CHAPTER 13
Public Purchases and Property

ARTICLE 1
Procurement

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 Repealed.

ANNOTATIONS

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 — Laws 1984, ch. 65, § 175, repealed 13-1-1 to 13-1-20 NMSA 1978, relating to public purchases, effective November 1, 1984.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

(3) "formal request for proposals process" means a competitive proposal process, including a competitive qualifications-based proposal process;

(4) "Native American resident business" means a business that has a valid Native American resident business certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978 but does not include a Native American resident veteran business;

(5) "Native American resident veteran business" means a business that has a valid Native American resident veteran business certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978;

(6) "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;

(7) "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;

(8) "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 but does not include a resident veteran business; and

(9) "resident veteran business" means a business that has a valid resident veteran business certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978.

B. Except as provided in Subsection C of this section, when a public body makes a purchase using a formal bid process, the public body shall deem a bid submitted by a:

(1) resident business or Native American resident business to be eight percent lower than the bid actually submitted; or

(2) resident veteran business or Native American resident veteran business with annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year to be ten percent lower than the bid actually submitted.

C. When a public body makes a purchase using a formal bid process and the bids are received for both recycled content goods and nonrecycled content goods, the public body shall deem:

(1) bids submitted for recycled content goods from any business, except a resident veteran business or Native American resident veteran business, to be eight percent lower than the bids actually submitted; or

(2) bids submitted for recycled content goods from a resident veteran business or Native American resident veteran business with annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year to be ten percent lower than the bids actually submitted.

D. When a public body makes a purchase using a formal request for proposals process, not including contracts awarded on a point-based system, the public body shall award an additional:

(1) eight percent of the total weight of all the factors used in evaluating the proposals to a resident business or Native American resident business; and

(2) ten percent of the total weight of all the factors used in evaluating the proposals to a resident veteran business or Native American resident veteran business that has annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year.

E. When a public body makes a purchase using a formal request for proposals process, and the contract is awarded based on a point-based system, the public body shall award additional points equivalent to:

(1) eight percent of the total possible points to a resident business or Native American resident business; or

(2) ten percent of the total possible points to a resident veteran business or Native American resident veteran business that has annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year.

F. When a joint bid or joint proposal is submitted by a combination of resident veteran, Native American resident veteran, resident, Native American resident or nonresident businesses, the preference provided pursuant to Subsection B, C, D or E of this section shall be calculated 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 each business as specified in the joint bid or proposal.

G. A person shall not benefit from the provisions of this section based on more than one business concurrently.

H. A public body shall not award a business both a resident business preference and a resident veteran business preference or a Native American resident business preference and a Native American resident veteran business preference.

I. 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.

J. 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; 2012, ch. 56, § 1; 2012, ch. 56, § 2; 2016, ch. 5, § 1; 2022, ch. 6, § 1.

ANNOTATIONS

Repeals. — Laws 2016, ch. 5, § 4, effective July 1, 2016, repealed Laws 2012, ch. 56, § 2, which was to become effective July 1, 2022. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

The 2022 amendment, effective July 1, 2022, defined "Native American resident business" and Native American resident veteran business" for purposes of this section, increased the preference for New Mexico resident businesses, increased the maximum

allowable gross revenue for resident veteran businesses to qualify for certain preferences, amended existing provisions giving a preference to resident businesses and resident veteran businesses to include Native American resident businesses and Native American resident veteran businesses, and removed a provision that prohibited a business from claiming a preference for more than ten consecutive years; in Subsection A, added new Paragraphs A(4) and A(5) and redesignated former Paragraphs A(4) through A(7) as Paragraphs A(6) through A(9), respectively; in Subsection B, Paragraph B(1), after "resident business", added "or Native American resident business", after "to be", deleted "five" and added "eight", and in Paragraph B(2), after "resident veteran business", added "or Native American resident veteran business", after "gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection C, Paragraph C(1), after "resident veteran business", added "or Native American resident veteran business", and after "to be", deleted "five" and added "eight", and in Paragraph C(2), after "resident veteran business", added "or Native American resident veteran business", after "gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection D, Paragraph D(1), deleted "five" and added "eight", and after "resident business", added "or Native American resident business", and in Paragraph D(2), after "resident veteran business", added "or Native American resident veteran business", and after "gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection E, Paragraph E(1), deleted "five" and added "eight", and after "resident business", added "or Native American resident business", and in Paragraph E(2), after "resident veteran business", added "or Native American resident veteran business", and after "gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection F, after "resident veteran", added "Native American resident veteran", and after the next occurrence of "resident", added "Native American resident"; in Subsection G, deleted "A resident veteran business shall not benefit from the preference pursuant to this section for more than ten consecutive years. A person that is an owner of a business that is a resident veteran business shall not benefit from the preference pursuant to this section for more than ten consecutive years"; and in Subsection H, after "resident veteran business preference", added "or a Native American resident business preference and a Native American resident veteran business preference".

The 2016 amendment, effective July 1, 2016, reduced the maximum revenue that a resident veteran business can earn to receive the veteran business preference, merged the former tiered preferences into one ten percent preference, set a ten consecutive year maximum time for a vendor to use the resident veteran preference, and limited the benefit to one business concurrently; in Subsection A, Paragraph (3), after each occurrence of "competitive", deleted "sealed"; in Subsection B, Paragraph (1), after the semicolon, added "or", in Paragraph (2), after "annual", added "gross", after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4) which provided for a tiered veteran business preference; in Subsection C, Paragraph (1), after the semicolon, added "or", in Paragraph (2), after "annual", added "gross", and

after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4) which provided for a tiered veteran business preference; in Subsection D, Paragraph (1), after "business", added "and", in Paragraph (2), after "annual", added "gross", and after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4) which provided for a tiered veteran business preference; in Subsection E, in the introductory sentence, after "award", deleted "an", after "additional", deleted "of the" and added "points", and after "equivalent", deleted "of" and added "to", in Paragraph (1), after the semicolon, added "or", in Paragraph (2), after "annual", added "gross", and after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4), which provided for a tiered veteran business preference; deleted former Subsection G, which limited the former tiered veteran business preferences to an aggregate of ten million dollars ($10,000,000) in purchases by public bodies from all resident veteran businesses receiving preferences; and added a new Subsection G.

The 2012 amendment, effective July 1, 2012, alphabetized terms; gave resident veteran businesses a preference; limited the preference in any calendar year to an aggregate of ten million dollars in purchases by public bodies from all resident veteran businesses receiving preferences; in Subsection A, added Paragraph (5) and deleted former Paragraph (6) to alphabetize the definition of "recycled content goods", in Paragraph (6), after "Section 13-1-22 NMSA 1978", added the remainder of the sentence, and added Paragraph (7); in Subsection B, in the introductory sentence, added "Except as provided in Subsection C of this section", and added Paragraphs (3) through (4); added Subsection C; in Subsection D, after "request for proposals process", added the remainder of the sentence, in Paragraph (1), after "evaluating the proposals", deleted "shall be awarded" and after "resident business", deleted "based on the resident business possessing a valid resident business certificate; or", and added Paragraphs (2) through (4); in Subsection E, in the introductory sentence, added "When a public body makes a purchase using a formal request for proposals process" and after "point-based system", added the remainder of the sentence, in Paragraph (1), at the beginning of the sentence, deleted "a resident business shall be awarded the equivalent of", after "total possible points to", deleted "be awarded based on the" and added "a", and after "resident business", deleted "possessing a valid resident business certificate", and added Paragraphs (2) through (4); in Subsection F, after "proposal is submitted by", deleted "both resident and" and added "a combination of resident veteran, resident or", after "nonresident businesses, the", deleted "resident business", after "Subsection B, C", added "D or E", after "this section shall be", deleted "reduced" and added "calculated", and after "will be performed by", deleted "a nonresident" and added "each"; deleted former Subsection E, which provided a five percent preference for recycled content goods of equal quality when bids were received for the recycled content goods and nonrecycled content goods; and added Subsections G and H.

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.

The 1997 amendment, January 24, 1997, in Subsection A, inserted "a New Mexico resident business or a New York state business enterprise;" in Paragraph (1); designated 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).

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.

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.

A local vendor preference not disclosed in a request for proposals violates the Procurement Code. — The Procurement Code requires a government agency to give a preference to a resident business, 13-1-21(D) NMSA 1978, but if a public body, during a request for proposals process, awards a contract to a lower-ranked offeror based on a local vendor preference that was not disclosed in the request for proposals, the decision would violate the Procurement Code, because in evaluating responsive proposals, a public body is required to apply the factors listed in the request for proposals and no others. 2020 Op. Ethics Comm'n No. 2020-04.

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.

ANNOTATIONS

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.

History: Laws 1997, ch. 1, § 1 and Laws 1997, ch. 2, § 1; repealed by Laws 2011 (1st S.S.), ch. 3, § 8.

ANNOTATIONS

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 *NMOneSource.com.*

13-1-22. Resident business and resident contractor certification; Native American resident business and Native American resident contractor certificates; resident veteran business and resident veteran contractor certificates.

A. To receive a resident business, Native American resident business, resident veteran business or Native American resident veteran business preference pursuant to Section 13-1-21 NMSA 1978 or a resident contractor, Native American resident contractor, resident veteran contractor or Native American resident veteran 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, Native American resident business, resident veteran business or Native American resident veteran business certificate or valid resident contractor, Native American resident contractor, resident veteran contractor or Native American resident veteran 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 veteran business certificate shall include the affidavit required by Subsection B of this section and:

(1) verification by the United States department of veterans affairs as being either a veteran-owned small business or a service-disabled veteran-owned small business; or

(2) verification of veteran status as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the United States department of veterans affairs and proof that a veteran or veterans own a majority of the business.

D. 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.

E. An application for a resident veteran contractor certificate shall include the affidavit required by Subsection D of this section and:

(1) verification by the United States department of veterans affairs as being either a veteran-owned small business or a service-disabled veteran-owned small business; or

(2) verification of veteran status as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the United States department of veterans affairs and proof that a veteran or veterans own a majority of the business.

F. An application for a Native American resident business certificate or a Native American resident contractor certificate shall include an affidavit from a notary public setting forth that the business is:

(1) operating on lands located on an Indian nation, tribe or pueblo located in whole or in part on land within New Mexico; and

(2) at least fifty-one percent owned by an Indian nation, tribe or pueblo located in whole or in part on land within New Mexico; provided that:

(a) the Indian nation, tribe or pueblo receives at least a majority of the net income from the business; and

(b) the management and daily operation of the business are controlled by one or more individuals who are members of a New Mexico Indian nation, tribe or pueblo; or

(3) at least fifty-one percent owned by one or more New Mexico residents who are members of a federally recognized Indian nation, tribe or pueblo located in whole or in part on land within New Mexico and that is established for the purpose of profit; provided that:

(a) the Native American owners receive at least a majority of the net income from the business; and

(b) the management and daily operation of the business are controlled by one or more individuals who are members of a New Mexico Indian nation, tribe or pueblo.

