



STATE ETHICS  
COMMISSION MEETING

July 26, 2024

**PUBLIC MATERIALS**

**PUBLIC MATERIALS**  
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**STATE ETHICS COMMISSION**

Hon. William F. Lang, Chair  
Jeffrey L. Baker, Member  
Stuart M. Bluestone, Member  
Hon. Celia Castillo, Member  
Hon. Dr. Terry McMillan, Member  
Ronald Solimon, Member  
Dr. Judy Villanueva, Member

July 26, 2024, 9:00 a.m. to 10:30 a.m. (Mountain Time)

Meeting Link:

<https://us02web.zoom.us/j/86937612476?pwd=uQJceRoIP47lQz4wW4Zl7NvDT1fnja.1>

Meeting ID: 869 3761 2476

Passcode: Ethics123

**Commission Meeting**

Chair Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of May 24, 2024 Commission Meeting

**Commission Meeting Items**

**Action Required**

- |   |     |
|---|-----|
| 4. Financial Disclosure Act: compliance update<br>( <i>Manierre, Branch</i> ) | No  |
| 5. Advisory Opinion 2024-04<br>( <i>Manierre</i> )                            | Yes |

**Upon applicable motion, Commission goes into executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) and 10-15-1(H)(7) (attorney client privilege pertaining to litigation).**

6. Discussion regarding administrative matters under State Ethics Commission Act:  
(*Farris, Randall*)
  - a. Administrative Complaint No. 2024-10
  - b. Administrative Complaint No. 2024-15
  - c. Administrative Complaint No. 2024-16
  - d. Consolidated Administrative Complaint Nos. 2024-19, 2024-20, 2024-022, 2024-024 through 2024-033
  - e. Administrative Complaint No. 2024-34
  - f. Administrative Complaint No. 2024-035
  - g. Administrative Complaint No. 2024-039
  
7. Discussion regarding current and potential litigation:  
(*Farris, Boyd*)
  - a. *SEC v. TNMP, et al.*, 1:24-cv-00652 (D.N.M.)

**Upon applicable motion, Commission returns from executive session**

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8. Administrative Matters under State Ethics Commission Act: Yes  
(*Farris, Randall*)
  - a. Administrative Complaint No. 2024-10
  - b. Administrative Complaint No. 2024-15
  - c. Administrative Complaint No. 2024-16
  - d. Consolidated Administrative Complaint Nos. 2024-19, 2024-20, 2024-022, 2024-024 through 2024-033
  - e. Administrative Complaint No. 2024-34
  - f. Administrative Complaint No. 2024-035
  - g. Administrative Complaint No. 2024-039
  
9. Discussion of next meeting: No  
(*Lang*)
  
10. Public Comment No
  
11. Adjournment

For inquiries or special assistance, please contact [Ethics.Commission@sec.nm.gov](mailto:Ethics.Commission@sec.nm.gov)



## STATE ETHICS COMMISSION

### **Commission Meeting Minutes of May 24, 2024, | 9:00AM-1:00PM [Subject to Ratification by Commission]**

#### **Call to Order**

Chair Lang called the meeting to Order at 9:00 AM.

#### **1. Roll Call**

The roll was called; the following Commissioners were present:

Jeffrey L. Baker, Commissioner  
Stuart M. Bluestone, Commissioner  
Hon. Celia Castillo, Commissioner  
Ronald Solimon, Commissioner  
Dr. Judy Villanueva, Commissioner  
Hon. William F. Lang, Chair

The following Commissioners were absent at roll call but later joined the meeting at 9:08:

Hon. Dr. Terry McMillan, Commissioner

#### **2. Approval of Agenda**

No motions were made to amend the agenda. Chair Lang sought a motion for approval of the agenda. Commissioner Castillo moved to approve the agenda; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll call vote and all Commissioners present approved the agenda unanimously.

#### **3. Approval of April 5, 2024, Commission Meeting Minutes**

Chair Lang sought a motion for the approval of the minutes from the April 5<sup>th</sup>, 2024, Commission meeting. Commissioner Solimon moved to approve the minutes; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll call vote and all Commissioners present approved the minutes unanimously.

#### **Commission Meeting Items**

#### **4. Open Meetings Act best practices refresher**

Chief Compliance Counsel KC Manierre gave an overview of the best practices to comply with the Open Meetings Act.

