

ARTICLE 1 Procurement

Section

- 13-1-1 to 13-1-20 Repealed.
- 13-1-21 Application of preferences.
- 13-1-21.1 Repealed.
- 13-1-21.2 Repealed.
- 13-1-22 Resident business and resident contractor certification.
- 13-1-23 to 13-1-27 Repealed.
- 13-1-28 Short title.
- 13-1-29 Rules of construction; purposes.
- 13-1-30 Application of the code.
- 13-1-31 Definition; architectural services.
- 13-1-32 Definition; blind trust.
- 13-1-33 Definition; brand-name specification.
- 13-1-34 Definition; brand-name or equal specification.
- 13-1-35 Definition; business.
- 13-1-36 Definition; catalogue price.
- 13-1-37 Definition; central purchasing office.
- 13-1-38 Definition; change order.
- 13-1-39 Definition; confidential information.
- 13-1-40 Definition; construction.
- 13-1-40.1 Definition; construction management and construction manager.
- 13-1-41 Definition; contract.
- 13-1-42 Definition; contract modification.
- 13-1-43 Definition; contractor.
- 13-1-44 Definition; cooperative procurement.
- 13-1-45 Definition; cost analysis.
- 13-1-46 Definition; cost data.
- 13-1-47 Definition; cost reimbursement contract.
- 13-1-48 Repealed.
- 13-1-49 Definition; data.
- 13-1-50 Definition; definite quantity contract.
- 13-1-51 Definition; designee.
- 13-1-52 Definition; determination.
- 13-1-53 Definition; direct or indirect participation.
- 13-1-53.1 Definition; electronic.
- 13-1-54 Definition; employee.
- 13-1-55 Definition; engineering services.
- 13-1-56 Definition; external procurement unit.
- 13-1-57 Definition; financial interest.
- 13-1-58 Definition; firm fixed price contract.
- 13-1-59 Definition; gratuity.
- 13-1-60 Definition; heavy road equipment.
- 13-1-61 Definition; highway reconstruction.
- 13-1-62 Definition; immediate family.
- 13-1-63 Definition; indefinite quantity contract.
- 13-1-64 Definition; invitation for bids.

- 13-1-65 Definition; surveying services.
- 13-1-66 Definition; landscape architectural services.
- 13-1-66.1 Definition; local public works project.
- 13-1-67 Definition; local public body.
- 13-1-68 Definition; multi-term contract.
- 13-1-69 Definition; multiple source award.
- 13-1-70 Definition; notice of invitation for bids.
- 13-1-71 Definition; price agreement.
- 13-1-72 Definition; price analysis.
- 13-1-73 Definition; pricing data.
- 13-1-74 Definition; procurement.
- 13-1-75 Definition; procurement officer.
- 13-1-76 Definition; professional services.
- 13-1-77 Definition; purchase order.
- 13-1-78 Definition; purchase request.
- 13-1-79 Definition; qualified products list.
- 13-1-80 Definition; regulation.
- 13-1-81 Definition; request for proposals.
- 13-1-82 Definition; responsible bidder.
- 13-1-83 Definition; responsible offeror.
- 13-1-84 Definition; responsive bid.
- 13-1-85 Definition; responsive offer.
- 13-1-86 Definition; secretary.
- 13-1-87 Definition; services.
- 13-1-88 Definition; small business.
- 13-1-89 Definition; specification.
- 13-1-90 Definition; state agency.
- 13-1-91 Definition; state public works project.
- 13-1-92 Definition; state purchasing agent.
- 13-1-93 Definition; tangible personal property.
- 13-1-94 Definition; using agency.
- 13-1-95 Purchasing division; creation; director is state purchasing agent; appointment; duties.
- 13-1-95.1 Electronic transmissions.
- 13-1-96 Delegation of authority by the state purchasing agent.
- 13-1-97 Centralization of procurement authority.
- 13-1-97.1 Contract database.
- 13-1-98 Exemptions from the Procurement Code.
- 13-1-98.1 Hospital and health care exemption.
- 13-1-98.2 Additional exemptions from the Procurement Code.
- 13-1-99 Excluded from central purchasing through the state purchasing agent.
- 13-1-100 Construction contracts; central purchasing office.
- 13-1-100.1 Construction contracts; construction management services.
- 13-1-101 Repealed.
- 13-1-102 Competitive sealed bids required.
- 13-1-103 Invitation for bids.
- 13-1-104 Competitive sealed bids; public notice.
- 13-1-105 Competitive sealed bids; receipt and acceptance of bids.
- 13-1-106 Competitive sealed bids; correction or withdrawal of bids.
- 13-1-107 Competitive sealed bids; bid opening.
- 13-1-108 Competitive sealed bids; award.

- 13-1-109 Competitive sealed bids; multi-step sealed bidding.
- 13-1-110 Competitive sealed bids; identical bids.
- 13-1-111 Competitive sealed proposals; conditions for use.
- 13-1-112 Competitive sealed proposals; request for proposals.
- 13-1-113 Competitive sealed proposals; public notice.
- 13-1-114 Competitive sealed proposals; evaluation factors.
- 13-1-115 Competitive sealed proposals; negotiations.
- 13-1-116 Competitive sealed proposals; disclosure; record.
- 13-1-117 Competitive sealed proposals; award.
- 13-1-117.1 Procurement of professional services; local public bodies; legislative branch; selection and award.
- 13-1-117.2 Procurement of professional services; local public bodies; professional technical advisory assistance.
- 13-1-117.3 Contracts for the design and installation of measures for the conservation of natural resources.
- 13-1-118 Competitive sealed proposals; professional services contracts; contract review.
- 13-1-119 Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; additional requirements.
- 13-1-119.1 Public works project delivery system; design and build projects authorized.
- 13-1-119.2 Design and build procurement for certain transportation projects.
- 13-1-120 Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection process.
- 13-1-121 Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection committee; state public works projects.
- 13-1-122 Competitive sealed qualifications-based proposals; award of architect, engineering, landscape architect and surveying contracts.
- 13-1-123 Architectural, engineering, landscape architectural and surveying contracts.
- 13-1-124 Architect rate schedule.
- 13-1-124.1 Short title.
- 13-1-124.2 Applicability.
- 13-1-124.3 Definitions.
- 13-1-124.4 Construction manager at risk delivery method authorized; multiphase selection procedure.
- 13-1-124.5 Responsibilities of construction manager at risk following award of project.
- 13-1-125 Small purchases.
- 13-1-126 Sole source procurement.
- 13-1-127 Emergency procurements.
- 13-1-128 Sole source and emergency procurements; content and submission or record.
- 13-1-129 Procurement under existing contracts.
- 13-1-130 Purchases; antipoverty program business.
- 13-1-131 Rejection or cancellation of bids or requests for proposals; negotiations.
- 13-1-132 Irregularities in bids or proposals.
- 13-1-133 Responsibility of bidders and offerors.
- 13-1-134 Prequalification of bidders.
- 13-1-135 Cooperative procurement authorized.
- 13-1-135.1 Recycled content goods; cooperative procurement.
- 13-1-136 Cooperative procurement; reports required.
- 13-1-137 Sale, acquisition or use of property by a state agency or a local public body.
- 13-1-138 Cost or pricing data required.
- 13-1-138.1 Specification of certain components; separate pricing required.

- 13-1-138.2 School construction projects; separate pricing required in certain circumstances.
- 13-1-139 Cost or pricing data not required.
- 13-1-140 Cost or pricing data; change orders or contract modifications.
- 13-1-141 Cost or pricing data; change orders; contract modifications; exceptions.
- 13-1-142 Cost or pricing data; certification required.
- 13-1-143 Cost or pricing data; price adjustment provision required.
- 13-1-144 Cost or price analysis.
- 13-1-145 Cost principles; regulations.
- 13-1-146 Requirement for bid security.
- 13-1-146.1 Directed suretyship prohibited; penalty.
- 13-1-147 Bid security; rejection of bids.
- 13-1-148 Bid and performance bonds; additional requirements.
- 13-1-148.1 Bonding of subcontractors.
- 13-1-149 Types of contracts.
- 13-1-150 Multi-term contracts; specified period.
- 13-1-151 Multi-term contracts; determination prior to use.
- 13-1-152 Multi-term contracts; cancellation due to unavailability of funds.
- 13-1-153 Multiple source award; limitations on use.
- 13-1-154 Multiple source award; determination required.
- 13-1-154.1 Multiple source contracts; architectural and design service contracts; indefinite quantity construction contracts.
- 13-1-155 Procurement of used items; appraisal required; county road equipment exception for auctions.
- 13-1-156 Trade or exchange of used items; appraisal required.
- 13-1-157 Receipt; inspection; acceptance or rejection of deliveries.
- 13-1-158 Payments for purchases.
- 13-1-159 Right to inspect plant.
- 13-1-160 Audit of cost or pricing data.
- 13-1-161 Contract audit.
- 13-1-162 State procurement standards and specifications committee; terms; staff.
- 13-1-163 Committee powers and duties; special committees; annual report.
- 13-1-164 Specifications; maximum practicable competition.
- 13-1-165 Brand-name specification; use.
- 13-1-166 Brand-name specification; competition.
- 13-1-167 Brand-name or equal specification; required characteristics.
- 13-1-168 Brand-name or equal specification; required language.
- 13-1-169 Purchase request; specifications; purchase orders.
- 13-1-170 Uniform contract clauses.
- 13-1-171 Price adjustments.
- 13-1-172 Right to protest.
- 13-1-173 Procurements after protest.
- 13-1-174 Authority to resolve protests.
- 13-1-175 Protest; determination.
- 13-1-176 Protest; notice of determination.
- 13-1-177 Authority to debar or suspend.
- 13-1-178 Causes for debarment or suspension; time limit.
- 13-1-179 Debarment or suspension; determination.
- 13-1-180 Debarment or suspension; notice of determination.
- 13-1-181 Remedies prior to execution of contract.
- 13-1-182 Ratification or termination after execution of contract.

- 13-1-183 Judicial review.
- 13-1-184 Assistance to small business; policy.
- 13-1-185 Assistance to small business; duties of the state purchasing agent.
- 13-1-186 Assistance to small business; bid bonds; reduction.
- 13-1-187 Small business; report to the legislature.
- 13-1-188 Public acquisition of American-made motor vehicles required.
- 13-1-189 Procurements pursuant to the Corrections Industries Act.
- 13-1-190 Unlawful employee participation prohibited.
- 13-1-191 Bribes; gratuities and kickbacks; contract reference required.
- 13-1-191.1 Campaign contribution disclosure and prohibition.
- 13-1-192 Contingent fees prohibited.
- 13-1-193 Contemporaneous employment prohibited.
- 13-1-194 Waivers from contemporaneous employment and unlawful employee participation permitted.
- 13-1-195 Use of confidential information prohibited.
- 13-1-196 Civil penalty.
- 13-1-197 Recovery of value transferred or received; additional civil penalty.
- 13-1-198 Kickbacks; additional civil penalty.
- 13-1-199 Misdemeanor.

13-1-1 to 13-1-20. Repealed.

Repeals. — Laws 1984, ch. 65, § 175, repealed 13-1-1 to 13-1-20 NMSA 1978, relating to public purchases, effective November 1, 1984.

13-1-21. Application of preferences.

A. For the purposes of this section:

- (1) "business" means a commercial enterprise carried on for the purpose of selling goods or services, including growing, producing, processing or distributing agricultural products;
- (2) "formal bid process" means a competitive sealed bid process;
- (3) "formal request for proposals process" means a competitive sealed proposal process, including a competitive sealed qualifications-based proposal process;
- (4) "public body" means a department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of the state or a political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts, local school boards and all municipalities, including home-rule municipalities;
- (5) "resident business" means a business that has a valid resident business certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978; and
- (6) "recycled content goods" means supplies and materials composed twenty-five percent or more of recycled materials; provided that the recycled materials content meets or

exceeds the minimum content standards required by bid specifications.

B. When a public body makes a purchase using a formal bid process, the public body shall deem a bid submitted by a resident business to be five percent lower than the bid actually submitted.

C. When a public body makes a purchase using a formal request for proposals process:

(1) five percent of the total weight of all the factors used in evaluating the proposals shall be awarded to a resident business based on the resident business possessing a valid resident business certificate; or

(2) if the contract is awarded based on a point-based system, a resident business shall be awarded the equivalent of five percent of the total possible points to be awarded based on the resident business possessing a valid resident business certificate.

D. When a joint bid or joint proposal is submitted by both resident and nonresident businesses, the resident business preference provided pursuant to Subsection B or C of this section shall be reduced in proportion to the percentage of the contract, based on the dollar amount of the goods or services provided under the contract, that will be performed by a nonresident business as specified in the joint bid or proposal.

E. When bids are received for both recycled content goods and nonrecycled content goods, the public body shall deem the bids submitted for recycled content goods of equal quality to be five percent lower than the bids actually submitted. A bid calculation pursuant to this subsection for a resident business shall not also receive the bid calculation preference pursuant to Subsection B of this section.

F. The procedures provided in Sections 13-1-172 through 13-1-183 NMSA 1978 or in an applicable purchasing ordinance apply to a protest to a public body concerning the awarding of a contract in violation of this section.

G. This section shall not apply when the expenditure includes federal funds for a specific purchase.

History: 1978 Comp., § 13-1-21, enacted by Laws 1979, ch. 72, § 1; 1981, ch. 104, § 1; 1988, ch. 84, § 1; 1989, ch. 310, § 1; 1995, ch. 60, § 1; 1997, ch. 1, § 2; 1997, ch. 2, § 2; 1997, ch. 3, § 1; 2000, ch. 41, § 1; 2011 (1st S.S.), ch. 3, § 1.

Repeals and reenactments. — Laws 1968, ch. 72, § 9, repealed a former 6-5-32, 1953 Comp., relating to resident preference, and enacted a similar provision, also designated 6-5-32, 1953 Comp.

Laws 1979, ch. 72, § 1, repealed a former 13-1-21 NMSA 1978, relating to resident preference, and enacted a new 13-1-21 NMSA 1978.

The 2011 (1st. S.S.) amendment, effective October 5, 2011, provided a five percent advantage to bids and proposals by resident businesses and to recycled content goods; specified the minimum percentage of recycled materials in recycled content goods; eliminated the practice of brokering the preference through joint bids or proposals by resident and non-resident businesses by reducing the preference by the percentage of the contract performed by the nonresident business; eliminated the

preference for resident manufacturers and New York state business enterprises; expanded the application of the resident business preference to contracts larger than \$5,000,000; provided the procedure for protesting violations of this section; deleted former Paragraphs (2) through (4) and (6) of Subsection A, which defined "New Mexico resident business", "New York state business enterprise", "resident manufacturer", and "virgin content goods"; added Paragraphs (1) through (4) of Subsection A; in Paragraph (5) of Subsection A, after "means a", deleted "New Mexico resident business or a New York state business enterprise" and added the remainder of the sentence; in Paragraph (6) of Subsection A, after "materials composed", deleted "in whole or in part" and added "twenty-five percent or more"; deleted former Subsections B through J, which provided rules for awarding contracts for goods and services when the bid from a resident business or resident manufacturer or for virgin content goods and recycled goods is made lower, by the application of the five percent preference, than the lowest bid from other bidders; added new Subsections B through F; in Subsection G, after "when the expenditure", deleted "of" and added "includes", after the phrase "federal funds", deleted "designated", and at the end of the sentence, deleted "is involved or for any bid price greater than five million dollars (\$5,000,000)"; and deleted former Subsection L, which exempted the purchase of buses from resident manufacturers and resident businesses that manufactures buses in New Mexico.

The 2000 amendment, effective March 6, 2000, added Subsection L.

1997 amendments. — Identical amendments to this section, enacted by Laws 1997, ch. 1, § 2 and Laws 1997, ch. 2, § 2, both effective January 24, 1997, in Subsection A, inserted "a New Mexico resident business or a New York state business enterprise;" in Paragraph (1); designated present Paragraph (2), adding "'New Mexico resident business' means" at the beginning; added Paragraph (3), redesignating former Paragraphs (2) through (5) as Paragraphs (4) through (6), and added the proviso at the end of Paragraph (4). However, Laws 1997, ch. 3, § 1 also amended this section, effective January 29, 1997, by incorporating the changes made by Laws 1997, ch. 1, § 2 and ch. 2, § 2, and substituted "not" for "now" near the end of Subsection A(4). This section is set out as amended by Laws 1997, ch. 3, § 1. See 12-1-8 NMSA 1978.

The 1995 amendment, effective June 16, 1995, substituted "a business that" for "one which" in Paragraph (1) in Subsection A, added Paragraphs (3) and (4) in Subsection A, added Subsections G through J, and redesignated former Subsection G as Subsection K.

ANNOTATIONS

Policy. — The underlying policy of this section is to give a preference to those persons and companies who contribute to the economy of the state of New Mexico by maintaining plants and other facilities within the state and giving employment to residents of the state. 1969 Op. Att'y Gen. No. 69-42.

Multiple preference policy. — A bidder who offers materials grown, processed or manufactured in this state may not claim both the manufacturer's 5% preference and the resident dealer's 5% preference against an out-of-state supplier, giving the in-state supplier a 10% preference. 1968 Op. Att'y Gen. No. 68-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 52, 54, 67, 69.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Validity, construction, and effect of requirement under state statute or local ordinance giving local or

locally qualified contractors a percentage preference in determining lowest bid, 89 A.L.R.4th 587.

72 Supp. C.J.S. Public Contracts §§ 7 to 9, 16.

13-1-21.1. Repealed.

Repeals. — Laws 1984, ch. 65, § 175, repealed 13-1-21.1 NMSA 1978, as enacted by Laws 1981, ch. 340, § 1, relating to public purchases of American-made motor vehicles, effective November 1, 1984.

13-1-21.2. Repealed.

Repeals. — Laws 2011 (1st. S.S.), ch. 3, § 8 repealed 13-1-21.2 NMSA 1978, as enacted by Laws 1997, ch. 1, § 1 and Laws 1997, ch. 2, § 1, relating to equal procurement access for New York businesses, effective October 5, 2011. For provisions of former section, see the 2011 NMSA 1978 on New Mexico One Source of Law.

13-1-22. Resident business and resident contractor certification.

A. To receive a resident business preference pursuant to Section 13-1-21 NMSA 1978 or a resident contractor preference pursuant to Section 13-4-2 NMSA 1978, a business or contractor shall submit with its bid or proposal a copy of a valid resident business certificate or valid resident contractor certificate issued by the taxation and revenue department.

B. An application for a resident business certificate shall include an affidavit from a certified public accountant setting forth that the business is licensed to do business in this state and that:

(1) the business has paid property taxes or rent on real property in the state and paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit;

(2) if the business is a new business, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the business is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the business either leased real property for ten years or purchased real property greater than one hundred thousand dollars (\$100,000) in value in the state; or

(4) if the business is a previously certified business or was eligible for certification, the business has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same commercial

enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

C. An application for a resident contractor certificate shall include an affidavit from a certified public accountant setting forth that the contractor is currently licensed as a contractor in this state and that:

(1) the contractor has:

(a) registered with the state at least one vehicle; and

(b) in each of the five years immediately preceding the submission of the affidavit:
1) paid property taxes or rent on real property in the state and paid at least one other tax administered by the state; and 2) paid unemployment insurance on at least three full-time employees who are residents of the state; provided that if a contractor is a legacy contractor, the requirement of at least three full-time employees who are residents of the state is waived;

(2) if the contractor is a new contractor, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the five years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the contractor is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the contractor either leased real property for ten years or purchased real property greater than one hundred thousand dollars (\$100,000) in value in the state; or

(4) if the contractor is a previously certified contractor or was eligible for certification, the contractor has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

D. The taxation and revenue department shall prescribe the form and content of the application and required affidavit. The taxation and revenue department shall examine the application and affidavit and, if necessary, may seek additional information to ensure that the business or contractor is eligible to receive the certificate pursuant to the provisions of this section. If the taxation and revenue department determines that an applicant is eligible, the department shall issue a certificate pursuant to the provisions of this section. If the taxation and revenue department determines that the applicant is not eligible, the department shall issue notification within thirty days. If no notification is provided by the department, the certificate is deemed approved. A certificate is valid for three years from the date of its issuance; provided that if there is a change of ownership of more than fifty percent, a resident business or resident contractor shall reapply for a certificate.

E. A business or contractor whose application for a certificate is denied has fifteen days from the date of the taxation and revenue department's decision to file an objection with the taxation and revenue department. The person filing the objection shall submit evidence to support the objection. The taxation and revenue department shall review the evidence and issue a decision within fifteen days of the filing of the objection.

F. If, following a hearing and an opportunity to be heard, the taxation and revenue department finds that a business or contractor provided false information to the taxation and revenue department in order to obtain a certificate or that a business or contractor used a certificate to obtain a resident business or resident contractor preference for a bid or proposal and the resident business or contractor did not perform the percentage of the contract specified in the bid or proposal, the business or contractor:

(1) is not eligible to receive a certificate or a preference pursuant to Section 13-1-21 or 13-4-2 NMSA 1978 for a period of five years from the date on which the taxation and revenue department became aware of the submission of the false information or the failure to perform the contract as specified in the bid or proposal; and

(2) is subject to an administrative penalty of up to fifty thousand dollars (\$50,000) for each violation.

G. In a decision issued pursuant to Subsection E or F of this section, the taxation and revenue department shall state the reasons for the action taken and inform an aggrieved business or contractor of the right to judicial review of the determination pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

H. The taxation and revenue department may assess a reasonable fee for the issuance of a certificate not to exceed the actual cost of administering the taxation and revenue department's duties pursuant to this section.

I. The state auditor may audit or review the issuance or validity of certificates.

J. For purposes of this section:

(1) "new business" means a person that did not exist as a business in any form and that has been in existence for less than three years;

(2) "new contractor" means a person that did not exist as a business in any form and that has been in existence for less than five years;

(3) "legacy contractor" means a construction business that has been licensed in this state for ten consecutive years; and

(4) "relocated business" means a business that moved eighty percent of its total domestic personnel from another state to New Mexico in the past five years.

History: 1953 Comp., § 6-5-32.1, enacted by Laws 1969, ch. 184, § 1; 1979, ch. 72, § 2; 2011 (1st S.S.), ch. 3, § 2.