G. An application for a Native American resident veteran business certificate or a Native American resident veteran contractor certificate shall include the affidavit required by Subsection F of this section and, if the business is not owned by an Indian nation, tribe or pueblo:

(1) verification by the United States department of veterans affairs that the business is either a veteran-owned small business or a service-disabled veteran-owned small business;

(2) verification of veteran status of a majority of the owners of the business as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the United States department of veterans affairs; or

(3) verification of veteran status of the contractor as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the United States department of veterans affairs.

H. 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.

I. 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.

J. If, following a hearing and an opportunity to be heard, the administrative hearings office 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.

K. In a decision issued pursuant to Subsection I or J of this section, the taxation and revenue department or the administrative hearings office 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.

L. 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.

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

N. 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; 2012, ch. 56, § 3; repealed and reenacted by Laws 2012, ch. 56, § 4; 2015, ch. 73, § 24; 2015, ch. 73, § 25; 2022, ch. 6, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 2012, ch. 56, § 4 repealed former 13-1-22 NMSA 1978 and enacted a new section, effective July 1, 2022.

The 2022 amendment, effective July 1, 2022, amended existing provisions that provided for resident business and resident contractor certification to include Native American resident businesses and resident veteran businesses, and provided the necessary contents of an application for a resident veteran business certificate, a resident veteran contractor certificate, a Native American resident business certificate or Native American resident contractor certificate, and a Native American resident veteran business certificate or a Native American resident veteran contractor certificate; in the section heading, added "Native American resident business and Native American resident contractor certificates; resident veteran business and resident veteran contractor certificates"; in Subsection A, after the first occurrence of "resident business", added "Native American resident business, resident veteran business or Native American resident veteran business", after "resident contractor", added "Native American resident contractor, resident veteran contractor or Native American resident veteran contractor", after "valid resident business", added "Native American resident

business, resident veteran business or Native American resident veteran business", and after "valid resident contractor", added "Native American resident contractor, resident veteran contractor or Native American resident veteran contractor"; added A new Subsection C and redesignated former Subsection C as Subsection D; added new Subsections E through G and redesignated former Subsections D through J as Subsections H through N, respectively; and in Subsection K, after "Subsection", deleted "E or F" and added "I or J".

The second 2015 amendment, effective July 1, 2015, provided that a business or contractor is ineligible to receive a certificate of preference and is subject to administrative penalties if the administrative hearings office makes a finding that the business or contractor provided false information to the taxation and revenue department or did not perform as specified in a bid or proposal; in the introductory paragraph of Subsection F, after "opportunity to be heard, the", deleted "taxation and revenue department" and added "administrative hearings office"; and in Subsection G, after "taxation and revenue department", added "or the administrative hearings office".

The first 2015 amendment, effective July 1, 2015, provided that a business or contractor is ineligible to receive a certificate of preference and is subject to administrative penalties if the administrative hearings office makes a finding that the business or contractor provided false information to the taxation and revenue department or did not perform as specified in a bid or proposal; in the introductory paragraph of Subsection H, after "opportunity to be heard, the", deleted "taxation and revenue department" and added "administrative hearings office"; and in Subsection I, after "taxation and revenue department", added "or administrative hearings office".

The 2012 amendment, effective July 1, 2012, provided for certification of resident veteran businesses and resident veteran contractors; in the title, after "Resident business", deleted "and" and added "resident veteran business" and after "resident contractor", added "and resident veteran contractor"; in Subsection A, after "resident business", added "or resident veteran business", after "resident contractor", added "or resident veteran contractor", after "resident business certificate", added "valid resident veteran business certificate", and after "resident contractor certificate", added "or valid resident veteran contractor certificate"; added Subsections C and E; in Subsection F, in the first sentence, after "content of an application", added "for certification" and in the sixth sentence, after "resident business", added "resident veteran business" and after "resident contractor", added "or resident veteran contractor"; in Subsection H, after "obtain a resident business", deleted "or" and added "resident veteran business", after "resident veteran business, resident contractor", added "or resident veteran contractor", after "and the resident business", deleted "or" and added "resident veteran business, resident", and after "resident veteran business, resident contractor", added "or resident veteran contractor"; and in Subsection I, after "Subsection", deleted "E or F" and added "G or H".

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 contactor; 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.

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

ANNOTATIONS

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.

ANNOTATIONS

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 [repealed] 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.

ANNOTATIONS

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

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.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Licensed contractors only. — Reading the Procurement Code 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 expand 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.

ANNOTATIONS

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".

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.*, 1988-NMSC-058, 107 N.M. 378, 758 P.2d 792.

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. *State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

The Procurement Code applies to contingent-fee contracts for legal services. — The proper procedure for expending public funds when a state agency recovers money from a court judgment or settlement, according to Ch. 6, Art. 10 NMSA 1978, generally requires that the recovered money, which belongs to the state agency, should be paid into the state treasury, and any payments of the lawyers' fees from public money should be made pursuant to legislative appropriation and further made upon warrants drawn by the secretary of the department of finance and administration upon the state treasury, but assuming that the state agency or local public body has the constitutional or statutory authority to enter into contingency-fee contracts for legal services, the Procurement Code applies to such agreements, because at the conclusion of a contingent-fee matter, when a lawyer withdraws their fee and any costs from the fund that the lawyer recovers for a state agency or a local public body, the government body makes an "expenditure" for legal services under 13-1-30(A) NMSA 1978, and the

Procurement Code applies to every expenditure by state agencies and local public bodies for the procurement of tangible personal property, services, and construction. The application of the Procurement Code to a state agency's or local public body's selection of a contractor providing legal services necessarily includes the Procurement Code's central rule that government contracts be awarded following a competitive, sealed process and also includes several specific safeguards that are designed to deter conflicts of interest, undue influence, *quid pro quo* conduct, and the appearance thereof. 2023 Op. Ethics Comm'n No. 2023-07.

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.

The Procurement Code does not prohibit a business significantly owned by a legislator from applying for and receiving federal CARES relief funds. — The Procurement Code does not prohibit a business significantly owned by a legislator from applying for and receiving federal Coronavirus Aid, Relief, and Economic Security Act (CARES) relief funds, because CARES relief grants do not result in the acquisition of tangible personal property, services or construction. Accordingly, the Procurement Code does not apply to the application for CARES relief grants by a business in which the legislator has an interest. 2021 Op. Ethics Comm'n No. 2021-03.

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 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.

13-1-30.1. Standardized classification codes; applicability.

Each state agency and local public body shall use the standardized classification codes developed by the state purchasing agent.

History: Laws 2015, ch. 138, § 2.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 138, § 3 made Laws 2015, ch. 138, § 2 effective July 1, 2016.

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 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.

History: Laws 1984, ch. 65, § 10; 2013, ch. 70, § 2.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, removed the state purchasing officer from the central purchasing office; in the first sentence, after "that office", deleted "or officer" and in the second sentence, after "services department", deleted "and the state purchasing agent".

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.

13-1-38.1. Definition; chief procurement officer.

"Chief procurement officer" means that person within a state agency's or local public body's central purchasing office who is responsible for the control of procurement of items of tangible personal property, services or construction. "Chief procurement officer" includes the state purchasing agent.

History: Laws 2013, ch. 70, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 70, § 8 made Laws 2013, ch. 70, § 1 effective July 1, 2013.

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.

ANNOTATIONS

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

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

Formation of contract. — A contract was not formed when the Human Services Department [health care authority 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.

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

13-1-56.1. Recompiled.

History: Laws 2013, ch. 149, § 1.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 149, § 1 was erroneously compiled as 13-1-56.1 NMSA 1978 and has been recompiled as 13-1-156.1 NMSA 1978 by the compiler.

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.

13-1-63.1. Definition; instructional materials.

"Instructional materials" means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary materials and electronic media.

History: 1978 Comp., § 13-1-63.1, enacted by Laws 2023, ch. 149, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 149 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

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.

ANNOTATIONS

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.

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

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

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*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

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.

13-1-70.1. Definition; person.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or other legal or commercial entity.

History: Laws 2013, ch. 41, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 41 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

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.

ANNOTATIONS

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.

ANNOTATIONS

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*, 1980-NMSC-086, 95 N.M. 62, 618 P.2d 1226.

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*, 1980-NMSC-086, 95 N.M. 62, 618 P.2d 1226.

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.

ANNOTATIONS

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

13-1-86.1. Duty to promulgate rules.

The secretary of general services shall promulgate rules necessary to implement the provisions of this 2016 act.

History: Laws 2016, ch. 5, § 3.

ANNOTATIONS

Effective dates. — Laws 2016, ch. 5, § 5 made Laws 2016, ch. 5, § 3 effective July 1, 2016.

Compiler's notes. — The phrase "this 2016 act" refers to Laws 2016, ch. 5.

Cross references. — For additional duties of the 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.

ANNOTATIONS

2007 Multiple Amendments. — Laws 2007, ch. 312, § 4 and Laws 2007, ch. 315, § 2 enacted different amendments to this section. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 315, § 2, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2007, ch. 312, § 4 and Laws 2007, ch. 315, § 2 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

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, effective July 1, 2007, increased the minimum cost of professional services to $50,000.

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 director 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 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 rules 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;

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

(8) develop standardized classification codes for each expenditure by state agencies and local public bodies.

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. The state purchasing agent may procure a price agreement for services, construction or items of tangible personal property for a state agency or local public body that does not have a chief procurement officer.

History: Laws 1984, ch. 65, § 68; 2013, ch. 70, § 4; 2015, ch. 138, § 1.

ANNOTATIONS

The 2015 amendment, effective June 19, 2015, required the state purchasing agent to develop standardized classification codes for each expenditure by state agencies and local public bodies; in Paragraph (6) of Subsection D, after "information", deleted "and"; in Paragraph (7) of Subsection D, after "property;" added "and"; and added Paragraph (8) of Subsection D.

The 2013 amendment, effective July 1, 2013, authorized the state purchasing agent to procure price agreements for governmental entities that do not have a chief

procurement officer; in Subsection B, in the first sentence, after "administrator", deleted "chief executive" and added "director"; in Paragraph (1) of Subsection D, after "procurement", deleted "regulations" and added "rules"; and in Subsection E, added the last sentence.

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.

ANNOTATIONS

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.

13-1-95.2. Chief procurement officers; reporting requirement; training; certification.

A. On or before January 1 of each year beginning in 2014, and every time a chief procurement officer is hired, each state agency and local public body shall provide to the state purchasing agent the name of the state agency's or local public body's chief procurement officer and information identifying the state agency's or local public body's central purchasing office, if applicable.

B. The state purchasing agent shall maintain a list of the names of the chief procurement officers reported to the state purchasing agent by state agencies and local public bodies. The state purchasing agent shall make the list of chief procurement officers available to the public through the web site of the purchasing division of the general services department and in any other appropriate form.

C. The state purchasing agent shall offer a certification training program for chief procurement officers each year.

D. On or before January 1, 2015, the state purchasing agent shall establish a certification program for chief procurement officers that includes initial certification and recertification every two years for all chief procurement officers. In order to be

recertified, a chief procurement officer shall pass a recertification examination approved by the secretary of general services.

