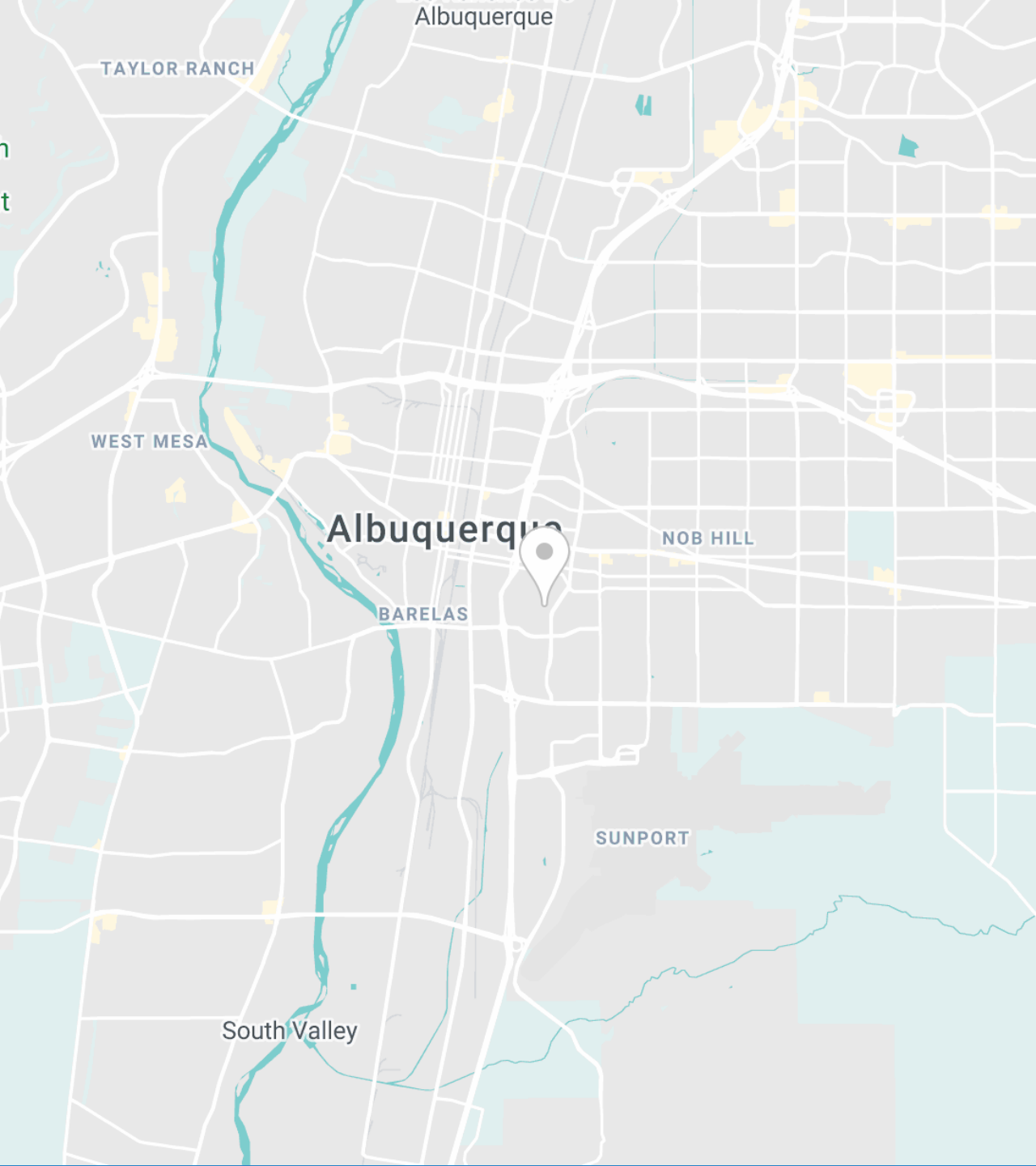


ETHICS FOR LOCAL GOVERNMENT

LGD Budget Conference | November 21, 2024
Caroline “KC” Chato, Chief Compliance Counsel
Rebecca Branch, Deputy Compliance Counsel



