

September 8, 2008 Possible Conflict of Interest

Mark A. Duran, Chairman
New Mexico Information Technology Commission
4 Tiwa Trail
Placitas, NM 87043

Re: Opinion Request - Possible Conflict of Interest

Dear Mr. Duran:

You have requested an Attorney General's opinion concerning any possible conflict of interest that may arise in your capacity as chairman of the New Mexico Information Technology Commission ("ITC"), given your status as a government relations consultant under contract with Northrop Grumman, Inc. ("NGI"), which does business with the state and at times bids on state information technology projects. We conclude, based on relevant New Mexico constitutional, statutory and case law authorities, that the ITC now performs a more global, long-range role than it did in the past and the performance of your duties on the ITC while a contractor with NGI would not constitute a conflict of interest.

Under prior statute, the ITC was responsible for promulgating rules to delineate the state information architecture as a framework for the state information technology strategic plan, and those necessary for the administration of the then-current information technology act and the conduct of the Office of the chief information officer. It was also tasked with establishing policies, procedures and rules to ensure compliance with criteria it established for information technology projects; how funding was released; completion of each phase, and; identification of specific deliverables. See NMSA 1978, § 15-1C-5(A), (B) and (H) (2003, repealed 2007).

Now, all of these responsibilities have been reassigned to the Department of Information Technology and its Secretary, acting as the chief information officer, under the Department of Information Technology Act (NMSA 1978, §§ 9-27-1 through 11 (2007, as amended 2008, hereinafter the "DIT" Act). It is now the Secretary who is in charge of the day to day operations of the Department and who is responsible for information technology activities within state government. See NMSA 1978, § 9-27-6(A)(2007). The Secretary, acting as chief information officer, must, among other duties, promulgate rules for oversight of information technology procurement; approve all executive agency requests for proposals and contract vendor requests subject to the Procurement Code, and; approve contracts and amendments relating to those procurements and any emergency procurements, sole source contracts and price agreements. See id. § 9-27-6(C)(2),(3),(4). It is the Secretary who now adopts rules to ensure information technology projects comply with criteria established by the Secretary and are properly phased in and funding released only upon successful completion of each prior phase. Id. at (C)(12).

The role of the ITC under the new law has been significantly reduced. The ITC now meets quarterly to review and approve: (1) the development and implementation of the state information technology strategic plan, updates and compliance by agencies; (2) critical information technology initiatives; (3) identification of state agencies' information technology needs; (4) strategies for identifying information technology projects that impact multiple agencies; (5) the state information architecture and the strategic plan for updates and compliance by executive agencies; (6) proposed rules promulgated by the Secretary, and; (7) guidelines for mediating disputes between an executive agency and the Secretary (who acts as the state's chief information officer). See id. § 9-27-9 (C)(1)-(7). These functions are of a generalized, high-level planning nature.

Potential conflicts of interest as to service on the ITC are governed by the Governmental Conduct Act, NMSA 1978, 10-16-1 through -13.3 (2007). Under subsection 10-16-4(A), it is unlawful for a member of the ITC, as a public officer, "to take an official act for the primary purpose of enhancing the public officer's or employee's financial interest or financial position." A commission member is disqualified from "engaging in any official act directly affecting the public officer's or employee's financial interest." NMSA 1978, § 10-16-4(B)(2007). "Official act" means "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority," and the term "financial interest" means, in the context of this inquiry "rendering services for compensation in the form of salary as an employee." See id. § 10-16-2 (F),(E) and (C).

Under the new role of the ITC, that body exercises no direct control or authority over the Department or its Secretary, the procurement practices of any state agency, or in the creation or management of any contract or project; all of those responsibilities now lie with the Department. It is the Secretary's responsibility to promulgate rules, subject to ITC's approval. In light of the ITC's current status, under which it provides a more generalized, long-range planning function, we believe the ITC's powers and duties as currently defined in statute do not give rise to the type of official action that may have a direct effect on a commission member's financial interests so as to give rise to a conflict under the Governmental Conduct Act.[1]

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

MARTHA A. DALY
Assistant Attorney General

[1] If a matter arises that may appear to create a conflict, commission members are always free to recuse themselves.