E. On and after July 1, 2015, only certified chief procurement officers may do the following, except that persons using procurement cards may continue to issue purchase orders and authorize small purchases:

(1) make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;

(2) issue purchase orders and authorize small purchases pursuant to the Procurement Code; and

(3) approve procurement pursuant to the Procurement Code.

History: Laws 2013, ch. 70, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 70, § 8 made Laws 2013, ch. 70, § 3 effective July 1, 2013.

13-1-95.3. State agency; reporting required; in-state and out-of-state contracts.

All state agencies shall report annually to the purchasing division of the general services department information on the amount of state agency contracts awarded to in-state contractors and the amount awarded to out-of-state contractors.

History: Laws 2019, ch. 153, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 153, § 7 made Laws 2019, ch. 153, § 1 effective July 1, 2019.

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, the chief procurement officer 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. Local public bodies shall identify their designated central purchasing office to the state purchasing agent and shall report their chief procurement officers to the state purchasing agent.

History: Laws 1984, ch. 65, § 70; 2013, ch. 70, § 5.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, permitted the chief procurement officers to act for state agencies that are excluded from the requirement of procurement through the state purchasing agent; required local public bodies to identify their central purchasing office and report their chief procurement officer to the state purchasing agent; in Subsection B, after "central purchasing office", deleted "designate by statute, the governing authority of that state agency" and added "the chief procurement officer"; and in Subsection C, added the last sentence.

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.

History: Laws 2009, ch. 107, § 1; repealed by Laws 2012, ch. 52, § 1.

ANNOTATIONS

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 *NMOneSource.com.*

13-1-97.2. Competitive sealed bids and proposals; record maintenance.

A central purchasing office shall maintain, for a minimum of three years, all records relating to the award of a contract through a competitive sealed bid or competitive sealed proposal process.

History: Laws 2013, ch. 40, § 7.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 40 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

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

The provisions of the Procurement Code shall not apply to:

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, periodicals, instructional materials and training materials in printed, digital or electronic format from the publishers, designated public-education-department-approved instructional material depositories or copyright holders thereof and purchases of print, digital or electronic format library materials by public, school and state libraries for access by the public;

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. purchases not exceeding ten thousand dollars ($10,000) consisting of magazine subscriptions, web-based or electronic subscriptions, conference registration fees and other similar purchases where prepayments are required;

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 legal subscription and research services and 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 [Chapter 4, Article 48B NMSA 1978] or operation and maintenance of a hospital pursuant to the Special Hospital District Act [Chapter 4, Article 48A 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, publishing and distribution 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 to 13-1C-7 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 [Chapter 10, Article 11 NMSA 1978];

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

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 of 1984 and the federal Violence Against Women Act of 1994;

FF.procurement by or through the early childhood education and care department of early pre-kindergarten and pre-kindergarten services purchased pursuant to the Pre-Kindergarten Act [Chapter 32A, Article 23 NMSA 1978];

GG. procurement of services of commissioned advertising sales representatives for New Mexico magazine;

HH. contracts entered into by the forestry division of the energy, minerals and natural resources department to distribute federal grants to nongovernmental entities and individuals selected through an application process conducted by the United States department of agriculture, the United States department of the interior or any division or bureau thereof for programs for wildfire prevention or protection, urban forestry, forest and watershed restoration and protection, reforestation or economic development projects to advance the use of trees and wood biomass for hazardous fuel reduction; and

II. procurements exempt from the Procurement Code as otherwise provided by law.

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; 2013, ch. 40, § 1; 2013, ch. 70, § 6; 2013, ch. 71, § 1; 2015, ch. 32, § 1; 2019, ch. 48, § 13; 2019, ch. 63, § 1; 2023, ch. 149, § 2; 2023, ch. 174, § 1.

ANNOTATIONS

2023 Multiple Amendments. — Laws 2023, ch. 149, § 2 and Laws 2023, ch. 174, § 1, both effective June 16, 2023, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2023, ch. 174, § 1 as the last act signed by the governor is set out above and incorporates both amendments. The amendments enacted by Laws 2023, ch. 149, § 2 and Laws 2023, ch. 174, § 1 are described below. To view the session laws in their entirety, *see* the 2023 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2023, ch. 149, § 2, provided exemptions from the Procurement Code for certain purchases of instructional materials, and Laws 2023, ch. 174, § 1, provided exemptions from the Procurement Code for contracts entered into by the forestry division of the energy, minerals and natural resources department to distribute federal grants to nongovernmental entities and individuals selected by the federal government for programs related to forestry.

Laws 2023, ch. 174, § 1, effective June 16, 2023, provided exemptions from the Procurement Code for contracts entered into by the forestry division of the energy, minerals and natural resources department to distribute federal grants to nongovernmental entities and individuals selected by the federal government for programs related to forestry; and added a new Subsection HH and redesignated former Subsection HH as Subsection II.

Laws 2023, ch. 149, § 2, effective June 16, 2023, provided exemptions from the Procurement Code for certain purchases of instructional materials; and in Subsection E, after "periodicals,", added "instructional materials", after "materials in printed", added "digital", and after "publishers", added "designated public-education-department-approved instructional material depositories".

2019 Amendments. — Laws 2019, ch. 48, § 13, effective July 1, 2020, provided an exemption from the Procurement Code for purchases by or through the early childhood education care department of early pre-kindergarten services pursuant to the Pre-Kindergarten Act; and in Subsection FF, after "procurement by or through the", deleted "children, youth and families" and added "early childhood education and care", and after "department of", added "early pre-kindergarten and".

Laws 2019, ch. 63, § 1, effective June 14, 2019, provided exemptions from the Procurement Code for certain library materials and publishing and distribution services for material produced and intended for resale by the cultural affairs department; in Subsection E, after "copyright holders thereof", added "and purchases of print, digital or

electronic format library materials by public, school and state libraries for access by the public"; and in Subsection X, after "printing", added "publishing and distribution".

The 2015 amendment, effective June 19, 2015, exempted the procurement of services of commissioned advertising sales representatives for New Mexico magazine from the provisions of the Procurement Code; in Subsection EE, after "Act", added "of 1994"; and added Subsection GG, and redesignated the succeeding subsection accordingly.

The 2013 amendment, effective June 14, 2013, in Subsection E, added "and training materials in printed or electronic format"; added Subsection FF; in Subsection J, at the beginning of the sentence, deleted "minor", changed "five thousand dollars ($5,000)" to "ten thousand dollars ($10,000)" and added "web-based or electronic subscriptions"; and in Subsection R, added "legal subscription and research services and".

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.

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.

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

The 2001 amendment, effective June 15, 2001, added Subsection S.

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.

The 1991 amendment, effective July 1, 1991, added Subsections O and P.

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 13-1-98A 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.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

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*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

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*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

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*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

Workers' compensation administration case manager's fee not exempt as a litigation expense. — The services provided by a case manager under the worker's compensation administration (WCA) are not incurred in connection with litigation. A WCA case manager's fees are not an expense of litigation pursuant to Subsection R of this section, but are incurred following a determination that a worker is injured or disabled and entitled to benefits under the WCA, and ongoing coordination of the healthcare services is required. *Trace v. University of N.M. Hosp.*, 2015-NMCA-083.

In a workers' compensation case, where the case manager's contract with the workers' compensation administration, to coordinate health care services provided to worker, expired, the workers' compensation judge (WCJ) erred in finding that the case manager's services constituted a litigation expense exempt from the Procurement Code, and the WCJ was without statutory authority to order that the case manager continue providing services as worker's case manager in the absence of a contract under the Procurement Code. *Trace v. University of N.M. Hosp.*, 2015-NMCA-083.

The Procurement Code generally prohibits prepayment for the purchase of items of tangible personal property. — Where the purchase of items of tangible personal property is subject to the Procurement Code, there is a general rule against prepayment. 2023 Op. Ethics Comm'n No. 2023-04.

A municipality's purchase of a firetruck is not exempt from the Procurement Code's general rule against prepayment. — The Procurement Code generally prohibits prepayment for the purchase of items of tangible personal property, 13-1-158 NMSA 1978, an exception of which are those purchases that are excluded from the Procurement Code's scope, and therefore where a municipality is considering purchasing a firetruck, an item subject to the Procurement Code, under a statewide price agreement with the National Association of State Procurement Officials, the municipality may not prepay for the firetruck and may only pay for the truck after the municipality's central purchasing office certifies that the truck has been received and meets the specifications that the municipality bargained for. Moreover, the fact that the municipality could get a discount for prepayment and the fact that the vendor would provide the municipality with a performance bond following the receipt of any prepayment do not operate as exceptions to the Procurement Code's general rule against prepayment. 2023 Op. Ethics Comm'n No. 2023-04.

Self-dealing by non-state-employed council members does not violate the Procurement Code. — The Procurement Code does not prohibit members of the New Mexico council for purchasing from persons with disabilities (council) from voting to approve a contract subject to the State Use Act, 13-1C-1 to 13-1C-7 NMSA 1978, between a state agency or local public body and a council member or a company in which the council member has a financial interest. Procurements under the State Use Act are exempt from the requirements of the Procurement Code, and therefore the Procurement Code's conflict of interest provisions do not prohibit a council member from participating in an award of a contract subject to the State Use Act. 2020 Op. Ethics Comm'n No. 2020-07.

Home rule municipality's sponsorship to planned parenthood of New Mexico does not implicate the Procurement Code. — The Procurement Code, pursuant to 13-1-98(K) NMSA 1978, does not apply to municipalities having adopted home rule charters and having enacted their own purchasing ordinances, and therefore, where the Albuquerque city council passed a floor amendment to the city's operating budget bill, which added $250,000 for a council-directed sponsorship to planned parenthood of New Mexico, a private corporation, the Procurement Code was not implicated, because the city of Albuquerque has adopted a home rule charter and has enacted its own purchasing ordinance. The city's own procurement ordinance therefore governs all purchasing transactions of the city, including a transaction between the city of Albuquerque and planned parenthood of New Mexico, and shall serve to exempt the city from all provisions of the New Mexico Procurement Code. 2022 Op. Ethics Comm'n No. 2022-07.

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 [public safety department], 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 [Chapter 4, Article 48B NMSA 1978] ;

C. the operation and maintenance of a hospital pursuant to the Special Hospital District Act [Chapter 4, Article 48A 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.

ANNOTATIONS

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 of instructional materials;

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; 2023, ch. 149, § 3.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, excluded the purchases of instructional materials from procurement through the state purchasing agent; and in Subsection I, after "purchases", deleted "from the", and after "instructional", deleted "material fund" and added "materials".

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.

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. 1956 Op. Att'y Gen. No. 56-6431.

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.

ANNOTATIONS

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

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.*, 1987-NMSC-029, 105 N.M. 611, 735 P.2d 528.

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. 1962 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.

ANNOTATIONS

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;

G. the Educational Facility Construction Manager At Risk Act [13-1-124.1 to 13-1-124.5 NMSA 1978]; and

H. the Transportation Construction Manager General Contractor Act [13-1-122.1 to 13-1-122.4 NMSA 1978].

History: Laws 1984, ch. 65, § 75; 2007, ch. 141, § 1; 2022, ch. 12, § 5.