STATE ETHICS COMMISSION



STATE ETHICS COMMISSION

7 COMMISSIONERS

- Hon. William Lang (ABQ) • Jeffrey L. Baker (ABQ)
- Stuart Bluestone (ABQ) • Hon. Celia Castillo (SF)
- Hon. Gary Clingman (Hobbs) • Hon. Dr. Terry McMillan (SF)
- Dr. Judy Villanueva (Carlsbad)

POWERS AND RESPONSIBILITIES:

- PROVIDE TRAINING ON ETHICS LAWS
- PROVIDE ADVICE TO PUBLIC OFFICIALS/EMPLOYEES
- ENFORCE APPLICABLE ETHICS LAWS

COMMISSION POWERS & DUTIES (1/2)

Quasi-Judicial Functions:

Adjudicate administrative complaints alleging violations of the laws under the SEC's jurisdiction. *Complainant v. Respondent* (State Ethics Comm'n)

Issue formal and informal (letter) advisory opinions on matters related to ethics and which identify a specific set of circumstances

Executive Functions:

Investigate alleged violations and initiate civil litigation in state courts to enforce selected provisions of ethics statutes. *State Ethics Comm'n v. Defendant* (2nd Jud. Dist. Ct.)

Provide recommendations on amendments to New Mexico's ethics laws

Offer ethics trainings and guides, and "other duties as assigned" (e.g., redistricting committee appointments)

Legislative Functions:

Delegated rulemaking powers (NMAC):

- Promulgate rules of procedure for administrative adjudication (1.8.3 NMAC)
- Promulgate proposed code of ethics (1.8.4 NMAC)

COMMISSION POWERS & DUTIES (2/2)

Personal Jurisdiction (as an adjudicatory body)

- All State Executive Officials and Legislators
- All State Executive and Legislative Employees
(~17,000 in filled positions)
- Lobbyists and lobbyists' employers
(725)
- Candidates and entities subject to Campaign Reporting Act
(700)
- State government contractors and seekers of state government contracts
(~40,000 active outside suppliers)

Subject-Matter Jurisdiction and Civil Enforcement Authority

- Campaign Reporting Act
- Financial Disclosure Act
- Gift Act
- Lobbyist Regulation Act[†]
- Voter Action Act
- Governmental Conduct Act^{*}
- Procurement Code[†]
- State Ethics Commission Act
- Article 9, Section 14 of the Constitution (Anti-Donation Clause)^{*}
- Revised Uniform Law on Notarial Acts

ADVISORY OPINIONS

- Commission may issue advisory opinions on matters related to ethics for a specific set of circumstances posed by the requester.
- Must be requested in writing:
ethics.commission@sec.nm.gov
- Requests for advisory opinions are confidential by law.
- Commission issues advisory opinions and informal advisory opinions.
 - Formal advisory opinions are binding on the Commission and are published (after removing identifying information) (§ 10-16G-8).
 - Informal advisory opinions are specific to the requestor and may be requested by persons subject to the Governmental Conduct Act. (1.8.1.9(B) NMAC).

