

THE GOVERNMENTAL CONDUCT ACT – ETHICAL REQUIREMENTS FOR PUBLIC AGENCIES AND EMPLOYEES

NMSBA Annual Conference 2021

M. Karen Kilgore, Partner &
Carol S. Helms, Partner
Cuddy & McCarthy, LLP

Governmental Conduct Act Amendments

- SB 432 – Passed by 2011 NM Legislature and signed by Governor Martinez on April 7, 2011, effective **July 1, 2011**.
- Amends definitions of:
 - **“local governmental agency,”** to include local political subdivisions, within scope of Act. **See Section 10-16-2G. School Districts are political subdivisions, per Section 22-1-2R**

Governmental Conduct Act Amendments

- Amends definitions of:
“**public employee**” bound by the Act to include employees of local governmental agencies. Local governmental agency employees include officers, elected or appointed officials and those eligible to receive per diem or mileage. See Section 10-16-2(I) . **Prior to 2011, only “prohibited bidding” section (Section 10-16-13) applied to local public schools.**

Governmental Conduct Act Amendments

- General Principles:
 - Public employment or office is a public trust. Officers and employees must maintain integrity and high ethical standards. May not use position to advance personal or private interests; must disclose real or potential conflicts of interest. **Section 10-6-3 A, B and C.**
 - May not offer, request or receive any money or thing of value in exchange for performance of an official act, or take official act which primarily enhances personal financial interest. **Imposes 4th degree felony penalties! Sections 10-16-3D and 10-16-4A.**

Governmental Conduct Act Amendments

- Additional Prohibitions - Public Officers and Employees Shall Not:
 - Coerce or attempt to coerce another public officer or employee to pay or contribute anything of value to any person or organization for political purposes. **Section 10-16-3.1A.**
 - Threaten or deny promotion or pay increase to an employee who does not vote for certain candidates, require contributions to political fund or purchase of fundraising tickets for political event or advise employee to participate in political activity. **Section 10-16-3.1B.**

Governmental Conduct Act Amendments

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - Use or allow use of governmental property for unauthorized purposes. **Section 10-16-3.1C.**
 - Engage in official act directly affecting personal financial interest (unless greater benefit accrues to public), or acquire financial interest which will be affected by the officer's or employee's official action. **Section 10-16-4B and C.**

Governmental Conduct Act Amendments

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - Receive payment or honoraria exceeding \$100, exclusive of per diem, mileage and lodging, for speeches or services related to performance of official duties. **Section 10-16-4.1.**
 - Disclose confidential information acquired in an official position for his or another's private gain. **Section 10-16-6.**

Governmental Conduct Act Amendments

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - If the employee or official has authority over public money or issuance of bonds, accept a contribution or anything of value (not including food or refreshments less than \$100 consumed in one day) from a business that contracts with the governmental entity for financial services involving investment of public funds or issuance of bonds. **Section 10-16-13.3B.**

Governmental Conduct Act Amendments

- Specific Requirements as to **Contracts** with the Public Agency:
 - Current Officers or Employees:
 - Officer or employee, family members, or businesses in which officer or employee has a **substantial interest** may not enter into contract with Agency, unless public disclosure of interest is made, and competitive process is used to award the contract. **Sections 10-16-13.2B and 10-16-7 (similar to current restrictions imposed by Sections 22-21-1 and 13-1.190.)**

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not sell or be party to contract to sell goods, services tangible personal property or construction directly or indirectly through family or business to an employee supervised by the officer or employee. **Section 10-16-3.2A.**

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Agency may not accept a bid or proposal from a person who directly participated in preparing the specifications, evaluation criteria or qualifications for the bid or RFP.
Section 10-16-13.

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not accept an offer of a contract or receive a commission or profit from sale or transaction to sell goods, services, tangible personal property or construction from person over whom officer or employee has regulatory authority. **Section 10-16-3.2C and D.**

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees:
 - Agency may not enter into contract with person or business which:
 - Is assisted in transaction by a former employee whose action while a public employee resulted in the Agency making or acting on the contract,

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees (Continued):
 - Agency may not enter into contract with person or business which:
 - Is represented by person who was public officer or employee within the preceding year, if the contract amount exceeds \$1,000, and results from official act of the officer or employee.