ANNOTATIONS

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 2022 amendment, effective July 1, 2022, added procurements pursuant to the Transportation Construction Manager General Contractor Act to the list of exemptions from competitive sealed bid requirements of the Procurement Code; and added Subsection H.

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

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. 1954 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 [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.

The Procurement Code prohibits procurement based on noncompetitive bids. — Identical twenty-part bids submitted by two companies that were separately registered suppliers to the state, and which shared the same physical address and some administrative operations, created a strong inference that the separate bids were not independently formulated, but rather were purposefully coordinated, and therefore not competitive as required by this section. Accordingly, procurement based on those bids would violate the Procurement Code. 2020 Op. Ethics Comm'n No. 2020-05.

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.

ANNOTATIONS

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.

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.

ANNOTATIONS

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.

The Procurement Code does not prohibit *ex parte* communications with potential offerors. — A school board member who, during a public hearing to discuss a local school district's chief procurement officer's (CPO) recommendation to contract with an offeror following the CPO's issuance of a request for proposals (RFP) for cleaning services, asked the CPO to provide copies of the RFPs and the names of all vendors who received notice, and after receiving this information, contacted local vendors to discuss the cost of the cleaning services requested and asked whether they had received notice of the RFPs, did not violate the Procurement Code, because the Procurement Code does not prohibit *ex parte* communications with potential offerors. 2020 Op. Ethics Comm'n No. 2020-04.

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.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, in Subsection A, added the requirement that prime contractors and subcontractors be registered as 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.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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*, 1994-NMSC-007, 117 N.M. 1, 868 P.2d 646.

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.

13-1-108.1. Recompiled.

History: Laws 2013, ch. 41, § 5.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 41, § 5 was erroneously compiled as 13-1-108.1 NMSA 1978 and has been recompiled as 13-1-180.1 NMSA 1978 by the compiler.

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.

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, 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 to 13-1-124.5 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 [Chapter 6, Article 23 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.

ANNOTATIONS

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".

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.

ANNOTATIONS

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.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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.

ANNOTATIONS

The Procurement Code prohibits public discussion of proposals from the time of submission of proposals until the award of the contract. — A school board member who, during a public hearing to discuss a local school district's chief procurement officer's (CPO) recommendation to contract with an offeror following the CPO's issuance of a request for proposals (RFP) for cleaning services, asked the CPO to provide copies of the RFPs and the names of all vendors who received notice, and after receiving this information, contacted local vendors to discuss the cost of the cleaning services requested and asked whether they had received notice of the RFPs, violated the Procurement Code, because 13-1-116 NMSA 1978's duty of confidentiality applies during the "negotiation process," that is, from the time of submission of proposals until the procuring entity awards a contract. 2020 Op. Ethics Comm'n No. 2020-04.

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 [Chapter 61, Article 15 NMSA 1978], the Engineering and Surveying Practice Act [Chapter 61, Article 23 NMSA 1978] or the Landscape Architects Act [Chapter 61, Article 24B 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 to 10-8-8 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.

ANNOTATIONS

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 [Chapter 6, Article 23 NMSA 1978].

History: Laws 2005, ch. 178, § 3.

ANNOTATIONS

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 if required by the regulations of the department. This section does 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; 2019, ch. 153, § 2.

ANNOTATIONS

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.

The 2019 amendment, effective July 1, 2019, removed the department of finance and administration from the responsibility of reviewing contracts for professional services with state agencies; after "general services department", deleted "or the department of finance and administration", and after "regulations of", deleted "either or both of the departments" and added "the department".

Temporary provisions. — Laws 2019, ch. 153, § 6 provided:

A. On the effective date of this act, all personnel, functions, appropriations, money, records, furniture, equipment and other property of, or attributable to, the contracts review bureau of the administrative services division of the department of finance and administration are transferred to the purchasing division of the general services department.

B. On the effective date of this act, all contractual obligations of the contracts review bureau of the administrative services division of the department of finance and administration become binding on the purchasing division of the general services department.

C. On and after the effective date of this act, rules of the department of finance and administration pertaining to the approval of professional services contracts shall be deemed to be the rules of the general services department until amended or repealed by the general services department, and all references in those rules to the department of finance and administration shall be deemed to be references to the general services department.

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. The determination shall be issued only after the state purchasing agent or a 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 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; 2013, ch. 146, § 1.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, removed the ten million dollar minimum on design and build projects; in Subsection A, in the introductory paragraph, in the first sentence, after "the system on a specific project", deleted "with a maximum allowable construction cost of more than ten million dollars ($10,000,000)"; and in Subsection F, in the introductory sentence, after "Subsections C and D of this section", deleted "and the minimum construction cost requirement of Subsection A of this section".

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.

History: Laws 2009, ch. 207, § 1; 2016, ch. 85, § 1; 2016, ch. 86, § 1; 2021, ch. 26, § 1; 2022, ch. 12, § 6.

ANNOTATIONS

The 2022 amendment, effective July 1, 2022, removed language limiting use of the design and build procurement method to projects with a cost of over fifty million dollars ($50,000,000); and after "Section 13-1-119.1 NMSA 1978", deleted "for projects with a maximum allowable construction cost of more than fifty million dollars ($50,000,000)".

The 2021 amendment, effective July 1, 2021, removed language limiting use of design and build procurement to federally-funded transportation projects; and after "(50,000,000)", deleted "funded in whole or in part by federal-aid highway funds".

The 2016 amendment, effective May 18, 2016, allowed the use of design and build project delivery systems for road and highway projects that use federal-aid highway funds; after "funded in whole or in part by", deleted "the grants programs of the federal American Recovery and Reinvestment Act of 2009" and added "federal-aid highway funds".

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.

ANNOTATIONS

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. For each state public works project, an "architect, engineer, landscape architect and surveyor selection committee" shall be formed with four members as follows:

(1) one member of the agency for which the project is being designed;

(2) the director of the facilities management division of the general services department, or the director's designee, who shall be chair;

(3) one member designated by the joint practice committee; and

(4) one member designated by the secretary.

B. Once an architect, engineer, landscape architect and surveyor selection committee is formed, no member shall be substituted or permitted to serve through a proxy for the duration of the selection process for a state public works project.

C. The staff architect or the staff architect's designee of the facilities management division shall serve as staff to the architect, engineer, landscape architect and surveyor selection committee.

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

E. Notwithstanding the provisions of this section, an architect, engineer, landscape architect and surveyor selection committee shall not be formed for department of transportation highway projects. The department of transportation shall create its own selection committee by rule, after notice and hearing, for department of transportation highway projects.

History: Laws 1984, ch. 65, § 94; 1987, ch. 301, § 3; 1989, ch. 69, § 13; 1993, ch. 72, § 4; 2013, ch. 115, § 10; 2015, ch. 139, § 1.

ANNOTATIONS

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 2015 amendment, effective June 19, 2015, permitted a designee of the director of the facilities management division of the general services department to serve on an architect, engineer, landscape architect and surveyor selection committee, provided that once a committee is formed, substitution of members is not permitted for the duration of the selection process for a state public works project, and clarified that the provisions of this section do not apply to department of transportation highway projects; in the introductory sentence of Subsection A, deleted "The" and added "For each state public works project, an", after "selection committee", deleted "is created. The committee, which shall serve as the selection committee for state public works projects, except for highway projects of the department of transportation, is composed of" and added "shall be formed with"; in Paragraph (2) of Subsection A, after "services department", added "or the director's designee"; added a new Subsection B and redesignated the succeeding subsections accordingly; in Subsection E, added "Notwithstanding the provisions of this section, an architect, engineer, landscape architect and surveyor selection committee shall not be formed for department of transportation highway projects.", after "shall create", deleted "a" and added "its own", after "notice and hearing", deleted "that shall serve as the selection committee", after "for", added "department of transportation", and after "highway projects", deleted "of the department".

The 2013 amendment, effective June 14, 2013, changed the name of the property control division of the general services department to the facilities management division; in Paragraph (2) of Subsection A and in Subsections B and C, deleted "property control" and added "facilities management" before "division"; in Subsections A and D, changed "state highway and transportation department" to "department of transportation"; and in Paragraph (3) of Subsection A, after "designated by the", deleted "architect-engineer-landscape architect".

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.

ANNOTATIONS

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.

13-1-122.1. Short title.

Sections 13-1-122.1 through 13-1-122.4 NMSA 1978 may be cited as the "Transportation Construction Manager General Contractor Act".

History: 1978 Comp., § 13-1-122.1, enacted by Laws 2022, ch. 12, § 1.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 12, § 8 made Laws 2022, ch. 12, § 1 effective July 1, 2022.

13-1-122.2. Definitions.

As used in the Transportation Construction Manager General Contractor Act:

A. "construction manager general contractor" means a person who, pursuant to a contract with the department, provides preconstruction services, construction management and construction services required for a project;

B. "construction manager general contractor delivery method" means a project delivery method in which a contract for construction manager general contractor services is procured separately from a contract for project design services and a contract for independent cost estimate services;

C. "department" means the department of transportation;

D. "guaranteed maximum price" means the maximum amount to be paid by the department for the construction of the project;

E. "preconstruction services" means consulting services related to construction management and construction provided during the transportation project design stage;

F. "project" means a state public works project for highway construction or reconstruction;

G. "project design services" means engineering services, surveying services or landscape architectural services; and

H. "secretary" means the secretary of transportation.

History: 1978 Comp., § 13-1-122.2, enacted by Laws 2022, ch. 12, § 2.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 12, § 8 made Laws 2022, ch. 12, § 2 effective July 1, 2022.

13-1-122.3. Construction manager general contractor delivery method authorized.

A. The secretary may use a construction manager general contractor delivery method on a project if the department makes a written determination that it is appropriate and in the best interest of the department to use this method of project delivery to procure an eligible project. The determination to use the construction manager general contractor delivery method shall be issued only after the department considers the following criteria, at a minimum:

(1) the level of design and the extent to which the project requirements have been or can be adequately defined;

(2) time constraints for project delivery;

(3) project complexity;

(4) the suitability of use of the construction manager general contractor delivery method; and

(5) the capability of the department to manage the project, including experienced personnel or outside consultants.

B. The secretary shall not make a determination to use a construction manager general contractor delivery method unless the project is posted with such determination on the department's website for at least ninety days.

C. The secretary, in consultation with the professional associations and contractors from within the highway design and construction industry, shall promulgate rules for solicitation and award of construction manager general contractor contracts. The rules shall establish criteria for selecting, procuring and contracting a project using the construction manager general contractor delivery method. The rules shall define the scope of the construction manager general contractor contract to require the construction manager general contractor to:

(1) provide a range of preconstruction services and participate in project design, cost control, scheduling and value engineering efforts for the project; and

(2) if the second phase of the contract is entered into, provide the construction work for the project or work packages associated with the project at a guaranteed maximum price for which the construction manager general contractor is financially responsible.

History: 1978 Comp., § 13-1-122.3, enacted by Laws 2022, ch. 12, § 3.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 12, § 8 made Laws 2022, ch. 12, § 3 effective July 1, 2022.

13-1-122.4. Construction manager general contractor; multi-phased procedure.

