

1 SENATE BILL 372

2 **54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

3 INTRODUCED BY

4 Sander Rue

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10 AN ACT

11 RELATING TO PROCUREMENT; ENACTING THE PUBLIC CONTRACTS ETHICS
12 ACT; CREATING A PUBLIC CONTRACTS ETHICS ADVISORY OPINION
13 COMMITTEE; ENACTING PENALTIES; REPEALING AND ENACTING SECTIONS
14 OF THE NMSA 1978.

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
18 cited as the "Public Contracts Ethics Act".

19 SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
20 Public Contracts Ethics Act:

21 A. "assisted in the transaction" means any
22 assistance, aid or advice given, including personal or any
23 other form of representation;

24 B. "direct or indirect participation" means
25 involvement through decision, approval, disapproval,

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1 recommendation, formulation of any part of a purchase request,
2 influencing the content of any specification, investigation,
3 auditing or the rendering of advice;

4 C. "local public body" means every political
5 subdivision of the state and the agencies, instrumentalities
6 and institutions thereof, including two-year post-secondary
7 educational institutions, school districts and local school
8 boards and municipalities except as exempted pursuant to the
9 Procurement Code;

10 D. "official act" means an action of a public
11 officer or employee in an administrative capacity pertaining to
12 the procurement process;

13 E. "public contract" means any valid and binding
14 written agreement entered into by a state agency or local
15 public body, but not including a collective bargaining
16 agreement;

17 F. "public officer or employee" means any elected
18 or appointed official or employee of a state agency or local
19 public body who receives compensation in the form of salary or
20 is eligible for per diem or mileage but excludes legislators;
21 and

22 G. "state agency" means any department, commission,
23 council, board, committee, institution, legislative body,
24 agency, government corporation, educational institution or
25 official of the executive, legislative or judicial branch of

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1 the government of this state. "State agency" includes the
2 purchasing division of the general services department and the
3 state purchasing agent but does not include local public
4 bodies.

5 SECTION 3. [NEW MATERIAL] CONFIDENTIAL INFORMATION.--It
6 is unlawful for any public officer or employee or former public
7 officer or employee to knowingly use confidential information
8 for actual or anticipated personal gain or for another's actual
9 or anticipated personal gain.

10 SECTION 4. [NEW MATERIAL] PROHIBITED COMPETITIVE SEALED
11 BIDS OR COMPETITIVE SEALED PROPOSALS.--

12 A. No state agency or local public body shall
13 accept a competitive sealed bid or competitive sealed proposal
14 from a person who directly or indirectly participated in the
15 preparation of the specifications, qualifications or evaluation
16 criteria on which the specific bid or proposal was based.

17 B. A public officer or employee accepting a bid or
18 proposal on behalf of a state agency or local public body shall
19 exercise due diligence to ensure compliance with this section.

20 SECTION 5. [NEW MATERIAL] CONTRACTS INVOLVING PUBLIC
21 OFFICERS OR EMPLOYEES--WAIVERS FROM CONTEMPORANEOUS EMPLOYMENT
22 AND UNLAWFUL EMPLOYEE PARTICIPATION PERMITTED.--

23 A. A state agency shall not enter into a contract
24 with a public officer or employee of the state, with the family
25 of the public officer or employee or with a business in which

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1 the public officer or employee or the family of the public
2 officer or employee has a substantial interest unless the
3 public officer or employee has disclosed through public notice
4 the public officer's or employee's substantial interest and
5 unless the contract is awarded pursuant to a competitive
6 process; provided that this subsection does not apply to a
7 contract of official employment with the state. A person
8 negotiating or executing a contract on behalf of a state agency
9 shall exercise due diligence to ensure compliance with the
10 provisions of this subsection.

11 B. A local public body shall not enter into a
12 contract with a public officer or employee of that local public
13 body, with the family of the public officer or employee or with
14 a business in which the public officer or employee or the
15 family of the public officer or employee has a substantial
16 interest unless a public officer or employee has disclosed the
17 public officer's or employee's substantial interest through
18 public notice and unless a contract is awarded pursuant to a
19 competitive process.

20 C. Subsection B of this section does not apply to a
21 contract of official employment with a local public body. A
22 person negotiating or executing a contract on behalf of a local
23 public body shall exercise due diligence to ensure compliance
24 with the provisions of this section.

25 D. A state agency or a local public body may grant

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1 a waiver from unlawful employee participation pursuant to
2 Section 9 of the Public Contracts Ethics Act, or
3 contemporaneous employment pursuant to Section 11 of the Public
4 Contracts Ethics Act, upon making a determination that:

5 (1) the contemporaneous employment or
6 financial interest of the employee has been publicly disclosed;

7 (2) the employee will be able to perform the
8 employee's procurement functions without actual or apparent
9 bias or favoritism; and

10 (3) the employee participation is in the best
11 interests of the state agency or a local public body.