## **5. Update on Commissioner appointment**

Executive Director Farris gave an update on Commissioner Solimon and Commissioner Baker's term limits. Commissioner Baker has chosen to seek reappointment to another four-year term. Commissioner Solimon has chosen not to seek reappointment and the Commission will seek a replacement. Director Farris gave an overview of the effort being made by staff to solicit applications to appoint Commissioner Solimon's successor and the Commission's process for that appointment.

## **6. FY25 Operating Budget**

Executive Director Farris and Chief Financial Officer Wendy George presented the FY25 operating budget of about \$1.7 million. Director Farris requested Commission approval for the budget. Chair Lang sought a motion to approve the budget. Commissioner Castillo moved to approve; Commissioner Baker seconded. After some discussion Chair Lang conducted a roll call vote, and the FY25 Operating Budget was approved unanimously.

## **7. Advisory opinion 2024-03**

Chief Compliance Counsel KC Manierre gave an overview of the advisory opinion which addressed the question:

*“A legislator is a key organizer in a nonpartisan conference coordinated by a 501(c)(3) non-profit organization. The legislator helps to organize this event for what the legislator believes is an important responsibility of being a legislator — bringing education to colleagues and the public on an important issue to the forefront in a nonpartisan manner. The legislator often emails contacts about the event, including speakers and sponsors, and wants to know whether the legislator is allowed to send those emails using the official legislative email address (nmlegis.gov).”*

### **ANSWER**

*Legislators are permitted to use an official legislative email address to email contacts about an event, including speakers and sponsors, to address general administration and logistics of the event. But the use of a legislative email address to contact sponsors for the purpose of soliciting donations to a charity is likely prohibited by the Gift Act.*

With the inclusion of two minor amendments, Chair Lang sought a motion to approve the advisory opinion as amended. Commissioner Bluestone moved to approve the opinion; Commissioner Baker seconded. Chair Lang conducted a roll call vote, and the advisory opinion was approved unanimously.

8. **Public Comment (pre-closed session)**

Chris Mechels gave a public comment with concerns about violations of the election code by state officials.

No other public comments were made.

**---Beginning of Executive Session---**

Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings), and 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Solimon moved to enter executive session; Commissioner Castillo seconded. Hearing no discussion, Chair Lang conducted a roll call vote, all commissioners present voted unanimously to enter executive session.

9. Discussion regarding current and potential litigation:

*(Farris)*

- a. Proposed pre-litigation settlement with local government official for violation of the Governmental Conduct Act
- b. Authorization of civil action against persons subject to the Campaign Reporting Act for violations of that statute
- c. Authorization of civil action against local government officials and domestic LLC for violations of the Procurement Code
- d. Campaign Reporting Act violations as identified in 2023 and 2024 expenditure filings

10. Discussion regarding administrative matters under State Ethics Commission Act:

*(Farris)*

Dismissals of administrative complaints:

- a. Administrative Complaint No. 2024-04
- b. Administrative Complaint No. 2024-07
- c. Administrative Complaint No. 2024-09
- d. Administrative Complaint No. 2024-11
- e. Administrative Complaint No. 2024-12
- f. Administrative Complaint No. 2024-13
- g. Administrative Complaint No. 2024-14

**---End of Executive Session---**

*The matters discussed in the closed meeting were limited to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session upon an appropriate motion pursuant to NMSA 1978, § 10-15-1(J).*

## 11. Authorization of Civil Action

- a. **Authorization approving Executive Director to negotiate and enter pre-litigation settlement, as discussed in closed session, with local government official for violation of the Governmental Conduct Act:** Commissioner Castillo moved as stated above, Commissioner McMillan seconded. Chair Lang conducted a roll call vote. The votes were recorded as follows:

**Commissioner Baker:** Yes  
**Commissioner Bluestone:** No  
**Commissioner Castillo:** Yes  
**Commissioner McMillan:** Yes  
**Commissioner Solimon:** Yes  
**Commissioner Villanueva:** No  
**Chair Lang:** Yes

The motion carries with a vote of 5-2.

- b. **Authorization of civil action against The New Mexico Project and Jeff Apodoca for violations of the Campaign Reporting Act:** Commissioner Bluestone moved as stated above; Commissioner Solimon seconded. Hearing no discussion, Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative. Authorization to file civil enforcement action was approved.
- c. **Authorization of civil action against Village of Angel Fire officials and Carristo Creative LLC for violations of the Procurement Code and Governmental Conduct Act:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative. Authorization to file civil enforcement action was approved.

## 12. Action on Administrative Matters under the State Ethics Commission Act (Farris)

The Commission considered the following motions regarding actions on Administrative Complaints:

- a. **Commission staff sought motion of dismissal of Administrative Case No. 2024-04:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote.