A. The selection procedure shall use a competitive sealed qualifications-based proposal method that conforms with Sections 13-1-111 through 13-1-117 NMSA 1978 and results in a professional services contract. The contract scope of work shall be divided into two separate but related phases:

(1) phase one for design consultation and preconstruction services; and

(2) phase two for project construction.

B. The department shall issue a separate request for proposals for each project that uses a construction manager general contractor delivery method.

C. The department's request for proposals for a construction manager general contractor contract shall contain, at a minimum, the following elements:

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

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

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

(c) minimum bond capacity;

(d) the ability to self-perform, with its own organization, a minimum percentage of construction work as required and defined in the department's standard specifications for highway and bridge construction, current edition; and

(e) current registration as a prequalified contractor pursuant to rule promulgated by the department;

(2) the procedures for submitting proposals, the criteria for evaluation of qualifications and the relative weight of the criteria;

(3) the form of contract to be awarded;

(4) a listing or description of the types of preconstruction and construction services that will be required;

(5) identification of requirements for liability insurance, a proposal bond pursuant to Section 13-1-146 NMSA 1978 and performance and payment bonds pursuant to Section 13-4-18 NMSA 1978;

(6) a description of the method to be used for pricing or negotiation of construction manager general contractor fees for the scope of services; and

(7) preferences as allowed by law in the Procurement Code for New-Mexico-based businesses and others.

D. The department shall use a selection committee for the evaluation of the qualifications submitted by offerors and shall determine the offerors that qualify for award of the construction manager general contractor contract. The department shall establish a construction manager general contractor selection committee by rule. The

selection committee shall rank the offerors and provide a recommendation to the department identifying the offeror most qualified based on the highest ranking score.

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

F. The department shall promulgate rules for the selection process and award of contract that include interviews with top-ranked offerors, price negotiations and the authority to terminate negotiations.

G. The department rules shall address the processes applicable to the award of a contract for construction management and construction services, including the process for conducting contract negotiations with the construction manager general contractor for construction of the project or work packages associated with the project in accordance with contract documents and specifications.

H. The department shall secure and use an independent cost estimate for the project or each work package associated with the project to validate the negotiated costs for the construction management and construction services contract. The independent cost estimate shall remain confidential until notice of award of the construction contract.

I. The construction manager general contractor shall submit a guaranteed maximum price proposal for construction management and construction services for the project or work packages associated with the project.

J. Negotiations may begin between the department and the construction manager general contractor for the construction services before completion of the design work. Upon successful negotiation, the department shall execute the contract with the construction manager general contractor for construction of the project or work packages associated with the project.

K. Negotiations shall be terminated if the department is unable to reach a price agreement with the construction manager general contractor. In the event that negotiations are terminated, the department may competitively bid the construction phase of the project, in accordance with the department's procedures applicable to public works construction projects. The construction manager general contractor may be allowed to bid or provide subcontract services for the project, unless prohibited by Section 10-16-13 NMSA 1978.

L. Data developed during the design services and the construction manager general contractor's preconstruction services, unless otherwise protected by law, shall be made available to all bidders.

M. After a construction manager general contractor contract is awarded for the preconstruction services, the department shall make the names of each offeror and the ranking and evaluation scores for each available for public inspection.

History: 1978 Comp., § 13-1-122.4, enacted by Laws 2022, ch. 12, § 4.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 12, § 8 made Laws 2022, ch. 12, § 4 effective July 1, 2022.

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.

ANNOTATIONS

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 [Chapter 14, Article 4 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.

ANNOTATIONS

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.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 141, § 10 contained 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 to 13-1-124.5 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.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 141, § 10 contained 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 to 13-1-124.5 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.

ANNOTATIONS

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 [Chapter 60, Article 13 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.

ANNOTATIONS

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.

ANNOTATIONS

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 sixty thousand dollars ($60,000), excluding applicable state and local gross receipts taxes, in accordance with the applicable small purchase rules adopted by the secretary, a local public body or a central purchasing office that has the authority to issue rules.

B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding sixty thousand dollars ($60,000), 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 rules promulgated by the general services department or a central purchasing office with the authority to issue rules.

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 twenty thousand dollars ($20,000), excluding applicable state and local gross receipts taxes, 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; 2013, ch. 70, § 7; 2019, ch. 153, § 3.

ANNOTATIONS

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 2019 amendment, effective July 1, 2019, removed the department of finance and administration from the responsibility of promulgating rules for procuring certain professional services by a central purchasing office; in Subsection B, after "promulgated by", deleted "the department of finance and administration".

Temporary provisions. — Laws 2019, ch. 153, § 6 provided:

A. On the effective date of this act, all personnel, functions, appropriations, money, records, furniture, equipment and other property of, or attributable to, the contracts review bureau of the administrative services division of the department of finance and administration are transferred to the purchasing division of the general services department.

B. On the effective date of this act, all contractual obligations of the contracts review bureau of the administrative services division of the department of finance and administration become binding on the purchasing division of the general services department.

C. On and after the effective date of this act, rules of the department of finance and administration pertaining to the approval of professional services contracts shall be deemed to be the rules of the general services department until amended or repealed by the general services department, and all references in those rules to the department

of finance and administration shall be deemed to be references to the general services department.

The 2013 amendment, effective July 1, 2013, increased the dollar amount of small purchases; in Subsection A, after "not exceeding", deleted "twenty thousand dollars ($20,000)" and added "sixty thousand dollars ($60,000), excluding applicable state and local gross receipts taxes", after "applicable small purchase", deleted "regulation" and added "rules", and after "authority to issue", deleted "regulation" and added "rules"; in Subsection B, after "not exceeding", deleted "fifty thousand dollars ($50,000)" and added "sixty thousand dollars ($60,000)", after "professional services procurement", deleted "regulation" and added "rules", and after "authority to issue", deleted "regulation" and added "rules"; and in Subsection C, after "not exceeding", deleted "ten thousand dollars ($10,000)" and added "twenty thousand dollars ($20,000), excluding applicable state and local gross receipts taxes".

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.

School board's procurement of legal services without a competitive-sealed-proposal process did not violate the Procurement Code. — A school district that procured legal services at a cost of approximately $40,000 from a law firm that was not awarded a contract through the school district's competitive sealed proposal process did not violate the Procurement Code, because under the Procurement Code, a local public body, which includes a school district, can procure professional legal services from a law firm without using a competitive sealed proposal process as long as the total contract amount does not exceed $60,000 and the procurement accords with the

professional services procurement rules promulgated by the school district's central purchasing office, and in this case, the procurement at issue did not exceed $60,000 and did not violate the school district's professional services procurement rules. 2020 Op. Ethics Comm'n No. 2020-08.

13-1-126. Sole source procurement.

A. 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 determines, in writing, that:

(1) there is only one source for the required service, construction or item of tangible personal property;

(2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and

(3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract.

B. The state purchasing agent or a central purchasing office shall use due diligence in determining the basis for the sole source procurement, including reviewing available sources and consulting the using agency, and shall include its written determination in the procurement file.

C. 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.

D. A contract for the purchase of research consultant services by institutions of higher learning constitutes a sole source procurement.

E. The state purchasing agent or a central purchasing office shall not circumvent this section by narrowly drafting specifications so that only one predetermined source would satisfy those specifications.

History: Laws 1984, ch. 65, § 99; 1987, ch. 348, § 9; 2013, ch. 40, § 2.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, added additional criteria and changed the procedures for sole source procurement; in Subsection A, after "central purchasing office", deleted "makes a determination, after conducting a good faith review of available sources and consulting the using agency" and added "determines, in writing"; added Paragraphs (2) and (3) of Subsection A; and added Subsections B and E.

13-1-126.1. Sole source contracts; notice; protest.

A. At least thirty days before it awards a sole source contract, the state purchasing agent shall post notice of its intent to award the contract on its website. At least thirty days before it awards a sole source contract, a central purchasing office shall post notice of its intent to award the contract on its website, if it maintains one, and shall transmit the notice to the state purchasing agent for posting on the state purchasing agent's website. In each case, the notice shall identify, at a minimum:

(1) the parties to the proposed contract;

(2) the nature and quantity of the service, construction or item of tangible personal property being contracted for; and

(3) the contract amount.

B. Any qualified potential contractor that was not selected for a proposed sole source contract may protest the selection in writing, within fifteen calendar days after the notice of intent to award the contract was posted by the state purchasing agent or central purchasing office, by submitting the protest to the state purchasing agent or central purchasing office, as appropriate. The state purchasing agent or central purchasing office shall then reconsider its selection.

History: Laws 2013, ch. 40, § 6; 2019, ch. 153, § 4.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, required a central purchasing office to post on its website notice of its intent to award a sole source contract and to transmit the notice to the state purchasing agent for posting, and required the state purchasing agent or central purchasing office, following a written protest by a potential contractor, to reconsider an award for a sole source contract; in Subsection A, in the introductory paragraph, deleted " a central purchasing office or a designee of either", after "intent to award", deleted "a sole source" and added "the", deleted "web site. If a central purchasing office does not maintain a website, it shall post the notice" and added "website. At least thirty days before it awards a sole source contract, a central purchasing office shall post notice of its intent to award the contract on its website, if it maintains one, and shall transmit the notice to the state purchasing agent for posting"; in Subsection B, after "potential contractor", deleted "who" and added "that", after "awarded", added "selected for", after "a", added "proposed", after "may protest", deleted "to the state purchasing agent or a central purchasing office. The protest shall be submitted" and added "the selection", and after "central purchasing office", added "by submitting the protest to the state purchasing agent or central purchasing office, as appropriate. The state purchasing agent or central purchasing office shall then reconsider its selection".

Notice provisions also apply to amendments to sole source contracts. — The notice and availability of protest provisions of this section not only apply to sole source contracts, but also apply when a state agency amends a sole source contract, because the contract amendment might affect the applicability of the state purchasing agent's or central purchasing office's previously-issued determination that a sole source procurement is necessary, which provides the public and potential contractors the opportunity to scrutinize whether the state purchasing agent's or central purchasing office's sole source determination for the original contract remains applicable as to the amended contract, and notice for amended contracts prevents unfair gamesmanship in sole source procurement, maintaining a procurement system of quality and integrity. 2021 Op. Ethics Comm'n No. 2021-06.

13-1-127. Emergency procurement; required conditions; limitations; notice.

A. The state purchasing agent or a central purchasing office may only make an emergency procurement when the service, construction or item of tangible personal property procured:

(1) is needed immediately to:

(a) control a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; or

(b) plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; and

(2) cannot be acquired through normal procurement methods.

B. The state purchasing agent or a central purchasing office:

(1) in making an emergency procurement, shall:

(a) employ a competitive process to the extent practicable under the circumstances; and

(b) use due diligence in determining the basis for the procurement and in selecting a contractor; and

(2) shall not make an emergency procurement for the purchase or lease of heavy road equipment.

C. The state purchasing agent or a central purchasing office that makes an emergency procurement shall outline its determination of the basis for the procurement

and its selection of the contractor in writing and include the writing in the procurement file. Promptly thereafter:

(1) the state purchasing agent shall post notice of the procurement on its website; or

(2) the central purchasing office shall post notice of the procurement on its website, if it maintains one, and shall transmit the notice to the state purchasing agent for posting on the state purchasing agent's website.