The 2011 (1st S.S.) amendment, effective October 5, 2011, provided for the certification of resident businesses and contractors by the taxation and revenue department; specified the qualifications for certification as a resident business or contractor; required businesses and contractors to submit a copy of a valid resident business or contractor certification with their bids or proposal as a condition to receiving the resident business and contractor preferences; provided for the review of denials of applications for certification; provided penalties for providing false information to obtain certification or for failure to perform the percentage of a contract specified in a bid or proposal; in the catchline, after "Resident business and", deleted "manufacturer", and added "resident contractor" and deleted "application; information"; deleted the former introductory paragraph and Subsections A through C, which provided for the certification of resident businesses and resident manufacturers and the issuance of a certification number by the state purchasing agent; and added new Subsections A through J.

Temporary provisions. — Laws 2011 (1st S.S.), ch. 3, § 7, effective October 5, 2011, provided that a certification as a resident business or resident manufacturer by the general services department that is in effect prior to the passage of this 2011 act is valid until January 1, 2012 for the purpose of obtaining a resident business preference pursuant to Section 13-1-21 NMSA 1978. A certification as a resident contractor by the general services department that is in effect prior to passage of this 2011 act is valid until January 1, 2012 for the purpose of obtaining a resident contractor preference pursuant to Section 13-4-2 NMSA 1978. After January 1, 2012, a certification as a resident business or resident contractor by the taxation and revenue department for the purpose of obtaining a resident business preference or a resident contractor preference is required for all bids and proposals.

13-1-23 to 13-1-27. Repealed.

Repeals. — Laws 1984, ch. 65, § 175, repealed 13-1-23 to 13-1-27 NMSA 1978, relating to public purchases, effective November 1, 1984.

13-1-28. Short title.

Sections 13-1-28 through 13-1-199 NMSA 1978 may be cited as the "Procurement Code".

History: Laws 1984, ch. 65, § 1; 2006, ch. 23, § 1.

Meaning of "this act". — The term "this act", referred to in this section, means Laws 1984, Chapter 65, Sections 1 through 172 of which appear as 13-1-28 to 13-1-40, 13-1-41 to 13-1-100, 13-1-102 to 13-1-117, 13-1-118, 13-1-119, 13-1-120 to 13-1-135, and 13-1-136 to 13-1-146, and 13-1-147 to 13-1-199 NMSA 1978.

The 2006 amendment, effective March 2, 2006, changed the session law reference to the NMSA reference.

13-1-29. Rules of construction; purposes.

A. The Procurement Code shall be liberally construed and applied to promote its purposes and policies.

B. All references in law to the Public Purchases Act shall be construed to be references to the Procurement Code.

C. The purposes of the Procurement Code are 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.

History: Laws 1984, ch. 65, § 2.

Public Purchases Act. — The Public Purchases Act, referred to in Subsection B, was compiled as 13-1-1 to 13-1-27 NMSA 1978, and was repealed by Laws 1984, ch. 65, § 175, effective November 1, 1984.

ANNOTATIONS

Purposes. — The Procurement Code protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Duty of fair and equitable treatment. — The duty of good faith and fair dealing in the bidding process required that the city abide by the strictures of the Procurement Code and the purchasing manual. Specifically, the criteria provided by the city were an implied contract that if any bids were accepted, the acceptance would be based on these criteria and no others. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Breach of implied contract to follow Procurement Code. — By unlawfully introducing, considering, and relying on a criterion not listed in the request, the city breached an informal contract that it would follow the Procurement Code and the purchasing manual in considering each bid. Thus, though no formal contract was ever concluded between the parties, the city's conduct was a breach of an implied contract for which damages will lie. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Licensed contractors only. — Reading the Procurement Code, Section 13-1-28 NMSA 1978 et seq., and the Construction Industries Licensing Act, Chapter 60, Article 13 NMSA 1978, together, it is clear that the legislature intended (1) that public contracts should be awarded only to licensed contractors and (2) that purchasing authorities should be relieved from the necessity of making an independent investigation into the qualifications and fiscal responsibility of a contractor who is not licensed at the time of bidding. Thus, the doctrine of substantial compliance does not apply to the requirement of 60-13-12B NMSA 1978 that a contractor have a valid license when submitting a bid on a public contract. *BC&L Pavement Servs. v. Higgins*, 2002-NMCA-087, 132 N.M. 490, 51 P.3d 533.

13-1-30. Application of the code.

A. Except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. That code also applies to concession contracts at the New Mexico state fair in excess of twenty thousand dollars (\$20,000), whether those concession contracts generate revenue and earnings or expend funds.

B. When a procurement involves the expenditure of federal funds, the procurement shall be

conducted in accordance with mandatory applicable federal law and regulations. When mandatory applicable federal law or regulations are inconsistent with the provisions of the Procurement Code, compliance with federal law or regulations shall be compliance with the Procurement Code.

History: Laws 1984, ch. 65, § 3; 1994, ch. 143, § 1; 2005, ch. 131, § 1.

The 2005 amendment, effective June 17, 2005, amended Subsection A to provide that the Procurement Code increase the applicability of the code for concession contracts at the state fair from ten to twenty thousand dollars.

The 1994 amendment, effective July 1, 1994, in Subsection A, deleted "and" preceding "construction" and added the language following "construction".

ANNOTATIONS

An incorporated electric cooperative is neither a state agency nor a local public body; therefore, the Procurement Code does not apply to it. *Fratello v. Socorro Elec. Corp.*, 107 N.M. 378, 758 P.2d 792 (1988).

Cooperative formed pursuant to the Joint Powers Agreements Act. — An agreement entered into by 30 school districts forming a cooperative pursuant to the Joint Powers Agreements Act, Section 11-1-1 NMSA 1978 et seq., for the purpose of procuring and delivering educational services, was required to comply with the provisions of the Procurement Code, Section 13-1-28 NMSA 1978 et seq. *State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs.*, 115 N.M. 196, 848 P.2d 1123 (1993).

Applicable to municipalities. — The Procurement Code applies to all nonfederal expenditures by state agencies and local public bodies for the procurement of items of tangible personal property, services, and construction. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Private non-profit corporations. — The standard to be applied when determining whether private non-profit corporations that lease hospitals from government entities meet the definition of "local public bodies" under this section and are, therefore, subject to the Procurement Code is whether under the totality of the circumstances the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity. *Memorial Med. Ctr. v. Tatsch Constr., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431.

Agreement to administer deferred compensation program. — The public employees' retirement board's administrator's agreement with the company provided professional services by administering and marketing the state's deferred compensation program must be let for proposals pursuant to the Procurement Code, Section 13-1-28 NMSA 1978 et seq., to the extent the administrator receives as compensation an amount exceeding \$20,000, although the administrator's sole compensation under the contract derives from sales commission, etc., from the underwriter. 1987 Op. Att'y Gen. No. 87-35.

Federal law governed state agency on aging's designation of area agencies on aging, and such agencies need not qualify for sole source status under this article. 1987 Op. Att'y Gen. No. 87-72.

Purchase of computer voting devices. — Section 1-9-14 NMSA 1978, governing computer voting devices, does not bar application of the Procurement Code to the purchase of internal computers used to

record and tabulate votes, and the Procurement Code applies to such machines used for such purposes after November 1, 1984, the effective date of the Procurement Code. 1988 Op. Att'y Gen. No. 88-68.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 1, 29, 33, 66.

72 C.J.S. Public Contracts §§ 2 to 4, 6 to 8.

13-1-31. Definition; architectural services.

"Architectural services" means services related to the art and science of designing and building structures for human habitation or use and includes planning, providing preliminary studies, designs, specifications, working drawings and providing for general administration of construction contracts.

History: Laws 1984, ch. 65, § 4.

13-1-32. Definition; blind trust.

"Blind trust" means a trust managed by a person other than the employee-beneficiary in which the employee-beneficiary is not given notice of alterations in the property of the trust.

History: Laws 1984, ch. 65, § 5.

13-1-33. Definition; brand-name specification.

"Brand-name specification" means a specification limited to describing an item by manufacturer's name or catalogue number.

History: Laws 1984, ch. 65, § 6.

13-1-34. Definition; brand-name or equal specification.

"Brand-name or equal specification" means a specification describing one or more items by manufacturer's name or catalogue number to indicate the standard of quality, performance or other pertinent characteristics and providing for the substitution of equivalent items.

History: Laws 1984, ch. 65, § 7.

13-1-35. Definition; business.

"Business" means any corporation, partnership, individual, joint venture, association or any other private legal entity.

History: Laws 1984, ch. 65, § 8.

13-1-36. Definition; catalogue price.

"Catalogue price" means the price of items of tangible personal property in the most current catalogue, price list, schedule or other form that:

- A. is regularly maintained by the manufacturer or vendor of an item; and
- B. is either published or otherwise available for inspection by a customer.

History: Laws 1984, ch. 65, § 9.

13-1-37. Definition; central purchasing office.

"Central purchasing office" means that office or officer within a state agency or a local public body responsible for the control of procurement of items of tangible personal property, services or construction. "Central purchasing office" includes the purchasing division of the general services department and the state purchasing agent.

History: Laws 1984, ch. 65, § 10.

13-1-38. Definition; change order.

"Change order" means a written order signed and issued by a procurement officer directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order with or without the consent of the contractor.

History: Laws 1984, ch. 65, § 11.

13-1-39. Definition; confidential information.

"Confidential information" means any information which is available to an employee because of the employee's status as an employee of a state agency or a local public body and which is not a matter of public knowledge or available to the public on request.

History: Laws 1984, ch. 65, § 12.

13-1-40. Definition; construction.

A. "Construction" means building, altering, repairing, installing or demolishing in the ordinary course of business any:

- (1) road, highway, bridge, parking area or related project;
- (2) building, stadium or other structure;
- (3) airport, subway or similar facility;
- (4) park, trail, athletic field, golf course or similar facility;

- (5) dam, reservoir, canal, ditch or similar facility;
- (6) sewage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
- (7) sewage, water, gas or other pipeline;
- (8) transmission line;
- (9) radio, television or other tower;
- (10) water, oil or other storage tank;
- (11) shaft, tunnel or other mining appurtenance;
- (12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditioners;
- (13) air conditioning conduit, heating or other similar mechanical work; or
- (14) similar work, structures or installations.

B. "Construction" shall also include:

- (1) leveling or clearing land;
- (2) excavating earth;
- (3) drilling wells of any type, including seismographic shot holes or core drilling; and
- (4) similar work, structures or installations.

History: Laws 1984, ch. 65, § 13.

13-1-40.1. Definition; construction management and construction manager.

A. "Construction management" means consulting services related to the process of management applied to a public works project for any duration from conception to completion of the project for the purpose of controlling time, cost and quality of the project.

B. "Construction manager" means a person who acts as an agent of the state agency or local public body for construction management, for whom the state agency or local public body shall assume all the risks and responsibilities.

History: 1978 Comp., § 13-1-40.1, enacted by Laws 1997, ch. 171, § 1.

13-1-41. Definition; contract.

"Contract" means any agreement for the procurement of items of tangible personal property, services or construction.

History: Laws 1984, ch. 65, § 14.

Cross references. — For definition of "procurement," see 13-1-74 NMSA 1978.

For definition of "tangible personal property," see 13-1-93 NMSA 1978.

ANNOTATIONS

Formation of contract. — A contract was not formed when the Human Services Department selected a bid pending General Service Department approval and legislative appropriation, since the pending actions were not mere legal formalities, but conditions precedent to contract formation. *Wisznia v. Human Servs. Dep't*, 1998-NMSC-011, 125 N.M. 140, 958 P.2d 98.

13-1-42. Definition; contract modification.

"Contract modification" means any written alteration in the provisions of a contract accomplished by mutual action of the parties to the contract.

History: Laws 1984, ch. 65, § 15.

13-1-43. Definition; contractor.

"Contractor" means any business having a contract with a state agency or a local public body.

History: Laws 1984, ch. 65, § 16.

13-1-44. Definition; cooperative procurement.

"Cooperative procurement" means procurement conducted by or on behalf of more than one state agency or local public body, or by a state agency or local public body with an external procurement unit.

History: Laws 1984, ch. 65, § 17.

13-1-45. Definition; cost analysis.

"Cost analysis" means the evaluation of cost data and profit for the purpose of arriving at costs actually incurred by a contractor, estimates of costs to be incurred by a contractor and a profit to be allowed to a contractor.

History: Laws 1984, ch. 65, § 18.

13-1-46. Definition; cost data.

"Cost data" means factual information concerning the cost of labor, material, overhead and other cost elements which are expected to be incurred by a contractor or which have been actually incurred by a contractor in performing the contract.

History: Laws 1984, ch. 65, § 19.

13-1-47. Definition; cost reimbursement contract.

"Cost reimbursement contract" means a contract which provides for a fee other than a fee based on a percentage of cost and under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms.

History: Laws 1984, ch. 65, § 20.

13-1-48. Repealed.

Repeals. — Laws 1985, ch. 90, § 1 repealed 13-1-48 NMSA 1978, as enacted by Laws 1984, ch. 65, § 21, relating to the definition of "current ownership" or "current officers and directors," effective April 1, 1985.

13-1-49. Definition; data.

"Data" means recorded information regardless of form or characteristic.

History: Laws 1984, ch. 65, § 22.

13-1-50. Definition; definite quantity contract.

"Definite quantity contract" means a contract which requires the contractor to furnish a specified quantity of services, items of tangible personal property or construction at or within a specified time.

History: Laws 1984, ch. 65, § 23.

13-1-51. Definition; designee.

"Designee" means a representative of a person holding a superior position.

History: Laws 1984, ch. 65, § 24.

13-1-52. Definition; determination.

"Determination" means the written documentation of a decision of a procurement officer including findings of fact required to support a decision. A determination becomes part of the procurement file to which it pertains.

History: Laws 1984, ch. 65, § 25.

13-1-53. Definition; direct or indirect participation.

"Direct or indirect participation" means involvement through decision, approval, disapproval, recommendation, formulation of any part of a purchase request, influencing the content of any specification, investigation, auditing or the rendering of advice.

History: Laws 1984, ch. 65, § 26.

13-1-53.1. Definition; electronic.

"Electronic" includes electric, digital, magnetic, optical, electronic or similar medium.

History: Laws 2001, ch. 292, § 1.

Effective dates. — Laws 2001, ch. 292, § 8 makes the act effective July 1, 2001.

13-1-54. Definition; employee.

"Employee" means an individual receiving a salary, wages or per diem and mileage from a state agency or a local public body whether elected or not and any noncompensated individual performing personal services as an elected or appointed official or otherwise for a state agency or a local public body.

History: Laws 1984, ch. 65, § 27.

13-1-55. Definition; engineering services.

"Engineering services" means any service or creative work, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, engineering studies and the review of construction for the purpose of assuring substantial compliance with drawings and specifications; any of which embrace such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, chemical, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. Such practice includes the performance of architectural work incidental to the practice of engineering. "Engineering services" does not include responsibility for the superintendence of construction, site conditions, operations, equipment, personnel or the maintenance of safety in the work place.

History: 1978 Comp., § 13-1-55, enacted by Laws 1989, ch. 69, § 1.

Repeals and reenactments. — Laws 1989, ch. 69, § 1 repealed former 13-1-55 NMSA 1978, as enacted by Laws 1984, ch. 65, § 28, relating to the definition of engineering services, and enacted the above section, effective June 16, 1989.

13-1-56. Definition; external procurement unit.

"External procurement unit" means any procurement organization not located in this state which, if in this state, would qualify as a state agency or a local public body. An agency of the United States government is an external procurement unit.

History: Laws 1984, ch. 65, § 29.

13-1-57. Definition; financial interest.

"Financial interest" means:

A. holding a position in a business as officer, director, trustee or partner or holding any position in management; or

B. ownership of more than five percent interest in a business.

History: Laws 1984, ch. 65, § 30.

13-1-58. Definition; firm fixed price contract.

"Firm fixed price contract" means a contract which has a fixed total price or fixed unit price.

History: Laws 1984, ch. 65, § 31.

13-1-59. Definition; gratuity.

"Gratuity" means a payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, received or promised, unless consideration of substantially equal or greater value is exchanged.

History: Laws 1984, ch. 65, § 32.

13-1-60. Definition; heavy road equipment.

"Heavy road equipment" means any motor-driven vehicle or apparatus capable of use for earth moving or mixing components which has an aggregate value or price of over one thousand dollars (\$1,000).

History: Laws 1984, ch. 65, § 33.

13-1-61. Definition; highway reconstruction.

"Highway reconstruction" means the rebuilding, altering or repairing of any road, highway, bridge, parking area or related project. "Highway reconstruction" does not include routine maintenance.

History: Laws 1984, ch. 65, § 34.

13-1-62. Definition; immediate family.

"Immediate family" means a spouse, children, parents, brothers and sisters.

History: Laws 1984, ch. 65, § 35.

13-1-63. Definition; indefinite quantity contract.

"Indefinite quantity contract" means a contract which requires the contractor to furnish an indeterminate quantity of specified services, items of tangible personal property or construction during a prescribed period of time at a definite unit price or at a specified discount from list or catalogue prices.

History: Laws 1984, ch. 65, § 36.

13-1-64. Definition; invitation for bids.

"Invitation for bids" means all documents, including those attached or incorporated by reference, utilized for soliciting sealed bids.

History: Laws 1984, ch. 65, § 37.

13-1-65. Definition; surveying services.

"Surveying services" means any service or work, the substantial performance of which involves the application of the principles of mathematics and the related physical and applied sciences for:

- A. the measuring and locating of lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings and on the beds or bodies of water for the purpose of defining location, areas and volume;
- B. the monumenting of property boundaries and the platting and layout of lands and subdivisions thereof;
- C. the application of photogrammetric methods used to derive topographic and other data;
- D. the establishment of horizontal and vertical controls for surveys for design, topographic surveys including photogrammetric methods, construction surveys for engineering and architectural public works; and
- E. the preparation and perpetuation of maps, records, plats, field notes and property descriptions.

History: 1978 Comp., § 13-1-65, enacted by Laws 1989, ch. 69, § 2.

Cross references. — For licensing of surveyors, see Chapter 61, Article 23 NMSA 1978.

Repeals and reenactments. — Laws 1989, ch. 69, § 2 repealed former 13-1-65 NMSA 1978, as enacted by Laws 1984, ch. 65, § 38, relating to the definition of land surveying services, and enacted the above section, effective June 16, 1989.

13-1-66. Definition; landscape architectural services.

"Landscape architectural services" means services including but not limited to consultation, investigation, reconnaissance, research, design, preparation of drawings and specifications and administration of contracts where the dominant purposes of such services are:

- A. the preservation or enhancement of land uses and natural features;
- B. the location and construction of functional approaches for structures, pathways or walkways; or
- C. the design of trails, plantings and landscape irrigation. Excluded from the provisions of this section are the services of architects, engineers and surveyors as defined in the Procurement Code [13-1-28 NMSA 1978].

History: Laws 1984, ch. 65, § 39; 1989, ch. 69, § 3.

Cross references. — For licensing of landscape architects, see Chapter 61, Article 24B NMSA 1978.

13-1-66.1. Definition; local public works project.

"Local public works project" means a project of a local public body that uses architectural or engineering services requiring professional services costing fifty thousand dollars (\$50,000) or more or landscape architectural or surveying services requiring professional services costing ten thousand dollars (\$10,000) or more, excluding applicable state and local gross receipts taxes.

History: 1978 Comp., § 13-1-66.1, enacted by Laws 1989, ch. 69, § 4; 1993, ch. 72, § 1; 2007, ch. 315, § 1.

The 2007 amendment, effective June 15, 2007, increased the minimum amount of a local public works project requiring professional services from \$25,000 to \$50,000 and landscape architectural or surveying services from \$5,000 to \$10,000.

The 1993 amendment, effective June 18, 1993, rewrote this section, which read " 'Local public works project' means a project of a local public body which uses architectural landscape architectural engineering or surveying services requiring professional services costing fifteen thousand dollars (\$15,000) or more, excluding applicable state and local gross receipts taxes."

13-1-67. Definition; local public body.

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

History: Laws 1984, ch. 65, § 40; 1999, ch. 258, § 1; 2003, ch. 267, § 1.

The 2003 amendment, effective June 20, 2003 added "school districts and local school boards and municipalities, except as exempted pursuant to the Procurement Code" at the end of the section.

The 1999 amendment, effective June 18, 1999, added "including two-year post-secondary educational institutions" at the end of the section.

ANNOTATIONS

Municipality and school district within definition. — A municipality and a school district fall within the definition of "local public body" in this section, and, thus, a transaction involving the purchase of water services by the school district from the water utility of the municipality is within the exemptions contained in Subsections A and D of Section 13-1-98 NMSA 1978 because the municipality is a local public body selling water services to another local public body and the school district is purchasing "publicly provided" water. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 120 N.M. 307, 901 P.2d 725 (1995).

County-municipal hospital is "local public body" and, therefore, purchases made by such a hospital must be made in compliance with any provisions governing public procurement. 1969 Op. Att'y Gen. No. 69-78.

County commission is "local public body". 1969 Op. Att'y Gen. No. 69-135.

An intercommunity water supply association qualifies as a local public body for purposes of the Procurement Code given the availability of municipal funds to pay the association's expenses and the extent of the control over the management of the association by the member villages. 1991 Op. Att'y Gen. No. 91-07.

13-1-68. Definition; multi-term contract.

"Multi-term contract" means a contract having a term longer than one year.

History: Laws 1984, ch. 65, § 41.

ANNOTATIONS

County fair board publishing book affected. — Under the former Public Purchases Act, a county fair board publishing an annual fair book at a cost exceeding \$1000 was required to comply with the bidding provisions of the act. 1964 Op. Att'y Gen. No. 64-110.

13-1-69. Definition; multiple source award.

"Multiple source award" means an award of an indefinite quantity contract for one or more similar services, items of tangible personal property or construction to more than one bidder or offeror.

History: Laws 1984, ch. 65, § 42.

13-1-70. Definition; notice of invitation for bids.

"Notice of invitation for bids" means a document issued by a procurement officer which contains a brief description of the services, construction or items of tangible personal property to be procured, the location where copies of the invitation for bid may be obtained, the location where bids are to be received, the cost, if any, for copies of plans and specifications, the date and place of the bid opening and such other information as the procurement officer deems necessary.

History: Laws 1984, ch. 65, § 43.

13-1-71. Definition; price agreement.

"Price agreement" means a definite quantity contract or indefinite quantity contract which requires the contractor to furnish items of tangible personal property, services or construction to a state agency or a local public body which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.

History: Laws 1984, ch. 65, § 44.

13-1-72. Definition; price analysis.

"Price analysis" means the evaluation of pricing data without analysis of the separate cost components and profit.