All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.

- b. **Commission staff sought motion of dismissal of Administrative Case No. 2024-07:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.
- c. **Commission staff sought motion of dismissal upon certification by the Secretary of State's office for voluntary compliance of Administrative Case No. 2024-09:** Commissioner Bluestone moved as stated above, Commissioner Castillo seconded. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.
- d. **Commission staff sought motion of dismissal of Administrative Case No. 2024-11:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.
- e. **Commission staff sought motion of dismissal of Administrative Case No. 2024-12:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.
- f. **Commission staff sought motion of dismissal of Administrative Case No. 2024-13:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.
- g. **Commission staff sought motion of dismissal of Administrative Case No. 2024-14:** Commissioner Solimon moved as stated above, Commissioner Bluestone seconded. Hearing no discussion Chair Lang conducted a roll call vote. All Commissioners and the Chair voted in the affirmative, and the administrative case was dismissed.

### 13. Discussion of Next Meeting

Chair Lang confirmed that the next regularly scheduled meeting will take place, July 26<sup>th</sup> at 9:00 AM in Santa Fe. In addition to the regularly scheduled meeting there will be a meeting of the legislatively appointed commissioners to reappoint a commissioner and appoint a new commissioner.

14. **Public Comment**

No public comments were made.

15. **Adjournment**

Chair Lang raised the adjournment of the meeting. With no objections made, the meeting was adjourned at 1:00 PM.

*For inquiries or special assistance, please contact [Ethics.Commission@sec.nm.gov](mailto:Ethics.Commission@sec.nm.gov)*



## STATE ETHICS COMMISSION

### **[DRAFT] ADVISORY OPINION NO. 2024-04<sup>1</sup>**

July 26, 2024

### **QUESTIONS PRESENTED<sup>2</sup>**

This opinion presents a series of follow-up questions to the State Ethics Commission concerning Advisory Opinion No. 2023-04,<sup>3</sup> wherein the Commission opined that the Procurement Code<sup>4</sup> prohibited a municipality from prepaying for the purchase of a firetruck and that the municipality could only pay for the truck

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<sup>1</sup> 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).

<sup>2</sup> 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 February 19, 2024, the Commission received a request for an advisory opinion that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. Commissioner Bluestone requested that that advisory letter be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1) (2019); 1.8.1.9(A)(1) NMAC. The Commission then received three additional requests for advisory opinions, one on April 4, 2024, one on April 11, 2024, and one on May 15, 2024. Based on the interrelated issues presented in the requests, the responses have been consolidated herein.

<sup>3</sup> State Ethics Comm’n Adv. Op. 2023-04 (June 2, 2023), *available at* <https://nmonesource.com/nmos/secap/en/18776/1/document.do>.

<sup>4</sup> NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2023).

after the municipality’s central purchasing office certified that the truck had been received and met the specifications for which the municipality bargained.

1. The first question presented here is whether Advisory Opinion No. 2023-04 specifically analyzed the applicability of Section 13-1-158(A)<sup>5</sup> of the Procurement Code to only goods because that was the issue presented, or if a different analysis applies where the contemplated purchase for prepayment is for a service.
2. The second question asks whether, given the language in Section 13-1-158(B),<sup>6</sup> partial prepayment is acceptable where the terms of the contract provide for payment of fifty percent down and the balance due at completion.
3. The third question asks about the term “receipt” in Section 13-1-158(A). The requester explained the agency is looking to purchase goods to assist with one of the agency’s initiatives. The vendor is willing to warehouse the items (the vendor’s physical location is in another state) and then drop ship them based on the agency’s directive. The drop shipment dates would occur in Fiscal Year 2025. The funding available for this purchase is Fiscal Year 2024 funding and the agency would like to procure and pay for the items before June 30th. The request poses the question, since the vendor agreed to store the goods for the agency and it is in the agreement with the vendor stating as much, would this satisfy the receipt of goods requirement to pay the invoice for purposes of the Procurement Code or must the agency wait to certify receipt of the items until the drop ship occurs (that is, when the agency would have physical possession), which would require Fiscal Year 2025 funds for the purchase?

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<sup>5</sup> NMSA 1978, § 13-1-158(A) (1997).

<sup>6</sup> NMSA 1978, § 13-1-158(B) (1997).

4. The final question concerns the purchasing of IT software/hardware license or service agreements (subscriptions), and poses the question of whether a multi-year license or service agreement would violate the advance payment prohibition set forth in Section 13-1-158(A). The request specifically references a quote for IT equipment that includes a service agreement or license to use, where the service agreement for software support is a 36-month term and is approximately \$34,000.00.

