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August 17, 2007

The Honorable Eric A. Youngberg
New Mexico State Representative
5315 Montaño Plaza Drive NW
Albuquerque, NM 87120

Re: Request for Opinion – Disclosure and Prohibition of Campaign Contributions

Dear Representative Youngberg:

You requested our advice on whether a prospective contractor is required to disclose or can be prohibited from making contributions to a public official's campaign for federal office. More specifically, you asked whether contributions to the Governor's or the Attorney General's federal campaign must be disclosed pursuant to NMSA 1978, Section 13-1-191.1 (2007). This issue arose after the New Mexico Attorney General issued Opinion No. 07-01 that noted the applicability of federal preemption to state laws governing candidates for federal office. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that Section 13-1-191.1(F) is impermissible to the extent that it places a limitation on contributions to candidates for federal office. We further conclude that Section 13-1-191.1(B) is permissible and that a prospective contractor must disclose campaign contributions made to a local or state public official's federal campaign.

The purpose of the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended through 2006), is "to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity." NMSA 1978, § 13-1-29(C) (1984). In 2006, the state legislature amended the Code to provide that a prospective contractor shall disclose all campaign contributions given to an applicable public official of the state but shall be forbidden from contributing during the procurement and negotiating process. See NMSA 1978, § 13-1-191.1 (2007). An applicable public official is defined as "a person elected to an office or a person appointed to complete a term of an elected office who has the authority to award or

influence the contract." NMSA 1978, § 13-1-191.1(G)(1) (2006). Since the purpose of the Procurement Code is to regulate fairness and equality, it focuses on the public official's position and his authority and role in the process. There is no statutory distinction between contributions made to a candidate's state or federal campaign. It is therefore reasonable to conclude that the goal of the law from a procurement prospective is that all campaign contributions by prospective contractors to a public official of the state must be disclosed or, in some cases, stopped, regardless of whether the campaign is for state or federal office.

Your request questioned whether federal preemption principles apply to Section 13-1-191.1. We previously wrote: "When a state law may be construed to attempt to govern a federal process, it must undergo a preemption analysis." N.M. Att'y Gen. Op. 07-01 (2007). That opinion cited to the Federal Election Campaign Act of 1971 ("FECA" or "Act"), which states that the provisions of the Act and rules prescribed under the Act supersede and preempt any provision of State law with respect to election to Federal office. See 2 U.S.C. § 452 (2002). The opinion also cited to a specific federal regulation, which states: "Federal law supersedes State Law concerning (1) organization and registration of political committees supporting Federal candidates; (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and (3) Limitation on contributions and expenditures regarding Federal candidates and political committees." 11 CFR § 108.7(b) (2002). We concluded that the federal regulation covered contributions regarding federal candidates and thus the regulation preempted New Mexico's law that placed a limit on certain contributions to federal candidates. See Letter to Bryan Otero, State Investment Office, from Deputy Attorney General Albert Lama (Apr. 4, 2007) (federal regulations preempted new language in House Bill 823 that placed a limit on financial services companies from making contributions to federal candidates).

Section 13-1-191.1(E) reads: "A prospective contractor...shall not give a campaign contribution...to an applicable public official...during the pendency of the procurement process or during the pendency of negotiations for a sole source or small purchase contract." This subsection appears to be superseded by federal law to the extent it would otherwise limit contributions to federal candidates. Therefore, based on the doctrine of federal preemption, explained in Attorney General Opinion No. 07-01, the prohibition in Section 13-1-191.1(E) does not apply to prospective contractors' contributions to candidates for federal office.

"[P]reemption doctrine is rooted in the Supremacy Clause and grows from the premise that when state law conflicts or interferes with federal law, state law must give way." Teper v. Miller, 82 F.3d 989, 993 (11th Cir. 1996). Section 13-1-191.1(B) reads in pertinent part:

> "A prospective contractor...shall disclose all campaign contributions...to an applicable public official of the state...during the two years prior to the date on which a proposal is submitted or, in the case of a sole source or

> small purchase contract, the two years prior to the date on which the contractor signs the contract, if the aggregate total...exceeds two hundred fifty dollars ($250) over the two-year period." NMSA 1978, § 13-1-191.1(B) (2006).

In contrast to Subsection (E), this subsection does not limit contributions to federal candidates. It also does not appear to conflict or interfere with federal regulations relating to disclosure by federal candidates, because a prospective contractor can report the contribution pursuant to state law without affecting a federal candidate's ability to report the contribution pursuant to federal regulation.

Furthermore, the state Governmental Conduct Act forbids a sitting state official from using his position of power to improperly solicit money or curry favor. "No legislator [or] public officer... may request or receive, and no person may offer a legislator [or] public officer...any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official [state] act." NMSA 1978, Section 10-16-3(D) (1993). In addition, state officials "shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests incompatible with the public interest." NMSA 1978, Section 10-16-3(A) (1993). Therefore, current and future public officials seeking federal office must comply with the Governmental Conduct Act even though they are exempt from certain fundraising prohibitions to the extent their fundraising concerns only a campaign for federal office.

Your request to us was for a formal Attorney General's Opinion on the issues discussed within. Such an opinion is a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public. If there are any further questions that I can assist you with, do not hesitate to contact me.

Sincerely,

Tania Maestas

TANIA MAESTAS
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General