History: Laws 1984, ch. 65, § 45.

13-1-73. Definition; pricing data.

"Pricing data" means factual information concerning prices for items identical to or substantially similar to those being procured.

History: Laws 1984, ch. 65, § 46.

13-1-74. Definition; procurement.

"Procurement" means:

A. purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction; and

B. all procurement functions, including but not limited to preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration.

History: Laws 1984, ch. 65, § 47.

13-1-75. Definition; procurement officer.

"Procurement officer" means any person or a designee authorized by a state agency or a local public body to enter into or administer contracts and make written determinations with respect thereto.

History: Laws 1984, ch. 65, § 48.

13-1-76. Definition; professional services.

"Professional services" means the services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, construction managers and other persons or businesses providing similar professional services, which may be designated as such by a determination issued by the state purchasing agent or a central purchasing office.

History: Laws 1984, ch. 65, § 49; 1989, ch. 69, § 5; 1997, ch. 171, § 2.

Cross references. — For professional and occupational licenses, see Chapter 61 NMSA 1978.

The 1997 amendment, effective June 20, 1997, substituted the language beginning "construction managers and" for "and persons or businesses providing similar services" at the end of the section.

13-1-77. Definition; purchase order.

"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.

History: Laws 1984, ch. 65, § 50; 2001, ch. 292, § 2.

The 2001 amendment, effective July 1, 2001, deleted "pursuant to an existing contract" from the end of the section.

13-1-78. Definition; purchase request.

"Purchase request" means the document by which a using agency requests that a contract be obtained for a specified service, construction or item of tangible personal property and may include but is not limited to the technical description of the requested item, delivery schedule, transportation requirements, suggested sources of supply and supporting information.

History: Laws 1984, ch. 65, § 51.

13-1-79. Definition; qualified products list.

"Qualified products list" means a list of items of tangible personal property described by model or catalogue number which, prior to the solicitation of competitive sealed bids or competitive sealed proposals, are items the state purchasing agent or a central purchasing office has determined will meet the applicable specifications.

History: Laws 1984, ch. 65, § 52.

13-1-80. Definition; regulation.

"Regulation" means any rule, order or statement of policy, including amendments thereto and repeals thereof, issued by a state agency or a local public body to affect persons not members or employees of the issuer.

History: Laws 1984, ch. 65, § 53.

13-1-81. Definition; request for proposals.

"Request for proposals" means all documents, including those attached or incorporated by reference, used for soliciting proposals.

History: Laws 1984, ch. 65, § 54.

13-1-82. Definition; responsible bidder.

"Responsible bidder" means a bidder who submits a responsive bid and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.

History: Laws 1984, ch. 65, § 55.

ANNOTATIONS

Factor affecting adequacy of agent. — The length of time an insurance agency has been located

within the school district may be considered by the school district in determining whether the service, reputation and experience of an agent are adequate. 1969 Op. Att'y Gen. No. 69-19.

Burden on bidder. — If the central purchasing office of the school district believes that a bidder is not a "responsible bidder" because he has not maintained an office in the district for a reasonable period of time, the burden is on the bidder to prove that his service facilities, service reputation and experience are adequate to make satisfactory delivery of the services required. 1969 Op. Att'y Gen. No. 69-19.

13-1-83. Definition; responsible offeror.

"Responsible offeror" means an offeror who submits a responsive proposal and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services or items of tangible personal property described in the proposal.

History: Laws 1984, ch. 65, § 56.

13-1-84. Definition; responsive bid.

"Responsive bid" means a bid which conforms in all material respects to the requirements set forth in the invitation for bids. Material respects of a bid include but are not limited to price, quality, quantity or delivery requirements.

History: Laws 1984, ch. 65, § 57; 1987, ch. 348, § 1.

ANNOTATIONS

Responsible bid must be within bid request specifications. — A bid price not in conformity with the specifications of the bid request is not a responsible bid. *Shed Indus., Inc. v. King*, 95 N.M. 62, 618 P.2d 1226 (1980).

Bid must incorporate public works minimum wage rates. — A bid is not a responsible bid when it fails to incorporate the state's public works minimum wage rates. *Shed Indus., Inc. v. King*, 95 N.M. 62, 618 P.2d 1226 (1980).

13-1-85. Definition; responsive offer.

"Responsive offer" means an offer which conforms in all material respects to the requirements set forth in the request for proposals. Material respects of a request for a proposal include, but are not limited to, price, quality, quantity or delivery requirements.

History: Laws 1984, ch. 65, § 58.

13-1-86. Definition; secretary.

"Secretary" means the secretary of general services.

History: Laws 1984, ch. 65, § 59.

Cross references. — For powers and duties of secretary of general services, see 9-17-5 NMSA 1978.

13-1-87. Definition; services.

"Services" means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. "Services" includes the furnishing of insurance but does not include construction or the services of employees of a state agency or a local public body.

History: Laws 1984, ch. 65, § 60.

13-1-88. Definition; small business.

"Small business" means a business, not a subsidiary or division of another business, having an average annual volume for the preceding three fiscal years which does not exceed one million five hundred thousand dollars (\$1,500,000).

History: Laws 1984, ch. 65, § 61.

13-1-89. Definition; specification.

"Specification" means a description of the physical or functional characteristics or of the nature of items of tangible personal property, services or construction. "Specification" may include a description of any requirement for inspecting or testing, or for preparing items of tangible personal property, services or construction for delivery.

History: Laws 1984, ch. 65, § 62.

13-1-90. Definition; state agency.

"State agency" means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of this state. "State agency" includes the purchasing division of the general services department and the state purchasing agent but does not include local public bodies.

History: Laws 1984, ch. 65, § 63.

13-1-91. Definition; state public works project.

"State public works project" means a project of a state agency, not including projects of the state educational institutions, the supreme court building commission, the legislature or local public bodies, that uses architectural or engineering services requiring professional services costing fifty thousand dollars (\$50,000) or more or landscape architectural or surveying services requiring professional services costing ten thousand dollars (\$10,000) or more, excluding applicable state and local gross receipts taxes.

History: Laws 1984, ch. 65, § 64; 1989, ch. 69, § 6; 1991, ch. 127, § 1; 1993, ch. 72, § 2; 2007, ch. 312, § 4; 2007, ch. 315, § 2.

2007 amendments. — Laws 2007, ch. 312, § 4 and Laws 2007, ch. 315, § 2 both enacted amendments to this section. The section was set out as amended by Laws 2007, ch. 315, § 2. See 12-1-8 NMSA 1978.

Laws 2007, ch. 315, § 2, effective June 15, 2007, increased the minimum amount of a state public works project requiring professional services from \$25,000 to \$50,000 and landscape architectural or surveying services from \$5,000 to \$10,000.

Laws 2007, ch. 312, § 4 increased the minimum cost of professional services to \$50,000 and provided:

"13-1-91. Definition; state public works project.

"State public works project" means a project of a state agency, not including projects of the state educational institutions, the supreme court building commission, the legislature or local public bodies, that uses architectural or engineering services requiring professional services costing fifty thousand dollars (\$50,000) or more or landscape architectural or surveying services requiring professional services costing five thousand dollars (\$5,000) or more, excluding applicable state and local gross receipts taxes."

The 1993 amendment, effective June 18, 1993, deleted "highway projects of the state highway and transportation department, or" following "not including" near the beginning and substituted "five thousand dollars (\$5,000)" for "fifteen thousand dollars (\$15,000)" near the end of the section.

The 1991 amendment, effective June 14, 1991, substituted "architectural or engineering services requiring professional services costing twenty-five thousand dollars (\$25,000) or more, or landscape architectural or surveying services requiring professional services costing fifteen thousand dollars (\$15,000) or more" for "architectural, landscape architectural, engineering or surveying services requiring professional services costing fifteen thousand dollars (\$15,000) or more."

13-1-92. Definition; state purchasing agent.

"State purchasing agent" means the director of the purchasing division of the general services department.

History: Laws 1984, ch. 65, § 65.

13-1-93. Definition; tangible personal property.

"Tangible personal property" means tangible property other than real property having a

physical existence, including but not limited to supplies, equipment, materials and printed materials.

History: Laws 1984, ch. 65, § 66.

13-1-94. Definition; using agency.

"Using agency" means any state agency or local public body requiring services, construction or items of tangible personal property.

History: Laws 1984, ch. 65, § 67.

ANNOTATIONS

When state fair commission neither "user" nor making "purchase". — State fair commission need not advertise or invite bids from prospective concessionaires because the commission would not be a "user" of the services provided and because the commission is actually licensing, not expending public funds in a "purchase". 1980 Op. Att'y Gen. No. 80-07.

13-1-95. Purchasing division; creation; director is state purchasing agent; appointment; duties.

A. The "purchasing division" is created within the general services department.

B. Subject to the authority of the secretary, the state purchasing agent shall be the administrator and chief executive of the purchasing division. The state purchasing agent shall be appointed by the secretary with the approval of the governor.

C. The purchasing division and state purchasing agent shall be responsible for the procurement of services, construction and items of tangible personal property for all state agencies except as otherwise provided in the Procurement Code [13-1-28 NMSA 1978] and shall administer the Procurement Code for those state agencies not excluded from the requirement of procurement through the state purchasing agent.

D. The state purchasing agent shall have the following additional authority and responsibility to:

- (1) recommend procurement regulations to the secretary;
- (2) establish and maintain programs for the development and use of procurement specifications and for the inspection, testing and acceptance of services, construction and items of tangible personal property;
- (3) cooperate with the state budget division of the department of finance and administration in the preparation of statistical data concerning the acquisition and usage of all services, construction and items of tangible personal property by state agencies;

(4) require state agencies to furnish reports concerning usage, needs and stocks on hand of items of tangible personal property, and usage and needs for services or construction;

(5) prescribe, with consent of the secretary, forms to be used by state agencies to requisition and report the procurement of items of tangible personal property, services and construction;

(6) provide information to state agencies and local public bodies concerning the development of specifications, quality control methods and other procurement information; and

(7) collect information concerning procurement matters, quality and quality control of commonly used services, construction and items of tangible personal property.

E. The state purchasing agent shall, upon the request of the central purchasing office of a local public body, procure a price agreement for the requested services, construction or items of tangible personal property.

History: Laws 1984, ch. 65, § 68.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 491 to 515; 68 Am. Jur. 2d Schools § 75 et seq.

20 C.J.S. Counties §§ 143 to 149; 63 C.J.S. Municipal Corporations §§ 874, 897; 78 C.J.S. Schools and School Districts §§ 328, 402; 81A C.J.S. States § 154 et seq.

13-1-95.1. Electronic transmissions.

A. The state purchasing agent shall develop guidelines for central purchasing offices to use electronic media, including distribution of solicitations and acceptance of sealed bids and competitive sealed proposals that include electronic signatures. The guidelines shall include:

(1) appropriate security to prevent unauthorized access to electronically submitted bids or proposals prior to the date and time set for opening of bids or the deadline set for receipt for proposals, including the electronic bidding, approval and award process; and

(2) accurate retrieval or conversion of electronic forms of information into a medium that permits inspection and copying.

B. A central purchasing office, in an invitation for bids or a request for proposals, may require all or any part of a sealed bid or a competitive sealed proposal to be submitted electronically if the office determines that an electronic submission will be advantageous to the procurement process. If electronic submission is required:

(1) no hard copy documentation shall be submitted to the central purchasing office prior to the award of the contract, except as specifically identified in the invitation for bids or the

request for proposals;

(2) the invitation for bids or request for proposals shall specify an opening date and time, a fixed closing date and time and an email account or other secure electronic location to which the electronic bid or proposal shall be submitted;

(3) sealed bids submitted electronically shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and each bid item, if appropriate, and such other relevant information as may be specified by the state purchasing agent or a central purchasing office, together with the name of each bidder, shall be recorded, and the record and each bid shall be open to public inspection; and

(4) for sealed proposals, the proposals shall be opened, evaluated and the contract awarded as required in the request for proposals and as otherwise provided in the Procurement Code.

History: Laws 2001, ch. 292, § 7; 2006, ch. 23, § 2.

The 2006 amendment, effective March 2, 2006, deleted the requirement in Subsection A that the state purchasing agent work with the attorney general to develop guidelines; required the state purchasing agent to develop guidelines that include distribution of solicitations and acceptance of competitive sealed proposals; added a new Subsection B to provide that a central purchasing office may require all or part of sealed bids or proposals to be submitted electronically; added Paragraph (1) to Subsection B to provide that no hard copy documentation shall be submitted prior to award of the contract; added Paragraph (2) to Subsection B to require that invitations for bids or requests for proposals shall specify the opening date and time, closing date and time, and an email account or secure electronic location for submitting bids or proposals; added Paragraph (3) to Subsection B to provide that bids submitted electronically shall be opened in the presence of witnesses at the bid opening and the bid information recorded; and added Paragraph (4) to Subsection B to provide that proposals shall be opened and evaluated and a contract awarded as required in the request for proposals or as provided in the Procurement Code.

13-1-96. Delegation of authority by the state purchasing agent.

The state purchasing agent may, with the consent of the secretary, delegate such of his authority to subordinates as he deems necessary and appropriate by clearly delineating in writing such delegated authority and the limitations thereto.

History: Laws 1984, ch. 65, § 69.

13-1-97. Centralization of procurement authority.

A. All procurement for state agencies shall be performed by the state purchasing agent except as otherwise provided in the Procurement Code.

B. All procurement for state agencies excluded from the requirement of procurement through the office of the state purchasing agent shall be performed by a central purchasing office

designated by statute, the governing authority of that state agency or as otherwise provided in the Procurement Code.

C. All procurement for local public bodies shall be performed by a central purchasing office designated by the governing authority of the local public body except as otherwise provided in the Procurement Code.

History: Laws 1984, ch. 65, § 70.

ANNOTATIONS

Violation of former act. — Appointment of a local insurance agency as an exclusive agent for the life, accident, sickness and hospital benefits for the employees of a county, whose duties would be to conduct a survey of the needs of the employees, prepare specifications to be submitted in invitations to bid, take care of all mechanical work in the bidding process, recommend to a county commission which bid should be accepted and service the policy of the successful bidder as if it were the agent of the bidder, receiving the commission for such work from the successful insurance company, would have been a violation of the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-135.

When former act not violated. — If the state purchasing agent secured free technical assistance from a supplier in order to aid in preparing specifications, the former Public Purchases Act was not violated. 1967 Op. Att'y Gen. No. 67-118.

Group insurance. — Except for the statutory exceptions to the former Public Purchases Act, all purchases of group insurance for employees of state agencies were required to be done by the state purchasing agent. 1969 Op. Att'y Gen. No. 69-117.

Lease purchase. — A lease purchase of personalty by a school district is exempted from the Bateman Act (6-6-11, 6-6-13 to 6-6-18 NMSA 1978), but was subject to the former Public Purchases Act in respect to bidding requirements. 1964 Op. Att'y Gen. No. 64-141.

When rental exempt. — The rental of realty and school buildings whereby the local school board rents from private entities for school purposes did not come within the provisions of the former Public Purchases Act. 1964 Op. Att'y Gen. No. 64-141.

Delegation restricted. — Under the former Public Purchases Act, the local public body had no authority to delegate the performance of purchasing to someone other than the central purchasing office. 1969 Op. Att'y Gen. No. 69-135.

13-1-97.1. Repealed.

Repeals. — Laws 2012, ch. 52, § 1 repealed 13-1-97.1 NMSA 1978, as enacted by Laws 2009, ch. 107, § 1, relating to the state contracts database, effective May 16, 2012. For provisions of former section, see the 2011 NMSA 1978 on New Mexico One Source of Law.

13-1-98. Exemptions from the Procurement Code.

The provisions of the Procurement Code shall not apply to:

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- A. procurement of items of tangible personal property or services by a state agency or a local public body from a state agency, a local public body or external procurement unit except as otherwise provided in Sections 13-1-135 through 13-1-137 NMSA 1978;
- B. procurement of tangible personal property or services for the governor's mansion and grounds;
- C. printing and duplicating contracts involving materials that are required to be filed in connection with proceedings before administrative agencies or state or federal courts;
- D. purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services;
- E. purchases of books and periodicals from the publishers or copyright holders thereof;
- F. travel or shipping by common carrier or by private conveyance or to meals and lodging;
- G. purchase of livestock at auction rings or to the procurement of animals to be used for research and experimentation or exhibit;
- H. contracts with businesses for public school transportation services;
- I. procurement of tangible personal property or services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978, by the corrections industries division of the corrections department pursuant to rules adopted by the corrections industries commission, which shall be reviewed by the purchasing division of the general services department prior to adoption;
- J. minor purchases not exceeding five thousand dollars (\$5,000) consisting of magazine subscriptions, conference registration fees and other similar purchases where prepayments are required;
- K. municipalities having adopted home rule charters and having enacted their own purchasing ordinances;
- L. the issuance, sale and delivery of public securities pursuant to the applicable authorizing statute, with the exception of bond attorneys and general financial consultants;
- M. contracts entered into by a local public body with a private independent contractor for the operation, or provision and operation, of a jail pursuant to Sections 33-3-26 and 33-3-27 NMSA 1978;
- N. contracts for maintenance of grounds and facilities at highway rest stops and other employment opportunities, excluding those intended for the direct care and support of persons with handicaps, entered into by state agencies with private, nonprofit, independent contractors who provide services to persons with handicaps;
- O. contracts and expenditures for services or items of tangible personal property to be paid or compensated by money or other property transferred to New Mexico law enforcement agencies by the United States department of justice drug enforcement administration;

P. contracts for retirement and other benefits pursuant to Sections 22-11-47 through 22-11-52 NMSA 1978;

Q. contracts with professional entertainers;

R. contracts and expenditures for litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts;

S. contracts for service relating to the design, engineering, financing, construction and acquisition of public improvements undertaken in improvement districts pursuant to Subsection L of Section 3-33-14.1 NMSA 1978 and in county improvement districts pursuant to Subsection L of Section 4-55A-12.1 NMSA 1978;

T. works of art for museums or for display in public buildings or places;

U. contracts entered into by a local public body with a person, firm, organization, corporation or association or a state educational institution named in Article 12, Section 11 of the constitution of New Mexico for the operation and maintenance of a hospital pursuant to Chapter 3, Article 44 NMSA 1978, lease or operation of a county hospital pursuant to the Hospital Funding Act [4-48B-1 NMSA 1978] or operation and maintenance of a hospital pursuant to the Special Hospital District Act [4-48A-1 NMSA 1978];

V. purchases of advertising in all media, including radio, television, print and electronic;

W. purchases of promotional goods intended for resale by the tourism department;

X. procurement of printing services for materials produced and intended for resale by the cultural affairs department;

Y. procurement by or through the public education department from the federal department of education relating to parent training and information centers designed to increase parent participation, projects and initiatives designed to improve outcomes for students with disabilities and other projects and initiatives relating to the administration of improvement strategy programs pursuant to the federal Individuals with Disabilities Education Act ; provided that the exemption applies only to procurement of services not to exceed two hundred thousand dollars (\$200,000);

Z. procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act [13-1C-1 NMSA 1978];

AA. purchases of products or services for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973;

BB. procurement, by either the department of health or Grant county or both, of tangible personal property, services or construction that are exempt from the Procurement Code pursuant to Section 9-7-6.5 NMSA 1978;

CC. contracts for investment advisory services, investment management services or

other investment-related services entered into by the educational retirement board, the state investment officer or the retirement board created pursuant to the Public Employees Retirement Act [10-11-1 NMSA 1978];

DD. the purchase for resale by the state fair commission of feed and other items necessary for the upkeep of livestock; and

EE. contracts entered into by the crime victims reparation commission to distribute federal grants to assist victims of crime, including grants from the federal Victims of Crime Act and the federal Violence Against Women Act.

History: Laws 1984, ch. 65, § 71; 1987, ch. 6, § 1; 1987, ch. 348, § 2; 1990, ch. 73, § 1; 1991, ch. 78, § 1; 1991, ch. 118, § 1; 1994, ch. 143, § 2; 1999, ch. 258, § 2; 2001, ch. 291, § 8; 2001, ch. 292, § 3; 2001, ch. 305, § 28; 2001, ch. 312, § 13; 2004, ch. 62, § 1; 2005, ch. 23, § 2; 2005, ch. 317, § 2; 2005, ch. 318, § 1; 2005, ch. 334, § 8; 2007, ch. 55, § 1; 2007, ch. 345, § 1; 2008, ch. 4, § 2; 2008, ch. 70, § 2; 2009, ch. 231, § 1.

The 2009 amendment, effective July 1, 2009, added Subsection EE.

The 2008 amendment, effective February 29, 2008, exempted the procurement of tangible personal property, services or construction to replace the Fort Bayard medical center. Laws 2008, ch. 4, § 2 enacted identical amendments to this section. This section was set out as amended by Laws 2008, ch. 70, § 2. See 12-1-8 NMSA 1978.

The 2005 amendment, effective June 17, 2005, added Subsection Z to exempt procurement from community rehabilitation programs or qualified individuals pursuant to the State Use Act; and added Subsection AA to exempt purchases of products for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973. Laws 2005, ch. 23, § 2, Laws 2005, ch. 317, § 2 and Laws 2005, ch. 318, § 1 also amended this section. The section was set out as amended by Laws 2005, ch. 334, § 8. See 12-1-8 NMSA 1978.

The 2004 amendments, effective July 1, 2004, added Subsections T through X.

The 2001 amendment, effective June 15, 2001, added Subsection S. Laws 2001, ch. 291, § 8, Laws 2001, ch. 292, § 3 and Laws 2001, ch. 305, § 28 also amended this section. The section was set out as amended by Laws 2001, ch. 312, § 13. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, substituted "commission" for "industries" in Subsection I, inserted "not exceeding five thousand dollars (\$5,000)" in Subsection J, and added Subsection R.

The 1994 amendment, effective July 1, 1994, added Subsection Q and made related stylistic changes.

1991 amendments. — Laws 1991, ch. 78, § 1, effective April 2, 1991, deleting "industries" following "corrections" the second time the word appears in Subsection I; adding Subsection O identical to that added by Laws 1991, ch. 118, § 1; and making a minor stylistic change in Subsection C and related stylistic changes in Subsections M and N, was approved on April 2, 1991. However, Laws 1991, ch. 118, § 1, effective July 1, 1991, making a minor stylistic change in Subsection N and adding Subsections O and P, was approved on April 3, 1991. The section is set out as amended by Laws 1991, ch. 118, § 1. See 12-1-8 NMSA 1978.