12 E. The obligation to give public notice required
13 pursuant to Subsections A and B of this section shall be
14 satisfied by posting the required disclosure in a prominent
15 place on the web page of the state purchasing agent.

16 SECTION 6. [NEW MATERIAL] CONTRACTS INVOLVING FORMER
17 PUBLIC OFFICERS OR EMPLOYEES.--

18 A. A state agency shall not enter into a contract
19 with, or take any action favorably affecting, any person or
20 business that is assisted in the transaction by a former public
21 officer or employee of the state whose official act, while in
22 state employment, involved a decision, approval, disapproval,
23 recommendation, formulation of any part of a purchase request,
24 influencing the content of any specification, investigation,
25 auditing or the rendering of advice regarding the agency's

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1 initial procurement of the contract or taking that action.

2 B. A former public officer or employee shall not
3 represent a person in the person's dealings with the government
4 on a matter in which the former public officer or employee
5 participated personally and substantially while a public
6 officer or employee.

7 C. A local public body shall not enter into a
8 contract with, or take any action favorably affecting, any
9 person or business that is assisted in the transaction by a
10 former public officer or employee of that local public body
11 whose official act, while in employment with that local public
12 body, involved a decision, approval, disapproval,
13 recommendation, formulation of any part of a purchase request,
14 influencing the content of any specification, investigation,
15 auditing or the rendering of advice regarding the local public
16 body's initial procurement of the contract or taking that
17 action.

18 D. The provisions of Subsections A through C of
19 this section shall cease to apply two years after the former
20 public officer or employee has left public office.

21 E. For a period of one year after leaving
22 government service or employment, a former public officer or
23 employee shall not represent for pay a person before the state
24 agency or local public body at which the former public officer
25 or employee served or worked.

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1 SECTION 7. ~~[NEW MATERIAL]~~ CONTRACTS INVOLVING

2 LEGISLATORS.--

3 A. A state agency shall not enter into a contract
4 for services, construction or items of tangible personal
5 property with a legislator, the legislator's family or with a
6 business in which the legislator or the legislator's family has
7 a substantial interest unless the legislator has disclosed the
8 legislator's substantial interest and unless the contract is
9 awarded in accordance with the provisions of the Procurement
10 Code and the Public Contracts Ethics Act, except the potential
11 contractor shall not be eligible for a sole source or small
12 purchase contract. A person negotiating or executing a
13 contract on behalf of a state agency shall exercise due
14 diligence to ensure compliance with the provisions of this
15 subsection.

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

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1 SECTION 8. ~~[NEW MATERIAL]~~ PROHIBITED CONTRIBUTIONS AND
2 DISCLOSURE.--

3 A. A business that contracts with a state agency or
4 local public body to provide financial services involving the
5 investment of public money or issuance of bonds for public
6 projects shall not knowingly contribute anything of value to a
7 public officer or employee of that state agency or local public
8 body who has authority over the investment of public money or
9 issuance of bonds, the revenue of which is used for public
10 projects in the state.

11 B. A public officer or employee of a state agency
12 or local public body who has authority over the investment of
13 public money or issuance of bonds, the revenue of which is used
14 for public projects in the state, shall not knowingly accept a
15 contribution of anything of value from a business that
16 contracts with that state agency or local public body to
17 provide financial services involving the investment of public
18 money or issuance of bonds for public projects.

19 C. A prospective contractor with the state or a
20 local public body shall disclose all campaign contributions
21 given by the prospective contractor or a family member or
22 representative of the prospective contractor to an applicable
23 public officer of the state or a local public body during the
24 two years prior to the date on which a proposal is submitted
25 or, in the case of a sole source or small purchase contract,

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1 the two years prior to the date on which the contractor signs
2 the contract, if the aggregate total of contributions given by
3 the prospective contractor or a family member or representative
4 of the prospective contractor to the public officer exceeds two
5 hundred fifty dollars (\$250) over the two-year period.

6 D. The disclosure shall indicate the date, the
7 amount, the nature and the purpose of the contribution. The
8 disclosure statement shall be on a form developed and made
9 available electronically by the department of finance and
10 administration to all state agencies and local public bodies.
11 The state agency or local public body that procures the
12 services or items of tangible personal property shall indicate
13 on the form the name or names of every applicable public
14 officer, if any, for which disclosure is required by a
15 prospective contractor for each competitive sealed proposal,
16 sole source or small purchase contract. The form shall be
17 filed with the state agency or local public body as part of the
18 competitive sealed proposal, or in the case of a sole source or
19 small purchase contract, on the date on which the contractor
20 signs the contract.