## ANSWERS

1. The prohibition against prepayment of purchases applies to payments for services, construction, and items of tangible personal property unless Section 13-1-98 excludes the purchase from the requirements of the Procurement Code.<sup>7</sup>
2. Unless an exemption applies, partial prepayment is prohibited under Section 13-1-158(A). Section 13-1-158(B) references the timeline on how invoices, certification, and payment *following* notice that the requested services or construction are completed or items of tangible personal property are delivered on site and received.
3. Items of tangible personal property are received for purposes of Section 13-1-158(A) when the property is delivered to the agency.
4. While a procuring agency is permitted to prepay a contract under ten thousand dollars for web-based and electronic subscriptions, other restrictions might prohibit payment for services across multiple fiscal

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<sup>7</sup> NMSA 1978, § 13-1-98 (2019).

years. For web-based and electronic subscriptions exceeding ten thousand dollars, the agency may not prepay for such purchases, but could enter into a multi-term contract in accordance with the provisions of the Procurement Code and make payment arrangements that, while not prepaying the contract, could otherwise ameliorate the concerns of the contractor, including a purchase order or progress payments.

## ANALYSIS

### I. Services fall under the prepayment prohibition in Section 13-1-158(A) of the Procurement Code.

In Advisory Opinion 2023-04, the Commission reviewed the specific question of whether certain items of tangible personal property fall under the prohibition against prepayment. While the Commission’s opinion focused exclusively on items of tangible personal property, Section 13-1-158(A)’s prohibition on prepayment also applies to services and construction:

No warrant, check or other negotiable instrument shall be issued in payment for *any purchase of services, construction or items of tangible personal property* unless the central purchasing office or the using agency certifies that *the services, construction or items of tangible personal property* have been received and meet specifications or unless prepayment is permitted under Section 13-1-98 NMSA 1978 by exclusion of the purchase from the Procurement Code.<sup>8</sup>

Statutes are interpreted using specific principles of construction.<sup>9</sup> To discern the meaning of a statute’s words, or, alternatively, its purpose, the Commission “rel[ies] on the classic canons of statutory interpretation and look[s] first to the

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<sup>8</sup> NMSA 1978, § 13-1-158(A) (emphasis added).

<sup>9</sup> See, e.g., See, e.g., NMSA 1978, §§ 12-2A-18 to -20 (1997) (directing courts to discern the meaning of text and purpose); see generally Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 391–96 (2012).

plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.”<sup>10</sup> The Commission also “will not read the plain language of the statute in a way that is absurd, unreasonable, or contrary to the spirit of the statute, and will not read any provision of the statute in a way that would render another provision of the statute null or superfluous.”<sup>11</sup> “Statutory language that is clear and unambiguous must be given effect.”<sup>12</sup>

Here, each subsection of Section 13-1-158 governing payment for purchases, including the prohibition on prepayment, specifically references “services” in addition to construction or items of tangible personal property.<sup>13</sup> While Advisory Opinion 2023-04 dealt with a specific tangible good, there is nothing in the statute that would suggest a different analysis applies to services: Section 13-1-158(A) includes services, construction, and items of tangible personal property. Therefore, a procuring agency may not pay for the purchase of services until the central purchasing office or using agency certifies the services have been received and meet specifications. (Normally, this certification occurs through the receipt and review of invoices.) This is not to say that *all* services fall under the prohibition against prepayment; Section 13-1-158 allows for the prepayment of services where permitted by Section 13-1-98 as an exemption of the purchase from the Procurement Code. Section 13-1-98 in turn identifies specific exemptions related to services, including, for example “purchases not exceeding ten thousand dollars (\$10,000) consisting of magazine subscriptions, web-based or electronic

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<sup>10</sup> *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 (cleaned up). *See also* NMSA 1978, § 12-2A-18(A) (1997) (“A statute or rule is construed, if possible, to: (1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result.”).

<sup>11</sup> *Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7.