ANNOTATIONS

Applicability. — When a local public body acquires property or services from a joint procurement agency of local public bodies, the acquisition is not subject to any provisions of the Procurement Code except those set forth in Sections 13-1-135, 13-1-136, and 13-1-137; on the other hand, Section 13-1-98(A) does not exempt the procurement of goods or services by the joint agency from an outsider. *State ex rel. Educ. Assessments Sys. v. Coop. Educ. Servs.*, 115 N.M. 196, 848 P.2d 1123 (1993).

Applicability of section to school districts. — The provision of Section 22-5-4N NMSA 1978 of the [Public] School Code, requiring that contracts for expenditure of money be made in accordance with the Procurement Code, requires school boards to contract according to all but two sections of the entire Procurement Code; this means that all bidding requirements of the Code, including the exemptions in this section, apply to school district contracts. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 120 N.M. 307, 901 P.2d 725 (1995).

Tariff permitting utility to recover costs of relocation required by a local ordinance did not violate the New Mexico Procurement Code by failing to provide for the seeking of bids by local governments because it fell within the specific statutory exception for purchases of utility facilities. *City of Albuquerque v. New Mexico Pub. Regulation Comm'n*, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297.

Sale of water services by municipality to school district. — A municipality and a school district fall within the definition of "local public bodies" in Section 13-1-67 NMSA 1978, and, thus, a transaction involving the purchase of water services by the school district from the water utility of the municipality is within the exemptions of Subsections A and D because the municipality is a local public body selling water services to another local public body and the school district is purchasing "publicly provided" water. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 120 N.M. 307, 901 P.2d 725 (1995).

Emergency requirements not applicable to exempt transaction. — The emergency provisions of Section 13-1-127 NMSA 1978 did not apply to a contract for the purchase of water services by a school district from the water utility of a municipality which was within the exemptions contained in Subsections A and D of this section. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 120 N.M. 307, 901 P.2d 725 (1995).

Scope of exemption provision. — Only when centralized control was thought to be harmful or unproductive of savings were exemptions allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

When public notice and competitive bidding required. — A professional legal services contract in excess of \$1,000 between a state agency and legislator may be awarded only after public notice and competitive bidding. 1979 Op. Att'y Gen. No. 79-23.

Attempt to add exemption. — Section 73-20-45H NMSA 1978 attempts to add an exemption to the former State Purchasing Act by reference to that act. Properly the State Purchasing Act should have been amended. 1967 Op. Att'y Gen. No. 67-110.

Effect. — Section 73-20-45H NMSA 1978, having the same object as and being prior and repugnant to the former Public Purchases Act, is repealed by implication. 1967 Op. Att'y Gen. No. 67-110.

Jail facilities exemptions. — Laws 1987, ch. 348, § 2 amended this section to permit local public bodies to enter into contracts with an independent contractor for construction and operation of a jail

facility without competitive bidding. The financing and design of a jail facility are also exempt from this article, as long as the local public body does not have a direct contractual relationship with the parties responsible for designing and financing the facility. 1987 Op. Att'y Gen. No. 87-47.

Contract for professional services of insurance agency exempt. — A contract whereby an insurance agency would provide technical or professional services to the central purchasing office of a local public body for a fee would have been exempt from the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-135.

Sale of manual by state employee. — The Procurement Code does not apply to the sale of a manual by a state employee to the New Mexico State Department of Public Safety, as long as the department purchases the manual from the copyright holder. 1988 Op. Att'y Gen. No. 88-42.

13-1-98.1. Hospital and health care exemption.

The provisions of the Procurement Code shall not apply to procurement of items of tangible personal property or services by a state agency or a local public body through:

A. an agreement with any other state agency, local public body or external procurement unit or any other person, corporation, organization or association that provides that the parties to the agreement shall join together for the purpose of making some or all purchases necessary for the operation of public hospitals or public and private hospitals, if the state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs; or

B. an agreement with any other state agency, local public body or external procurement unit or any other person, corporation, organization or association for the purpose of creating a network of health care providers or jointly operating a common health care service, if the state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs, improve quality of care or improve access to care.

History: Laws 1998, ch. 69, § 1.

13-1-98.2. Additional exemptions from the Procurement Code.

The provisions of the Procurement Code do not apply to contracts entered into by a local public body with a person, firm, organization, corporation, association or state educational institution named in Article 12, Section 11 of the constitution of New Mexico for:

A. the operation and maintenance of a hospital pursuant to Chapter 3, Article 44 NMSA 1978;

B. the lease or operation of a county hospital pursuant to the Hospital Funding Act [4-48B-1 NMSA 1978] ;

C. the operation and maintenance of a hospital pursuant to the Special Hospital District Act [4-48A-1 NMSA 1978]; or

D. the use of county buildings pursuant to Section 4-38-13.1 NMSA 1978.

History: Laws 2003, ch. 187, § 1; 2009, ch. 155, § 2.

The 2009 amendment, effective June 19, 2009, added Subsection D.

13-1-99. Excluded from central purchasing through the state purchasing agent.

Excluded from the requirement of procurement through the state purchasing agent but not from the requirements of the Procurement Code are the following:

- A. procurement of professional services;
- B. small purchases having a value not exceeding one thousand five hundred dollars (\$1,500);
- C. emergency procurement;
- D. procurement of highway construction or reconstruction by the department of transportation;
- E. procurement by the judicial branch of state government;
- F. procurement by the legislative branch of state government;
- G. procurement by the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico;
- H. procurement by the state fair commission of tangible personal property, services and construction under twenty thousand dollars (\$20,000);
- I. purchases from the instructional material fund;
- J. procurement by all local public bodies;
- K. procurement by regional education cooperatives;
- L. procurement by charter schools;
- M. procurement by each state health care institution that provides direct patient care and that is, or a part of which is, medicaid certified and participating in the New Mexico medicaid program; and
- N. procurement by the public school facilities authority.

History: Laws 1984, ch. 65, § 72; 1987, ch. 189, § 1; 1988, ch. 84, § 2; 1994, ch. 143, § 3; 1995, ch. 130, § 1; 1996, ch. 25, § 2; 1999, ch. 281, § 16; 2001, ch. 292, § 4; 2004, ch. 62, § 2; 2006, ch. 95, § 11; 2007, ch. 93, § 1.

The 2007 amendment, effective June 15, 2007, excluded procurement by the state fair commission under \$20,000.

The 2006 amendment, effective March 6, 2006, added Subsection N to exclude procurement by a

public school facilities authority.

The 2004 amendment, effective July 1, 2004, amended Subsection D to change the name of the department and increase the state fair commission exclusion from central purchasing from \$5,000 to \$10,000 in Subsection H.

The 2001 amendment, effective July 1, 2001, substituted "one thousand five hundred dollars" for "two hundred fifty dollars" in Subsection B.

The 1999 amendment, effective June 18, 1999, deleted former Subsection H, which read "procurement of information processing resources procured through the commission on information and communication management", redesignated former Subsections I to L as Subsections H to K, and added Subsection L.

The 1996 amendment, effective July 1, 1996, deleted former Subsection J relating to procurement by the intertribal Indian ceremonial association, and redesignated Subsections K through N as Subsections J through M.

The 1995 amendment, effective June 16, 1995, added Subsection M, redesignated former Subsection M as Subsection N, and made a minor stylistic change in Subsection L.

The 1994 amendment, effective July 1, 1994, substituted "commission on information and communication management" for "information systems council" in Subsection H and added the language following "commission" in Subsection I.

ANNOTATIONS

When exceptions allowed. — Only when centralized control would be harmful or unproductive of savings were exceptions allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Factual questions to be determined. — The question of the serving of public interest and the impracticability of obtaining bids is a factual question to be determined by the board of county commissioners and the state board of finance. The determinations of these boards are final unless such determination is arbitrary or capricious. 1955-56 Op. Att'y Gen. No. 6431.

13-1-100. Construction contracts; central purchasing office.

The award and execution of contracts for major construction, including but not limited to roads, bridges, airports, buildings and dams, shall be made by the governing authority of the using agency. The procurement officer responsible for the procurement shall give notice to prospective bidders pursuant to Section 13-1-104 NMSA 1978.

History: Laws 1984, ch. 65, § 73; 1987, ch. 348, § 3.

Cross references. — For public works contracts, see 13-4-1 NMSA 1978 et seq.

ANNOTATIONS

Electrical contract for state correctional facility. — Former Section 13-1-10 NMSA 1978 did not preclude the department of corrections from using the services of the state construction manager for the purpose of awarding an electrical contract for work at a state correctional facility. *State v. Integon Indem. Corp.*, 105 N.M. 611, 735 P.2d 528 (1987).

Legislative intent. — The legislature intended that public construction projects come within the safeguards of the former State Purchasing Act, and be awarded whenever practicable to New Mexico contractors. 1961-62 Op. Att'y Gen. No. 62-80.

13-1-100.1. Construction contracts; construction management services.

A. A construction management services contract may be entered into for any construction or state or local public works project when a state agency or local public body makes a determination that it is in the public's interest to utilize construction management services. Construction management services shall not duplicate and are in addition to the normal scope of separate architect or engineer contracts, the need for which may arise due to the complexity or unusual requirements of a project as requested by a state agency or local public body.

B. To insure fair, uniform, clear and effective procedures that will strive for the delivery of a quality project, on time and within budget, the secretary, in conjunction with the appropriate and affected professional associations and contractors, shall promulgate regulations, which shall be adopted by the governing bodies of all using agencies and shall be followed by all using agencies when procuring construction management services as authorized in Subsection A of this section.

C. A state agency shall make the decision on a construction management services contract for a state public works project, and a local public body shall make that decision for a local public works project. A state agency shall not make the decision on a construction management services contract for a local public works project.

History: 1978 Comp., § 13-1-100.1, enacted by Laws 1997, ch. 171, § 3.

13-1-101. Repealed.

Repeals. — Laws 1985, ch. 90, § 1, repealed 13-1-101 NMSA 1978, as enacted by Laws 1984, ch. 65, § 74, relating to ownership disclosure, affidavits, filing requirements and contents, effective April 1, 1985.

13-1-102. Competitive sealed bids required.

All procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978, except procurement achieved pursuant to the following sections of the Procurement Code:

- A. Sections 13-1-111 through 13-1-122 NMSA 1978, competitive sealed proposals;
- B. Section 13-1-125 NMSA 1978, small purchases;

- C. Section 13-1-126 NMSA 1978, sole source procurement;
 - D. Section 13-1-127 NMSA 1978, emergency procurements;
 - E. Section 13-1-129 NMSA 1978, existing contracts;
 - F. Section 13-1-130 NMSA 1978, purchases from antipoverty program businesses;
- and
- G. the Educational Facility Construction Manager At Risk Act [13-1-124.1 NMSA 1978].

History: Laws 1984, ch. 65, § 75; 2007, ch. 141, § 1.

Cross references. — For Bateman Act, see 6-6-11, 6-6-13 to 6-6-18 NMSA 1978.

For exemptions from Bateman Act, see 6-6-12 NMSA 1978.

The 2007 amendment, effective April 2, 2007, added Subsection G.

ANNOTATIONS

When lowest bid not best bid. — The school board, if it has accurate figures at its disposal showing the lowest bid not to be the best bid because of such matters as operating expense, may award the contract to a higher bidder. 1953-54 Op. Att'y Gen. No. 54-5959.

Effect on lease purchase. — A lease purchase of personalty by a school district is exempted from the Bateman Act [Sections 6-6-11, 6-6-13 to 6-6-18 NMSA 1978], but was subject to the former Public Purchases Act in respect to bidding requirements. 1964 Op. Att'y Gen. No. 64-141.

Purchase of group insurance. — The purchase of group insurance for employees of state agencies was required to be made in compliance with the former Public Purchases Act including the requirement for bids. 1969 Op. Att'y Gen. No. 69-117.

Contract renewal. — A renewal of a contract which was for a definite term is a new and separate contract; it was therefore required to meet the requirements of the former Public Purchases Act. 1966 Op. Att'y Gen. No. 66-40.

Trade-in or exchange. — If there is to be a trade-in or exchange of used articles as part payment on a purchase price, the bid procedure to be followed is that for the total expenditure and not what may be the bid of the seller when the bid is the difference between the sale price and the trade-in allowance. 1969 Op. Att'y Gen. No. 69-142.

Effect on insurance contracts. — Material changes in an insurance contract with a school district, which would increase the rates and/or benefits, could not be made without following the bid procedures set forth in the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-43.

Union statement not required. — It would not be legal to require a union statement in the acceptance of an invitation to bid for printing because to do so would possibly shut out bidders who qualify. 1968 Op. Att'y Gen. No. 68-34.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 29 to

61.

Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee, 2 A.L.R.4th 991.

Standing of disappointed bidder on public contract to seek damages under 42 USCS § 1983 for public authorities' alleged violation of bidding procedures, 86 A.L.R. Fed. 904.

20 C.J.S. Counties §§ 165 to 168; 63 C.J.S. Municipal Corporations §§ 917 to 933; 72 Supp. C.J.S. Public Contracts § 9; 78 C.J.S. Schools and School Districts § 409 et seq.; 81A C.J.S. States § 116.

13-1-103. Invitation for bids.

A. An invitation for bids shall be issued and shall include the specifications for the services, construction or items of tangible personal property to be procured, all contractual terms and conditions applicable to the procurement, the location where bids are to be received, the date, time and place of the bid opening and the requirements for complying with any applicable in-state preference provisions as provided by law.

B. If the procurement is to be by sealed bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of the bid opening.

C. If the procurement is to be by sealed bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with the requirements of Section 13-1-95.1 NMSA 1978.

History: Laws 1984, ch. 65, § 76; 2006, ch. 23, § 3; 2011 (1st S.S.), ch. 3, § 3.

The 2011 (1st. S.S.) amendment, effective October 5, 2011, required that invitations for bids include a statement of the requirements for complying with the applicable resident preference; and in Subsection A, after "place of the bid opening", added the remainder of the sentence.

The 2006 amendment, effective March 2, 2006, added Subsection B to provide that if the procurement is a bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of bid opening and added Subsection C to provide that if the procurement is to be by bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with 13-1-95.1 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 53.

72 Supp. C.J.S. Public Contracts § 11.

13-1-104. Competitive sealed bids; public notice.

A. An invitation for bids or a notice thereof shall be published not less than ten calendar

days prior to the date set forth for the opening of bids. In the case of purchases made by the state purchasing agent, the invitation or notice shall be published at least once in at least three newspapers of general circulation in this state; in addition, an invitation or notice may be published electronically on the state purchasing agent's web site that is maintained for that purpose. In the case of purchases made by other central purchasing offices, the invitation or notice shall be published at least once in a newspaper of general circulation in the area in which the central purchasing office is located. These requirements of publication are in addition to any other procedures that may be adopted by central purchasing offices to notify prospective bidders that bids will be received, including publication in a trade journal, if available. If there is no newspaper of general circulation in the area in which the central purchasing office is located, such other notice may be given as is commercially reasonable.

B. Central purchasing offices shall send copies of the notice or invitation for bids involving the expenditure of more than twenty thousand dollars (\$20,000) to those businesses that have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and that have paid any required fees. A central purchasing office may set different registration fees for different categories of services, construction or items of tangible personal property, but such fees shall be related to the actual, direct cost of furnishing copies of the notice or invitation for bids to the prospective bidders. The fees shall be used exclusively for the purpose of furnishing copies of the notice or invitation for bids of proposed procurements to prospective bidders.

C. A central purchasing office may satisfy the requirement of sending copies of a notice or invitation for bids by distributing the documents to prospective bidders through electronic media. Central purchasing offices shall not require that prospective bidders receive a notice or invitation for bids through electronic media.

D. As used in this section, "prospective bidders" includes persons considering submission of a bid as a general contractor for the construction contract and persons who may submit bids to a general contractor for work to be subcontracted pursuant to the construction contract. Central purchasing offices shall make copies of invitations for bids for construction contracts available to prospective bidders. A central purchasing office may require prospective bidders who have requested documents for bid on a construction contract to pay a deposit for a copy of the documents for bid. The deposit shall equal the full cost of reproduction and delivery of the documents for bid. The deposit, less delivery charges, shall be refunded if the documents for bid are returned in usable condition within the time limits specified in the documents for bid, which time limits shall be no less than ten calendar days from the date of the bid opening. All forfeited deposits shall be credited to the funds of the applicable central purchasing office.

History: Laws 1984, ch. 65, § 77; 1989, ch. 275, § 1; 1995, ch. 102, § 1; 1999, ch. 166, § 1; 2001, ch. 292, § 5; 2005, ch. 214, § 1.

Cross references. — For publication of public notices, see 14-11-1 NMSA 1978 et seq.

The 2005 amendment, effective July 1, 2005, increased the maximum expenditure for purchases

from \$10,000 to \$20,000 in Subsection B.

The 2001 amendment, effective July 1, 2001, added the language beginning "in addition, an invitation or notice" to the end of the second sentence in Subsection A; deleted "The state purchasing agent and all" from the beginning of the first sentence and "The state purchasing agent or" from the beginning of the second sentence in Subsection B; added Subsection C; redesignated former Subsection C as Subsection D; deleted "The state purchasing agent and all" from the beginning of the second sentence, "The state purchasing agent or" from the beginning of the third sentence, "state purchasing agent or" from the middle of the last sentence; and made a stylistic change in current Subsection D.

The 1999 amendment, effective June 18, 1999, substituted "an" for "the" at the beginning of Subsection A, and substituted "ten thousand dollars (\$10,000)" for "five thousand dollars (\$5,000)" in Subsection B.

The 1995 amendment, effective June 16, 1995, substituted "shall" for "must" in the second sentence of Subsection A and added the first sentence in Subsection C.

13-1-105. Competitive sealed bids; receipt and acceptance of bids.

A. Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in the Procurement Code. In addition to the requirement for the prime contractor and subcontractors to be registered as provided in Section 13-4-13.1 NMSA 1978, bids shall be evaluated based on the requirements set forth in the invitation for bids, which requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life-cycle costs that will affect the bid price shall be objectively measurable, which shall be defined by rule. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids. A bid submitted by a prime contractor that was not registered as required by Section 13-4-13.1 NMSA 1978 shall not be considered for award. A bid submitted by a registered prime contractor that includes any subcontractor that is not registered in accordance with that section may be considered for award following substitution of a registered subcontractor for any unregistered subcontractor in accordance with Section 13-4-36 NMSA 1978.

B. If the lowest responsible bid has otherwise qualified, and if there is no change in the original terms and conditions, the lowest bidder may negotiate with the purchaser for a lower total bid in order to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds. Such negotiation shall not be allowed if the lowest bid was more than ten percent over budgeted project funds.

History: Laws 1984, ch. 65, § 78; 1987, ch. 348, § 4; 2005, ch. 98, § 1.

The 2005 amendment, effective June 17, 2005, in Subsection A, added the requirement that prime contractors and subcontractors be registered as a criteria for bid evaluation; provided that a bid submitted by a prime contractor who is not registered shall not be considered for award; and provided that a bid by a registered prime contractor that includes a bid by any subcontractor who is not registered may be

considered for award after the substitution of a registered subcontractor for any unregistered subcontractor.

ANNOTATIONS

Evaluation of bids. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 64 to 65.

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts, 49 A.L.R.5th 747.

72 Supp. C.J.S. Public Contracts § 15.

13-1-106. Competitive sealed bids; correction or withdrawal of bids.

A. A bid containing a mistake discovered before bid opening may be modified or withdrawn by a bidder prior to the time set for bid opening by delivering written or telegraphic notice to the location designated in the invitation for bids as the place where bids are to be received. After bid opening, no modifications in bid prices or other provisions of bids shall be permitted. A low bidder alleging a material mistake of fact which makes his bid nonresponsive may be permitted to withdraw its bid if:

- (1) the mistake is clearly evident on the face of the bid document; or
- (2) the bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

B. Any decision by a procurement officer to permit or deny the withdrawal of a bid on the basis of a mistake contained therein shall be supported by a determination setting forth the grounds for the decision.

History: Laws 1984, ch. 65, § 79.

ANNOTATIONS

Section not applicable to executed contracts. — While this section can prevent modification of bid prices after bid opening, it does not address contracts or contract modification or reformation. Because this section relates to bids and not contracts, it is not applicable and it does not preclude contract reformation based upon mutual mistake discovered after contract formation. *Ballard v. Chavez*, 117 N.M. 1, 868 P.2d 646 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 80.

Mistake: right of bidder for state or municipal contract to rescind bid on ground that bid was based on his own mistake or that of his employee, 2 A.L.R.4th 991.

72 Supp. C.J.S. Public Contracts § 14.

13-1-107. Competitive sealed bids; bid opening.

Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and each bid item, if appropriate, and such other relevant information as may be specified by the state purchasing agent or a central purchasing office, together with the name of each bidder, shall be recorded, and the record and each bid shall be open to public inspection.

History: Laws 1984, ch. 65, § 80.

13-1-108. Competitive sealed bids; award.

A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder. Contracts solicited by competitive sealed bids shall require that the bid amount exclude the applicable state gross receipts tax or applicable local option tax but that the contracting agency shall be required to pay the applicable tax including any increase in the applicable tax becoming effective after the date the contract is entered into. The applicable gross receipts tax or applicable local option tax shall be shown as a separate amount on each billing or request for payment made under the contract.

History: Laws 1984, ch. 65, § 81; 1987, ch. 348, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Low bidder's monetary relief against state or local agency for nonaward of contract, 65 A.L.R.4th 93.

13-1-109. Competitive sealed bids; multi-step sealed bidding.

When the state purchasing agent or a central purchasing office makes a determination that it is impractical to initially prepare specifications to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids.

History: Laws 1984, ch. 65, § 82.

13-1-110. Competitive sealed bids; identical bids.

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When competitive sealed bids are used and two or more of the bids submitted are identical in price and are the low bid, the state purchasing agent or a central purchasing office may:

- A. award pursuant to the multiple source award provisions of Sections 126 and 127 [13-1-153 and 13-1-154 NMSA 1978] of the Procurement Code;
- B. award to a resident business if the identical low bids are submitted by a resident business and a nonresident business;
- C. award to a resident manufacturer if the identical low bids are submitted by a resident manufacturer and a resident business;
- D. award by lottery to one of the identical low bidders; or
- E. reject all bids and resolicit bids or proposals for the required services, construction or items of tangible personal property.

History: Laws 1984, ch. 65, § 83.

13-1-111. Competitive sealed proposals; conditions for use.