D. The state purchasing agent or a central purchasing office that makes an emergency procurement to plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event shall account for the money spent in making the procurement and report on that accounting to the legislative finance committee and the department of finance and administration within sixty days after the end of the fiscal year in which the procurement was made.

History: Laws 1984, ch. 65, § 100; 1987, ch. 348, § 10; 2002, ch. 84, § 1; 2013, ch. 40, § 3; repealed and reenacted by Laws 2019, ch. 153, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 2019, ch. 153, § 5 repealed and reenacted 13-1-127 NMSA 1978, effective July 1, 2019.

The 2013 amendment, effective June 14, 2013, changed the procedures for an emergency procurement; in Subsection A, after "central purchasing office", deleted "or a designee or either", after "purchasing office may make", deleted "or authorize others to make", and deleted the former second sentence which required a written determination of the basis for an emergency procurement and the selection of a contractor and prohibited the emergency procurement of heavy road equipment; and added Subsections C and D.

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.

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*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

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.

The Procurement Code does not provide a method for an emergency procurement of legal services. — An emergency procurement is authorized only when the procurement is needed immediately for a serious threat to public health, welfare, safety or property which is caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event, or for the planning or preparation for such an event, and the procurement cannot be acquired through normal procurement methods, and therefore, as a general matter, the Attorney General's Office would not be allowed to use the emergency procurement section for situations where the State may potentially lose a claim due to the running of the statute of limitations, a statute of repose, or other filing deadline. 2024 Op. Ethics Comm'n No. 2024-01.

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; publication of award to agency web site and sunshine portal; content and submission of record.

A. Prior to award of a sole source procurement contract, the state purchasing agent or central purchasing office shall:

(1) provide the information described in Subsection E of this section to the department of information technology for posting on the sunshine portal; and

(2) forward the same information to the legislative finance committee.

B. Prior to the award of a sole source procurement contract, the local public body central purchasing office shall post the information described in Subsection E of this section on the local public body web site, if one exists.

C. Within three business days of awarding an emergency procurement contract, the awarding central purchasing office within a state agency shall:

(1) provide the information described in Subsection E of this section to the department of information technology for posting on the sunshine portal; and

(2) forward the same information to the legislative finance committee.

D. Within three business days of awarding an emergency procurement contract, the local public body central purchasing office shall post the information described in Subsection E of this section on the local public body web site, if one exists.

E. 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:

(1) the contractor's name and address;

(2) the amount and term of the contract;

(3) a listing of the services, construction or items of tangible personal property procured under the contract;

(4) whether the contract was a sole source or emergency procurement contract; and

(5) the justification for the procurement method.

History: Laws 1984, ch. 65, § 101; 1987, ch. 348, § 11; 2013, ch. 40, § 4.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, required the publication of information about a sole source procurement prior to the award of a contract; required the publication of information about an emergency procurement after the award of a contract; in the title of the section, added "publication of award to agency web site and sunshine portal"; added Subsections A through D; and added Paragraph (4) of Subsection E.

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.

Notice provisions also apply to amendments to sole source contracts. — The notice and availability of protest provisions of this section and 13-1-126.1 NMSA 1978 not only apply to sole source contracts, but also apply when a state agency amends a sole source contract, because the contract amendment might affect the applicability of the state purchasing agent's or central purchasing office's previously-issued determination that a sole source procurement is necessary, which provides the public and potential contractors the opportunity to scrutinize whether the state purchasing agent's or central purchasing office's sole source determination for the original contract remains applicable as to the amended contract, and notice for amended contracts prevents unfair gamesmanship in sole source procurement, maintaining a procurement system of quality and integrity. 2021 Op. Ethics Comm'n No. 2021-06.

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.

ANNOTATIONS

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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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 to 11-1-7 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.

ANNOTATIONS

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 redesginated former Subsection B as Subsection C.

Cooperative Educational Services does not have the authority to establish a scholarship program. — The Cooperative Educational Services (CES) was created under a cooperative procurement agreement authorized by the Procurement Code, NMSA 1978, § 13-1-135, and entered into under the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to 11-1-7, and under this cooperative procurement agreement, the CES was designated as the agency to administer or execute the cooperative procurement agreement for the limited purpose of procuring items of tangible personal property, services or construction, and therefore a proposal for CES to establish a scholarship program for students attending state educational institutions that are parties to its cooperative procurement agreement would exceed the scope of its authority, because the scholarship program would include a disbursement of funds, not a procurement of tangible personal property, services or construction, and, moreover, the scholarship program would not be considered a service provided by CES to the

educational institutions, because, as proposed, the program's purpose is to defray certain costs charged by these educational institutions. 2024 Att'y Gen. Adv. Ltr. No. 2024-01.

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.

ANNOTATIONS

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.

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.

ANNOTATIONS

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.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 366, § 27 made Laws 2007, ch. 366, § 2 effective 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 [Public Facility Energy Efficiency and Water Conservation Act] [Chapter 6, Article 23 NMSA 1978].

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

ANNOTATIONS

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

The title of the "Public Building Energy Efficiency Act" was changed to the "Public Facility Energy Efficiency and Water Conservation Act" by Laws 1997, ch. 42, § 1 and Laws 2001, ch. 247, § 1.

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 contract 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.

ANNOTATIONS

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

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 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.

ANNOTATIONS

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.

ANNOTATIONS

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.

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.

ANNOTATIONS

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

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 ten years, including all extensions and renewals, except that for a contract entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [Chapter 6, Article 23 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 [Chapter 21, Article 21K NMSA 1978];

(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;

(6) services relating to the design and engineering of a state public works project:

(a) for a period not to exceed the requisite time for project completion and a subsequent warranty period; and

(b) upon approval of the secretary of finance and administration; and

(7) services relating to the design and engineering of a regional water project with an estimated cost of more than five hundred million dollars ($500,000,000):

(a) for a period not to exceed the requisite time for project completion and a subsequent warranty period; and

(b) upon approval of the secretary of finance and administration.

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; 2017, ch. 55, § 1; 2018, ch. 43, § 1; 2023, ch. 40, § 1.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, provided an exception from the Procurement Code for service contracts related to the design and engineering of a regional water project with an estimated cost of more than five hundred million dollars; and in Subsection B, added Paragraph B(7).

The 2018 amendment, effective May 16, 2018, increased the maximum term for certain multi-term contracts; and in Subsection A, after "the term shall not exceed", deleted "eight" and added "ten".

The 2017 amendment, effective June 16, 2017, provided an exception to the four-year limitation on professional services contracts for services relating to the design and engineering of a state public works project; and added Paragraph B(6).

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).

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.

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.

13-1-152.1. Water storage tank service contracts.

A municipality may, by direct negotiation subsequent to receiving responses to requests for proposals, enter into a multiyear service contract for the engineering, repair and maintenance of a water storage tank and the appurtenant facilities owned, controlled or operated by the municipality; provided that the contract for services includes provisions that:

A. provide that the municipality is not required to make total payments in a single year that exceed the water utility charges received by the municipality for that year;

B. require that the work be performed under the review of a professional engineer licensed in New Mexico who certifies that the work will be performed in compliance with all applicable codes and engineering standards; and

C. provide that if, on the date of commencement of the contract, the water storage tank or appurtenant facilities require engineering, repair or service in order to bring the tank or facilities into compliance with federal, state or local requirements, the party contracting with the municipality shall provide the engineering, repair or service and that

the cost of the work necessary to ensure such compliance shall be itemized separately and charged to the municipality in payments spread over a period of not less than three years from the date of commencement of the contract.

History: Laws 2013, ch. 164, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 164, § 2 provided that Laws 2013, ch. 164, § 1 was effective July 1, 2013.

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.

ANNOTATIONS

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.

The Procurement Code allows the Attorney General's Office to make multiple source awards for legal representation of the state. — The Procurement Code allows multiple source awards as long as the chief procurement officer of the state agency documents the reasons for a multiple source award and includes findings of fact to support the decision, and therefore the New Mexico Attorney General's Office may award multiple contracts to two or more private law firms to pursue the state's affirmative litigation, so long as its chief procurement officer decides that awards to two or more offerors are necessary and that a single award to a single private law firm will not meet the needs of the agency without sacrifice of economy or service. 2024 Op. Ethics Comm'n No. 2024-01.

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 engineering services contracts; indefinite quantity construction contracts.

A. A state agency or local public body may procure multiple architectural or engineering services contracts for multiple projects under a single qualifications-based request for proposals; provided that the total amount of multiple contracts and all renewals for a single contractor does not exceed seven million five hundred thousand dollars ($7,500,000) over four years and that a single contract, including any renewals, does not exceed six hundred fifty thousand dollars ($650,000).

B. A state agency or local public body may procure multiple indefinite quantity construction contracts pursuant to a price agreement for multiple projects under a single request for proposals; provided that the total amount of a contract and all renewals does not exceed twelve million five hundred thousand dollars ($12,500,000) over three years and the contract provides that any one purchase order under the contract may not exceed four million dollars ($4,000,000).

C. A state agency or local public body may make procurements in accordance with the provisions 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; and

(3) each of the multiple contracts for architectural or engineering services has a term not exceeding four years, or for construction, has a term not exceeding three years, each including all extensions and renewals.

D. A contract to be awarded pursuant to this section to a firm that is currently performing under a contract issued pursuant to this section shall not cause the total amount of all contracts issued pursuant to this section to that firm to exceed:

(1) seven million five hundred thousand dollars ($7,500,000) in any four-year period for architectural or engineering services; or

(2) twelve million five hundred thousand dollars ($12,500,000) in any three-year period for construction.

E. Procurement pursuant to this section is subject to the limitations of Sections 13-1-150 through 13-1-154 NMSA 1978.

F. A state agency and a local public body, not including an agency of the legislative or judicial branch of state government, shall report to the legislative finance committee on an annual basis and to the purchasing division of the general services department on, at minimum, a quarterly basis the aggregate amount of contracts for each contractor and the corresponding amounts to be spent under each multiple source contract pursuant to this section. The general services department may promulgate rules regarding reporting to the department pursuant to this subsection.

History: Laws 2007, ch. 312, § 1; 2013, ch. 99, § 1; 2017, ch. 92, § 1; 2020, ch. 66, § 1.

ANNOTATIONS

The 2020 amendment, effective March 6, 2020, increased the total amount limit on multiple source contracts for procurement of architectural and engineering services and construction that state agencies and local public bodies may enter into and for purchase orders under those contracts, and required certain reporting requirements for certain state agencies regarding multiple source contracts; in Subsection A, after the first occurrence of "does not exceed", deleted "six million dollars ($6,000,000)" and added "seven million five hundred thousand dollars ($7,500,000)", and after the second occurrence of "does not exceed", deleted "five hundred thousand dollars ($500,000)" and added "six hundred fifty thousand dollars ($650,000)"; in Subsection B, after "does not exceed", deleted "ten million dollars ($10,000,000)" and added "twelve million five hundred thousand dollars ($12,500,000)", and after "may not exceed", deleted "one million dollars ($1,000,000)" and added "four million dollars ($4,000,000)"; redesignated former Paragraph C(4) and C(5) as new Subsections D and E, respectively, and redesignated former Subparagraphs C(4)(a) and C(4)(b) as Paragraphs D(1) and D(2), respectively; in Subsection D, in the introductory clause, after "issued pursuant to this section", deleted "will" and added "shall", in Paragraph D(1), deleted "six million dollars ($6,000,000)" and added "seven million five hundred thousand dollars ($7,500,000)", and in Paragraph D(2), deleted "ten million dollars ($10,000,000)" and added "twelve million five hundred thousand dollars ($12,500,000)"; in Subsection E, after "Procurement", added "pursuant to this section"; and added Subsection F.