21 E. A prospective contractor submitting a disclosure
22 statement pursuant to this section who has not contributed to
23 an applicable public official, whose family members have not
24 contributed to an applicable public official or whose
25 representatives have not contributed to an applicable public

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1 official shall make a statement that no contribution was made.

2 F. A prospective contractor or a family member or
3 representative of the prospective contractor shall not give a
4 campaign contribution or other thing of value to an applicable
5 public official or the applicable public official's employees
6 during the pendency of the procurement process or during the
7 pendency of negotiations for a sole source or small purchase
8 contract.

9 G. A solicitation or proposed award for a proposed
10 contract may be canceled pursuant to Section 13-1-181 NMSA 1978
11 or a contract that is executed may be ratified or terminated
12 pursuant to Section 13-1-182 NMSA 1978 if:

13 (1) a prospective contractor fails to submit a
14 fully completed disclosure statement pursuant to this section;
15 or

16 (2) a prospective contractor or family member
17 or representative of the prospective contractor gives a
18 campaign contribution or other thing of value to an applicable
19 public official or the applicable public official's employees
20 during the pendency of the procurement process.

21 H. As used in this section:

22 (1) "anything of value" means any money,
23 property, service, loan or promise, but does not include food
24 and refreshments with a value of less than one hundred dollars
25 (\$100) consumed in a day;

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1 (2) "applicable public official" means a
2 person elected to an office or a person appointed to complete a
3 term of an elected office, who has the authority to award or
4 influence the award of the contract for which the prospective
5 contractor is submitting a competitive sealed proposal or who
6 has the authority to negotiate a sole source or small purchase
7 contract that may be awarded without submission of a sealed
8 competitive proposal;

9 (3) "contribution" means a donation or
10 transfer to a recipient for the personal use of the recipient,
11 without commensurate consideration, except that "campaign
12 contribution" means a donation given for a campaign for
13 elective office of a public official;

14 (4) "family member" means a spouse, father,
15 mother, child, father-in-law, mother-in-law, daughter-in-law or
16 son-in-law of:

17 (a) a prospective contractor, if the
18 prospective contractor is a natural person; or

19 (b) an owner of a prospective
20 contractor;

21 (5) "pendency of the procurement process"
22 means the time period commencing with the public notice of the
23 request for proposals and ending with the award of the contract
24 or the cancellation of the request for proposals;

25 (6) "prospective contractor" means a person or

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1 business that is subject to the competitive sealed proposal
2 process set forth in the Procurement Code or is not required to
3 submit a competitive sealed proposal because that person or
4 business qualifies for a sole source or small purchase
5 contract; and

6 (7) "representative of the prospective
7 contractor" means an officer or director of a corporation, a
8 member or manager of a limited liability corporation, a partner
9 of a partnership or a trustee of a trust of the prospective
10 contractor.

11 SECTION 9. [NEW MATERIAL] UNLAWFUL EMPLOYEE PARTICIPATION
12 PROHIBITED.--

13 A. Except as permitted by the University Research
14 Park and Economic Development Act or the New Mexico Research
15 Applications Act, it is unlawful for any state agency or local
16 public body employee to participate directly or indirectly in a
17 procurement when the employee knows that the employee or any
18 member of the employee's immediate family has a financial
19 interest in the business seeking or obtaining a contract.

20 B. An employee or any member of an employee's
21 immediate family who holds a financial interest in a disclosed
22 blind trust shall not be deemed to have a financial interest
23 with regard to matters pertaining to that trust.

24 SECTION 10. [NEW MATERIAL] CONTINGENT FEES
25 PROHIBITED.--It is unlawful for a person or business to be

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1 retained or for a business to retain a person or business to
2 solicit or secure a contract upon an agreement or understanding
3 that the compensation is contingent upon the award of the
4 contract, except for retention of bona fide employees or bona
5 fide established commercial selling agencies for the purpose of
6 securing business and persons or businesses employed by a local
7 public body that are providing professional services to the
8 local public body in anticipation of the receipt of federal or
9 state grants or loans.

10 SECTION 11. [NEW MATERIAL] CONTEMPORANEOUS EMPLOYMENT
11 PROHIBITED.--It is unlawful for a state agency or local public
12 body employee who is participating directly or indirectly in
13 the procurement process to become or to be, while such an
14 employee, the employee of any person or business contracting
15 with the governmental body by whom the employee is employed.