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TWO ORGANIZING IDEAS

Government

1. belongs to the public

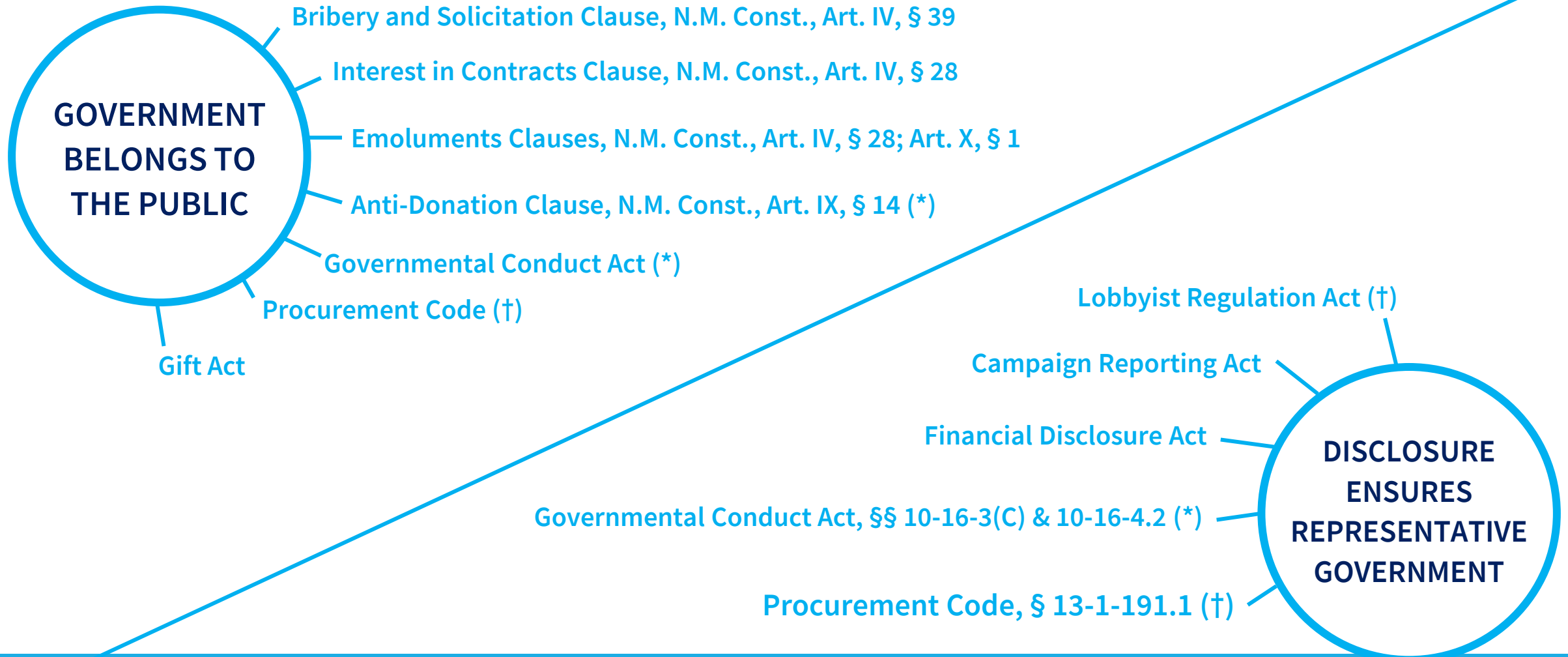
The property, powers, and prerogatives of government office *belong to and are for* the benefit of the public only, not the officials. See NMSA 1978, § 10-16-3(A).

TWO ORGANIZING IDEAS

2. Disclosure ensures representative government

- (a) Disclosure of who and what might influence an elected official allows constituents to check that the uses of government office are for the benefit of the public and not the official.
- (b) Disclosure helps to justify commonplace departures from the ideal theory of representation that representatives reflect the voices of the constituent members of their districts.

THESE TWO IDEAS ORGANIZE NM'S ETHICS LAWS



LOBBYIST REGULATION ACT

Filing requirements (§ 2-11-6): expenditure reports or statements of no activity, to be filed either by the lobbyist or lobbyist employer (so, make sure your lobbyist is filing appropriate disclosures with the SOS).

Prohibition on contingent fees (§ 2-11-8): lobbyist employers cannot condition a lobbyist's compensation on the outcome of lobbying activities before legislative branch or with respect to a gubernatorial veto

City of Farmington

Compliant

Type Lobbyist Employer	Address 800 Municipal Dr. Farmington, NM, 87401 USA	Phone (505) 599-1100	Email rmayes@fmtn.org	Registration Year 2024
Status Active	Address While Lobbying	Phone	Email	Authorizing Officer Mr. Robert Mayes Business Interest Governmental Affairs

SUMMARY **LOBBYISTS** FILINGS FINES DOCUMENTS

2024 ▼

Lobbyist	Registered	Authorized	Compensated	Date Employed	Date Terminated	Source of Funds	Lobbying Efforts	Year
Scott Scanland	Active	Yes	Yes	01/01/2021		General Fund	All matters of governmental affairs	2024

GOVERNMENTAL CONDUCT ACT

**Selected provisions of the Governmental Conduct Act relevant to
municipal government**

Duties at a High Level of Generality

Prohibited use of public powers (§ 10-16-3(A)):

Municipal officer or employee “shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests”

Disqualification for conflicts of interest (§ 10-16-4(B)):

Municipal official or employee is disqualified and must recuse from taking any official act directly benefiting their financial interest, where the benefit to their financial interest is proportionately greater than the benefit to the general public.

