



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2024-01

February 2, 2024¹

QUESTIONS PRESENTED²

Following the State Ethics Commission's issuance of Advisory Opinion 2023-07, in which the Commission opined that the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2023), applies to the selection of contracts for legal services on a contingent-fee basis, on December 12, 2023, the Commission received a related request for an advisory opinion regarding the procurement of contracts for outside counsel. That request explains:

Based in part on staffing limitations and the extensive resources needed for certain cases and types of litigation, [the Attorney General's Office ("AGO")] frequently requires the assistance of outside law firms to represent the

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). "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. On December 12, 2023, the Commission received a request for an advisory opinion that detailed the issues as presented herein.

State. This is particularly true for complex affirmative civil litigation in the subject areas of consumer protection, environmental protection, civil rights, securities, antitrust, and fraud against taxpayers. In some cases, [the AGO] may become aware of claims on its own and seek outside assistance; in others, private law firms bring claims or theories of recovery to [the AGO] based on their independent investigation or other proprietary information. Also, at times, the State may need to act quickly to file an action in order to avoid the running of a statute of limitations, a statute of repose, or other filing deadline. For example, a lead plaintiff motion in a securities case must be filed within sixty days of the complaint, much of which can elapse before [the AGO] even learns of a fund's eligibility for lead plaintiff status. These circumstances can make it challenging to establish a uniform procurement process.

Considering that context, the request poses two questions regarding the application of the Procurement Code to the AGO's procurement of contracts for legal services:

1. Would the AGO be in compliance with the Procurement Code if it (a) generates a list of approved law firms by issuing a request for proposals ("RFP") for legal representation on any affirmative AGO litigation in which the services of outside counsel are needed without reference to a specific case or subject area and (b) later selects one of the approved law firms to represent the State in specific matters as they arise without using an additional, separate procurement process under the Code for each matter?
2. Is there a method for an emergency procurement of legal services when compliance with the normal procurement methods in the Procurement Code would cause the State to lose a claim due to the expiration of a statute of limitations or filing deadline?

ANSWERS

1. Yes.
2. Likely no.

ANALYSIS

I.

Under the Procurement Code, the AGO may award two or more contracts to private law firms for legal representation of the State in pursuit of the State's claims and, following those multiple contract awards, assign work to particular contract awardees in the AGO's discretion.³ The Code classifies such procurements as "multiple source awards," and Section 13-1-153 governs how state agencies and local public bodies may award multiple source contracts. The section provides:

A multiple source award may be made pursuant to Section 13-1-110 NMSA 1978 or Section 1 of this 2007 act when awards to two or more bidders or offerors are necessary for adequate delivery or service. Multiple source awards shall not be made when a single award will meet the needs of the state agency or a local public body without sacrifice of economy or service. Awards shall be limited to the least number of suppliers in one geographical area necessary to meet the requirements of the state agency or a local public body. A multiple source award shall be based upon the lowest responsible bid or proposal received in each

³ We observe that the New Mexico Office of the Attorney General recently changed its name to the New Mexico Department of Justice. Following the terms of the request, in this advisory opinion we will refer to the agency as AGO. *See* Press Release, Empowering Justice: Attorney General Raúl Torrez Unveils New Identity as the New Mexico Department of Justice (Jan. 10, 2024), <https://nmag.gov/empowering-justice-attorney-general-raul-torrez-unveils-new-identity-as-the-new-mexico-department-of-justice/>.

geographical area unless the award is made in response to a qualifications-based proposal.

NMSA 1978, § 13-1-153 (2007).⁴

The Code also requires that, before resorting to a multiple source award, “[t]he state purchasing agent or central purchasing office shall make a *determination* setting forth the reasons for a multiple source award.” NMSA 1978, § 13-1-154 (1984) (emphasis added). Under the Code, “determination” is a defined term, meaning “the written documentation of a decision of a procurement officer including findings of fact required to support a decision.” NMSA 1978, § 13-1-52 (1984). Such determinations become part of the procurement file to which they pertain. *See id.*

Under the Procurement Code, “only certified chief procurement officers” may “make determinations.” NMSA 1978, § 13-1-95.2(E)(1) (2013). Because the Code requires that a “determination” support the use of a multiple source award, § 13-1-154, the agency’s chief procurement officer must be involved in the agency’s decision to use a multiple source award. Considering the Code’s definition of “determination,” we perceive some ambiguity regarding both the extent and the exclusivity of the chief procurement officer’s role in *making* that decision for the agency; however, at the very least, the chief procurement officer must *document* the decision and the reasons and findings that support it. *See* §§ 13-1-52; 13-1-95.2(E)(1).⁵

⁴ Section 1 of the 2007 Act is Laws 2007, Chapter 312, Section 1, which has been codified at 13-1-154.1, and governs multiple source architectural, engineering, and indefinite quantity construction contracts. *See* 13-1-154.1 (2020).

