



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-07

October 2, 2020¹

QUESTION PRESENTED

Some members of the New Mexico Council for Purchasing from Persons with Disabilities (“Council”) are not employed by the state. Can those Council members participate in the Council’s vote to award State Use Act contracts to themselves or companies they own? If not, what actions should the Council take to ensure its members do not engage in such acts of self-dealing?

FACTS²

The State Use Act, NMSA 1978, §§ 13-1C-1 to -7 (2005) (“Act”) “encourage[s] and assist[s] persons with disabilities to achieve maximum personal independence through useful and productive employment by ensuring an expanded and constant market for services delivered by persons with disabilities, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and entitlements.” § 13-1C-2. The Act is inspired by the Wagner-O’Day Act of 1938, which established a federal preference for the disabled in certain categories of public procurements. *See* Wagner-O’Day Act of 1938, Pub. L. No. 739, ch. 697, 52 Stat. 1196, 1196 (1938) (codified as amended at 41 U.S.C.

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

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* 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, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)).

§§ 8501-8506 (2018)); *see generally* Christopher McCrudden, *Using public procurement to achieve social outcomes*, 28 Nat. Res. Forum 257, 258 (2004) (providing a history of procurement preferences for disabled workers in the United States).

The Act establishes the Council, which is comprised of:

1. the state purchasing agent or their designee;
2. two persons who represent state agencies that purchase significant amounts of goods and services from the private sector;
3. a state-employed vocational rehabilitation counselor who is familiar with employment needs of persons with disabilities and with current pricing and marketing of goods and services;
4. two persons with disabilities;
5. a person who is familiar with employment needs of persons with disabilities and with current pricing and marketing of goods and services; and
6. two persons who represent community rehabilitation programs that provide employment services to persons with disabilities.

See § 13-1C-4(A). “Except for the regular pay of public employee members, council members shall serve without compensation or cost reimbursement.” § 13-1C-4(D). While the State compensates Council members in categories 1-3 by virtue of their qualifications, the State neither compensates nor reimburses Council members in the remaining categories. *Id.*

In general, under the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended 2019), state agencies and local public bodies procure services from third parties through invitations to bid or requests for proposals. *See* Advisory Opinion No. 2020-04, at 3 (June 5, 2020) (explaining how state agencies procure goods and services). But the Act establishes a preference for services providers who employ persons with disabilities. *See* § 13-1C-7(A). Procurements under the Act are “exempt from the provisions of the Procurement Code.” *Id.*

The Council implements the Act’s procurement preference by “determin[ing] which services provided by persons with disabilities are suitable for sale to state agencies and local public bodies[.]” § 13-1C-5(A)(1)-(2). After identifying suitable services, the Council determines the prices of those services, balancing the need to provide the “best value for state agencies and local public bodies” against “the benefits associated with employing persons with disabilities[.]” § 13-1C-5(A)(3); *see also* § 13-1C-7(A) (noting the Council’s authority to establish prices for

eligible services). The Council establishes a procedure “to certify eligible community rehabilitation programs and qualified individuals that have services suitable for procurement by state agencies and local public bodies” and to place qualified programs or individuals on the list of suitable services. § 13-1C-5(A)(4).

A state agency or local public body does not directly contract for services with qualified community rehabilitation programs or other persons. Instead, the Council “establish[es] a procedure for approval of a central nonprofit agency that shall hold contracts, facilitate the equitable distribution of orders for services to be procured by state agencies and local public bodies and market approved services to state agencies and local public bodies” among other things. *See* § 13-1C-5(A)(1), (5). Thus, a state agency procuring services under the Act does not contract directly with the Council or a qualified provider of services; instead, the central nonprofit agency “hold[s]” the contract with the state agency and subcontracts for services from qualified programs or individuals, thereby “facilitat[ing] the equitable distribution of orders for services” among qualified programs or individuals.

