

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

July 12, 2016

Pete Domenici, Esq.
Domenici Law Firm, Inc.
320 Gold Avenue SW
Albuquerque, NM 87102

Re: Open Meetings Act Complaint – New Mexico Central Arizona Project Entity

Dear Mr. Domenici:

We have reviewed the complaint submitted by Norm Gaume alleging that New Mexico Central Arizona Project Entity (“NM CAP Entity”) violated the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (as amended through 2013), at its meetings held on January 14, 2016 and March 1, 2016, *see* letter to Tania Maestas, Division Director and Dylan Lange, Assistant Attorney General, from Norm Gaume (Mar. 24, 2016), and your response on behalf of the NM CAP Entity to our inquiry regarding the complaint. *See* letter to Dylan K. Lange, Assistant Attorney General from Pete Domenici, Esq, Attorney for the NM CAP Entity (April 7, 2016) (“NM CAP Entity’s Response”). As discussed below, based on the complaint, the NM CAP Entity’s Response and applicable law, we conclude that the NM CAP Entity violated OMA when it improperly discussed matters in closed session that were not covered by an exception from OMA’s requirements for open, public meetings.

Background

According to the NM Cap Entity’s Response, the NM CAP Entity was formed in 2015 to design, construct, operate and maintain a project to divert water from the Gila Basin pursuant to the federal Arizona Water Settlements Act of 2004. The NM CAP Entity was created by a joint powers agreement, which requires the NM CAP Entity to comply with OMA. In July 2015, the Interstate Stream Commission (“ISC”) issued a Request for Qualifications-Based Proposals for “professional engineering services to be to begin additional design work for the New Mexico Unit of the Central Arizona Project (‘NM Unit’) which may progress up to, but not to exceed, a 30-percent complete engineering design for all, or a portion of the NM Unit.” *See* NM CAP Entity’s Response, Exhibit 1. The NM CAP Entity created a Technical Committee to assist the

ISC in developing a scope of work to be negotiated under the RFP. *See* Minutes of the NM CAP Entity's March 1, 2016 meeting, § VIII.b (attached to NM CAP Entity's Response as Exhibit 6).

Allegations in the Complaint

The allegations in the complaint center on meetings of the NM CAP Entity held on January 14 and March 1, 2016. During the January 14 meeting, the NM CAP Entity went into closed session "for the purpose of discussing the contract negotiation process regarding competitive sealed proposals for engineering design pursuant to the Procurement Code as authorized by NMSA 1978, Section 10-15-1(H)(6)." Minutes of the January 14, 2016 meeting, § X (attached to NM CAP Entity's Response as Exhibit 5). The stated purpose of the closed session apparently related to the Technical Committee's responsibility for developing a scope of work for the Request for Qualifications-Based Proposals issued by the ISC. After returning to open session, the NM CAP Entity voted in favor of a motion to follow the "recommendation of the Technical Committee which is to approve the contract negotiation process for the request for proposal issued by the New Mexico Interstate Stream Commission for the up to 30% design for engineering services." *Id.* § XI. At its March 1 meeting, the NM CAP Entity went into closed session for virtually the same purpose and voted to "approve the final scope of work for the contract negotiation process" when it returned to open session. Minutes of the March 1, 2016 meeting, §§ X, IX.¹

OMA's Provisions Governing Closed Meetings

In pertinent part, OMA provides:

All meetings of a quorum of members of any board, commission ... or other policymaking body of any state agency ... held for the purpose of formulating public policy, ... discussing public business or for the purpose of taking any action within the authority of ... any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.

NMSA 1978, § 10-15-1(B). The exceptions from OMA's public meeting requirements are listed in Section 10-15-1(H). When a public body votes to close a meeting pursuant to an exception contained in Subsection (H), OMA requires that the motion to close state the "authority for the closure and the subject to be discussed ... with reasonable specificity." *Id.* § 10-15-1(I)(1).

Motions to Close the January 14 and March 1 Meetings

When the NM CAP Entity went into closed session during its January 14 and March 1 meetings, it relied on OMA's exception for "that portion of meetings at which the contents of competitive

¹ In addition to alleging that it improperly closed its January 14 and March 1 meetings, the complaint contends that the NM CAP Entity violated OMA when voted in open session "to approve whatever it was they decided in closed session without any public information pertaining to those approvals." Because we conclude that the discussions during the closed sessions violated OMA, we do not address the second allegation.

sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process.” *Id.* § 10-15-1(H)(6). The exception corresponds to a similar provision of the Procurement Code, which states that “[t]he contents of any [competitive sealed] proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.” *Id.* § 13-1-116 (1984). The General Services Department’s regulations implementing the Procurement Code provide that the contents of proposals shall not be disclosed “during the negotiation process and prior to award,” which is defined as “the final agency signature on the contract(s) resulting from the procurement.” Procurement Code Regulations, 1.4.1.40 NMAC (2013). Section 10-15-1(H)(6) allows members of a public body to close a meeting to discuss the contents of competitive sealed proposals during the contract negotiation process and gives effect to the protection for proposals conferred by the Procurement Code. *See* Attorney General’s Open Meetings Compliance Guide, pp. 27-28 (8th ed. 2015).