A. Except as provided in Subsection G of Section 13-1-119.1 NMSA 1978, when a state agency or a local public body is procuring professional services or a design and build project delivery system, or when the state purchasing agent, a central purchasing office or a designee of either officer [office] makes a written determination that the use of competitive sealed bidding for items of tangible personal property or services is either not practicable or not advantageous to the state agency or a local public body, a procurement shall be effected by competitive sealed proposals.

B. Competitive sealed proposals may also be used for contracts for construction and facility maintenance, service and repairs.

C. Competitive sealed proposals may also be used for construction manager at risk contracts if a three-step selection procedure is used pursuant to the Educational Facility Construction Manager At Risk Act [13-1-124.1 NMSA 1978].

D. Competitive qualifications-based proposals shall be used for procurement of professional services of architects, engineers, landscape architects, construction managers and surveyors who submit proposals pursuant to Sections 13-1-120 through 13-1-124 NMSA 1978.

E. Competitive sealed proposals shall also be used for contracts for the design and installation of measures the primary purpose of which is to conserve natural resources, including guaranteed utility savings contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [6-23-1 NMSA 1978].

History: Laws 1984, ch. 65, § 84; 1989, ch. 69, § 7; 1997, ch. 171, § 4; 1999, ch. 220, § 1; 2003, ch. 267, § 2; 2005, ch. 178, § 2; 2007, ch. 141, § 2.

Bracketed material. — The bracketed word "[office]" was inserted by the compiler to correct an apparent error and is not part of the law.

The 2007 amendment, effective April 2, 2007, added Subsection C.

The 2005 amendment, effective June 17, 2005, added Subsection D to provide that competitive sealed proposals shall be used for contracts for the design and installation of natural resource conservation measures, including guaranteed utility savings contracts pursuant to the Public Facility Energy and Water Conservation Act.

The 2003 amendment, effective June 20, 2003 inserted the subsection designation A and added present Subsection B; inserted "Competitive, sealed proposals may also be used for contracts for construction and facility maintenance, service and repairs" following "competitive sealed proposals" near the middle of present Subsection A.

The 1999 amendment, effective June 18, 1999, added the exception at the beginning of the section.

The 1997 amendment, effective June 20, 1997, in the first sentence, inserted "or a design and build project delivery system", "written", and "for items of tangible personal property or services" and, in the second sentence, inserted "construction managers".

ANNOTATIONS

Outpatient clinics. — County was authorized to enter into a contract with a private, for-profit group to provide a daytime, outpatient clinic in the county, but the county could not sign the proposed contract until it chose a clinic pursuant to this article. 1987 Op. Att'y Gen. No. 87-74.

Public defenders. — The public defender's office may not award state representative professional service contracts unless solicitation for competitive bids is done, in accordance with this article. 1987 Op. Att'y Gen. No. 87-67.

13-1-112. Competitive sealed proposals; request for proposals.

A. Competitive sealed proposals, including competitive sealed qualifications-based proposals, shall be solicited through a request for proposals that shall be issued and shall include:

- (1) the specifications for the services or items of tangible personal property to be procured;
- (2) all contractual terms and conditions applicable to the procurement;
- (3) the form for disclosure of campaign contributions given by prospective contractors to applicable public officials pursuant to Section 13-1-191.1 NMSA 1978;
- (4) the location where proposals are to be received and the date, time and place where proposals are to be received and reviewed; and
- (5) the requirements for complying with any applicable in-state preference provisions as provided by law.

B. A request for proposals may, pursuant to Section 13-1-95.1 NMSA 1978, require that all or a portion of a responsive proposal be submitted electronically.

C. In the case of requests for competitive qualifications-based proposals, price shall be determined by formal negotiations related to scope of work.

History: Laws 1984, ch. 65, § 85; 1989, ch. 69, § 8; 2006, ch. 23, § 4; 2007, ch. 234, § 1; 2011 (1st S.S.), ch. 3, § 4.

The 2011 (1st S.S.) amendment, effective October 5, 2011, required that requests for proposals include a statement of the requirements for complying with the applicable resident preference; and added Paragraph (5) of Subsection A.

The 2007 amendment, effective July 1, 2007, added Paragraph (3) of Subsection A.

The 2006 amendment, effective March 2, 2006, added the last sentence in Subsection A to provide that a request for proposals may require that all or a portion of the proposal be submitted electronically.

ANNOTATIONS

Request is not an offer. — A request for bids is not an offer; the bidders are making offers when they submit bids. No contract for the procurement occurs until acceptance by the party that solicited bids. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Effect of request for proposals. — By requesting proposals, the City entered into an implied or informal contract that it would fairly consider each bid in accordance with all applicable statutes. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

13-1-113. Competitive sealed proposals; public notice.

Public notice of the request for proposals shall be given in the same manner as provided in Section 77 [13-1-104 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 86.

13-1-114. Competitive sealed proposals; evaluation factors.

The request for proposals shall state the relative weight to be given to the factors in evaluating proposals.

History: Laws 1984, ch. 65, § 87.

ANNOTATIONS

Evaluation of proposals. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals

after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

13-1-115. Competitive sealed proposals; negotiations.

Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted after submissions of proposals and prior to award for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award. This section shall not apply to architects, engineers, landscape architects and surveyors who submit proposals pursuant to Sections 13-1-120 through 13-1-124 NMSA 1978.

History: Laws 1984, ch. 65, § 88; 1989, ch. 69, § 9.

13-1-116. Competitive sealed proposals; disclosure; record.

The contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.

History: Laws 1984, ch. 65, § 89.

13-1-117. Competitive sealed proposals; award.

The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the state agency or a local public body, taking into consideration the evaluation factors set forth in the request for proposals.

History: Laws 1984, ch. 65, § 90; 1987, ch. 348, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 40, 42.

72 Supp. C.J.S. Public Contracts §§ 6 to 9.

13-1-117.1. Procurement of professional services; local public bodies; legislative branch; selection and award.

A. Each agency within the legislative branch of government operating under the provisions of the Procurement Code and each local public body shall adopt regulations regarding its selection and award of professional services contracts.

B. The award shall be made to the responsible offeror or offerors whose proposal is most

advantageous to the local public body or legislative agency respectively, taking into consideration the evaluation factors set forth in the request for proposals.

History: 1978 Comp., § 13-1-117.1, enacted by Laws 1987, ch. 348, § 7.

13-1-117.2. Procurement of professional services; local public bodies; professional technical advisory assistance.

A. Any local public body which does not have on staff a licensed professional engineer, surveyor, architect or landscape architect shall have appointed to it or have the appointment waived by the appropriate New Mexico professional society listed in Subsection D of this section, an individual to serve as a professional technical advisor. The professional technical advisor shall be a senior member of an architectural, engineering, surveying or landscape architectural business with experience appropriate to the type of local public works project proposed and shall be a resident licensed architect, professional engineer, surveyor or landscape architect in the state who possesses at least ten years of experience in responsible charge as defined in the Architectural Act [61-15-1.1 NMSA 1978], the Engineering and Surveying Practice Act [61-23-1 NMSA 1978] or the Landscape Architects Act [61-24B-1 NMSA 1978], respectively.

B. The professional technical advisor to a local public body shall serve as an agent of the local public body and shall be indemnified and held harmless. He may be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 NMSA 1978] for per diem and mileage in connection with his service as a professional technical advisor and shall receive no other compensation, perquisite or allowance.

C. The duties and responsibilities of the professional technical advisor shall include but may not be limited to the following activities:

(1) advise the local public body in the development of requests for proposals for engineering, surveying, architectural or landscape architectural services procured by the local public body;

(2) advise the local public body in giving public notice of requests for proposals;

(3) advise in the evaluation and selection of professional businesses to perform services for the local public body, based upon demonstrated competence and qualification for the type of professional services required; and

(4) assist in contract negotiations.

D. Professional technical advisors shall be obtained through the professional technical advisory board, a consortium of the consulting engineers council of New Mexico and the professional engineers in private practice division of the New Mexico society of professional engineers; the New Mexico professional surveyors; the New Mexico society of architects; or the New Mexico chapter of the American society of landscape architects.

E. No individual or firm whose principal, officer, director or employee serves as a professional technical advisor to a local public body shall be permitted to submit a proposal to the local public body during the period in which the individual, principal, officer, director or employee serves as a professional technical advisor to the local public body; however, nothing in this section shall prohibit an individual or firm from submitting a proposal to any municipality in which the individual or a principal, officer, director or employee is not serving as a professional technical advisor.

History: 1978 Comp., § 13-1-117.2, enacted by Laws 1989, ch. 69, § 10; 1991, ch. 127, § 2; 1993, ch. 289, § 1.

The 1993 amendment, effective June 18, 1993, in the first sentence of Subsection A, substituted "shall have appointed to it or have the appointment waived" for "may, upon request by the local body, have appointed to it"; and in Subsection D, inserted "professional technical advisory board, a consortium of the" and substituted "professional surveyors; the New Mexico society of architects" for "association of surveyors and mappers; the New Mexico society of architects and the Albuquerque chapter of the American institute of architects".

The 1991 amendment, effective June 14, 1991, substituted "may, upon request by the local body, have appointed" for "shall have appointed" in the first sentence in Subsection A and substituted "advise" for "assist" at the beginning of Paragraphs (1) and (3) in Subsection C.

13-1-117.3. Contracts for the design and installation of measures for the conservation of natural resources.

A state agency or a local public body may solicit competitive sealed proposals for a contract that provides for both the design and installation of measures the primary purpose of which is to conserve natural resources, including guaranteed utility savings contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [6-23-1 NMSA 1978].

History: Laws 2005, ch. 178, § 3.

Effective dates. — Laws 2005, ch. 178 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

13-1-118. Competitive sealed proposals; professional services contracts; contract review.

All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the general services department or the department of finance and administration if required by the regulations of either or both of the departments. This section shall not apply to contracts entered into by the legislative branch of state government, the judicial branch of state government or the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico.

History: Laws 1984, ch. 65, § 91.

Cross references. — For adoption of rules and regulations by secretary of finance and administration, see 9-6-5 NMSA 1978.

For adoption of rules and regulations by secretary of general services department, see 9-17-5 NMSA 1978.

13-1-119. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; additional requirements.

In addition to compliance with the requirements of Sections 13-1-112 through 13-1-114 and 13-1-116 through 13-1-118 NMSA 1978, a state agency or local public body, when procuring the services of architects, landscape architects, engineers or surveyors for state public works projects or local public works projects, shall comply with Sections 13-1-120 through 13-1-124 NMSA 1978.

History: Laws 1984, ch. 65, § 92; 1987, ch. 301, § 1; 1989, ch. 69, § 11.

13-1-119.1. Public works project delivery system; design and build projects authorized.

A. Except for road and highway construction or reconstruction projects, a design and build project delivery system may be authorized when the state purchasing agent or a central purchasing office makes a determination in writing that it is appropriate and in the best interest of the state or local public body to use the system on a specific project with a maximum allowable construction cost of more than ten million dollars (\$10,000,000). The determination shall be issued only after the state purchasing or central purchasing office has taken into consideration the following criteria, which shall be used as the minimum basis in determining when to use the design and build process:

- (1) the extent to which the project requirements have been or can be adequately defined;
- (2) time constraints for delivery of the project;
- (3) the capability and experience of potential teams with the design and build process;
- (4) the suitability of the project for use of the design and build process as concerns time, schedule, costs and quality; and
- (5) the capability of the using agency to manage the project, including experienced personnel or outside consultants, and to oversee the project with persons who are familiar with the design and build process.

B. When a determination has been made by the state purchasing agent or a central purchasing office that it is appropriate to use a design and build project delivery system, the design and build team shall include, as needed, a New Mexico registered engineer or architect and a contractor properly licensed in New Mexico for the type of work required.

C. Except as provided in Subsections F and G of this section, for each proposed state or local public works design and build project, a two-phase procedure for awarding design and build contracts shall be adopted and shall include at a minimum the following:

(1) during phase one, and prior to solicitation, documents shall be prepared for a request for qualifications by a registered engineer or architect, either in-house or selected in accordance with Sections 13-1-120 through 13-1-124 NMSA 1978, and shall include minimum qualifications, a scope of work statement and schedule, documents defining the project requirements, the composition of the selection committee and a description of the phase-two requirements and subsequent management needed to bring the project to completion. Design and build qualifications of responding firms shall be evaluated and a maximum of five firms shall be short-listed in accordance with technical and qualifications-based criteria; and

(2) during phase two, the short-listed firms shall be invited to submit detailed specific technical concepts or solutions, costs and scheduling. Unsuccessful firms may be paid a stipend to cover proposal expenses. After evaluation of these submissions, selection shall be made and the contract awarded to the highest ranked firm.

D. Except as provided in Subsections F and G of this section, to ensure fair, uniform, clear and effective procedures that will strive for the delivery of a quality project on time and within budget, the secretary, in conjunction with the appropriate and affected professional associations and contractors, shall promulgate rules applicable to all using agencies, which shall be followed by all using agencies when procuring a design and build project delivery system.

E. A state agency shall make the decision on a design and build project delivery system for a state public works project, and a local public body shall make that decision for a local public works project. A state agency shall not make the decision on a design and build project delivery system for a local public works project.

F. The requirements of Subsections C and D of this section and the minimum construction cost requirement of Subsection A of this section do not apply to a design and build project delivery system and the services procured for the project if:

(1) the maximum allowable construction cost of the project is four hundred thousand dollars (\$400,000) or less; and

(2) the only requirement for architects, engineers, landscape architects or surveyors is limited to either site improvements or adaption for a pre-engineered building or system.

G. The procurement of a design and build project delivery system qualifying for exemptions pursuant to Subsection F of this section, including the services of any architect, engineer, landscape architect, construction manager or surveyor needed for the project, shall be accomplished by competitive sealed bids pursuant to Sections 13-1-102 through 13-1-110 NMSA 1978.

History: 1978 Comp., § 13-1-119.1, enacted by Laws 1997, ch. 171, § 5; 1999, ch. 220, § 2; 2003, ch. 222, § 1.

The 2003 amendment, effective June 20, 2003, substituted "four hundred thousand dollars (\$400,000)" for "two hundred thousand dollars (\$200,000)" in Paragraph F(1).

The 1999 amendment, effective June 18, 1999, deleted "of the state highway and transportation department or any local public body" following "reconstruction projects" near the beginning of the first sentence in Subsection A; added the exceptions at the beginning of Subsections C and D; and added Subsections F and G.

13-1-119.2. Design and build procurement for certain transportation projects.

Notwithstanding any prohibition on road and highway construction or reconstruction projects in Section 13-1-119.1 NMSA 1978, the department of transportation may use a design and build project delivery system pursuant to Section 13-1-119.1 NMSA 1978 for projects with a maximum allowable construction cost of more than fifty million dollars (\$50,000,000) funded in whole or in part by the grants programs of the federal American Recovery and Reinvestment Act of 2009.

History: Laws 2009, ch. 207, § 1.

Emergency clauses. — Laws 2009, ch. 207, § 2 contained an emergency clause and was approved on April 7, 2009.

13-1-120. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection process.

A. For each proposed state public works project, local public works project or construction management contract, the architect, engineer, landscape architect, construction management and surveyor selection committee, state highway and transportation department selection committee or local selection committee, as appropriate, shall evaluate statements of qualifications and performance data submitted by at least three businesses in regard to the particular project and may conduct interviews with and may require public presentation by all businesses applying for selection regarding their qualifications, their approach to the project and their ability to furnish the required services.

B. The appropriate selection committee shall select, ranked in the order of their qualifications, no less than three businesses deemed to be the most highly qualified to perform the required services, after considering the following criteria together with any criteria, except price, established by the using agency authorizing the project:

(1) specialized design and technical competence of the business, including a joint venture or association, regarding the type of services required;

(2) capacity and capability of the business, including any consultants, their representatives, qualifications and locations, to perform the work, including any specialized services, within the time limitations;

(3) past record of performance on contracts with government agencies or private industry with respect to such factors as control of costs, quality of work and ability to meet schedules;

(4) proximity to or familiarity with the area in which the project is located;

(5) the amount of design work that will be produced by a New Mexico business within this state;

(6) the volume of work previously done for the entity requesting proposals which is not seventy-five percent complete with respect to basic professional design services, with the objective of effecting an equitable distribution of contracts among qualified businesses and of assuring that the interest of the public in having available a substantial number of qualified businesses is protected; provided, however, that the principle of selection of the most highly qualified businesses is not violated; and

(7) notwithstanding any other provisions of this subsection, price may be considered in connection with construction management contracts, unless the services are those of an architect, engineer, landscape architect or surveyor.

C. Notwithstanding the requirements of Subsections A and B of this section, if fewer than three businesses have submitted a statement of qualifications for a particular project, the appropriate committee may:

(1) rank in order of qualifications and submit to the secretary or local governing authority of the public body for award those businesses which have submitted a statement of qualifications; or

(2) recommend termination of the selection process pursuant to Section 13-1-131 NMSA 1978 and sending out of new notices of the resolicitation of the proposed procurement pursuant to Section 13-1-104 NMSA 1978. Any proposal received in response to the terminated solicitation is not public information and shall not be made available to competing offerors.

D. The names of all businesses submitting proposals and the names of all businesses, if any, selected for interview shall be public information. After an award has been made, the appropriate selection committee's final ranking and evaluation scores for all proposals shall become public information. Businesses which have not been selected for contract award shall be so notified in writing within fifteen days after an award is made.

History: Laws 1984, ch. 65, § 93; 1987, ch. 301, § 2; 1989, ch. 69, § 12; 1993, ch. 72, § 3; 1997, ch. 171, § 6.

The 1997 amendment, effective June 20, 1997, in Subsection A, inserted "or construction management contract" and "construction management" and made related stylistic changes; inserted "appropriate" in Subsections B and C; inserted "including any consultants, their representatives, qualifications and locations, to" in Paragraph B(2); substituted "violated" for "violate" at the end of Paragraph B(6); added Paragraph B(7) and made related stylistic changes; inserted "governing authority of the" in Paragraph C(1); in paragraph C(2), inserted "pursuant to Section 13-1-131 NMSA 1978" and

"resolicitation of the" and added the last sentence; and in Subsection D, inserted "the appropriate selection committee's" and "for contract award", and substituted "fifteen days" for "twenty-one days" near the end of the subsection.

The 1993 amendment, effective June 18, 1993, inserted "state highway and transportation department selection committee" in Subsection A.

13-1-121. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection committee; state public works projects.

A. The "architect, engineer, landscape architect and surveyor selection committee" is created. The committee, which shall serve as the selection committee for state public works projects, except for highway projects of the state highway and transportation department, is composed of four members as follows:

- (1) one member of the agency for which the project is being designed;
- (2) the director of the property control division of the general services department who shall be chairman;
- (3) one member designated by the architect-engineer-landscape architect joint practice committee; and
- (4) one member designated by the secretary.

B. The staff architect or his designee of the property control division shall serve as staff to the architect, engineer, landscape architect and surveyor selection committee.

C. The members of the architect, engineer, landscape architect and surveyor selection committee shall be reimbursed by the property control division for per diem and mileage in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 NMSA 1978].

D. The state highway and transportation department shall create a selection committee by rule, after notice and hearing, which shall serve as the selection committee for highway projects of the department.

History: Laws 1984, ch. 65, § 94; 1987, ch. 301, § 3; 1989, ch. 69, § 13; 1993, ch. 72, § 4.

Cross references. — For director of property control division of general services department, see 15-3B-3 NMSA 1978.

For position of staff architect, see 15-3B-5 NMSA 1978.

The 1993 amendment, effective June 18, 1993, inserted "except for highway projects of the state highway and transportation department" in the introductory paragraph of Subsection A and added Subsection D.

13-1-122. Competitive sealed qualifications-based proposals; award of architect, engineering, landscape architect and surveying contracts.

The secretary or his designee, or the secretary of the highway and transportation department or his designee or a designee of a local public body shall negotiate a contract with the highest qualified business for the architectural, landscape architectural, engineering or surveying services at compensation determined in writing to be fair and reasonable. In making this decision, the secretary or his designee or the designee of a local public body shall take into account the estimated value of the services to be rendered and the scope, complexity and professional nature of the services. Should the secretary or his designee or the designee of a local public body be unable to negotiate a satisfactory contract with the business considered to be the most qualified at a price determined to be fair and reasonable, negotiations with that business shall be formally terminated. The secretary or his designee or the designee of a local public body shall then undertake negotiations with the second most qualified business. Failing accord with the second most qualified business, the secretary or his designee or a designee of a local public body shall formally terminate negotiations with that business. The secretary or his designee or the designee of the local public body shall then undertake negotiations with the third most qualified business. Should the secretary or his designee or a designee of a local public body be unable to negotiate a contract with any of the businesses selected by the committee, additional businesses shall be ranked in order of their qualifications and the secretary or his designee or the designee of a local public body shall continue negotiations in accordance with this section until a contract is signed with a qualified business or the procurement process is terminated and a new request for proposals is initiated. The secretary or the representative of a local public body shall publicly announce the business selected for award.

History: Laws 1984, ch. 65, § 95; 1989, ch. 69, § 14; 1993, ch. 72, § 5.

The 1993 amendment, effective June 18, 1993, inserted "or the secretary of the highway and transportation department or his designee" and substituted "or surveying services" for "and surveying services" in the first sentence.

13-1-123. Architectural, engineering, landscape architectural and surveying contracts.

A. All contracts between a state agency and an architect for the construction of new buildings or for the remodeling or renovation of existing buildings shall contain the provision that all designs, drawings, specifications, notes and other work developed in the performance of the contract are the sole property of this state.

B. All documents, including drawings and specifications, prepared by the architect, engineer, landscape architect or surveyor are instruments of professional service. If the plans and specifications developed in the performance of the contract shall become the property of the contracting agency upon completion of the work, the contracting agency agrees to hold harmless, indemnify and defend the architect, engineer, landscape architect or surveyor against all damages, claims and losses, including defense costs, arising out of any reuse of the plans and specifications without the written authorization of the architect, engineer, landscape architect or surveyor.

C. A copy of all designs, drawings and other materials which are the property of this state shall be transmitted to the contracting agency. The contracting agency shall index these materials, and a copy of the index shall be provided to the records center.

History: Laws 1984, ch. 65, § 96; 1989, ch. 69, § 15.

Cross references. — For property control division generally, see Chapter 15, Article 3B NMSA 1978.

13-1-124. Architect rate schedule.