According to the request, “a few years ago there were Council members who voted to approve contracts for hundreds of thousands of dollars that directly benefited themselves and their own companies.” The Commission’s limited understanding of the situation is as follows: a state agency had procured services through a request for proposals. After a contract had been awarded to the winning offeror, a Council member contacted and informed the agency that the services the agency had procured were on the Council’s list of services suitable for provision by the central nonprofit. The agency canceled the procurement and obtained the services from the central nonprofit. The central nonprofit selected a company owned by the Council member, and the Council member voted to approve the award.

The request states: “[w]hen professionalism is [so] compromised . . . the question of what recourse the Council might have arises because the [Governmental Conduct Act] does not apparently apply to certain members [of the Council].” The request asks the Commission to opine on whether “there is an ethical loophole in the [Governmental Conduct Act], whether or not these facts would violate any statute or rule,” and to provide “recommendations on possible solutions which may include among others, legislative action for a statutory change, an administrative rule, or a policy action.”

ANSWER

Self-dealing by non-state-employed Council members does not violate the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended

2019), or the Procurement Code.³ If the Council wishes to prohibit a member from participating in a decision to award a contract to the member or a company the member owns, the Council can (1) amend its rules to eliminate Council votes on individual contract awards; (2) amend its rules to require conflicted Council members to recuse from votes affecting their financial interests; or (3) suggest amendments to the Act that would subject the Council’s contract award decisions to the Procurement Code’s conflict-of-interest provisions.

ANALYSIS

We appreciate the diligence and ethical concerns expressed by the requester in bringing this matter to our attention. We also agree with their expression that when self-dealing like that described occurs, “professionalism is . . . compromised,” and when that occurs in our judgment public confidence in the ethical operation of government suffers. We are nevertheless constrained by the laws under which we operate only to determine if a law currently in effect has been violated, not whether we believe every action we may be asked about is ethical.

Given that limitation, we are compelled to conclude that self-dealing by non-state-employed Council members, while it may offend a sense of morality, does not, as the law is currently written, violate the Governmental Conduct Act. Most of the members of the Council do not receive compensation or cost reimbursements from the state, and therefore are not subject to the Governmental Conduct Act’s conflict-of-interest provisions or the Financial Disclosure Act’s disclosure requirements. Similarly, the Act exempts contracts awarded pursuant to that Act from the provisions of the Procurement Code. As a result, the Procurement Code’s conflict of interest provisions also do not prohibit a Council member from participating in an award of a contract subject to the Act. To address the potential for self-dealing, the Council should consider either amending its rules so that Council members are no longer involved in approving or disapproving specific contracts, or

³The Commission notes that self-dealing by non-state-employed Council members might violate the criminal code’s kickback or unlawful-interest-in-public-contract provisions. *See* NMSA 1978, § 30-41-1 (kickbacks); *see also* NMSA 1978, § 30-23-6 (unlawful interest in public contract). The Commission, however, will not opine on the applicability of the criminal code to facts presented in a request for an advisory opinion. Under NMSA 1978, Section 10-16G-8(A), the Commission may issue advisory opinions “on matters related to ethics.” “Such ‘matters related to ethics’ are both informed and circumscribed by the nine laws that the Commission currently may enforce.” State Ethics Comm’n, Advisory Op. No. 2020-05, at 1 n.2 (Aug. 7, 2020).

recommending amendments to the Act which subject the Council's members to the Procurement Code's conflict-of-interest prohibitions.

1. Governmental Conduct Act

As the request notes, Council members are required to serve “without compensation or cost reimbursement,” § 13-1C-4(D); as such, they do not fall within the Governmental Conduct Act's definition of “public officer or employee.” *See* § 10-16-2(I) (defining “public officer or employee” as “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”) (emphasis added). This means that a Council member who is not otherwise employed or receiving compensation from the State would not be subject to the Governmental Conduct Act's conflict-of-interest prohibitions. *Cf.* §§ 10-16-3(A) (prohibiting a “public officer or employee” from using “the powers and resources of public office . . . to obtain personal benefits or pursue private interests”).⁴

The Governmental Conduct Act also prohibits a state agency from entering into a contract

with a public officer or employee of the state, 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 unless the public officer or employee has disclosed through public notice the public officer's or employee's substantial interest and unless the contract is awarded pursuant to a competitive process.