The 2017 amendment, effective July 1, 2017, increased the dollar amount limits for multiple source contracts for procurement of architectural and engineering services and construction and for purchase orders under those contracts by state agencies or local public bodies; after "state agency", added "or local public body" throughout the section; in Subsection A, after "does not exceed", deleted "two million dollars ($2,000,000)" and added "six million dollars ($6,000,000); in Subsection B, deleted "two million dollars ($2,000,000)" and added "ten million dollars ($10,000,000)", after "over", deleted "four" and added "three", and after "may not exceed", deleted "five hundred thousand dollars ($500,000)" and added "one million dollars ($1,000,000)"; and in Subsection C, Paragraph C(3), after "engineering services", added "has a term not exceeding four years", after "or", added "for", after "construction", deleted "shall have" and added "has", after the second occurrence of "not exceeding", deleted "four" and added "three", and after the second occurrence of "years", added "each", in Paragraph C(4), in the

introductory clause, after "to exceed", deleted "two million dollars ($2,000,000)", added new subparagraph designation "(a)", and in Subparagraph C(4)(a), added "six million dollars ($6,000,000)", after "architectural", added "or", after "engineering", deleted "or construction", at the end of the subparagraph, deleted "and" and added "or", and added Subparagraph C(4)(b).

The 2013 amendment, effective July 1, 2013, increased the dollar amount limit of multiple source contracts for procurement of architectural and engineering services; in the title, after "architectural and", deleted "design services", and added "engineering services"; in Subsection A, after "engineering", deleted "design service" and added "services", after "total amount of", deleted "a contract" and added "multiple contracts", after "all renewals", added "for a single contractor", after "does not exceed", deleted "two hundred thousand dollars ($200,000)" and added "two million dollars ($2,000,000)", and after "over four years", added "and that a single contract, including any renewals, does not exceed five hundred thousand dollars ($500,000)"; in Paragraph (3) of Subsection C, after "multiple contracts for", deleted "professional design" and added "architectural or engineering"; and in Paragraph (4) of Subsection C, in the introductory sentence, after "a contract", deleted "shall not" and added "to" and after "pursuant to this section", deleted "if", and added "will not cause", deleted Subparagraph (a) which provided for a limit of two hundred thousand dollars, and in Subparagraph (b), after "four-year period for", added "architectural, engineering or".

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.

ANNOTATIONS

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.

13-1-156.1. Trade, exchange or disposal of tangible personal property; state-owned railroad.

A. In addition to other methods of disposal authorized by law, the tangible personal property of a state-owned railroad may be traded or exchanged for new items of tangible personal property, or disposed of, by the department of transportation or a local public body that manages the railroad, if authorized by the department of transportation pursuant to the provisions of this section. The central purchasing office may require in a request for proposals that quotes be submitted for the purchase or disposal of the tangible personal property to be traded in, exchanged or disposed of. The tangible personal property may be traded, exchanged or disposed of pursuant to the terms of the contract with the responsible offeror who is awarded the contract if an amount offered in trade or exchange, or amount for disposal, in the proposal is found by the central purchasing office to be:

(1) a fair reflection of the current market value;

(2) representative of the condition of the tangible personal property;

(3) in the best interest of the agency; and

(4) included as an itemized adjustment in the price in the case of a trade or exchange, or itemized cost in the case of disposal.

B. All terms of the trade, exchange or disposal of the items of tangible personal property shall be part of the contract.

History: Laws 2013, ch. 149, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 149 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

Compiler's notes. — Laws 2013, ch. 149, § 1 was erroneously compiled as 13-1-56.1 NMSA 1978 and has been recompiled as 13-1-156.1 NMSA 1978 by the compiler.

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.

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.

ANNOTATIONS

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

Laws 1998, ch. 108, § 80 provided that all references to the state corporation commission be construed as references to the public regulation commission.

The 1997 amendment, effective June 20, 1997, 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, ch. 104, § 1 and Laws 1997, ch. 222, § 1, enacted identical amendments to this section.

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.

General rule against prepayment. — Where the purchase of items of tangible personal property is subject to the Procurement Code, there is a general rule against prepayment. 2023 Op. Ethics Comm'n No. 2023-04.

Municipality prohibited from prepaying for the purchase of a firetruck. — The Procurement Code generally prohibits prepayment for the purchase of items of tangible personal property, an exception of which are those purchases that are excluded from the Procurement Code's scope, and therefore where a municipality is considering purchasing a firetruck, an item subject to the Procurement Code, under a statewide price agreement with the National Association of State Procurement Officials, the municipality may not prepay for the firetruck and may only pay for the truck after the

municipality's central purchasing office certifies that the truck has been received and meets the specifications that the municipality bargained for. Moreover, the fact that the municipality could get a discount for prepayment and the fact that the vendor would provide the municipality with a performance bond following the receipt of any prepayment do not operate as exceptions to the Procurement Code's general rule against prepayment. 2023 Op. Ethics Comm'n No. 2023-04.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, 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, ch. 104, § 2 and Laws 1997, ch. 222, § 2 enacted identical amendments to this section.

Termination for convenience clause. — Where the city of Albuquerque contracted with plaintiff to be the primary supplier of certain fuels to the city's fleet management division, the city did not wrongfully terminate the contract when plaintiff was unable to meet the city's fuel needs, where the evidence established that the city terminated the contract for default and convenience, and where the contract specifically stated that the city may terminate the contract at any time by giving plaintiff at least thirty days notice in writing of such termination; the city was not required to have any good cause or persuasive reason for terminating the contract. *MB Oil Ltd., Co. v. City of Albuquerque*, 2016-NMCA-090.

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.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

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.

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.

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.

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.

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.

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.

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 suspend or debar.

A. The state purchasing agent or a central purchasing office, after consultation with the using agency, may suspend a person from consideration for award of contracts if the state purchasing agent or central purchasing office, after reasonable investigation, finds that a person has engaged in conduct that constitutes cause for debarment pursuant to Section 13-1-178 NMSA 1978.

B. The term of a suspension pursuant to this section shall not exceed three months; however, if a person, including a bidder, offeror or contractor, has been charged with a criminal offense that would be a cause for debarment pursuant to Section 13-1-178 NMSA 1978, the suspension shall remain in effect until the criminal charge is resolved and the person is debarred or the reason for suspension no longer exists.

C. The state purchasing agent or a central purchasing office, after reasonable notice to the person involved, shall have authority to recommend to the governing authority of a state agency or a local public body the debarment of a person 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. The authority to debar shall be exercised by the governing authority of a state agency or a local public body in accordance with rules that shall provide for reasonable notice and a fair hearing prior to debarment.

D. As used in this section, the terms "person", "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the person, bidder, offeror or contractor.

History: Laws 1984, ch. 65, § 150; 2013, ch. 41, § 2.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, authorized suspension based on charges of civil violations and criminal offenses that are causes for debarment; provided the periods of suspension based on charges of civil violations and criminal offenses; added Subsections A and B; in the first sentence of Subsection C, deleted "business" and added "person", in the second sentence, after "three years", deleted "and a suspension shall not exceed three months", and in the third sentence, after "authority to debar", deleted "or suspend", after "in accordance with", deleted "regulations which" and added "rules that", and after "hearing prior to", deleted "suspension or"; and added Subsection D.

13-1-178. Causes for debarment or suspension; time limit.

A. The causes for debarment or suspension occurring within three years of the date final action on a procurement is taken include but are not limited to the following:

(1) criminal conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(2) civil judgment against a bidder, offeror or contractor for a civil violation related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(3) conviction of a bidder, offeror or contractor under state or federal statutes related to embezzlement, theft, forgery, bribery, fraud, falsification or destruction of records, making false statements or receiving stolen property or for violation of federal or state tax laws;

(4) conviction of a bidder, offeror or contractor under state or federal antitrust statutes relating to the submission of offers;

(5) criminal conviction against a bidder, offeror or contractor for any other offense related to honesty, integrity or business ethics;

(6) civil judgment against a bidder, offeror or contractor for a civil violation related to honesty, integrity or business ethics;

(7) civil judgment against a bidder, offeror or contractor pursuant to the Unfair Practices Act [Chapter 57, Article 12 NMSA 1978];

(8) violation by a bidder, offeror or contractor of contract provisions, as set forth in this paragraph, of a character that is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action, including:

(a) willful failure to perform in accordance with one or more contracts; or

(b) 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;

(9) any other cause that the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

(10) for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code.

B. As used in this section, the terms "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the bidder, offeror or contractor.

History: Laws 1984, ch. 65, § 151; 2013, ch. 41, § 3.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, added additional causes for debarment or suspension; in Subsection A, in the introductory sentence, after "within three years of", added "the date final action on" and after "action on a procurement", added "is taken"; in Paragraph (1) of Subsection A, at the beginning of the sentence, added "criminal", after "related to obtaining", added "unlawfully", after "subcontract, or", deleted "in" and added "related to", and after "related to the", added "unlawful"; added Paragraph (2) of Subsection A; in Paragraph (3) of Subsection A, after "federal statutes", deleted "of" and added "related to", after "bribery", added "fraud", after "destruction of records", deleted "or" and added "making false statements or" and after "receiving stolen property", added "or for violation of federal or state tax laws"; in Paragraph (4) of Subsection A, after "antitrust statutes", deleted "arising out of" and added "related to" and after "submission of", deleted "bids or proposals" and added "offers"; added Paragraphs (5) through (7) of Subsection A; in Subparagraph (a) of Paragraph (8) of Subsection A, after "one or more contracts", deleted "provided that this failure has occurred within a reasonable time preceding the decision to impose debarment"; in Paragraph (9) of Subsection A, after "any other cause", deleted "occurring within three years of a procurement"; and added Subsection B.

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 made pursuant to Section 13-1-179 NMSA 1978 shall be:

A. mailed to the last known address on file with the state purchasing agent or central purchasing office, by first class mail, within three business days after issuance of the written determination; or

B. transmitted electronically within three business days after issuance of the written determination.

History: Laws 1984, ch. 65, § 153; 2013, ch. 41, § 4.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, authorized notice of debarment or suspension to be sent by mail or electronic transmission; in the introductory sentence, after "determination", deleted "under" and added "made pursuant to", after "Section", deleted "152 of the Procurement Code" and added "13-1-179 NMSA 1978" and after "shall", deleted "immediately be mailed to the debarred or suspended business" and added "be"; and added Subsections A and B.

13-1-180.1. Continuation of current contracts; restrictions on subcontracting.