The secretary shall adopt by regulation an architect rate schedule which shall set the highest permissible rates for each building-type group, which shall be defined in the regulations. The rate schedule shall be in effect upon the approval of the state board of finance and compliance with the State Rules Act [14-4-1 NMSA 1978] and shall apply to all contracts between a state agency and an architect which are executed after the effective date of the architect rate schedule.

History: Laws 1984, ch. 65, § 97.

Cross references. — For state board of finance generally, see Chapter 6, Article 1 NMSA 1978.

13-1-124.1. Short title.

Sections 13-1-124.1 through 13-1-124.5 NMSA 1978 may be cited as the "Educational Facility Construction Manager At Risk Act".

History: Laws 2007, ch. 141, § 3.

Emergency clause. — Laws 2007, ch. 141, § 10 contains an emergency clause and was approved on April 2, 2007.

13-1-124.2. Applicability.

The provisions of the Educational Facility Construction Manager At Risk Act [13-1-124.1 NMSA 1978] apply to contracts for the construction of educational facilities if the governing body chooses, pursuant to the provisions of that act, to use the services of a construction manager at risk.

History: Laws 2007, ch. 141, § 4.

Emergency clause. — Laws 2007, ch. 141, § 10 contains an emergency clause and was approved on April 2, 2007.

13-1-124.3. Definitions.

As used in the Educational Facility Construction Manager At Risk Act [13-1-124.1 NMSA

1978]:

A. "construction manager at risk" means a person who, pursuant to a contract with a governing body, provides the preconstruction services and construction management required in a construction manager at risk delivery method;

B. "construction manager at risk delivery method" means a construction method for an educational facility wherein a construction manager at risk provides a range of preconstruction services and construction management, including cost estimation and consultation regarding the design of the building project, preparation and coordination of bid packages, scheduling, cost control, value engineering and, while acting as the general contractor during construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, prequalifying and evaluating trade contractors and subcontractors and providing management and construction services, all at a guaranteed maximum price for which the construction manager at risk is financially responsible;

C. "educational facility" means a public school, including a locally chartered or state-chartered charter school or a facility of a state educational institution listed in Section 6-17-1.1 NMSA 1978;

D. "governing body" means:

(1) the public school facilities authority if the authority is the using agency that requires the construction of an educational facility;

(2) a local school board if the board is the using agency that requires the construction of an educational facility;

(3) the governing body of a charter school if the governing body is the using agency that requires the construction of an educational facility; or

(4) the governing body of a state educational institution if the governing body is the using agency that requires the construction of an educational facility; and

E. "guaranteed maximum price" means the maximum amount to be paid by the governing body for the construction of the educational facility, including the cost of the work, the general conditions and the fees charged by the construction manager at risk.

History: Laws 2007, ch. 141, § 5.

Emergency clause. — Laws 2007, ch. 141, § 10 contained an emergency clause and was approved April 2, 2007.

13-1-124.4. Construction manager at risk delivery method authorized; multiphase selection procedure.

A. A construction manager at risk delivery method may be used when a governing body determines that it is in its interest to use that method on a specific educational facility construction project, provided that the construction manager at risk shall be selected pursuant to

the provisions of this section.

B. The governing body shall form a selection committee of at least three members with at least one member being an architect or engineer. The selection committee shall develop an evaluation process, including a multiphase procedure consisting of two or three steps. A two-step procedure may be used when the total amount of money available for the project is less than five hundred thousand dollars (\$500,000) and shall include a request for qualifications and an interview. A three-step procedure shall consist of a request for qualifications, a request for proposals and an interview.

C. A request for qualifications shall be published in accordance with Section 13-1-104 NMSA 1978 and shall include at a minimum the following:

(1) a statement of the minimum qualifications for the construction manager at risk, including the requirements for:

(a) a contractor's license for the type of work to be performed, issued pursuant to the Construction Industries Licensing Act [60-13-1 NMSA 1978];

(b) registration pursuant to Section 13-4-13.1 NMSA 1978; and

(c) a minimum bond capacity;

(2) a statement of the scope of work to be performed, including:

(a) the location of the project and the total amount of money available for the project;

(b) a proposed schedule, including a deadline for submission of the statements of qualification;

(c) specific project requirements and deliverables;

(d) the composition of the selection committee;

(e) a description of the process the selection committee shall use to evaluate qualifications;

(f) a proposed contract; and

(g) a detailed statement of the relationships and obligations of all parties, including the construction manager at risk, agents of the governing body, such as an architect or engineer, and the governing body;

(3) a verification of the maximum allowable construction cost; and

(4) a request for a proposal bond as required by Section 13-1-146 NMSA 1978.

D. The selection committee shall evaluate the statements of qualifications submitted and determine the offerors that qualify for the construction manager at risk. If the selection committee has chosen a three-step procedure, the committee shall issue a request for proposals to the offerors that qualify.

E. If the selection committee has chosen a two-step procedure, the committee shall rank the persons that qualify based upon the statements of qualification and interview up to three of the

highest-ranked offerors.

F. In a three-step procedure, the selection committee shall issue a request for proposals and evaluate the proposals pursuant to Sections 13-1-112 through 13-1-117 NMSA 1978 except that:

(1) the request for proposals shall be sent only to those determined to be qualified pursuant to Subsection D of this section;

(2) the selection committee shall evaluate the proposals and conduct interviews with up to three of the highest-ranked offerors instead of negotiating with responsible offerors found to be reasonably likely to be selected; and

(3) pursuant to Subsection G of this section, the contract award may be made after the interviews.

G. After conducting interviews with the highest-ranked offerors and after considering the factors listed in Subsection H of this section, the selection committee shall recommend to the governing body the offeror that will be most advantageous to the governing body. Should the governing body or designee be unable to negotiate a satisfactory contract with the offeror considered to be the most qualified at a price determined to be fair and reasonable, negotiations with that offeror shall be formally terminated. The governing body or designee shall then undertake negotiations with the second most qualified offeror. Failing accord with the second most qualified offeror, the governing body or designee shall formally terminate negotiations with the offeror. The governing body or designee shall then undertake negotiations with the third most qualified offeror. Should the governing body or designee be unable to negotiate a contract with any of the offerors selected by the committee, additional offerors shall be ranked in order of their qualifications and the governing body or designee shall continue negotiations in accordance with this section until a contract is signed with a qualified offeror or the procurement process is terminated and a new request for proposals is initiated.

H. In evaluating and ranking statements of qualifications, proposals and results of interviews, and in the final recommendation of a construction manager at risk, the selection committee shall consider:

(1) the offeror's experience with construction of similar types of projects;

(2) the qualifications and experience of the offeror's personnel and consultants and the role of each in the project;

(3) the plan for management actions to be undertaken on the project, including services to be rendered in connection with safety and the safety plan for the project;

(4) the offeror's experience with the construction manager at risk method; and

(5) all other selection criteria, as stated in the request for qualifications and the request for proposals.

I. Nothing in this section precludes the selection committee from recommending the termination of the selection procedure pursuant to Section 13-1-131 NMSA 1978 and repeating

the selection process pursuant to this section. Any material received by the selection committee in response to a solicitation that is terminated shall not be disclosed so as to be available to competing offerors.

J. After a contract is awarded, the selection committee shall make the names of all offerors and the names of all offerors selected for interview available for public inspection along with the selection committee's final ranking and evaluation scores. Offerors who were interviewed but not selected for contract award shall be notified in writing within fifteen days of the award.

History: Laws 2007, ch. 141, § 6.

Emergency clause. — Laws 2007, ch. 141, § 10 contained an emergency clause and was approved April 2, 2007.

13-1-124.5. Responsibilities of construction manager at risk following award of project.

A. The contract with the construction manager at risk shall specify:

- (1) the guaranteed maximum price; and
- (2) the percentage of the guaranteed price that the construction manager at risk will perform with its own work force.

B. The construction manager at risk, in cooperation with the governing body, shall seek to develop subcontractor interest in the project and shall furnish to the governing body and any architect or engineer representing the governing body a list of subcontractors who state in writing that they are a responsible bidder or a responsible offeror, including suppliers who are to furnish materials or equipment fabricated to a special design and from whom proposals or bids will be requested for each principal portion of the project. The governing body and its architect or engineer shall promptly reply in writing to the construction manager at risk if the governing body, architect or engineer knows of any objection to a listed subcontractor or supplier, provided that the receipt of the list shall not require the governing body, architect or engineer to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the governing body, architect or engineer later to object to or reject any proposed subcontractor or supplier.

C. The construction manager at risk shall:

- (1) conduct pre-bid or pre-proposal meetings;
- (2) advise the governing body about bidding or proposals;
- (3) enter into contracts; and
- (4) assist the governing body in evaluating submissions by responsible bidders and offerors.

History: Laws 2007, ch. 141, § 7.

Emergency clause. — Laws 2007, ch. 141, § 10 contained an emergency clause and was approved April 2, 2007.

13-1-125. Small purchases.

A. A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding twenty thousand dollars (\$20,000) in accordance with the applicable small purchase regulations adopted by the secretary, a local public body or a central purchasing office that has the authority to issue regulations.

B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding fifty thousand dollars (\$50,000), excluding applicable state and local gross receipts taxes, except for the services of landscape architects or surveyors for state public works projects or local public works projects, in accordance with professional services procurement regulations promulgated by the department of finance and administration, the general services department or a central purchasing office with the authority to issue regulations.

C. Notwithstanding the requirements of Subsection A of this section, a state agency or a local public body may procure services, construction or items of tangible personal property having a value not exceeding ten thousand dollars (\$10,000) by issuing a direct purchase order to a contractor based upon the best obtainable price.

D. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

History: Laws 1984, ch. 65, § 98; 1987, ch. 348, § 8; 1988, ch. 54, § 1; 1989, ch. 69, § 16; 1995, ch. 139, § 1; 1997, ch. 69, § 1; 2001, ch. 292, § 6; 2005, ch. 214, § 2; 2007, ch. 315, § 3.

Cross references. — For adoption of rules and regulations by director of department of finance and administration, see 9-6-5 NMSA 1978.

For adoption of rules and regulations by secretary of general services department, see 9-17-5 NMSA 1978.

The 2007 amendment, effective June 15, 2007, increased the amount of small purchases of professional services from \$30,000 to \$50,000 and tangible personal property from \$5,000 to \$10,000.

The 2005 amendment, effective July 1, 2005, increased the maximum value of small purchases from \$10,000 to \$20,000 in Subsection A; increased the maximum value of professional services from \$20,000 to \$30,000 in Subsection B; and increased the maximum value of purchases at best obtainable prices from \$1,500 to \$5,000 in Subsection C.

The 2001 amendment, effective July 1, 2001, deleted "The state purchasing agent or" from the beginning of the first sentence of Subsection A; and substituted "one thousand five hundred dollars" for "five hundred dollars" in Subsection C.

The 1997 amendment, effective June 20, 1997, substituted "ten thousand dollars" for "five thousand

dollars" in Subsection A, deleted former Subsection C relating to school and educational institution purchases, and redesignated former Subsections D and E as Subsections C and D.

The 1995 amendment, effective June 16, 1995, made a minor stylistic change in Subsection A and inserted "for a state two-year post-secondary institution or for a school district as defined in the Public School Code" in Subsection C.

13-1-126. Sole source procurement.

A contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the state purchasing agent or a central purchasing office makes a determination, after conducting a good-faith review of available sources and consulting the using agency, that there is only one source for the required service, construction or item of tangible personal property. The state purchasing agent or a central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the state agency or a local public body. A contract for the purchase of research consultant services by institutions of higher learning constitutes a sole source procurement.

History: Laws 1984, ch. 65, § 99; 1987, ch. 348, § 9.

13-1-127. Emergency procurements.

A. The state purchasing agent, a central purchasing office or a designee of either may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, safety or property requiring procurement under emergency conditions; provided that emergency procurements shall be made with competition as is practicable under the circumstances. A written determination of the basis for the emergency procurement and for the selection of the particular contractor or vendor shall be included in the procurement file. Emergency procurements shall not include the purchase or lease purchase of heavy road equipment.

B. An emergency condition is a situation which creates a threat to public health, welfare or safety such as may arise by reason of floods, fires, epidemics, riots, acts of terrorism, equipment failures or similar events and includes the planning and preparing for an emergency response. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- (1) the functioning of government;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

C. Money expended for planning and preparing for an emergency response shall be accounted for and reported to the legislative finance committee and the department of finance

and administration within sixty days after the end of each fiscal year.

History: Laws 1984, ch. 65, § 100; 1987, ch. 348, § 10; 2002, ch. 84, § 1.

The 2002 amendment, effective March 5, 2002, inserted "or vendor" in the second sentence of Subsection A; inserted "fires", "acts of terrorism", and "and includes the planning and preparing for an emergency response" in the first sentence of Subsection B; and added Subsection C.

ANNOTATIONS

Applicability to exempt transaction. — The emergency provisions of Section 13-1-127 NMSA 1978 did not apply to a contract for the purchase of water services by a school district from the water utility of a municipality which was within the exemptions contained in Subsections A and D of Section 13-1-98 NMSA 1978. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 120 N.M. 307, 901 P.2d 725 (1995).

Intent. — The intention of the emergency purchases statute is to keep a public record of such purchases and to provide some means of control over them. 1969 Op. Att'y Gen. No. 69-107.

Reason for exceptions. — Only where centralized control may be harmful or unproductive of savings were exceptions from the bid requirement allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Misuse remedy. — The remedy for any misuse of the emergency purchases provisions would appear to be in the form of reporting the same in an audit report rather than in approving or disapproving the purchase itself. 1969 Op. Att'y Gen. No. 69-107.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 38.

13-1-128. Sole source and emergency procurements; content and submission or record.

All central purchasing offices shall maintain, for a minimum of three years, records of sole source and emergency procurements. The record of each such procurement shall be public record and shall contain:

- A. the contractor's name and address;
- B. the amount and term of the contract;
- C. a listing of the services, construction or items of tangible personal property procured under the contract; and
- D. the justification for the procurement method.

History: Laws 1984, ch. 65, § 101; 1987, ch. 348, § 11.

ANNOTATIONS

Intent. — The intention of the emergency purchases statute is to keep a public record of such

purchases and to provide some means of control over them. 1969 Op. Att'y Gen. No. 69-107.

Reason for exceptions. — Only when centralized control may be harmful or unproductive of savings were exceptions from the bid requirement allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Misuse remedy. — The remedy for any misuse of the emergency purchases provisions would appear to be in the form of reporting the same in an audit report rather than in approving or disapproving the purchase itself. 1969 Op. Att'y Gen. No. 69-107.

13-1-129. Procurement under existing contracts.

A. Notwithstanding the requirements of Sections 13-1-102 through 13-1-118 NMSA 1978, the state purchasing agent or a central purchasing office may contract for services, construction or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

(1) at a price equal to or less than the contractor's current federal supply contract price (GSA), providing the contractor has indicated in writing a willingness to extend such contractor pricing, terms and conditions to the state agency or local public body and the purchase order adequately identifies the contract relied upon; or

(2) with a business which has a current exclusive or nonexclusive price agreement with the state purchasing agent or a central purchasing office for the item, services or construction meeting the same standards and specifications as the items to be procured if the following conditions are met:

(a) the quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and

(b) the purchase order adequately identifies the price agreement relied upon.

B. The central purchasing office shall retain for public inspection and for the use of auditors a copy of each federal supply contractor state purchasing agent price agreement relied upon to make purchases without seeking competitive bids or proposals.

History: Laws 1984, ch. 65, § 102; 1991, ch. 254, § 1.

The 1991 amendment, effective June 14, 1991, in Subsection A, substituted "Sections 13-1-102 through 13-1-118 NMSA 1978" for "Sections 75 through 91 of the Procurement Code" in the introductory paragraph, rewrote Paragraph (1) which read "at a price equal to or less than the federal supply contract price or catalogue price, whichever is lower and the purchase order adequately identifies the contract relied upon", substituted "exclusive or nonexclusive" for "contract or" in the introductory paragraph in Paragraph (2) and substituted "price agreement" for "contract" in Subparagraphs (a) and (b) in Paragraph (2); inserted "federal supply contractor", deleted "contract or current" preceding "price agreement", and added "or proposals" at the end of Subsection B; and deleted the former second and third sentences in Subsection B relating to obtaining copies of price agreements or contracts and the fees therefor.

13-1-130. Purchases; antipoverty program business.

A. Without regard to the bid requirements of Section 75 [13-1-102 NMSA 1978] of the Procurement Code, a central purchasing office may negotiate a contract for materials grown, processed or manufactured in this state by small businesses, cooperatives, community self-determination corporations or other such enterprises designed and operated to alleviate poverty conditions and aided by state or federal antipoverty programs or through private philanthropy.

B. Prior to negotiating a contract under this section, a central purchasing office shall make a determination of the reasonableness of the price and the quality of the materials and that the public interest will best be served by the procurement.

History: Laws 1984, ch. 54, § 103.

13-1-131. Rejection or cancellation of bids or requests for proposals; negotiations.

An invitation for bids, a request for proposals or any other solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part when it is in the best interest of the state agency or a local public body. A determination containing the reasons for cancellation shall be made part of the procurement file. If no bids are received or if all bids received are rejected and if the invitation for bid was for any tangible personal property, construction or service, then new invitations for bids shall be requested. If upon rebidding the tangible personal property, construction or services, the bids received are unacceptable, or if no bids are secured, the central purchasing office may purchase the tangible personal property, construction or services in the open market at the best obtainable price.

History: Laws 1984, ch. 65, § 104; 1987, ch. 348, § 12.

ANNOTATIONS

Evaluation of proposals. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Public contracts: authority of state or its subdivision to reject all bids, 52 A.L.R.4th 186.

13-1-132. Irregularities in bids or proposals.

The state purchasing agent or a central purchasing office may waive technical irregularities in the form of the bid or proposal of the low bidder or offeror which do not alter the price, quality or quantity of the services, construction or items of tangible personal property bid or offered.

History: Laws 1984, ch. 65, § 105.

13-1-133. Responsibility of bidders and offerors.

If a bidder or offeror who otherwise would have been awarded a contract is found not to be a responsible bidder or offeror, a determination that the bidder or offeror is not a responsible bidder or offeror, setting forth the basis of the finding, shall be prepared by the state purchasing agent or a central purchasing office. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination that the bidder or offeror is not a responsible bidder or offeror.

History: Laws 1984, ch. 65, § 106.

13-1-134. Prequalification of bidders.

A business may be prequalified by a central purchasing office as a bidder or offeror for particular types of services, construction or items of tangible personal property. Mailing lists of potential bidders or offerors shall include but shall not be limited to such prequalified businesses.

History: Laws 1984, ch. 65, § 107.

13-1-135. Cooperative procurement authorized.

A. Any state agency or local public body may either participate in, sponsor or administer a cooperative procurement agreement for the procurement of any services, construction or items of tangible personal property with any other state agency, local public body or external procurement unit in accordance with an agreement entered into and approved by the governing authority of each of the state agencies, local public bodies or external procurement units involved. The cooperative procurement agreement shall clearly specify the purpose of the agreement and the method by which the purpose will be accomplished. Any power exercised under a cooperative procurement agreement entered into pursuant to this subsection shall be limited to the central purchasing authority common to the contracting parties, even though one or more of the contracting parties may be located outside this state. An approved and signed copy of all cooperative procurement agreements entered into pursuant to this subsection shall be filed with the state purchasing agent. A cooperative procurement agreement entered into pursuant to this subsection is limited to the procurement of items of tangible personal property, services or construction.

B. Notwithstanding the provisions of Subsection A of this section, a cooperative procurement agreement providing for mutually held funds or for other terms and conditions involving public funds or property included in Section 11-1-4 NMSA 1978 shall be entered into pursuant to the provisions of the Joint Powers Agreements Act [11-1-1 NMSA 1978].

C. Central purchasing offices other than the state purchasing agent may cooperate by

agreement with the state purchasing agent in obtaining contracts or price agreements, and such contract or agreed prices shall apply to purchase orders subsequently issued under the agreement.

History: Laws 1984, ch. 65, § 108; 1999, ch. 167, § 1.

The 1999 amendment, effective June 18, 1999, in Subsection A substituted the language beginning "and approved by the governing authority of each of the state agencies" to the end of the subsection for "Joint Powers Agreements Act", added Subsection B, and redesignated former Subsection B as Subsection C.

13-1-135.1. Recycled content goods; cooperative procurement.

A. Beginning July 1, 1995, each central purchasing office shall, whenever its price, quality, quantity, availability and delivery requirements are met, purchase recycled content goods through contracts established by the purchasing division of the general services department or with other central purchasing offices.

B. For purposes of this section, "recycled content goods" means supplies and materials composed in whole or in part of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications.

History: 1978 Comp., § 13-1-135.1, enacted by Laws 1995, ch. 60, § 2.

13-1-136. Cooperative procurement; reports required.

The general services department and the department of finance and administration shall notify the state purchasing agent on or before January 1 of each year of the cooperative procurement agreements entered into by state agencies with local public bodies or external procurement units during the preceding fiscal year.

History: Laws 1984, ch. 65, § 109.

13-1-137. Sale, acquisition or use of property by a state agency or a local public body.

Any state agency or local public body may sell property to, acquire property from or cooperatively use any items of tangible personal property or services belonging to another state agency or a local public body or external procurement unit:

A. in accordance with an agreement entered into with the approval of the state board of finance or the data processing and data communications planning council [information technology commission systems council]; or

B. subject to the provisions of Sections 3-46-1 through 3-46-45; 3-54-1 through 3-54-3; 3-60-1 through 3-60-37 and 3-60A-1 through 3-60A-48 NMSA 1978.

History: Laws 1984, ch. 65, § 110.

Bracketed material. — The bracketed material was inserted by the compiler and it is not part of the law. Pursuant to Laws 1984, ch. 64, the data processing and data communications planning council, was renamed the information systems council. That council was subsequently renamed as the commission on information and communication management and then again as the information technology commission. See 15-1C-4 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States § 66.

81A C.J.S. States §§ 145 to 147.

13-1-138. Cost or pricing data required.

When required by the state purchasing agent or a central purchasing office, a prospective contractor shall submit cost or pricing data when the contract is expected to exceed twenty-five thousand dollars (\$25,000) and is to be awarded by a method other than competitive sealed bids.

History: Laws 1984, ch. 65, § 111.

13-1-138.1. Specification of certain components; separate pricing required.