§ 10-16-7(A). But this prohibition does not apply to State Use Act contracts involving uncompensated and unreimbursed Council members for two reasons. First, an uncompensated and unreimbursed Council member is not a “public officer

⁴A Council member who receives compensation from the state in the form of salary or per diem would be subject to the Governmental Conduct Act and, therefore, is precluded from voting to award a contract that implicates a financial interest. *See* NMSA 1978, §§ 10-16-3(A) & 10-16-7(A).

or employee” as defined by the Governmental Conduct Act. § 10-16-2(I).⁵ Second, under the Act, the designated “central nonprofit agency” holds contracts, not the Council. *See* § 13-1C-5(A)(5). State agencies contract with the central nonprofit agency, not with a business in which the Council member has a substantial interest. *See id.*

2. Procurement Code

The Procurement Code separately provides that it is “unlawful for any state agency or local public body employee, as defined in the Procurement Code, to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee’s immediate family has a financial interest in the business seeking or obtaining a contract.” *See* § 13-1-190(A). The Procurement Code defines “employee” broadly, such that the term encompasses all Council members. *See* § 13-1-54 (defining “employee” as “an individual receiving a salary, wages or per diem and mileage from a state agency or a local public body whether elected or not and any noncompensated individual performing personal services as an elected or appointed official or otherwise for a state agency or a local public body.”). Yet, the Procurement Code’s conflict-of-interest section is unavailing because procurements under the Act are exempted from the requirements of the Procurement Code. *See* § 13-1C-7(A); *see also* § 13-1-98(Z) (exempting from the Procurement Code any “procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act”). Accordingly, the Procurement Code’s conflict-of-interest prohibition does not extend to a decision by a Council member to award a subcontract to themselves or to a company in which they have a financial interest.

3. Suggested amendments to Council rules or statutes

The request states that the Council currently functions under a kind of honor system: members are expected (but not required) to recuse themselves from votes “regarding contracts that might directly affect their businesses[.]” The request asks the Commission to opine on how the Council should pursue a more formal prohibition against conflicted transactions.

⁵Uncompensated and unreimbursed council members are not subject to the disclosure requirements of the Financial Disclosure Act for the same reason. Under the Financial Disclosure Act, only state officials or employees who receive compensation in the form of salary or per diem and mileage are subject to its requirements. *See* NMSA 1978, §§ 10-16A-2(F).

In large part potential conflicts of interest stem from the Council’s own rules, which give Council members the authority to approve or disapprove specific contracts. Specifically, the Council’s rules state the Council’s “authority to make final contract distribution decisions,” ostensibly to ensure that contracts are distributed to “as broad a base of eligible participants as possible . . . as well as any other unique factors or special circumstances.” *See* 2.40.5.14(A), (B) NMAC. The Act, by contrast, does not directly confer on the Council express authority to approve specific contracts. *See* § 13-1-5(A). Nor is it obvious that the Act implies that authority. *See id.* Rather, the Act endows the Council with authority to adopt rules that “determine which services provided by persons with disabilities are suitable for sale to state agencies and local public bodies” and “establish a procedure to certify eligible community rehabilitation programs and qualified individuals that have services suitable for procurement by state agencies and local public bodies” §§ 13-1C-5(A)(1), (A)(4). The Act seems to contemplate that individual contracts are the business of “a central nonprofit agency,” which “hold[s] contracts [and] facilitate[s] the equitable distribution of orders for services to be procured by state agencies and local public bodies” § 13-1C-5(A)(5).⁶

The requester has asked the Commission to offer recommendations that would prevent Council members from approving contracts involving their own financial interests. The Commission commends this request and the concern it demonstrates for governmental ethics. In the Commission’s view, this can be accomplished in several ways:

First, the Council’s four state-employee members could recuse from any vote to approve a contract in which *any* Council member has a financial interest. Such a recusal policy might deter other, non-state-employee Council members from voting to approve any contract that involves self-dealing. Furthermore, the refusal of state-employee Council members to vote on any contract that implicates a financial interest of any Council member is entirely consistent with the duties that Section 10-16-3 of the Governmental Conduct Act requires of public employees to “use the

⁶Horizons of New Mexico is the nonprofit entity selected by the Council to hold contracts and perform other functions assigned to the “central nonprofit agency” under the Act. § 13-1C-5(A)(5). But Horizons of New Mexico has an unclear status. Its website lists members of the Council on its “About Us” page. *See* Horizons of New Mexico, *About Us*, <http://horizonsofnewmexico.org/about.html> (last accessed October 1, 2020). Horizons of New Mexico, however, uses the same Federal tax identification number as Workquest, a Texas-based 501(c)(3) nonprofit.

powers and resources of public office only to advance the public interest” and to disclose “real or potential conflicts of interest.” § 10-16-3(A) & (B).

Second, the Council could amend its rules so that its members no longer exercise approval authority over individual contracts. These amendments are arguably required by the Act, which gives the Council explicit authority only to determine which services are suitable for provision and set eligibility criteria for service providers and which accord on the “central nonprofit agency” the role of “hold[ing] contracts” and “facilit[ating] the equitable distribution of orders for services” provided by qualified programs and individuals. § 13-1C-5(A)(5); *see generally* § 13-1C-5(A) (providing the Council’s rulemaking authority); *N.M. Bd. of Pharmacy v N.M. Bd. Of Osteopathic Medical Examiners*, 1981-NMCA-034, ¶ 8, 95 N.M. 780, 626 P.2d 854 (“An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.”). These amendments would leave individual acts of contracting to the procuring state agency or local public body, the central nonprofit, and the subcontracted, qualified service provider—perhaps restoring the scheme contemplated by the statute.

Third, even if the Council retains authority over contract approvals, the Council could nevertheless amend its rules to prohibit its members from participating in votes to approve or disapprove specific contracts. *See* § 13-1C-5(A)(7) (giving Council the authority to “adopt rules . . . [to] address any other matter necessary to *the proper administration* of the State Use Act”) (emphasis added). As compared to the foregoing option, this amendment would perhaps require less sweeping changes to the Council’s practices. This option, however, would require Council members to make detailed financial disclosures to enable meaningful enforcement.

Fourth, at the Council’s request, the Commission could ask the legislature to amend the Act, either to include a specific recusal requirement for Council members for conflicted transactions, or to incorporate the conflict-of-interest prohibitions in the Governmental Conduct Act or the Procurement Code by reference.⁷ These statutory amendments would enable law enforcement agencies such as the State Ethics Commission or the Office of the Attorney General to investigate potential violations. Enforcement would likely arise from violations reported by Council

⁷Under the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16 (2019), the Commission must make an annual report, which includes “any recommendations regarding state ethics laws . . . in December of each year to the legislature and the governor.” § 10-16G-5(B)(5).

members or disappointed third-party vendors that sought procurement from state agencies or local public bodies.

CONCLUSION

We commend the requester for bringing these ethical concerns to our attention. We also share the stated concern about the dangers of self-dealing in public procurement. We can opine, however, only about what the law currently provides rather than offering general views of what we believe is moral or ethical. Given that, we are constrained to conclude that the Governmental Conduct Act and the Procurement Code do not, as currently written, prohibit a Council member from voting to approve a contract subject to the Act between a state agency or local public body and the Council member or a company in which the Council member has a financial interest. To remedy this gap, the Council could either amend its rules or recommend to the legislature (through or in concert with the Commission) that the legislature extend the Procurement Code's conflict-of-interest prohibition to Council members by appropriate statutory amendment.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

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