⁵ The Code defines “determination” as “the written documentation of a decision of a procurement officer including findings of fact required to support a decision.” § 13-1-52. The Code also defines “procurement officer” as “any person or a designee authorized by a state agency or a local public body to enter into or administer contracts and make written determinations with respect thereto.” NMSA 1978, § 13-1-75 (1984). Procurement officers, therefore, are those individuals in a state agency or local public body with the authority to bind the agency in contract. *See id.* In addition to procurement officers, the Code creates the office of the “chief procurement officer,” which the Code defines as “that person within a state agency’s or local public body’s central purchasing office who is responsible for the control of procurement of items of tangible personal property, services or construction.” NMSA 1978, § 13-1-38.1 (2013). “Chief procurement officer” includes the state purchasing agent. *Id.* While only the chief procurement officer may make determinations pursuant to the Code, § 13-1-95.2(E)(1), under the foregoing definitions, that reservation of authority strictly means that the chief

For the AGO to award multiple contracts to two or more private law firms to pursue the State's affirmative litigation, the AGO, through its procurement officers and chief procurement officer, must decide that "awards to two or more offerors are necessary" and that a single award to a single private law firm will not meet the needs of the agency "without sacrifice of economy or service." § 13-1-153. Considering the extent and the different types of claims that the State affirmatively litigates as a plaintiff, a single award to a single private law firm to pursue the State's civil actions would not serve New Mexico; therefore, contract awards to two or more private law firms are necessary. This necessity is likely the case not only with respect to the State's affirmative litigation generally, but also with respect to each of the different kinds of plaintiff-side, civil litigation that the request references—*e.g.*, consumer protection, environmental protection, civil rights, securities, antitrust, and fraud against taxpayers, among others. It is very likely that in each of these areas of civil litigation, the State requires more than one contract with outside counsel to affirmatively litigate the State's claims and seek recovery for New Mexico.

Accordingly, the AGO may use a request for proposals for a multiple source award for outside counsel across all the AGO's categories of affirmative litigation, as the request seems to contemplate.⁶ As with any procurement by a request for

procurement officer (and no one else) must make the "written documentation" of a decision of a procurement officer. § 13-1-52. By contrast, the Code does not say that *only* the chief procurement officer may make decisions under the Code. Rather, the Code suggests that "procurement officers"—*i.e.*, those individuals, in addition to the chief procurement officer, with authority to bind an agency in contract—may make decisions under the Code. Accordingly, we do not understand the Code, as currently drafted, to vest exclusive authority in chief procurement officers to make decisions under the Code, including the decision whether a multiple source award is available. That authority, rather, seems to reside with any of the agency's procurement officers, provided again that the agency's chief procurement officer is involved, at the very least, to document the decision.

⁶ We observe that the use of a single request for proposals to make a multiple source award to outside counsel to represent the State is not a novel feature of New Mexico state government. Indeed, the Risk Management Division of the General Services Department issues a global request for proposals for outside counsel to provide legal services to support the defense of: (i) the public liability fund in cases related to the Tort Claims Act, medical malpractice, law enforcement and corrections liability, employment and ethics laws, civil rights, insurance, subrogation and contractual indemnity, construction, property rights and usage, and class action litigation; and (ii) the worker's compensation retention fund in workers compensation matters and appeals. Once the Risk Management Division has awarded those contracts, the Division

proposals, the procuring agency must abide by the Code’s provisions that govern the use of competitive sealed proposals. *See* NMSA 1978, §§ 13-1-111 to 13-1-117 (1984, as amended through 2011). While the request contemplates the use of a single request for proposals for affirmative litigation contracts, we note that the AGO may also use requests for proposals for multiple source awards for outside counsel for discrete categories of civil actions. The AGO need only determine that, for a particular kind of affirmative litigation (such as environmental production or antitrust), awards to two or more private firms “are necessary for adequate delivery or service” and that an award to a single private firm will not meet the needs of the State “without sacrifice of economy or service.” § 13-1-153.

Whether the AGO uses one or several requests for proposals for outside counsel, the procurement results in multiple contract awards to responsible offerors whose proposals are most advantageous to AGO and to the State. The contracts may include compensation terms and terms governing the process by which the AGO will select contract awardees for particular matters. Once the contracts are in place, the AGO may then assign work by purchase order to contract awardees as appropriate to the needs of the AGO in its pursuit of the State’s civil claims. *See* NMSA, § 13-1-77 (2001) (defining a purchase order as “the document issued by the state purchasing agent or a central purchasing office that directs a contractor to deliver items of tangible personal property, services or construction”).⁷ In this way, the AGO’s purchase of services from a particular vendor following a multiple source award functions akin to a state agency’s purchase of services by purchase order pursuant to a federal supply contract or a statewide price agreement. *See* NMSA 1978, § 13-1-129(A) (1991) (allowing for purchases under federal and statewide price agreements so long as the purchase order adequately identifies the price agreement relied upon).

