plaintiff, exercising due diligence, would have discovered the conduct forming the basis of a lawsuit). Whether a reasonable person “should have reason to believe” may be supported by circumstantial evidence. *See State v. Elmquist*, 1992-NMCA-119, ¶ 20, 114 N.M. 551 (determining that whether a defendant who shot at a building had “knowledge or reason to believe” a building was occupied may be proved by circumstantial evidence such as time of day, type of building, presence of vehicles, sounds from the building, and lights in the building).

<sup>22</sup> NMSA 1978, § 10-16-13 (2011). This is addition to any requirements imposed by the municipality itself. For example, an applicable municipal ordinance requires a public employee with a financial interest in a business contracting with the municipality disclose that financial interest in writing and recuse from voting or participating in the making of such a contract.

government agency.”<sup>23</sup> The statute defines “employment” as “rendering of services for compensation in the form of salary as an employee[.]”<sup>24</sup> If the public official is also an “employee” of Company B, the official must also disclose this outside employment in writing to the municipality.

### **B. Scenario Two: Public Official whose firm contracts with the municipality**

The second scenario involves a public official who is on the governing body and who owns a firm that is the only company providing certain services in the county. The firm performs the majority of those services for both municipal departments and private developers, and the owner frequently speaks before a committee of the governing body on behalf of clients. The firm has also expressed interest in continuing to contract with the municipality. As a public official, the individual and their firm are not prohibited from contracting with the municipality, but must abide by certain statutory requirements. First, the public official must comply with the recusal and disqualification provisions of Section 10-16-4 implicating his financial interest, whether through a primary contract or, if applicable, as subcontract. Second, the municipality must require any contract with the public official be the product of a competitive process and the public official’s substantial interest in the contract must be disclosed (both under Section 10-16-7(B) and under 10-16-3(C) where appropriate), and the cautions above concerning any subcontracting work the public official performs should be adhered to. And third, the public official may not be involved both in the creation of the criteria for a certain bid or proposal as well as submit a bid or proposal on the same project. Again, to the extent the public official is an “employee” of the firm, he will need to disclose that in writing to the municipality.

The fact that the owner speaks frequently before the governing body and its committees on behalf of clients raises additional concerns under Section 10-16-3(A) and (C). Section 10-16-3(A) requires a public officer “use the powers and resources of public office only to advance the public interest and not to obtain

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<sup>23</sup> NMSA 1978, § 10-16-4.2 (2011). While there is conceivably an argument that this provision does not require disclosure of “service to a state agency or local government agency” such an argument runs counter to the common sense reading of the statute.

<sup>24</sup> NMSA 1978, § 10-16-2(D) (2011).

personal benefits or pursue private interests.”<sup>25</sup> The public official will need to ensure that he does not misuse the powers and resources of public office in his participation in any committees on behalf of clients. The official can make no threats or insinuations concerning potential repercussions or implications if the committee members do not take certain action related to his company or his clients. And while the public official’s co-workers would not necessarily be precluded from presenting to the municipality or its committees, the public official will need to ensure he is not participating in prohibited official acts related to his financial interests.

### **C. Scenario Three: Public Official who is a Subcontractor**

The final situation involves a public official who is a member of the governing body who also operates a business that occasionally serves as a subcontractor on municipal projects. The request explains the municipality currently addresses potential conflicts by requiring potential contractors provide (1) written disclosure that are employing the services of a public officer, (2) public announcement by the public officer of the financial interest at a public meeting, (3) recusal from the decision involving a potential contractor’s bid, and (4) adherence to the competitive bid process for all bids.

Again, the considerations above would guide the public official’s actions as a public officer. The requirements identified in the request would largely cover the applicable Governmental Conduct Act provisions. Two things of note, the definition of “official act” includes not just decisions, but also any other official “recommendation, approval, disapproval or other action that involves the use of discretionary authority[.]” And again, if the public official’s position in the business is as an employee, that too will need to be disclosed in writing. While each of the identified requirements might not be directly required under the Governmental Conduct Act for a subcontract (see discussion above), they are still good practices and encourage disclosure, competitive bidding processes, and prudent recusals.

## **CONCLUSION**

By enforcing full disclosure, maintaining transparency in procurement, and following the recommendations above, the municipality will ensure compliance

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<sup>25</sup> § 10-16-3(A).

with the Governmental Conduct Act. Doing so protects both the integrity of municipal decision-making and the public's trust in its elected officials.

**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**