



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-03

February 5, 2021¹

QUESTION PRESENTED

May a business significantly owned by a legislator apply for and receive a grant from the Department of Finance and Administration and the New Mexico Finance Authority for economic hardship suffered as a result of the COVID-19 pandemic?

FACTS

The legislature passed, and the governor signed into law, amendments to the General Appropriations Act of 2020 to provide direct grants to New Mexico businesses suffering economic hardship as a result of the COVID-19 pandemic. See Laws 2020 (2nd S.S.), ch. 1, § 2 (55th Leg., 2nd Special Sess.). Specifically, the legislature appropriated \$100,000,000 of federal Coronavirus Aid, Relief, and Economic Security Act relief funds to the Department of Finance and Administration (“DFA”) to contract for services with the New Mexico Finance Authority (“NMFA”) to provide grants of up to \$50,000 to eligible New Mexico businesses (“CARES relief grants”). Businesses eligible for the grants include (i) tax-exempt nonprofits subject to the New Mexico Nonprofit Corporation Act; sole proprietorships owned by New Mexico residents; and corporations, partnerships, joint ventures, limited liability companies or limited partnerships at least 51 percent of which are owned by one or more New Mexico residents, that (ii) do not employ more than one hundred employees. Laws 2020 (2nd S.S.), ch. 1 § 2(a)(2)(a).

¹This 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).

Commission staff received a request on December 15, 2020 for an informal advisory opinion asking whether a business formerly owned by a current legislator (and now owned by the legislator’s family members) could apply for and receive a CARES relief grant. *See* 1.8.1.9(B) NMAC (permitting a person subject to the Commission’s jurisdiction to request an informal advisory opinion). Commission staff issued an informal advisory opinion on the next day, December 16, 2020. Because the issue addressed by the informal opinion is likely to reoccur, the Commission’s executive director presented a formal advisory opinion based on the informal advisory opinion. *See* 1.8.1.9(B)(3) NMAC (“The director, based on any informal advisory opinion issued, may draft an advisory opinion for the commission to consider for issuance as an advisory opinion.”). The Commission has elected to issue a formal advisory opinion on a broader factual scenario, covering businesses that are currently owned by a legislator.

ANSWER

Yes.

ANALYSIS

Two provisions of the Governmental Conduct Act (“GCA”), NMSA 1978, §§ 10-16-1 to -18 (1967, amended 2019), potentially apply to the facts presented: Sections 10-16-3 and Section 10-16-9. The Procurement Code does not apply because CARES relief grants are not procurements.

1. GCA

The GCA does not prohibit a business significantly owned by a legislator from applying for and receiving a CARES relief grant.

Section 10-16-3 requires legislators to treat their offices “as a public trust,” and directs “us[ing] the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” § 10-16-3(A). It also requires legislators to “conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service,” and to take “reasonable efforts . . . to avoid undue influence and abuse of office in public service.” § 10-16-3(B), (C). Finally, Section 10-16-3 prohibits a legislator from requesting or receiving “any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.” § 10-16-3(D).

Because a legislator is not directly responsible for DFA's and NMFA's distribution of CARES relief grants, the decision to award grant money to a business owned by the legislator has no direct connection with an exercise of the powers and responsibilities of the legislator's public office. The only basis for finding a GCA violation based entirely on the legislator's status *qua* legislator would be if the legislator voted for the appropriations bill under consideration in exchange for a promise that DFA or NMFA would award a CARES relief grant to the legislator's business.

Section 10-16-9 provides more specific proscriptions that apply to contracts involving legislators, their immediate family members, and their businesses and to a legislator's representation of others before a state agency:

A. 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.

B. A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

NMSA 1978, § 10-16-9 (1967, amended 2007).

Section 10-16-9(A) prohibits a state agency like NMFA from "enter[ing] into a contract for services, construction or items of tangible personal property" with a business owned by a legislator or the legislator's family unless three conditions are met. First, the legislator must disclose their substantial interest in the business with which the state agency is contracting. *See* § 10-16-9(A); *see also* NMSA 1978, § 10-16-2(L) (defining "substantial interest" to mean an ownership

interest that is greater than twenty percent). Second, the contract must be awarded in accordance with the Procurement Code. *See* § 10-16-9(A). Third, the contract must not be awarded pursuant to the Procurement Code’s exceptions for sole source and small purchase contracts. *See id.*

The limitations that Section 10-16-9(A) imposes, however, do not apply to the CARES relief grant awards authorized by Laws 2020 (2nd S.S.), ch. 1, § 2. A CARES relief grant is not a contract for services, construction, or items of tangible personal property; it is a payment of an allocation of federal funds to New Mexico businesses to lessen the “impact from the public health orders issued by the secretary of health and related to the coronavirus disease 2019 public health emergency.” Laws 2020 (2nd S.S.), ch. 1, § 2(A)(2). The State does not receive any services, construction, or property in return for the grant of federal funds, and therefore the CARES relief grants are not contracts for services, construction or items of tangible personal property that are subject to the prohibition in Section 10-16-9(A). *See also* New Mexico Finance Authority, Small Business CARES Relief Grants, <https://www.nmfinance.com/cares-continuity-grants/> (last accessed Jan. 5, 2021) (“What is a grant? A grant is money given for a specific purpose without any obligation to repay the funding. In this case, grants will be given to help New Mexico businesses weather the economic hardship due to the pandemic. This grant does not need to be paid back.”); *see also Grant, Black’s Law Dictionary* (11th ed. 2019) (defining “grant” as a “subsidy”).

Next, Section 10-16-9(B) does not prohibit a business in which a legislator has an interest from applying for a CARES relief grant. Rather, the statutory provision prohibits a legislator from appearing on behalf of the business or otherwise assisting the business in applying for and receiving a CARES relief grant. Under section 10-16-9(B), the legislator’s business is a “person.” § 10-16-9(B); *see also* NMSA 1978, § 12-2A-3(E) (Uniform Statutory and Rules Construction Act) (defining “person” as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity”). And the application to NMFA for the grant is “a matter before a state agency.” § 10-16-9(B). Accordingly, the application for the CARES relief grant and other related matters should be accomplished by someone other than the legislator who has the interest.

2. Procurement Code

Subject to certain exceptions not relevant here, the Procurement Code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.”

NMSA 1978, § 13-1-30(A). *See also* Advisory Opinion No. 2020-04 (June 5, 2020) at 3-6 (providing overview of Procurement Code). The Procurement Code defines “procurement” as “purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction[.]” NMSA 1978, § 13-1-74(A). But CARES relief grants do not result in the acquisition of tangible personal property, services or construction. Accordingly, the Procurement Code (and its attendant conflict-of-interest provisions) does not apply to the application for CARES relief grants by a business in which the legislator has an interest.

CONCLUSION

The GCA and the Procurement Code do not prohibit a business in which a legislator has an interest from applying for and receiving a CARES relief grant.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

DR. JUDY VILLANUEVA, Commissioner

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