16 SECTION 12. [NEW MATERIAL] PUBLIC CONTRACTS ETHICS
17 ADVISORY OPINION COMMITTEE CREATED.--

18 A. The "public contracts ethics advisory opinion
19 committee" is created within the office of the attorney
20 general. The committee consists of three members appointed by
21 the attorney general and two members appointed by the governor.
22 The committee may issue advisory opinions to public officers
23 and employees in accordance with the Public Contracts Ethics
24 Act. The committee shall compile, index, maintain and provide
25 public access to all advisory opinions required to be made

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1 public pursuant to state law. The office of the attorney
2 general shall establish a procedure under which advisory
3 opinions may be requested.

4 B. The attorney general shall advise and seek to
5 educate all persons required to perform duties under the Public
6 Contracts Ethics Act of those duties. This includes advising
7 all those persons at least annually of that act's ethical
8 principles.

9 C. Complaints concerning an alleged violation of
10 the Public Contracts Ethics Act shall be filed with the
11 involved state agency or local public body, and such complaints
12 shall be forwarded to the office of the attorney general or the
13 state ethics commission for review and any necessary
14 investigation.

15 D. The attorney general shall seek first to ensure
16 voluntary compliance with the provisions of the Public
17 Contracts Ethics Act. A person who violates that act
18 unintentionally or for good cause shall be given ten days'
19 notice to correct the matter. Referrals for civil enforcement
20 of that act shall be pursued only after efforts to secure
21 voluntary compliance with that act have failed.

22 SECTION 13. [NEW MATERIAL] CIVIL PENALTIES.--

23 A. If the attorney general reasonably believes that
24 a person committed, or is about to commit, a violation of the
25 Public Contracts Ethics Act, the attorney general shall enforce

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1 the act or refer the matter to a district attorney for
2 enforcement.

3 B. The attorney general or a district attorney may
4 institute a civil action in district court if a violation has
5 occurred or to prevent a violation of any provision of the
6 Public Contracts Ethics Act. Relief may include a permanent or
7 temporary injunction, a restraining order or any other
8 appropriate order, including an order for a civil penalty of
9 two hundred fifty dollars (\$250) for each violation, not to
10 exceed five thousand dollars (\$5,000).

11 C. Any person, firm or corporation that knowingly
12 violates any provision of the Public Contracts Ethics Act is
13 subject to a civil penalty of not more than one thousand
14 dollars (\$1,000) for each procurement in violation of any
15 provision of the Public Contracts Ethics Act. The attorney
16 general or the district attorney in the jurisdiction in which
17 the violation occurs may bring a civil action for the
18 enforcement of any provision of the Public Contract Ethics Act.

19 D. An amount equal to the value of anything
20 transferred or received in violation of the provisions of the
21 Public Contracts Ethics Act by a transferor and transferee may
22 be imposed as a civil penalty upon both the transferor and
23 transferee. The civil penalty provided for in this section is
24 imposed in addition but pursuant to the terms and conditions of
25 Subsection C of this section.

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1 SECTION 14. [NEW MATERIAL] CRIMINAL PENALTIES.--Unless
2 specified otherwise in the Public Contracts Ethics Act, any
3 person who knowingly and willfully violates any of the
4 provisions of that act is guilty of a fourth degree felony and
5 upon conviction shall be sentenced pursuant to the provisions
6 of Section 31-18-15 NMSA 1978. Nothing in the Public Contracts
7 Ethics Act shall preclude criminal prosecution for bribery or
8 other provisions of law set forth in the constitution of New
9 Mexico or by statute.

10 SECTION 15. [NEW MATERIAL] COMPLAINTS--STATE ETHICS
11 COMMISSION.--Any complaints filed with a state agency or local
12 public body concerning an alleged violation of the Public
13 Contracts Ethics Act may be forwarded to the state ethics
14 commission for review and any necessary investigation. The
15 state ethics commission may issue an advisory opinion regarding
16 the matters presented by the complaint or may refer the
17 complaint to the office of the attorney general for review and
18 any necessary investigation.

19 SECTION 16. REPEAL.--Sections 10-16-6 through 10-16-9,
20 10-16-13, 10-16-13.3, 13-1-190 and 13-1-191.1 through 13-1-195
21 NMSA 1978 (being Laws 1967, Chapter 306, Sections 6 through 9
22 and 13, Laws 2007, Chapter 362, Section 11, Laws 1984, Chapter
23 65, Section 163, Laws 2006, Chapter 81, Section 1 and Laws
24 1984, Chapter 65, Sections 165 through 168, as amended) are
25 repealed.

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SECTION 17. EFFECTIVE DATE.--

A. The effective date of the provisions of Sections 1 through 14 and 16 of this act is July 1, 2019.

B. The effective date of the provisions of Section 15 of this act is the effective date of enabling legislation enacted to implement the provisions of Article 5, Section 17 of the constitution of New Mexico establishing a state ethics commission.