<sup>12</sup> *Id.*

<sup>13</sup> *See* NMSA 1978, § 13-1-158(A) (“... for any purchase of services, construction or items of tangible personal property . . .”), -158(B) (“... written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site and received . . .”), -158(C) (“... upon certification by the central purchasing office or the using agency that the services, construction or items of tangible personal property have been received and accepted . . .”), -158(D) (“If the central purchasing office or the using agency finds that the services, construction or items of tangible personal property are not acceptable . . .”).

subscriptions, conference registration fees and other similar purchases where prepayments are required[.]”<sup>14</sup>

The question before the Commission in Advisory Opinion 2023-04 was whether a firetruck constitutes tangible personal property such that it falls under the Procurement Code’s prohibition on prepayment of purchases; the opinion does not limit the prohibition to *only* tangible personal property. A central purchasing office or using agency is also prohibited from prepaying for the purchase of *any* service or construction unless prepayment is authorized by exemption of the purchase under Section 13-1-98.

## **II. Partial prepayments are not permitted under Section 13-1-158(A).**

The second question concerns whether a procuring agency may prepay for a portion of a contract and pay the remainder of the cost upon receipt of services or goods. The plain language of the statute provides that “*no* warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property” unless the services, construction, or goods have been received and the procuring agency so certifies.<sup>15</sup> Using the canons of statutory construction discussed above, there is no language in Section 13-1-158(A) excepting partial payment from this general prohibition. Partial payment would necessarily require a “warrant, check or other negotiable instrument” be issued in payment, even if it does not pay for the full amount. To pay fifty percent prior to the receipt of services, construction, or goods would necessarily constitute payment prior to the receipt and certification that the services, construction, or goods have been received and meet specifications.

The request references Subsection 13-1-158(B) for a possible exception to the prohibition in Section 13-1-158(A), but Subsection B concerns terms and timeline for payment *after* goods, services, or construction are received. Subsection B provides:

Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation forbids, request for

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<sup>14</sup> NMSA 1978, § 13-1-98(J) (2019).

<sup>15</sup> NMSA 1978, § 13-1-158(A) (emphasis added).



proposals or other solicitation, within fifteen days from the date the central purchasing office or using agency receives written notice from the contractor that payment is requested for services or construction *completed* or items of tangible personal property *delivered on site and received*, the central purchasing office or using agency shall issue a written certification of complete or partial acceptance or rejection of the services, construction or items of tangible personal property.<sup>16</sup>

Nothing in this Subsection suggests an exception to the prohibition contained in Subsection A. While Subsection B allows for a variation from payment within fifteen days of the request for payment by agreement of the parties, that variation is only as to the number of days for payment; for example, if the parties agree that payment must occur instead within ten days or thirty days of a request for payment.<sup>17</sup> The Procurement Code must be construed liberally,<sup>18</sup> but its statutory subsections must also be read harmoniously.<sup>19</sup> Section 13-1-158(A) specifically prohibits prepayment unless it is permitted under Section 13-1-98. If the Legislature wanted to allow additional exemptions, such as upon agreement by parties or in a request for proposals, it certainly could have done so by adding it as an exception; but the Legislature did not do so. Reading Section 13-1-158(B) to allow for prepayment by agreement of the parties or specifications in a bid would not be in accord with the remainder of the statute.

It is understandable that a vendor would want a government agency to prepay for a contract. The concerns of a vendor, however, can be addressed by means that are consistent with the prohibition against prepayment. For example, a

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<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *See id.*

<sup>18</sup> § 13-1-29.

<sup>19</sup> *State v. Smith*, 2004-NMSC-032, ¶ 10, 98 P.3d 1022 (“[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.” (alteration original) (quotation marks omitted) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev. 2000))).

purchase order that a government agency issues at the beginning of the contract term or the beginning of a fiscal year would encumber the funds but would not pay out public funds until the goods, services, or construction were provided.<sup>20</sup> Additionally, if the contract were to set out specific metrics or other terms for which periodic payments would be made, such as monthly payments or payments after a contractor completes certain work under the terms of the contract, while such payments would be made before the termination of the entire contract, it would not violate the prohibition against prepayments because the payments would be made for a specific quantity of goods, services, or construction received.

Subsection 13-1-158(A) prohibits the payment of *any* warrant, check or negotiable instrument unless an exception applies or the agency certifies the services, construction, or items of tangible property have been received and meet specifications.<sup>21</sup> Even partial payment prior to that certification of receipt would be an impermissible payment under the plain language of the statute. While Subsection 13-1-158(B) authorizes the parties or the initial solicitation to contemplate a different timeline for an agency to issue a written certification of complete or partial acceptance or rejection of services or construction completed or items of personal property delivered on site and received, it does not provide any specific language related to issuing payment *before* such delivery or completion.