II.

Turning to the request’s second inquiry, we do not believe that in most cases the Procurement Code allows a state agency to make an emergency procurement of legal services to represent the State in affirmative litigation when compliance with

then “assign[s] the most appropriate legal representation for legal matters related to its mission to defend the State.” *See* General Services Department, Risk Management Division, Request for Proposals #24-350-4905-0003, at 2 (Nov. 1, 2023), <https://www.generalservices.state.nm.us/wp-content/uploads/Legal-Services-RFP-09-2023GR-10-30-2023.pdf> (last accessed Dec. 26, 2023).

⁷ We note that except for certain statutorily defined exceptions, a contract for professional services may not exceed four years. *See* NMSA 1978, § 13-1-150(B) (2023).

the Code’s provisions would cause the State to lose a claim due to the expiration of a statute of limitations or filing deadline. Our view is based on the text of Section 13-1-127, which governs emergency procurement. Section 13-1-127 provides in pertinent part:

The state purchasing agent or a central purchasing office may only make an emergency procurement when the service, construction or item of tangible personal property procured:

(1) is needed immediately to:

(a) control a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; or

(b) plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; *and*

(2) cannot be acquired through normal procurement methods.

NMSA 1978, § 13-1-127(A) (2019) (emphasis added). Broken down, an emergency procurement is authorized only when the procurement is “needed immediately” for: (i) a “serious threat”; (ii) “to public health, welfare, safety or property”; (iii) which is “caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event[.]” or for the planning or preparation for such an event; and (iv) the procurement “cannot be acquired through normal procurement methods.” *Id.* In order to meet this exception, each of these requirements must be met. *See, e.g.,* NMSA 1978, § 12-2A-18(A) (“A statute or rule is construed, if possible, to: (1) give effect to its objective and purpose; (2) give effect to its entire text . . .”).

It is unlikely that the conditions that support an emergency procurement fairly characterize the circumstances that the request posits. While there might be situations where an imminent statute of limitations deadline jeopardizes a newly identified claim and thus arguably poses a threat to public property, it would be the rare case in which that threat were “*caused by* flood, fire, epidemic, riot, act of terrorism, equipment failure, or similar event[.]” § 13-1-127(A) (emphasis added). As a general matter, therefore, the AGO would not be allowed to use the emergency procurement section for the situations the request contemplates.

This is not to say, however, that there are *no* circumstances under which the AGO may utilize Section 13-1-127. In situations where the public health, welfare, safety or property is subject to serious threat caused by one of the conditions the statute contemplates, it is conceivable that the AGO might properly make an emergency procurement for special attorney services, for example, to seek injunctive relief connected to the threat that gives rise to the emergency.⁸ But that hypothetical is different than the circumstance of the State potentially losing a claim due to the running of a statute of limitations in, for example, a securities matter.

Finally, we emphasize that the AGO could take proactive measures to address the circumstances presented in the request—namely, those situations in which the agency becomes aware of a claim that a statute of limitations or statute of repose jeopardizes. By making a multiple source award, the AGO could enter into standing contracts with several firms able to begin representation of the State on any newly identified claim for which a statute of limitations might run.

CONCLUSION

The Procurement Code allows the AGO to award two or more contracts to private law firms for legal representation of the State. Through a multiple source award, the AGO could have such counsel on contract so the AGO would be able to assign work by purchase order as appropriate, including for those situations where previously unknown claims are discovered on the eve of a statute of limitations deadline. By contrast, the Code likely does not allow the AGO to make an emergency procurement of legal services to file an action to avoid the running of a statute of limitations, a statute of repose, or other filing deadline.

⁸ Where such emergency circumstances are present and normal procurement methods cannot be utilized, the AGO must follow the requirements set forth in statute and regulation. This includes that the AGO must “employ a competitive process to the extent practicable under the circumstances” and “use due diligence in determining the basis for the procurement and in selecting the contractor.” § 13-1-127(B). Further, such “procurements shall be limited to those services, construction, or items of tangible personal property necessary to meet the emergency.” 1.4.1.60 NMAC. In addition, the AGO must outline its determination in writing, including the basis for the procurement and its selection of the contractor, must post notice of the procurement, and must maintain records of the procurement and report the procurement under certain circumstances. *See* § 13-1-127(C), (D); § 13-1-128; 1.4.1.62–1.4.1.64 NMAC.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

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HON. DR. TERRY MCMILLAN, Commissioner

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