Prior to submitting a bid or proposal for a state public works project, if the state purchasing agent, or a responsible bidder or responsible offeror determines that there is only one source for a specific service, construction or item of tangible personal property that is required in the specifications, the state purchasing agent, responsible bidder or responsible offeror may require any bid or offer submitted by a subcontractor or supplier to price separately the specific service, construction or item of tangible personal property.

History: Laws 2007, ch. 312, § 2.

Effective dates. — Laws 2007, ch. 312, § 6 makes this section effective July 1, 2007.

13-1-138.2. School construction projects; separate pricing required in certain circumstances.

Prior to submitting a bid or proposal for a state or local public works project for the construction of a public school facility, if the central purchasing office or a responsible bidder or responsible offeror determines that there is only one source for a specific service, construction or item of tangible personal property that is required in the specifications, then the central purchasing office, responsible bidder or responsible offeror may require any bid or offer submitted by a subcontractor or supplier to separately price the specific service, construction or item of tangible personal property.

History: Laws 2007, ch. 366, § 2.

Effective dates. — Laws 2007, ch. 366, § 27 makes this section effective on July 1, 2007.

13-1-139. Cost or pricing data not required.

The cost or pricing data relating to the award of a contract shall not be required when:

- A. the procurement is based on competitive sealed bid;
- B. the contract price is based on established catalogue prices or market prices;
- C. the contract price is set by law or regulation;
- D. the contract is for professional services; or
- E. the contract is awarded pursuant to the Public Building Energy Efficiency Act [6-23-1 NMSA 1978].

History: Laws 1984, ch. 65, § 112; 1993, ch. 231, § 12.

The 1993 amendment, effective June 18, 1993, added Subsection (E) and made accompanying stylistic changes.

13-1-140. Cost or pricing data; change orders or contract modifications.

When required by the state purchasing agent or a central purchasing office, a contractor shall submit cost or pricing data prior to the execution of any change order or contract modification, whether or not cost or pricing data was required in connection with the initial award of the contract, when the change order or modification involves aggregate increases or aggregate decreases that are expected to exceed twenty-five thousand dollars (\$25,000).

History: Laws 1984, ch. 65, § 113.

13-1-141. Cost or pricing data; change orders; contract modifications; exceptions.

The submission of cost or pricing data relating to the execution of a change order or contract modification shall not be required when unrelated change orders or contract modifications for which cost or pricing data would not be required are consolidated for administrative convenience.

History: Laws 1984, ch. 65, § 114.

13-1-142. Cost or pricing data; certification required.

A contractor, actual or prospective, required to submit cost or pricing data shall certify that to the best of its knowledge and belief the cost or pricing data submitted was accurate, complete and current as of a specified date.

History: Laws 1984, ch. 65, § 115.

13-1-143. Cost or pricing data; price adjustment provision required.

Any contractor award, change order or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the state agency or a local public body, including profit or fee, shall be adjusted to exclude any significant sums by which the state agency or a local public body reasonably finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date specified.

History: Laws 1984, ch. 65, § 116.

13-1-144. Cost or price analysis.

A cost analysis or a price analysis, as appropriate, may be conducted prior to the award of a contract other than one awarded by competitive sealed bidding. A written record of such cost or price analysis shall be made a part of the procurement file.

History: Laws 1984, ch. 65, § 117.

13-1-145. Cost principles; regulations.

The secretary, a local public body or a central purchasing office which has the authority to issue regulations may promulgate regulations setting forth principles to be used to determine the allowability of incurred costs for the purpose of reimbursing costs to a contractor.

History: Laws 1984, ch. 65, § 118.

13-1-146. Requirement for bid security.

Bid security shall be required of bidders or offerors for construction contracts when the price is estimated by the procurement officer to exceed twenty-five thousand dollars (\$25,000). Bid security in an amount equal to at least five percent of the amount of the bid shall be a bond provided by a surety company authorized to do business in this state, or the equivalent in cash, or otherwise supplied in a form satisfactory to the state agency or a local public body.

History: Laws 1984, ch. 65, § 119; 2007, ch. 141, § 9.

The 2007 amendment, effective April 2, 2007, eliminates the provision that required bid security only for construction contracts procured by competitive sealed bid.

ANNOTATIONS

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Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 59.
72 Supp. C.J.S. Public Contracts §§ 41 to 43.

13-1-146.1. Directed suretyship prohibited; penalty.

A. Except to the extent necessary to ensure that a surety company meets the requirements of Subsection A of Section 13-4-18 NMSA 1978, an employee of the state or its political subdivisions, or a person acting or purporting to act on behalf of that employee, shall not require a bidder or an offeror in a procurement for a construction contract pursuant to the Procurement Code [13-1-28 NMSA 1978] to make application or furnish financial data for a surety bond or to obtain a surety bond from a particular surety company, insurance company, broker or agent in connection with the bid or proposal.

B. A person who violates Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

History: Laws 2003, ch. 305, § 1.

Cross references. — For construction contract performance and payment bonds, see 13-4-18 NMSA 1978.

Effective dates. — Laws 2003, ch. 305 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

13-1-147. Bid security; rejection of bids.

A. When the invitation for bids requires bid security, noncompliance by the bidder requires that the bid be rejected.

B. If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security.

History: Laws 1984, ch. 65, § 120.

13-1-148. Bid and performance bonds; additional requirements.

A. Bid and performance bonds or other security may be required for contracts for items of tangible personal property or services as the state purchasing agent or a central purchasing office deems necessary to protect the interests of the state agency or a local public body. Any such bonding requirements shall not be used as a substitute for a determination of the responsibility of a bidder or offeror.

B. As to performance and payment bonds for construction contracts, see the requirements of Section 13-4-18 NMSA 1978.

History: Laws 1984, ch. 65, § 121; 1987, ch. 348, § 13.

13-1-148.1. Bonding of subcontractors.

A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is one hundred twenty-five thousand dollars (\$125,000) or more.

History: Laws 2005, ch. 99, § 1; 2007, ch. 265, § 1.

Cross references. — For the definition of a state public works project, see 13-1-91 NMSA 1978.

For the definition of a local public works project, see 13-1-66.1 NMSA 1978.

The 2007 amendment, effective July 1, 2007, increased the minimum contract amount from \$50,000 to \$125,000.

ANNOTATIONS

Applicability. — Section 13-1-148.1 NMSA 1978 applies only to a subcontractor that contracts directly with the primary contractor and only to subcontractor contracts that were executed after the effective date of Section 13-1-148.1 NMSA 1978. 2005 Op. Att'y Gen. No. 05-02.

13-1-149. Types of contracts.

Subject to the limitations of Sections 123 through 127 [13-1-150 to 13-1-154 NMSA 1978] of the Procurement Code, any type of contract, including but not limited to definite quantity contracts, indefinite quantity contracts and price agreements, which will promote the best interests of the state agency or a local public body may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited except for the purchase of insurance. A cost-reimbursement contract may be used when such contract is likely to be less costly or it is impracticable to otherwise obtain the services, construction or items of tangible personal property required.

History: Laws 1984, ch. 65, § 122.

Cross references. — For public works contracts, see Chapter 13, Article 4 NMSA 1978.

ANNOTATIONS

Option for exempt agencies or public bodies. — When the state purchasing agent has entered into a contract which permits, but does not require, those state agencies or local public bodies not under the supervision of the agent to purchase under the contract, the purchases may be made by submission to bids, purchasing under the state purchasing agent contract or purchasing from any other vendor, provided the price obtained, etc., is equal to or better than the terms of the contract. 1969 Op. Att'y Gen. No. 69-113.

When manner of delivery or charging immaterial. — Because it is the responsibility of the state purchasing agent to reduce, to the maximum extent possible, the number of purchase transactions by combining into bulk orders and contracts the requirements of all state agencies for common-use items or items repetitively purchased, the fact that it may be delivered in small quantities and charged as delivered through the use of credit cards seems immaterial. 1968 Op. Att'y Gen. No. 68-8.

13-1-150. Multi-term contracts; specified period.

A. A multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under twenty-five thousand dollars (\$25,000), may be entered into for any period of time deemed to be in the best interests of the state agency or a local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is twenty-five thousand dollars (\$25,000) or more, the term shall not exceed eight years, including all extensions and renewals, except that for a contract entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [6-23-1 NMSA 1978], the term shall not exceed twenty-five years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

B. A contract for professional services may not exceed four years, including all extensions and renewals, except for the following:

(1) services required to support or operate federally certified medicaid, financial assistance and child support enforcement management information or payment systems;

(2) services to design, develop or implement the taxation and revenue information management systems project authorized by Laws 1997, Chapter 125;

(3) a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement and other similar services, excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities, may be for the life of the securities or as long as the securities remain outstanding;

(4) services relating to the implementation, operation and administration of the Education Trust Act [21-21K-1 NMSA 1978]; and

(5) services relating to measurement and verification of conservation-related cost savings and utility cost savings pursuant to the Public Facility Energy Efficiency and Water Conservation Act.

History: Laws 1984, ch. 65, § 123; 1987, ch. 348, § 14; 1993, ch. 225, § 1; 1993, ch. 231, § 13; 1998, ch. 27, § 1; 2001, ch. 247, § 11; 2001, ch. 270, § 1; 2009, ch. 138, § 5.

The 2009 amendment, effective July 1, 2009, in Subsection A, in the second sentence, changed "ten" to "twenty-five" and added Paragraph (5) of Subsection B.

The 2001 amendment, effective June 15, 2001, added the subsection and paragraph designations; inserted the provision that a contract for professional service may not exceed four years, including all extension and renewals in Subsection B; deleted "may not exceed a term of four years, including all extensions and renewals" at the end of Paragraph B(2); and added Paragraph B(4). Laws 2001, ch. 247, § 11 also amended this section. The section was set out as amended by Laws 2001, ch. 270, § 1. See 12-1-8 NMSA 1978.

The 1998 amendment, effective May 20, 1998, inserted "and Water Conservation" in the second sentence; substituted "therefor" for "therefore" in the third sentence; and inserted the language beginning with "and except for services to design," in the fourth sentence.

The 1993 amendment, effective June 18, 1993, added the language beginning "except that for any such contract" at the end of the second sentence, and inserted the language beginning ", except for services required" and ending "or payment systems," in the fourth sentence. Laws 1993, ch. 225, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 1993, ch. 231, § 13. See 12-1-8 NMSA 1978.

ANNOTATIONS

Professional services contract with bond counsel or financial advisors may not exceed a term of four years, including all extensions and renewals. 1990 Op. Att'y Gen. No. 90-10.

13-1-151. Multi-term contracts; determination prior to use.

Prior to the utilization of a multi-term contract, the state purchasing agent or the central purchasing office involved shall make a determination that:

- A. the estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- B. the contract will serve the best interests of the state agency or a local public body.

History: Laws 1984, ch. 65, § 124.

13-1-152. Multi-term contracts; cancellation due to unavailability of funds.

When funds are not appropriated or otherwise made available to support continuation of performance of a multi-term contract in a subsequent fiscal period, the contract shall be cancelled.

History: Laws 1984, ch. 65, § 125.

13-1-153. Multiple source award; limitations on use.

A multiple source award may be made pursuant to Section 13-1-110 NMSA 1978 or Section 1 of this 2007 act when awards to two or more bidders or offerors are necessary for adequate delivery or service. Multiple source awards shall not be made when a single award will meet the

needs of the state agency or a local public body without sacrifice of economy or service. Awards shall be limited to the least number of suppliers in one geographical area necessary to meet the requirements of the state agency or a local public body. A multiple source award shall be based upon the lowest responsible bid or proposal received in each geographical area unless the award is made in response to a qualifications-based proposal.

History: Laws 1984, ch. 65, § 126; 2007, ch. 312, § 5.

The 2007 amendment, effective July 1, 2007, changed the statutory reference and provided that a multiple source award shall be based on the lowest bid or proposal unless the award is made in response to a qualifications-based proposal.

13-1-154. Multiple source award; determination required.

The state purchasing agent or central purchasing office shall make a determination setting forth the reasons for a multiple source award.

History: Laws 1984, ch. 65, § 127.

13-1-154.1. Multiple source contracts; architectural and design service contracts; indefinite quantity construction contracts.

A. A state agency may procure multiple architectural or engineering design service contracts for multiple projects under a single qualifications-based request for proposals, provided the total amount of a contract and all renewals does not exceed two hundred thousand dollars (\$200,000) over four years.

B. A state agency may procure multiple indefinite quantity construction contracts pursuant to a price agreement for multiple projects under a single request for proposals, provided the total amount of a contract and all renewals does not exceed two million dollars (\$2,000,000) over four years and the contract provides that any one purchase order under the contract may not exceed five hundred thousand dollars (\$500,000).

C. A state agency may make procurements in accordance with the provision of Subsection A or B of this section if:

- (1) the advertisement and request for proposals states that multiple contracts may or will be awarded, states the number of contracts that may or will be awarded and describes the services or construction to be performed under each contract;
- (2) there is a single selection process for all of the multiple contracts, except that for each contract there may be a separate final list and a separate negotiation of contract terms;
- (3) each of the multiple contracts for professional design services or construction shall have a term not exceeding four years, including all extensions and renewals;
- (4) a contract shall not be awarded pursuant to this section to a firm that is currently

performing under a contract issued pursuant to this section if the total amount of all contracts issued pursuant to this section to that firm would exceed:

(a) two hundred thousand dollars (\$200,000) in any four-year period, for architectural or engineering design services; or

(b) two million dollars (\$2,000,000) in any four-year period, for construction services; and

(5) the procurement is subject to the limitations of Sections 13-1-150 through 13-1-154 NMSA 1978.

History: Laws 2007, ch. 312, § 1.

Effective dates. — Laws 2007, ch. 312, § 6 made this section effective July 1, 2007.

13-1-155. Procurement of used items; appraisal required; county road equipment exception for auctions.

A. A central purchasing office, when procuring used items of tangible personal property the estimated cost of which exceeds five thousand dollars (\$5,000), shall request bids as though the items were new, adding specifications that permit used items under conditions to be outlined in the bid specifications, including but not limited to requiring a written warranty for at least ninety days after date of delivery and an independent "certificate of working order" by a qualified mechanic or appraiser.

B. Notwithstanding the provisions of Subsection A of this section, the purchasing office for a county may purchase, at public or private auctions conducted by established, recognized commercial auction companies, used heavy equipment, having an estimated cost that exceeds five thousand dollars (\$5,000), for use in construction and maintenance of county streets, roads and highways, subject to the following provisions:

(1) the commercial auction company shall have been in business for at least three years preceding the date of purchase and shall conduct at least five auctions annually;

(2) the value of each piece of equipment shall be appraised prior to the auction by a qualified disinterested appraiser retained and paid by the county, who shall make a written appraisal report stating the basis for the appraisal, including the age, condition and comparable sales, and stating that the appraiser has exercised his independent judgment without prior understanding or agreement with any person as to a target value or range of value;

(3) an independent "certificate of working condition" shall be obtained prior to the auction from a qualified mechanic who shall have made a detailed inspection of each major working or major functional part and certified the working condition of each; and

(4) the price paid, including all auction fees and buyer's surcharges, shall not exceed the appraised value.

History: Laws 1984, ch. 65, § 128; 1987, ch. 348, § 15; 1995, ch. 197, § 1.

The 1995 amendment, effective June 16, 1995, added "county road equipment exception for auctions" to the section heading, inserted the Subsection A designation, and added Subsection B.

13-1-156. Trade or exchange of used items; appraisal required.

A. A central purchasing office, when trading in or exchanging used items of tangible personal property the estimated value of which exceeds five thousand dollars (\$5,000) as part-payment on the procurement of new items of tangible personal property, shall:

(1) have an independent appraisal made of the items to be traded in or exchanged. The appraisal shall be in writing, shall be made part of the procurement file and shall be a public record. The invitation for bids or request for proposals shall contain notice to prospective bidders or offerors of the description and specifications of the items to be traded in or exchanged, the appraised value of the items to be traded in or exchanged and the location where the items to be traded in or exchanged may be inspected; or

(2) have two written quotes for purchase of the property at a specified price.

B. Award shall be based upon the net bid. Bidders or offerors shall compute their net bid or offer by deducting the appraised value or highest quote of the items to be traded in or exchanged from the gross bid or offer on the new items of tangible personal property to be procured. If an amount offered in trade is less than the appraised value or the highest quote but is found to be a fair reflection of the current market, representative of the condition of the items of tangible personal property and in the best interest of the agency, the bid or offer may be accepted. Documentation of the terms of acceptance shall be in writing, shall be made a part of the procurement file and shall be a public record.

History: Laws 1984, ch. 65, § 129; 1987, ch. 348, § 16.

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.

History: Laws 1984, ch. 65, § 130.

13-1-158. Payments for purchases.

A. 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 [13-1-28 NMSA 1978].

B. Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation for bids, request for 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.

C. Except as provided in Subsection D of this section, 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, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month. For purchases funded by state or federal grants to local public bodies, if the local public body has not received the funds from the federal or state funding agency, payments shall be tendered to the contractor within five working days of receipt of funds from that funding agency.

D. If the central purchasing office or the using agency finds that the services, construction or 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 services or construction completed or items of tangible personal property delivered on site, provide to the contractor a letter of exception explaining the defect or objection to the services, construction or delivered tangible personal property along with details of how the contractor may proceed to provide remedial action.

E. Late payment charges that differ from the provisions of Subsection C of this section may be assessed if specifically provided for by contract or pursuant to tariffs approved by the New Mexico public utility commission or the state corporation commission [public regulation commission].

History: Laws 1984, ch. 65, § 131; 1987, ch. 348, § 17; 1989, ch. 334, § 1; 1993, ch. 282, § 15; 1997, ch. 104, § 1; 1997, ch. 222, § 1.

Cross references. — For references to state corporation commission being construed as references to the public regulation commission, see 8-8-21 NMSA 1978.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

1997 amendments. — Identical amendments to this section were enacted by Laws 1997, ch. 104, § 1 and Laws 1997, ch. 222, § 1, which deleted "state" preceding "central purchasing office" and "state" preceding "using agency" throughout the section, deleted "by the state" following "received" in Subsection B, in Subsection C, added "Except as provided in Subsection D" and substituted "thirty" for "sixty" in the first sentence, added the second sentence, substituted "thirtieth" for "sixtieth" in the third sentence, and added the last sentence, and added Subsection D and redesignated former Subsection D as Subsection E. Laws 1997, chs. 104 and 222 contain no effective date provisions, but, pursuant to N.M. Const., art. IV, § 23, both acts are effective June 20, 1997, 90 days after adjournment of the legislature.

The 1993 amendment, effective June 18, 1993, inserted "unless" preceding "prepayment" in Subsection A; and in Subsection D, substituted "New Mexico public utility commission" for "New Mexico public service commission" and made a stylistic change.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of 28 USCS § 2516(a) to government contractor's claim for interest expense or for loss of use of its capital caused by delay attributable to government, 59 A.L.R. Fed. 905.

13-1-159. Right to inspect plant.

A contract or a solicitation therefor may include a provision permitting a state agency or a local public body, at reasonable times, to inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded.

History: Laws 1984, ch. 65, § 132.

13-1-160. Audit of cost or pricing data.

A state agency or a local public body may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data, to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which cost or pricing data is required shall maintain books and records that relate to such cost or pricing data for three years from the date of final payment under the contract unless a shorter period is otherwise authorized in writing.

History: Laws 1984, ch. 65, § 133.

13-1-161. Contract audit.

A state agency or a local public body shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract unless a shorter period is otherwise authorized in writing.

History: Laws 1984, ch. 65, § 134.

13-1-162. State procurement standards and specifications committee; terms; staff.

A. There is created a "state procurement standards and specifications committee." The state purchasing agent is a member and the chairman of the committee.

B. The committee consists of eleven members knowledgeable in procurement procedures, appointed by the secretary with the approval of the governor as follows:

- (1) one representative of the state highway department;
- (2) one representative of the health and environment department;
- (3) one representative of the corrections department;
- (4) one person who is an elected county official or is a full-time county employee;
- (5) one person who is an elected municipal official or is a full-time municipal employee;
- (6) one person who is an elected district school board member or is a full-time school employee;
- (7) two persons representing other state departments; and
- (8) two persons representing the private sector.

C. The terms of all committee members are limited to the term of the governor under whom they were appointed; provided, however, that the terms of the county, municipal and district school board members are further conditioned upon their continuing service with the local governing body which qualified their appointment.

D. The state purchasing agent shall provide the necessary staff for the committee.

History: Laws 1984, ch. 65, § 135.

Compiler's notes. — Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, referred to in this section, and enacted a new 9-7-4 NMSA 1978, which created the department of health. Laws 1991, ch. 25, § 4 created the department of environment.

See 9-7A-1 NMSA 1978 et seq.

13-1-163. Committee powers and duties; special committees; annual report.

A. The committee shall prepare standards, specifications and a list of acceptable brand-name items and shall seek the advice and assistance of state agencies and local public bodies to ascertain their common and special requirements.

B. The committee shall develop model specifications for all state agencies and local public bodies.

C. The committee shall assist the state purchasing agent in the preparation of rules and regulations.

D. The committee shall appoint special committees consisting of representatives of state departments, local public bodies and private industry, including technical consultants, for the study of any commodity or commodity group whenever such appointment is necessary or reasonable. The special committee shall automatically dissolve upon the completion of its specific task.

E. The committee and special committees may make use of the laboratories, engineering facilities and technical staff of any state department or agency, including educational institutions, in connection with the performance of their duties.

F. The state purchasing agent shall report annually to the secretary on the work done by the committee and its special committees during the calendar year. The report shall be made available to the legislature by delivering a copy to the legislative finance committee prior to the beginning of each annual legislative session.

G. No standard, specification, acceptable brand list, rule or regulation recommended by the committee shall be construed to alter the authority of any state agency or local public body.

History: Laws 1984, ch. 65, § 136.

13-1-164. Specifications; maximum practicable competition.

All specifications shall be drafted so as to ensure maximum practicable competition and fulfill the requirements of state agencies and local public bodies. In preparing specifications, if, in the opinion of the state purchasing agent or central purchasing office, a proposed component is of a nature that would restrict the number of responsible bidders or responsible offerors and thereby limit competition, if practicable, the state purchasing agent or central purchasing office shall draft the specifications without the component and procure the component by issuing a separate invitation for bids or request for proposals or by entering into a sole source procurement.

History: Laws 1984, ch. 65, § 137; 2007, ch. 345, § 2.

The 2007 amendment, effective June 15, 2007, provided that in preparing specifications, the state purchasing agent or central purchasing office shall not include any specific component that would limit competition.

13-1-165. Brand-name specification; use.