Governmental Conduct Act Amendments

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees may not represent any person in dealings with the public employer:
 - On a matter as to which the former officer or employee participated directly or substantially, while employed
 - For one year period after leaving employment, receive compensation or pay for representation before the Employer.

Governmental Conduct Act Amendments

- Disclosure of Outside Employment:
 - **All public officers or employees must disclose in writing to the employer all employment engaged in by the officer or employee, other than the employment with or service to the School District.
Section 10-16-4.2**

Governmental Conduct Act Amendments

- Penalties for Violation:
 - Other than those prohibitions which carry felony sanctions, as specified above, violation of the Act constitutes a misdemeanor (maximum penalties \$1,000, or imprisonment of up to 1 year, or both.)
 - Attorney General may enforce civil penalties.
 - Alleged violations could be basis for initiating recall effort of local school board members.

Additional Board Member Ethics and Conflict of Interest Requirements

I. Conflicts arise in a variety of contexts:

- Nepotism –
NMSA 1978 Section 22-5-6
- Prohibited Employment –
NMSA 1978 Section 22-5-5

Additional Board Member Ethics and Conflict of Interest Requirements

- Restrictions on Procurement and Contracting – NMSA 1978 Section 22-21-1; NMSA 1978 Sections 13-1-190 to 13-1-194

II. Anticipate that such restrictions and challenges to perceived Board member conflicts will increase over time.

Additional Board Member Ethics and Conflict of Interest Requirements

- The Nepotism Law – Section 22-5-6
 - The Superintendent may not employ or approve the initial employment of the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of a local school board member or the Superintendent.
 - The Board may waive the prohibition as to relatives of the Superintendent.
 - “Grandfather Clause” applies to continuing employment of relatives.

Additional Board Member Ethics and Conflict of Interest Requirements

- **Prohibited Employment – Section 22-5-5**
 - Board members shall serve without compensation.
 - A Board member may not be employed in any capacity by the School District governed by that Board during the term of office for which the Board member was elected or appointed.
 - Charter Schools – Section 22-8B-4B (effective 7/1/12)
 - No Board member shall serve on the governing body of or be employed in any capacity by a locally chartered charter school located in the School District during the Board member's term of office.

Additional Board Member Ethics and Conflict of Interest Requirements

- **Board Members' sales or contracts with the School District – Section 22-21-1**
 - Board member may not directly or indirectly sell or be a party to a transaction to sell instructional materials, furniture, equipment, insurance, school supplies or work under contract with the School District.
 - Exception: Sales in regular course of business made in compliance with Procurement Code.
 - BEWARE: Unless an exception applies, violation carries FELONY sanctions!!

Additional Board Member Ethics and Conflict of Interest Requirements

- **Procurement Code Restrictions**

- Unlawful employee participation – Section 13-1-190.

- Local public body employee (includes Board members) may not participate in a procurement (i.e., authorize the procurement or approve the contract) when the employee or a member of the employee's immediate family has a financial interest in the business seeking or obtaining the contract.

- “Financial interest” means officer, director, trustee, partner or management position or 5% or more ownership interest. Section 13-1-57.

Additional Board Member Ethics and Conflict of Interest Requirements

- Procurement Code Restrictions
 - Contemporaneous Employment – Section 13-1-193.
 - Local public body employee (including Board members) may not participate directly or indirectly in procurement, and may not be or become the employee of a person or business contracting with the governmental body.

Additional Board Member Ethics and Conflict of Interest Requirements

- **Waiver of Unlawful Employee Participation and Contemporaneous Employment – Section 13-1-194**
 - School Board may waive these restrictions by making a determination (usually by resolution adopted in public meeting) that the conflict has been disclosed publicly, that the Board member can perform the procurement function without bias or favoritism (usually by abstaining from involvement in the procurement process), and that the waiver is in the best interest of the School District.

QUESTIONS?

Thank You!

**M. Karen Kilgore, Partner
Cuddy & McCarthy, LLP
1701 Old Pecos Trail
Santa Fe, NM 87505
(505) 988-4476**

kkilgore@cuddymccarthy.com

(866) 679-4476 Toll-free

**Carol S. Helms, Partner
Cuddy & McCarthy, LLP
201 Third St., Suite 1300
Albuquerque, NM 87102
(505) 888-1335**

chelms@cuddymccarthy.com