### **III. Tangible personal property must be delivered in order to meet the “receipt” requirement for delivery of goods under Section 13-1-158(A).**

The third request seeks further clarification regarding when goods are “received” for purposes of Section 13-1-158(A). To the extent the tangible personal property is not subject to an exclusion from the prepayment prohibition,

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<sup>20</sup> See NMSA 1978, § 13-1-77 (2001) (“‘Purchase order’ means 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.”).

<sup>21</sup> The request also acknowledges the requirement of a policy exemption under the Department of Finance and Administration Model Accounting Practices (“MAPs”), FIN 5.7 for advance payments. This rule is in keeping with the general rule provided under Section 13-1-158(A) – payments made prior to the receipt of goods or services are permissible only in certain circumstances.

goods must be, as a general matter, delivered to the agency to constitute “receipt” for purposes of Section 13-1-158(A).

As discussed above, “[t]he words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary.”<sup>22</sup> As is relevant here, Black’s Law Dictionary’s definition of “receive” includes “to come into possession of . . .”<sup>23</sup> Next, “[i]n interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part.”<sup>24</sup> Understanding “receipt” to mean when the items are in the agency’s possession is in line with Subsection 13-1-158(B), which makes clear that an agency shall issue a written certification when the “agency receives written notice from the contractor that payment is requested for . . . items of tangible personal property *delivered on site and received*.”<sup>25</sup> Subsection 13-1-158(D) similarly addresses written notice, providing that “[i]f the central purchasing office or the using agency finds that the . . . items of tangible personal property are not acceptable, it shall, within thirty days of the date of receipt of written notice from the contractor that payment is requested for . . . items of tangible personal property *delivered on site*, provide to the contractor a letter of exception explaining the defect or objection to the . . . *delivered tangible personal property*[.]”<sup>26</sup> Based on the plain meaning of the term “receive” and the language in Subsections 13-1-158(B) and (D), the goods must be delivered on site, which would preclude a contract term allowing the goods to be stored by the vendor.<sup>27</sup>

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<sup>22</sup> *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234, 880 P.2d 845 (citing *State ex rel. Reynolds v. Aamodt*, 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990)).

<sup>23</sup> *Receive*, Black’s Law Dictionary (11th ed. 2019)

<sup>24</sup> *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15 (internal quotation marks and citation omitted); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 252 (explaining that statutes in pari materia must be construed in reference to each other).

<sup>25</sup> § 13-1-158(B) (emphasis added).

<sup>26</sup> § 13-1-158(D) (1997) (emphasis added).

<sup>27</sup> This does not necessarily require the item be delivered to the agency’s offices. If, for example, an item is needed as part of a construction project, it may make sense that the item be delivered

Subsection 13-1-158(A) is further informed by Section 13-1-157, “Receipt; inspection; acceptance or rejection of deliveries”:

The using agency is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity is as specified in the purchase order or contract and whether the quality conforms to the specifications referred to or included in the purchase order or contract. If inspection reveals that the delivery does not conform to the quantity or quality specified in the purchase order or contract, the using agency shall immediately notify the central purchasing office. The central purchasing office shall notify the vendor that the delivery has been rejected and shall order the vendor to promptly make a satisfactory replacement or supplementary delivery. In case the vendor fails to comply, the central purchasing office shall have no obligation to pay for the nonconforming items of tangible personal property. If the delivery does conform to the quantity and quality specified in the purchase order or contract, the using agency shall certify to the central purchasing office that delivery has been completed and is satisfactory.<sup>28</sup>

If the goods remain in the vendor’s possession, it will be difficult or impractical for the agency to make the required inspection (particularly in this situation where the goods are in a different jurisdiction). There is also a possibility if the goods need to be “drop shipped” that the goods do not make it intact, thereby affecting the quality of the goods, or the quantity at delivery does not meet that specified in the purchase order or contract. The provisions of Section 157 of the Procurement Code concerning rejection and replacement of goods, as well as release of the obligation

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to a job site. But even there, the item is not being kept by a vendor in its warehouse, it is being delivered (and is received) on site for use by the agency.

<sup>28</sup> NMSA 1978, § 13-1-157 (1984).

to pay where the goods do not meet specifications, protect public funds from erroneous or deficient production, and to “deem received” the goods while they remain in storage by the vendor erodes those protections and subjects public procurement to potential abuses.

**IV. A procuring agency may prepay a contract under ten thousand dollars for web-based or electronic subscriptions, while other provisions address payment for multi-year contracts.**

While a procuring agency is permitted to prepay a contract under ten thousand dollars for web-based and electronic subscriptions, other restrictions might prohibit payment for services across multiple fiscal years. For web-based and electronic subscriptions exceeding ten thousand dollars, the agency may not prepay for such purchases, but could enter into a multi-term contract in accordance with the provisions of the Procurement Code and make payment arrangements that, while not prepaying the contract, could otherwise ameliorate the concerns of the contractor, including a purchase order or progress payments.