A brand-name specification may be used only when the state purchasing agent or a central purchasing office makes a determination that only the identified brand-name item or items will satisfy the needs of the state agency or a local public body.

History: Laws 1984, ch. 65, § 138.

13-1-166. Brand-name specification; competition.

The state purchasing agent or a central purchasing office shall seek to identify sources from which the designated brand-name items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 99 [13-1-126 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 139.

13-1-167. Brand-name or equal specification; required characteristics.

Unless the state purchasing agent or a central purchasing office makes a determination that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand-name or equal specifications shall include a description of the particular design, function or performance characteristics which are required.

History: Laws 1984, ch. 65, § 140.

13-1-168. Brand-name or equal specification; required language.

Where a brand-name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition.

History: Laws 1984, ch. 65, § 141.

13-1-169. Purchase request; specifications; purchase orders.

A. All using agency requests for procurement shall contain:

- (1) a statement of need and the general characteristics of the item, construction or

service desired; and

- (2) a statement of the quantity desired and a general statement of quality.

B. The central purchasing office may consolidate procurements and may contract for items of tangible personal property or services at a firm price at which the items or services needed during the year or portion of a year shall be purchased.

History: Laws 1984, ch. 65, § 142.

13-1-170. Uniform contract clauses.

A. A state agency, local public body or central purchasing office with the power to issue regulations may require by regulation that contracts include uniform clauses providing for termination of contracts, adjustments in prices, adjustments in time of performance or other contract provisions as appropriate, including but not limited to the following subjects:

- (1) the unilateral right of a state agency or a local public body to order in writing:
 - (a) changes in the work within the scope of the contract; and
 - (b) temporary stoppage of the work or the delay of performance;
- (2) variations occurring between estimated quantities of work in a contract and actual quantities;
- (3) liquidated damages;
- (4) permissible excuses for delay or nonperformance;
- (5) termination of the contract for default;
- (6) termination of the contract in whole or in part for the convenience of the state agency or a local public body;
- (7) assignment clauses providing for the assignment by the contractor to the state agency or a local public body of causes of action for violation of state or federal antitrust statutes;
- (8) identification of subcontractors by bidders in bids; and
- (9) uniform subcontract clauses in contracts.

B. A state agency, local public body or central purchasing office with the power to issue regulations shall require by regulation that contracts include a clause imposing late payment charges against the state agency or local public body in the amount and under the conditions stated in Section 13-1-158 NMSA 1978.

History: Laws 1984, ch. 65, § 143; 1997, ch. 104, § 2; 1997, ch. 222, § 2.

1997 amendments. — Identical amendments to this section were enacted by Laws 1997, ch. 104, § 2 and Laws 1997, ch. 222, § 2, which designated the introductory language as Subsection A, redesignated former Subsections A to I as Paragraphs A(1) to A(9), redesignated former Paragraphs A(1)

and A(2) as Subparagraphs A(1)(a) and A(1)(b), and added Subsection B. Laws 1997, chs. 104 and 222 contain no effective date provisions, but, pursuant to N.M. Const., art. IV, § 23, both acts are effective June 20, 1997, 90 days after adjournment of the legislature.

13-1-171. Price adjustments.

Adjustments in price shall be computed in one or more of the following ways as specified in the contract:

- A. by agreement on a fixed-price adjustment before commencement of performance or as soon thereafter as practicable;
- B. by unit prices specified in the contract or subsequently agreed upon by the parties;
- C. by the costs attributable to the events or conditions as specified in the contract or subsequently agreed upon by the parties;
- D. by a provision for both upward and downward revision of stated contract price upon the occurrence of specified contingencies if the contract is for commercial items sold in substantial quantities to the general public with prices based upon established catalogue or list prices in a form regularly maintained by the manufacturer or vendor and published or otherwise available for customer inspection. In the event of revision of the stated contract price, the contract file shall be promptly documented by the state purchasing agent or central purchasing office.
- E. in such other manner as the contracting parties may mutually agree; or
- F. in the absence of agreement by the parties, by a unilateral determination reasonably computed by the state agency or a local public body of the costs attributable to the events or conditions.

History: Laws 1984, ch. 65, § 144; 1987, ch. 348, § 18.

13-1-172. Right to protest.

Any bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest.

History: Laws 1984, ch. 65, § 145; 1987, ch. 348, § 19.

ANNOTATIONS

Appellate review of administrative protest. — A protest of the award of a contract for a campus electrical distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172),

who were given authority to resolve protests pursuant to § 13-1-174, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183, pursuant to the provisions of § 39-3-1.1. *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Adequate legal remedy. — The Procurement Code provides an adequate legal remedy to disappointed bidders by giving them the right to protest pursuant to § 13-1-172 and the statutory remedy of judicial review pursuant to § 13-1-183. *State ex rel. Educ. Assessments Sys., Inc. v. Coop. Educ. Servs. of N.M.*, 115 N.M. 196, 848 P.2d 1123 (Ct. App. 1993).

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

Triggering event. — It is clear from both this section and related regulations that the triggering event for the 15-day protest period is the knowledge of facts or occurrences giving rise to the protest during the entire procurement process, regardless of whether the protestant is protesting the solicitation, bid, or award process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

Knowledge. — This section does not limit knowledge of the facts to actual knowledge, but rather “knowledge” in this section can properly be construed as constructive as well as actual knowledge. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 83; 144 to 146.

Standing of disappointed bidder on public contract to seek damages under 42 U.S.C.S. § 1983 for public authorities' alleged violation of bidding procedures, 86 A.L.R. Fed. 904.

13-1-173. Procurements after protest.

In the event of a timely protest under Section 145 [13-1-172 NMSA 1978] of the Procurement Code, the state purchasing agent or a central purchasing office shall not proceed further with the procurement unless the state purchasing agent or a central purchasing office makes a determination that the award of the contract is necessary to protect substantial interests of the state agency or a local public body.

History: Laws 1984, ch. 65, § 146.

ANNOTATIONS

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

13-1-174. Authority to resolve protests.

The state purchasing agent, a central purchasing office or a designee of either shall have the authority to take any action reasonably necessary to resolve a protest of an aggrieved bidder or offeror. This authority shall be exercised in accordance with regulations promulgated by the secretary, a local public body or a central purchasing office which has the authority to issue regulations but shall not include the authority to award money damages or attorneys' fees.

History: Laws 1984, ch. 65, § 147; 1987, ch. 348, § 20.

ANNOTATIONS

Appellate review of administrative protest. — A protest of the award of a contract for a campus electrical distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172), who were given authority to resolve protests pursuant to § 13-1-174, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183, pursuant to the provisions of § 39-3-1.1. State ex rel. ENMU Regents v. Baca, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

13-1-175. Protest; determination.

The state purchasing agent, a central purchasing office or a designee of either shall promptly issue a determination relating to the protest. The determination shall:

- A. state the reasons for the action taken; and
- B. inform the protestant of the right to judicial review of the determination pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 148.

ANNOTATIONS

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534 (2003).

13-1-176. Protest; notice of determination.

A copy of the determination issued under Section 148 [13-1-175 NMSA 1978] of the Procurement Code shall immediately be mailed to the protestant and other bidders or offerors involved in the procurement.

History: Laws 1984, ch. 65, § 149.

13-1-177. Authority to debar or suspend.

The state purchasing agent or a central purchasing office, after reasonable notice to the business involved, shall have authority to recommend to the governing authority of a state agency or a local public body the suspension or debarment of a business for cause from consideration for award of contracts, other than contracts for professional services. The debarment shall not be for a period of more than three years, and a suspension shall not exceed three months. The authority to debar or suspend shall be exercised by the governing authority of a state agency or a local public body in accordance with regulations which shall provide for reasonable notice and a fair hearing prior to suspension or debarment.

History: Laws 1984, ch. 65, § 150.

13-1-178. Causes for debarment or suspension; time limit.

The causes for debarment or suspension occurring within three years of a procurement include but are not limited to the following:

A. conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

B. conviction of a bidder, offeror or contractor under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records or receiving stolen property;

C. conviction of a bidder, offeror or contractor under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation by a bidder, offeror or contractor of contract provisions, as set forth in this subsection, of a character which is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action:

(1) willful failure to perform in accordance with one or more contracts, provided that this failure has occurred within a reasonable time preceding the decision to impose debarment; or

(2) a history of failure to perform, or of unsatisfactory performance of, one or more contracts, provided that this failure or unsatisfactory performance has occurred within a

reasonable time preceding the decision to impose debarment and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

E. any other cause occurring within three years of a procurement which the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

F. for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code [13-1-28 NMSA 1978] within three years of a procurement.

History: Laws 1984, ch. 65, § 151.

13-1-179. Debarment or suspension; determination.

The governing authority of a state agency or a local public body shall issue a written determination to debar or suspend. The determination shall:

A. state the reasons for the action taken; and

B. inform the debarred or suspended business involved of its rights to judicial review pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 152.

13-1-180. Debarment or suspension; notice of determination.

A copy of the determination under Section 152 [13-1-179 NMSA 1978] of the Procurement Code shall immediately be mailed to the debarred or suspended business.

History: Laws 1984, ch. 65, § 153.

13-1-181. Remedies prior to execution of contract.

If prior to the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or proposed award of the proposed contract is in violation of law, then the solicitation or proposed award shall be canceled.

History: Laws 1984, ch. 65, § 154; 2002, ch. 62, § 1.

The 2002 amendment, effective May 15, 2002, substituted "execution of contract" for "award" in the section heading; and substituted "the execution of a valid, written contract by all parties and necessary approval authorities" for "award" near the beginning of the section.

13-1-182. Ratification or termination after execution of contract.

If after the execution of a valid, written contract by all parties and necessary approval

authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of the contract was in violation of law and if the business awarded the contract did not act fraudulently or in bad faith:

A. the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interests of a state agency or a local public body; or

B. the contract may be terminated, and the contractor shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

History: Laws 1984, ch. 65, § 155; 2002, ch. 62, § 2.

The 2002 amendment, effective May 15, 2002, substituted "execution of contract" for "award" in the section heading; substituted "the execution of a valid, written contract by all parties and necessary approval authorities" for "an award" near the beginning of the introductory language; and substituted "the contractor" for "the business awarded the contract" in Subsection B.

ANNOTATIONS

"Award of contract". — Selection of the top-ranked lease offeror through the notice of award is an "award of a contract" under this section. *Renaissance Office, LLC v. Gen. Servs. Dep't*, 2001-NMCA-066, 130 N.M. 723, 31 P.3d 381, cert denied, 130 N.M. 713, 30 P.3d 1147 (2001) (now see 2002 amendments to this section).

Revised determinations. — For the purposes of this section, when a court rules that a central purchasing office has erroneously determined that a contract award was lawful, the office shall be deemed to have entered a revised determination that the award was invalid, regardless of whether the court expressly orders the issuance of a new determination. *Hamilton Roofing Co. v. Carlsbad Mun. Sch. Bd. of Educ.*, 1997-NMCA-053, 123 N.M. 434, 941 P.2d 515.

13-1-183. Judicial review.

All actions authorized by the Procurement Code [13-1-28 NMSA] for judicial review of a determination shall be filed pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

History: Laws 1984, ch. 65, § 156; 1998, ch. 55, § 24; 1999, ch. 265, § 24.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1".

The 1998 amendment, effective September 1, 1998, rewrote this section to the extent that a detailed comparison is impracticable.

ANNOTATIONS

Administrative protest appealable. — A protest of the award of a contract for a campus electrical

distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172), who were given authority to resolve protests pursuant to § 13-1-174, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183, pursuant to the provisions of § 39-3-1.1. *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Judicial review standard. — Judicial relief is available to the disappointed bidder when a municipality acts in an arbitrary and capricious manner and violates the integrity of the Procurement Code. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Common law action. — Nothing in the Procurement Code [13-1-28 NMSA 1978] precludes an unsuccessful bidder from bringing a common-law action to challenge the acts of a third party whose protest results in the rejection of the bidder's bid. *Davis & Assocs., Inc. v. Midcon, Inc.*, 1999-NMCA-047, 127 N.M. 134, 978 P.2d 341.

Damages awarded to bidder. — Reliance damages compensate the bidder's interest in being reimbursed for loss caused by reliance on the contract. New Mexico, therefore, joins other jurisdictions that in similar situations have awarded to a disappointed bidder the expenses incurred in preparing and submitting a bid. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994).

Exclusivity of remedy. — The Procurement Code does not expressly or impliedly authorize any private right of action for disappointed offerors, since Section 13-1-183 provides an adequate legal remedy. *State ex rel. Educ. Assessments. Sys. v. Coop. Educ. Servs.*, 115 N.M. 196, 848 P.2d 1123 (1993).

Jurisdiction to review. — The court lacked jurisdiction to review a purported settlement agreement between a bidder and an incorporated electric cooperative since an incorporated electric cooperative is neither a state agency nor a local public body and the Procurement Code therefore does not apply to it. *Fratello v. Socorro Elec. Corp.*, 107 N.M. 378, 758 P.2d 792 (1988).

13-1-184. Assistance to small business; policy.

It shall be the policy of this state to encourage small businesses to do business with state agencies and local public bodies.

History: Laws 1984, ch. 65, § 157.

13-1-185. Assistance to small business; duties of the state purchasing agent.

A. The state purchasing agent shall issue publications designed to assist small businesses in learning how to do business with the state agencies and local public bodies.

B. The state purchasing agent shall compile, maintain and make available source lists of small businesses for the purpose of encouraging procurement by the state agencies and local public bodies from small businesses.

C. The state purchasing agent and central purchasing offices shall take all reasonable action to ensure that small businesses are solicited on each procurement for which they appear to be qualified.

D. The state purchasing agent shall develop training programs to assist small businesses in learning how to do business with the state agencies and local public bodies.

E. The state purchasing agent or a central purchasing office may make special provisions for progress payments as such office or officer may deem reasonably necessary to encourage procurement from small businesses in accordance with regulations promulgated by the secretary or a central purchasing office with authority to issue regulations.

History: Laws 1984, ch. 65, § 158.

Cross references. — For adoption of rules and regulations by secretary of general services department, see 9-17-5 NMSA 1978.

13-1-186. Assistance to small business; bid bonds; reduction.

The state purchasing agent or central purchasing office may reduce bid bond, performance bond or payment bond requirements authorized by the Procurement Code [13-1-28 NMSA 1978] to encourage procurement from small businesses.

History: Laws 1984, ch. 65, § 159.

13-1-187. Small business; report to the legislature.

The state purchasing agent shall annually, before January 1, report in writing to the legislature concerning the awarding of state contracts to small businesses during the preceding fiscal year.

History: Laws 1984, ch. 65, § 160.

13-1-188. Public acquisition of American-made motor vehicles required.

A state agency shall only acquire motor vehicles assembled in North America except for gas-electric hybrid vehicles until these vehicles are assembled in North America. For the purposes of this section, "motor vehicle" means a light duty vehicle under 8,500 pounds.

History: Laws 1984, ch. 65, § 161; 2002, ch. 32, § 1.

Cross references. — For acquisition of alternative fuel or gas-electric hybrid vehicles, see 13-1B-3 NMSA 1978.

The 2002 amendment, effective July 1, 2002, substituted "acquisition" for "purchases" in the section heading; and rewrote the section, which formerly read: "Any state agency shall only purchase cars and trucks assembled in North America".

13-1-189. Procurements pursuant to the Corrections Industries Act.

A. All state agencies shall purchase and all local public bodies may purchase items of tangible personal property and services offered pursuant to the provisions of the Corrections Industries Act [33-8-1 NMSA 1978].

B. The corrections industries commission shall prepare a catalogue containing an accurate and complete description of all items of tangible personal property and services available. A copy of the catalogue shall be provided to each state agency and local public body. The catalogue shall contain an approximate time required for delivery of each item of tangible personal property and service.

C. The state purchasing agent or a central purchasing office shall purchase available items of tangible personal property and services from the catalogue unless a determination is made that:

(1) an emergency exists requiring immediate action to procure the items of tangible personal property or service;

(2) the specifications for the items of tangible personal property or service, including quality, quantity and delivery requirements, cannot be met within a reasonable time by the corrections department; or

(3) the price to be paid to the corrections department for the items of tangible personal property or service is higher than the bid price of comparable items of tangible personal property or services.

History: Laws 1984, ch. 65, § 162; 1987, ch. 5, § 1.

Cross references. — For powers and duties of corrections industries commission, see 33-8-6 NMSA 1978.

13-1-190. Unlawful employee participation prohibited.

A. Except as permitted by the University Research Park and Economic Development Act [21-28-1 NMSA 1978] or the New Mexico Research Applications Act [53-7B-1 NMSA 1978], it is unlawful for any state agency or local public body employee, as defined in the Procurement Code [13-1-28 NMSA 1978], to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract.

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

History: Laws 1984, ch. 65, § 163; 1989, ch. 264, § 27; 2009, ch. 66, § 12.

The 2009 amendment, effective April 2, 2009, in Subsection A, added "and Economic Development Act" after "University Research Park" and added "or the New Mexico Research Applications Act".

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 25.
72 Supp. C.J.S. Public Contracts § 5.

13-1-191. Bribes; gratuities and kickbacks; contract reference required.

All contracts and solicitations therefor shall contain reference to the criminal laws prohibiting bribes, gratuities and kickbacks.

History: Laws 1984, ch. 65, § 164.

Cross references. — For bribery of public officer or public employee, see 30-24-1 NMSA 1978.

For demanding or receiving bribe by public officer or public employee, see 30-24-2 NMSA 1978.

For soliciting or receiving illegal kickback, see 30-41-1 to 30-41-3 NMSA 1978.

13-1-191.1. Campaign contribution disclosure and prohibition.

A. This section applies to prospective contractors with the state or a local public body.

B. A prospective contractor subject to this section shall disclose all campaign contributions given by the prospective contractor or a family member or representative of the prospective contractor to an applicable public official of the state or a local public body 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 of contributions given by the prospective contractor or a family member or representative of the prospective contractor to the public official exceeds two hundred fifty dollars (\$250) over the two-year period.

C. The disclosure shall indicate the date, the amount, the nature and the purpose of the contribution. The disclosure statement shall be on a form developed and made available electronically by the department of finance and administration to all state agencies and local public bodies. The state agency or local public body that procures the services or items of tangible personal property shall indicate on the form the name or names of every applicable public official, if any, for which disclosure is required by a prospective contractor for each competitive sealed proposal, sole source or small purchase contract. The form shall be filed with the state agency or local public body as part of the competitive sealed proposal, or in the case of a sole source or small purchase contract, on the date on which the contractor signs the contract.

D. A prospective contractor submitting a disclosure statement pursuant to this section who has not contributed to an applicable public official, whose family members have not contributed to an applicable public official or whose representatives have not contributed to an applicable

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

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

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

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

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

G. As used in this section:

(1) "applicable public official" means 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 award of the contract for which the prospective contractor is submitting a competitive sealed proposal or who has the authority to negotiate a sole source or small purchase contract that may be awarded without submission of a sealed competitive proposal;

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

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

(b) an owner of a prospective contractor;

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

(4) "prospective contractor" means a person or business that is subject to the competitive sealed proposal process set forth in the Procurement Code [13-1-28 NMSA 1978] or is not required to submit a competitive sealed proposal because that person or business qualifies for a sole source or small purchase contract; and

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

History: Laws 2006, ch. 81, § 1; 2007, ch. 234, § 2.

The 2007 amendment, effective July 1, 2007, amended Subsection C to require a state agency or local public body to indicate the applicable public officials for which disclosure of campaign contributions by prospective contractors is required for competitive sealed proposals, sole source or small purchase

contracts and added Subparagraphs (a) and (b) of Paragraph (2) of Subsection G.

13-1-192. Contingent fees prohibited.

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

History: Laws 1984, ch. 65, § 165.

13-1-193. Contemporaneous employment prohibited.

It is unlawful for any state agency or local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.

History: Laws 1984, ch. 65, § 166.

13-1-194. Waivers from contemporaneous employment and unlawful employee participation permitted.

A state agency or a local public body may grant a waiver from unlawful employee participation pursuant to Section 163 [13-1-190 NMSA 1978] of the Procurement Code, or contemporaneous employment pursuant to Section 166 [13-1-193 NMSA 1978] of the Procurement Code, upon making a determination that:

- A. the contemporaneous employment or financial interest of the employee has been publicly disclosed;
- B. the employee will be able to perform his procurement functions without actual or apparent bias or favoritism; and
- C. the employee participation is in the best interests of the state agency or a local public body.

History: Laws 1984, ch. 65, § 167.

13-1-195. Use of confidential information prohibited.

It is unlawful for any state agency or local public body employee or former employee knowingly to use confidential information for actual or anticipated personal gain or for the actual

or anticipated personal gain of any other person.

History: Laws 1984, ch. 65, § 168.

13-1-196. Civil penalty.

Any person, firm or corporation that knowingly violates any provision of the Procurement Code [13-1-28 NMSA 1978] is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement in violation of any provision of the Procurement Code. The attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of any provision of the Procurement Code. Any penalty collected under the provisions of this section shall be credited to the general fund of the political subdivision in which the violation occurred and on whose behalf the suit was brought.

History: Laws 1984, ch. 65, § 169.

13-1-197. Recovery of value transferred or received; additional civil penalty.

An amount equal to the value of anything transferred or received in violation of the provisions of the Procurement Code [13-1-28 NMSA 1978] by a transferor and transferee may be imposed as a civil penalty upon both the transferor and transferee. The civil penalty provided for in this section is imposed in addition but pursuant to the terms and conditions of Section 169 [13-1-196 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 170.

13-1-198. Kickbacks; additional civil penalty.

Upon a showing that a subcontractor made a kickback to a prime contractor or a higher-tier subcontractor in connection with the award of a subcontract or order thereunder, it is conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the state agency or a local public body. An amount equal to the kickback is imposed as a civil penalty by the state agency or a local public body upon the recipient and upon the subcontractor making such kickbacks in addition but pursuant to the terms and conditions of Section 169 [13-1-196 NMSA 1978] of the Procurement Code.

History: Laws 1984, ch. 65, § 171.

Cross references. — For soliciting or receiving illegal kickbacks, bribes or rebates, see Chapter 30, Article 41 NMSA 1978.

13-1-199. Misdemeanor.

Any business or person which violates the Procurement Code [13-1-28 NMSA 1978] is

guilty of a misdemeanor.

History: Laws 1984, ch. 65, § 172.

Cross references. — For sentencing for misdemeanors, see 31-19-1 NMSA 1978.