The “subject to be discussed” described in the motions to close the January 15 and March 1 meetings was “the contract negotiation process regarding competitive sealed proposals for engineering design pursuant to the Procurement Code.” The NM CAP Entity’s Response contends that the subject described in the motions to close was covered by Section 10-15-1(H)(6) because it, when read together with the provisions of the Procurement Code and Procurement Code Regulations quoted above, “provides a clear exception for procurement through competitive sealed proposals and does not require or indeed allow a public body to discuss the negotiations related to professional service contracts in public meetings before the contracts are awarded and signed.” As support, the NM CAP Entity’s Response points to the ISC procurement officer’s remarks after the closed session during the January 14 meeting expressing the ISC’s position that the substance of the closed session not be disclosed. *See* Minutes of the January 14 meeting, § XI.

Subject of Closed Meetings Was Not Excepted From Public Meeting Requirements

As discussed above, Section 10-15-1(H)(6) allows closed sessions to discuss “the contents of competitive sealed proposals solicited pursuant to the Procurement Code ... during the contract negotiation process.” The Procurement Code prohibits disclosure of “[t]he contents of any proposal ... so as to be available to competing offerors during the negotiation process.” NMSA 1978, § 13-1-116. The Procurement Code Regulations clarify that the “negotiation process” for purposes of protecting the contents of competitive proposals from disclosure ends when a contract is awarded, 1.4.1.40 NMAC, but does not expand the exception from disclosure authorized by OMA and the Procurement Code. That exception plainly applies only to discussions about the contents of competitive sealed proposals during the contract negotiation process. Contrary to the NM CAP Entity’s Response, Section 10-15-1(H)(6) does not provide a broad “exception for procurement through competitive sealed proposals” or prohibit a public body from discussing “the negotiations related to professional service contracts in public meetings.”

The NM CAP Entity and other public bodies subject to OMA may conduct business in private only for the narrow purposes set forth in OMA. Because the NM CAP Entity discussed matters

Mr. Pete Domenici
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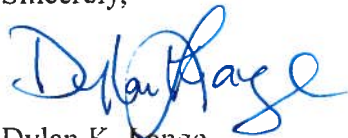
in closed session that were not excluded from OMA's requirement for open, public meetings, we determine that the January 14 and March 1 meetings were unlawfully closed.

Action taken by a public body at a meeting that violates OMA is invalid and without effect. *See* NMSA 1978, § 10-15-3(A). Before it subjects a public body to judicial enforcement resulting from a violation, OMA permits a public body that receives notice of a violation to take corrective action and avoid further legal proceedings. *Id.* § 10-15-3(B). A public meeting held to address a violation must "include a summary of comments made at the meeting at which the ... violation occurred." *Id.*

Here, the NM CAP Entity violated OMA by conducting closed sessions at its January 14 and March 1, 2016 meetings that were not authorized by an exception from OMA's public meeting requirements. We advise the NM CAP Entity to take measures to correct the violations, including addressing the violations at a properly noticed, open meeting. The open meeting should include a summary of the substance of the matters improperly discussed in each of the closed sessions. Within 30 days of the date of this determination, please provide us with a copy of the public notice, agenda and minutes for the meeting held to take corrective action.

If you have any questions regarding this determination, please let me know. I can be reached by phone at 505-827-7479 or email at dlange@nmag.gov.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Norm Gaume
Amy Haas, ISC General Counsel

Norman Gaume, P.E. (ret.)

March 24, 2016

Office of the Attorney General
Open Government Division
Santa Fe, NM 87504-1508

Attention: Tania Maestas, Division Director and Dylan Lange, Ass't AG

Subject: Complaint re New Mexico Central Arizona Project Entity's
Violations of the New Mexico Open Meetings Act

Dear Ms. Maestas and Mr. Lange:

The New Mexico Central Arizona Project Entity (NM CAP Entity) closed its public meetings on January 14, 2016 and March 1, 2016 in violation of the provisions of the Open Meetings Act to discuss public business that is not within the narrow exception cited as the basis of closing these public meetings. The NM CAP Entity committed additional violations of the Open Meetings Act when they voted in open session, on January 14 and again on March 1, to approve whatever it was they decided in closed session without any public information pertaining to these approvals.

Attached please find my two notices of violation to the NM CAP Entity dated March 1, 2016 and March 11, 2016. These notices contain the substance of this complaint. Video recordings of the meetings are publicly available and I have audio recordings that I will provide at your request. Three pertinent Silver City Daily Press news articles, an editorial, and my guest column are attached, also.

The NM CAP Entity has responded to my first notice of violation with the attached letter dated March 16, 2016. This response is an admission of the January 14 violations. My reply is attached. The Executive Director of the NM CAP Entity made explicit admissions in his oral report to the NM CAP Entity at its March 1 public meeting. I have received no response as of today to my second notice of violation but the NM CAP Entity's position is made clear by their March 16 response.

I hereby request the Office of the Attorney General require the NM CAP Entity to conduct its public business in public in compliance with the Open Meetings Act.

Sincerely,



Norm Gaume, P.E. (ret.)

Attachments

1. Gaume March 1 Open Meetings Act letter re NM CAP Entity Jan. 14 meeting
2. Gaume March 11 letter re NM CAP Entity March 1 meeting
3. NM CAP Entity March 16 response to Gaume March 1 letter
4. Gaume March 23 reply to NM CAP Entity
5. Silver City Daily Press March 2 news article, "Critics: Gila diversion plans kept secret"
6. Silver City Daily Press March 7 guest column Gaume, "NM CAP Entity can prevent lawsuit"
7. Silver City Daily Press March 14 news article, "Complaint brings more trouble for the CAP Entity"
8. Silver City Daily Press March 18 news article, "Diversion scope still secret after bid award"
9. Silver City Daily Press March 18 editorial, "Stop hiding, wasting cash"