No official acts to enhance financial interest (§ 10-16-4(A)):

Municipal officer or employee shall not take an official act for the primary purpose of directly enhancing their financial interest or financial position

**The knowing and willful violation of this section is a fourth degree felony.*

Note: the Governmental Conduct Act advances the main principle that the powers, prerogatives, and property of public office be exercised only for the public benefit by imposing duties both (1) at a high specificity (like prohibiting certain sales) and (2) at a high level of generality (like prohibiting any official act taken to promote one’s own financial interest).

Prohibited Political Activities and Unauthorized Use of Public Property

Coercing others to make contributions (§ 10-16-3.1(A) & (B)):

Municipal official or employee cannot

- (a) coerce another public officer or employee to make a contribution to a candidate, committee, or other person for a political purpose;
- (b) threaten to deny a pay increase to employee depending on how they vote;
- (c) require an employee to contribute percentage of their pay to a political fund; or
- (d) influence a subordinate employee to purchase a ticket to a political fundraising dinner.

Using municipal property for political purpose (§ 10-16-3.1(C)):

Municipal official or employee cannot use municipal property, or allow its use, “for other than authorized purposes”– i.e., as an in-kind contribution to a candidate or political campaign.

*This provision also prohibits more mundane unauthorized uses of municipal property for a personal benefit. (e.g., using a municipal truck for a personal vacation)

Note: These provisions prevent public officials from using the public powers and resources at their disposal to finance their own campaigns or to support their political party. The statutory provisions also protect core First Amendment rights of public employees with respect to their decisions about voting and political contributions. As such, these laws keep separate the government, as an entity, and the political parties that vie for leadership positions in government.

Prohibited Sales

Sales to employees (§ 10-16-13.2(A)):

Municipal official or employee cannot sell goods, services, or construction to an employee, unless the employee initiates the sale.

Sales to persons under regulatory authority (§ 10-16-13.2(B)-(C)):

Municipal official or employee cannot sell goods, services, or construction to a person over whom they have regulatory authority.

Governmental Conduct Act & Procurement

Contracts involving public officials or employees (§ 10-16-7(B))

No contract between municipality and a public officer or employee, their family, or a business in which they have > 20% ownership interest, unless:

- (a) The public officer or employee disclosed their interest; and
- (b) The contract is awarded pursuant to a competitive process (RFP or ITB)

*Does not apply to employment contracts with municipality

Prohibited bidding (§ 10-16-13):

Municipality cannot accept a bid or proposal from a person who participated in the preparation of the specifications, qualifications or evaluation criteria on which the bid or proposal was based.

Note: These GCA provisions apply even where the Procurement Code does not -- i.e., to home rule municipalities with their own procurement ordinances. These rules, and rules about contemporaneous outside employment, severely constrain the ability of a municipal official or employee to be on both sides of a transaction involving municipal funds.

Revolving Door

Permanent ban on representation (§ 10-16-8(B))

A former official or employee cannot represent a person with the person's dealings with "the government" on a matter in which the former official or employee "participated personally and substantially" while a public official or employee

Ban on revolving door contracts (§ 10-16-8(C))

Municipality cannot enter contract with a business who is represented by a person who, within the preceding year, was a municipal official or employee if:

- (a) The contract is for more than \$1000; and
- (b) The contract is a "direct result of an official act" of the former municipal official or employee

Cooling-off period (§ 10-16-8(D))

For a period of one year after leaving government service or employment, a former public official or employee shall not represent "for pay" a person before the local government agency at which the former public official or employee worked

Note: the purpose of "revolving-door" rules is to prevent private businesses from "capturing" government by incentivizing government employees to make biased decisions in their favor.