Subsection 13-1-98(J) specifically exempts from the requirements of the Procurement Code “purchases not exceeding ten thousand dollars (\$10,000) consisting of magazine subscriptions, web-based or electronic subscriptions, conference registration fees and other similar purchases where prepayments are required[.]”<sup>29</sup> This provision makes clear that a procuring agency may prepay for “web-based and electronic subscriptions” so long as the purchase is under \$10,000. This means that prepayment for a three-year contract for electronic subscriptions not exceeding ten thousand dollars does not violate Section 13-1-158(A), while those exceeding ten thousand dollars are prohibited.

The New Mexico Department of Justice has previously opined on an analogous situation.<sup>30</sup> There, the procuring agency proposed to contract for the

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<sup>29</sup> NMSA 1978, § 13-1-98(J).

<sup>30</sup> N.M. Att’y Gen. Adv. Ltr. 86-17, 1986 WL 220349 at \*7–\*8 (June 18, 1986). The State Ethics Commission considers the Advisory Opinions and Advisory Letters issued by the New Mexico Attorney General as persuasive authority. The Attorney General’s opinions and letters, however, do not necessarily dictate the advisory opinions that the Commission may issue. *See* NMSA 1978, §§ 8-5-2(D) (requiring the Attorney General to issue opinions in writing upon questions of

construction of a high-speed communications system along the Rio Grande corridor as well as operation and maintenance of the system during the primary three-year term. There too the contractor offered a discounted contract price for including the service and maintenance costs in a single advance payment. While the letter opined that the payment for the construction portion of the contract was permissible, the portion of the contract purporting to pay for three years of operation and maintenance services constituted an impermissible prepayment. In order to meet the needs of both the agency and the contractor, the Attorney General proposed that for the operation and maintenance portion of the contract, the agency could place the funds in an escrow account that would pay for the services as they came due.<sup>31</sup>

The Legislature has specifically addressed prepayment for web-based and electronic subscriptions by including those purchases in Section 13-1-98.<sup>32</sup> In so

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law submitted by state officials); 10-16G-8 (authorizing the Commission to issue advisory opinions on matters related to ethics upon request); *First Thrift & Loan Ass'n v. State ex rel. Robinson*, 1956-NMSC-099, ¶ 28, 62 N.M. 61, 304 P.2d 582 (“We are not bound by [opinions of the Attorney General’s office] in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong . . . we reject and decline to feel ourselves bound.”).

<sup>31</sup> It is also worth noting that the advisory letter further pointed to NMSA 1978, § 30-23-2, which makes it a fourth-degree felony to make, receive or cause payment to be made from public funds where such funds purport to be for wages, salary or remuneration for personal services which have not in fact been rendered. While there is no indication in the request that the facts here would implicate this provision, statutes are to be read in relation to other statutes dealing with the same subject matter. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 252. Here, the language of the criminal statute reinforces the public policy against paying out public funds for services that have not been received.

<sup>32</sup> This is in contrast to the federal government’s recent interpretation concerning such subscriptions. Under federal law, “a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.” 31 U.S.C. § 3324(a). In March 2024, the Government Services Administration (“GSA”) issued a memorandum determining that “upfront payment” for purchases for cloud-based Software as a Service meeting specific criteria are not considered advance payments in violation of 31 U.S.C. § 3324(a), with the “central distinction [being] contemporaneous access.” Mem. from Jeffrey A. Koses, GSA Office of Governmentwide Policy, Senior Procurement Executive, for All GSA Contracting Activities (Mar. 15-2024) (available at <https://www.gsa.gov/system/files/MV-2024-01.pdf>). Notably, the GSA opinion does not rely on any other law or analysis to differentiate between an “advance payment” and an “upfront

doing, it has made clear that in analyzing whether prepayment is authorized for a subscription for IT services the question is straightforward: is the contract above or below \$10,000? If it is below that amount, “[t]he provisions of the Procurement Code shall not apply to” the purchase.<sup>33</sup> If it is above that amount, the agency may not pay for the services until the “agency certifies that the services . . . have been received and meet specifications . . . .”<sup>34</sup> Reviewing the proposed purchase referenced in the request, the purchase is higher than \$10,000 and is for a term of 36 months. Because the purchase is above \$10,000 it would not fall under the exception in Section 13-1-98(J), and therefore the procuring agency may not pay for the services prior to the agency’s certification that the services have been received and meet specifications. To the extent the proposed term is for several years it is a multi-term contract, that is, “a contract having a term longer than one