Contemporaneous Outside Employment

Disclosure of outside employment (§ 10-16-4.2):

Municipal officer or employee can accept outside employment that does not relate to the performance of their official duties, but they must “disclose in writing” the outside employment to their respective municipal office.

Honoraria prohibited (§ 10-16-4.1):

Municipal officer or employee cannot request or receive an honorarium for a speech or a service rendered that relates to the performance of their public duties. An honorarium is cash or any thing of value greater than \$100, but excludes reimbursement for personal costs incurred in making the speech or rendering the service.

Prohibited employment with contracting businesses (§ 10-16-4.3):

Municipal officer or employee who is participating in municipal contracting process with a business cannot, while a municipal employee, accept outside employment with the business contracting with the municipality.
See also Procurement Code, § 13-1-193.

Prohibited employment with regulated businesses (§ 10-16-13.2(D)):

Municipal officer or employee cannot, while a municipal officer employee, accept an offer of employment or independent contract from a business over whom the municipal officer or employee has regulatory authority.

Also about prohibited employment: the old nepotism statute, § 10-1-10 (1925), prevents a municipal official or employee from employing a deputy, clerk or assistant who is a relative within the third degree (i.e., first cousins or closer), unless first approved by a higher officer, board, or council.

PROCUREMENT

Sources of rules, overview and scope of Procurement Code requirements, and selected ethics provisions

THE PROCUREMENT CODE IN ONE SLIDE

(1) *The main rule:* All procurement is achieved through competitive sealed bids or proposals. (§ 13-1-102).

(2) But there are *many exemptions and exceptions:*

- Purchases of tangible items from other government agencies (state and local)
- Procurements under existing contracts (e.g., GSA or statewide price agreements)
- Travel, meals and lodging
- Public school transportation services
- Prepayment for conferences, magazine subscriptions, etc.
- Jail and hospital operation contracts
- Advertising
- Purchases of services provided by disabled workers (State Use Act)
- Small purchases (\$60,000 for professional services; \$20,000 for other services and goods)

(3) And even where there are exceptions, other purchasing rules still apply.

WHO HOLDS THE CHECKBOOK?

Chief procurement officers. Only certified chief procurement officers may do the following:

- Make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;
- Issue purchase orders and authorize small purchases pursuant to the Procurement Code; and
- Approve procurement pursuant to the Procurement Code. See § 13-1-95.2(E).

The Procurement Code as a governmental ethics statute

And Sections 13-1-190 to -195 are the core, traditional ethics provisions of the Code

§ 13-1-190(A)

A government employee cannot participate directly or indirectly in a procurement when the employee knows that they or their immediate family member has a financial interest in the business seeking to obtain a contract. (Subject to a waiver under § 194)

§ 13-1-195

A current or former government employee cannot knowingly use confidential information for the actual or anticipated personal gain for any other person.

§ 13-1-193

A government employee who is participating directly or indirectly in the procurement process cannot become or be, while a government employee, also the employee of any person or business contracting with that same government agency. (Subject to a waiver under § 194)

See also §§ 10-16-6, -7, -13

Remember that certain sections of New Mexico's Governmental Conduct Act also apply to procurement by state and local government (e.g., regarding use of confidential information, self-dealing, prohibited bidding).

Nota bene: If you encounter a suggestion that a municipal official or employee is on both sides of a procurement, go reread sections 190 through 195 of the Code.

ANTI-DONATION CLAUSE

Anti-Donation Clause in a Nutshell

N.M. Const, Article IX, Section 14:

“Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.”

Two questions:

1. Has the state or any county, school district or municipality made a donation or pledged its credit in aid of any private person, association or corporation?
2. If the answer to Question 1 is ‘yes,’ does an exception apply?

Anti-Donation Clause Exceptions

Exceptions set out in the clause itself:

1. Care and maintenance of sick or indigent persons;
2. Veterans' scholarships;
3. Loans to nurses;
4. Transfers authorized by the Local Economic Development Act; and
5. Affordable housing.

Judicially recognized exceptions:

1. Donee is an arm of the state
2. Revenue bond and lease financing
3. Donor receives value
4. Just compensation

QUESTIONS AND COMMENTS

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- ethics.commission@sec.nm.gov



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