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payment” other than to emphasize the contemporaneous nature of the transaction. The U.S. Government Accountability Office (“GAO”) also previously issued a decision where it reviewed whether the Centers for Disease Control and Prevention (“CDC”) could make advance payment for a monthly subscription for a support package, which included a CD-ROM technical database with daily articles and a newsletter, as well as telephonic technical support services. *See Matter of: Authority to Make Advance Payments for Technical Support Associated with Computer Software Packages*, U.S. Government Accountability Office (June 22, 1995) (available at <https://www.gao.gov/products/b-256692>). The GAO determined that while the monthly subscriptions to the database, articles, and newsletter constituted publications and therefore met a statutory exception to the advance payment prohibition, “[t]he telephonic support services are connected to the publications only in that they are all sold by Microsoft together, as a package. We therefore conclude that CDC may not make advance payment for the telephonic support services offered as part of the technical support packages.” *Id.*

We reference these two advisory documents to highlight the distinction between federal law and the applicable New Mexico law. Unlike federal law, New Mexico expressly references web-based and electronic subscriptions “and other similar purchases where prepayments are required” in the specific statutory exemption cited in Section 13-1-158(A). *See* §§ 13-1-98(J), 13-1-158(A). “A statute or rule is construed, if possible, to . . . give effect to its entire text[.]” § 12-2A-18(A)(2). To reach a conclusion like that in the GSA opinion that if a subscription for cloud-based software services meets certain criteria it is an “upfront payment” rather than a “prepayment” would serve to render the \$10,000 limitation set forth in Section 13-1-98(J) entirely null or superfluous. *See Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7 (“[We] will not read any provision of the statute in a way that would render another provision of the statute null or superfluous.” (cleaned up)).

<sup>33</sup> § 13-1-98.

<sup>34</sup> § 13-1-158(A).

year[,]”<sup>35</sup> which is permissible, but which must otherwise meet the Code’s specific conditions required for such agreements.<sup>36</sup>

## CONCLUSION

The general rule under Section 13-1-158(A) is that unless an exemption applies, a state agency or local government entity may not prepay for services, construction, or items of tangible personal property. The language “No warrant, check or other negotiable instrument shall be issued in payment” indicates that even partial prepayment is prohibited under this Subsection, such that the terms of fifty percent down and fifty percent upon completion would violate the provisions of Section 13-1-158(A). A procuring agency may, however, enter into a contract that contemplates progress payments because in those situations an identified service, construction, or item of tangible personal property would be received (even if additional services, construction, or items of tangible personal property are expected). In order to meet the tangible personal property received portion of Section 13-1-158(A), the items must be delivered on site and received by the agency. Finally, a procuring agency may prepay for the purchase of a web-based or electronic subscription of less than ten thousand dollars; although for those contracts higher than ten thousand dollars, the agency is still permitted to enter into a multi-term contract if it meets the requirements under the Procurement Code and could enter into other payment arrangements.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

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<sup>35</sup> NMSA 1978, § 13-1-68 (1984).

<sup>36</sup> See NMSA 1978, § 13-1-150 (2023) (laying out the terms permissible under a multi-term contract). In addition, this analysis answers only the issue of prepayment. It is also important to note that whether or not a contract for electronic subscriptions falls under the prepayment exception in Section 13-1-98(J), agencies should also be aware that payment for services to be provided in subsequent fiscal years potentially implicates other financial controls requiring government funds only be expended for the fiscal year in which they are paid. See, e.g., Department of Finance and Administration’s Manual of Model Accounting Practices for Fiscal Year 2024 (“MAPS”) FIN 3.7(D)(4)(a), FIN 4.2(A) (“To comply with state laws, rules and regulations, expenditures must be charged to the budget period in which the expenditure was incurred, unless permission to pay prior year’s bills is obtained from FCD. This also means that *current fiscal year funds cannot be used for purchases to be received in the following fiscal year.*” (emphasis added)).



**JEFFREY L. BAKER, Commissioner**  
**STUART M. BLUESTONE, Commissioner**  
**HON. CELIA CASTILLO, Commissioner**  
**HON. DR. TERRY MCMILLAN, Commissioner**  
**RONALD SOLIMON, Commissioner**  
**DR. JUDY VILLANUEVA, Commissioner**

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