A. Notwithstanding the debarment, suspension or proposed debarment of a person, a state agency or local public body may continue contracts or subcontracts in existence at the time that the person is debarred, suspended or proposed for debarment unless the governing authority of the state agency or local public body directs otherwise.

B. Unless the governing authority of a state agency or local public body issues a written determination based on compelling reasons holding otherwise, a person that has been debarred or suspended or whose debarment has been proposed shall not, after the date that the person is debarred, suspended or proposed for debarment:

(1) incur financial obligations, including those for materials, services and facilities, unless the person is specifically authorized to do so under the terms and conditions of the person's contract; or

(2) extend the duration of the person's contract by adding new work, by exercising options or by taking other action.

C. Unless pursuant to written authorization based on the compelling reasons of the governing authority of a state agency or local public body, the state purchasing agent or a central purchasing office shall not consent to enter a subcontract subject to the Procurement Code with a person that has been debarred, suspended or proposed for debarment.

D. A person that has entered into a contract subject to the Procurement Code shall not subcontract with another person that has been debarred, suspended or proposed for debarment without the written authorization of the state purchasing agent or a central purchasing office. A person that wishes to subcontract with another person that has been debarred, suspended or proposed for debarment shall make a request to the applicable state agency or local public body that includes the following:

(1) the name of the proposed subcontractor;

(2) information about the proposed subcontractor's debarment, suspension or proposed debarment;

(3) the requester's compelling reasons for seeking a subcontract with the proposed subcontractor; and

(4) a statement of how the person will protect the interests of the state agency or local public body considering the proposed subcontractor's debarment, suspension or proposed debarment.

History: Laws 2013, ch. 41, § 5.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 41 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

Compiler's notes. — Laws 2013, ch. 41, § 5 was erroneously compiled as 13-1-108.1 NMSA 1978, and has been recompiled as 13-1-180.1 NMSA 1978 by the compiler.

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.

ANNOTATIONS

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.

ANNOTATIONS

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.

"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 (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 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.

ANNOTATIONS

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.

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 NMSA 1978), who were given authority to resolve protests pursuant to § 13-1-174 NMSA 1978, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183 NMSA 1978, 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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Common law action. — Nothing in the Procurement Code 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*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

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.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

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.*, 1988-NMSC-058, 107 N.M. 378, 758 P.2d 792.

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.

ANNOTATIONS

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 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; provided that this section shall not apply to motor vehicles used for law enforcement purposes. For the purposes of this section, "motor vehicle" means a light-duty vehicle under eight thousand five hundred pounds.

History: Laws 1984, ch. 65, § 161; 2002, ch. 32, § 1; 2013, ch. 217, § 1.

ANNOTATIONS

Cross references. — For acquisition of alternative fuel or gas-electric hybrid vehicles, *see* 13-1B-3 NMSA 1978.

The 2013 amendment, effective June 14, 2013, exempted motorcycles used for law enforcement purposes; and in the first sentence, after "vehicles are assembled in North America", added ", provided that this section shall not apply to motor vehicles used for law enforcement purposes".

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 to 33-8-15 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.

ANNOTATIONS

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 [Chapter 21, Article 28 NMSA 1978] or the New Mexico Research Applications Act [53-7B-1 to 53-7B-10 NMSA 1978], it is unlawful for any state agency or local public body employee, as defined in the Procurement Code, 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.

ANNOTATIONS

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".

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.

ANNOTATIONS

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 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.

ANNOTATIONS

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 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 district attorney in the jurisdiction in which the violation occurs or the state ethics commission is empowered to bring a civil action for the enforcement of any provision of the Procurement Code; provided that the commission may refer a matter for enforcement to the attorney general or the district attorney in the jurisdiction in which the violation occurred. 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; 2019, ch. 86, § 34.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, authorized the state ethics commission to bring a civil action for the enforcement of any provision of the Procurement Code or to refer a matter for enforcement to the attorney general or the district attorney in the jurisdiction in which the violation occurred; in the second sentence, after "The", deleted "attorney general or the", after "the violation occurs", added "or the state ethics commission", and after "Procurement Code", added "provided that the commission may refer a matter for enforcement to the attorney general or the district attorney in the jurisdiction in which the violation occurred".

13-1-196.1. State ethics commission jurisdiction.

The state ethics commission may investigate complaints against a contractor who has a contract with a state agency or a person who has submitted a competitive sealed

proposal or competitive sealed bid for a contract with a state agency. The state ethics commission may impose the civil penalties authorized in Sections 13-1-196 through 13-1-198 NMSA 1978 pursuant to the provisions of those sections.

History: Laws 2019, ch. 86, § 33.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 86, § 41 made Laws 2019, ch. 86, § 33 effective January 1, 2020.

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 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.

ANNOTATIONS

Cross references. — For soliciting or receiving illegal kickbacks, bribes or rebates, *see* Chapter 30, Article 41 NMSA 1978.

13-1-199. Penalties.

Any business or person that willfully violates the Procurement Code is guilty of:

A. a misdemeanor if the transaction involves fifty thousand dollars ($50,000) or less; or

B. a fourth degree felony if the transaction involves more than fifty thousand dollars ($50,000).

History: Laws 1984, ch. 65, § 172; 2013, ch. 40, § 5.

ANNOTATIONS

Cross references. — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

The 2013 amendment, effective June 14, 2013, increased the penalties for violations of the Procurement Code; in the title, deleted "Misdemeanor" and added "Penalties"; in the introductory sentence, after "person", added "that willfully"; in Subsection A, after "misdemeanor", added the remainder of the sentence; and added Subsection B.

ARTICLE 1A
Purchasing Discounts

13-1A-1. Short title.

This act [13-1A-1 to 13-1A-4 NMSA 1978] may be cited as the "Purchasing Discount Act".

History: Laws 1983, ch. 164, § 1.

13-1A-2. Purpose.

The purpose of the Purchasing Discount Act is to effect certain economies in the operation of state government by requiring state agencies to establish bookkeeping and administrative procedures to accelerate payments to vendors for supplies and equipment so as to secure price discounts offered by such vendors for early payment of accounts.

History: Laws 1983, ch. 164, § 2.

13-1A-3. Definition.

As used in the Purchasing Discount Act, "state agency" means agency, department, commission, board and institution of state government.

History: Laws 1983, ch. 164, § 3.

13-1A-4. Revision of bookkeeping and payment procedures; reports of progress.

A. Not later than July 1, 1986, each state agency shall review and revise its bookkeeping and vouchering procedures so as to effect accelerated payments to vendors for purchases of supplies and equipment in order to secure for the state the largest available price discount offered by such vendors for early payment of accounts. On or before September 1 of each year, a progress report of the implementation of the provisions of the Purchasing Discount Act shall be submitted by each state agency to the department of finance and administration and to the legislative finance committee as an addendum to its budget request for the ensuing fiscal year.

B. The department of finance and administration shall review its administrative procedures for payment of vouchers by state agencies for the purchase of supplies and equipment in order to effect revised procedures to secure the largest available price discounts offered by vendors for early payment of accounts. The department shall prescribe guidelines for state agencies to implement the provisions of the Purchasing Discount Act. The department shall, annually by December 15, submit a progress report to the legislature on the overall progress made by state agencies in implementing the procedures required by the Purchasing Discount Act.

History: Laws 1983, ch. 164, § 4.

ARTICLE 1B
Alternative Fuel Acquisition

13-1B-1. Short title.

Chapter 13, Article 1B NMSA 1978 may be cited as the "Alternative Fuel Acquisition Act".

History: Laws 1992, ch. 58, § 1; 2002, ch. 32, § 2.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, rewrote the section, which formerly read: "Sections 1 through 7 of this act may be cited as the "Alternative Fuel Conversion Act".

13-1B-2. Definitions.

As used in the Alternative Fuel Acquisition Act:

A. "alternative fuel" means natural gas, liquefied petroleum gas, electricity, hydrogen, a fuel mixture containing not less than eighty-five percent ethanol or

methanol, a fuel mixture containing not less than twenty percent vegetable oil or a water-phased hydrocarbon fuel emulsion consisting of a hydrocarbon base and water in an amount not less than twenty percent by volume of the total water-phased fuel emulsion;

B. "conventional fuel" means gasoline or diesel fuel;

C. "department" means the energy, minerals and natural resources department;

D. "fund" means the alternative fuel acquisition loan fund;

E. "heavy duty vehicle" means a vehicle weighing more than twenty-six thousand pounds;

F. "light duty vehicle" means a vehicle weighing not more than fourteen thousand pounds;

G. "medium duty vehicle" means a vehicle weighing more than fourteen thousand pounds but not more than twenty-six thousand pounds; and

H. "political subdivision" means a county, municipality or school district.

History: Laws 1992, ch. 58, § 2; 1994, ch. 130, § 1; 1995, ch. 160, § 1; 1997, ch. 24, § 2; 1998, ch. 22, § 2; 2002, ch. 32, § 3; 2018, ch. 53, § 1.

ANNOTATIONS

The 2018 amendment, effective July 1, 2018, defined "heavy duty vehicle", "light duty vehicle", and "medium duty vehicle", and removed the definition of "vehicle" as used in the Alternative Fuel Acquisition Act; added new Subsections E through G and redesignated former Subsection E as Subsection H; and deleted former Subsection F, which defined "vehicle".

The 2002 amendment, effective July 1, 2002, substituted "acquisition" for "conversion" in the section heading and in Subsection D; added "a fuel mixture containing not less than twenty percent vegetable oil" in Subsection A; deleted former Subsection F, which read: "'post-secondary institution' means two- and four-year public post-secondary institutions; and"; and redesignated former Subsection G as present Subsection F.

The 1998 amendment, effective July 1, 1998, substituted "energy, minerals and natural resources" for "general services" in Subsection C.

The 1997 amendment, effective June 20, 1997, added the language beginning "or a water-phased hydrocarbon" at the end of Subsection A, and made a minor stylistic change.

The 1995 amendment, effective June 16, 1995, added subsection B, redesignated the remaining subsections accordingly, and inserted "medium or heavy" preceding "duty" in Subsection G.

The 1994 amendment, effective May 18, 1994, substituted "or a" for "and" preceding "fuel mixture" in Subsection A, inserted Subsection D, and redesignated the remaining subsections accordingly.

13-1B-3. Acquisition of vehicles; exemptions.

A. Seventy-five percent of light duty vehicles acquired in fiscal year 2003 and each fiscal year thereafter by the agencies and departments of state government and educational institutions shall be vehicles that:

(1) meet or exceed the corporate average fuel economy standards for vehicles issued by the national highway transportation safety administration of the United States department of transportation;

(2) are hybrid vehicles;

(3) are capable of operating on alternative fuel with either bi-fuel capability or dedicated engine configurations; or

(4) are plug-in electric vehicles.

B. Certified law enforcement pursuit vehicles and emergency light duty vehicles are exempt from the provisions of the Alternative Fuel Acquisition Act. The department may exempt additional light duty vehicles from the requirements of Subsection A of this section upon demonstration by the acquiring entity that:

(1) a vehicle that meets the corporate average fuel economy standards is not suitable for its intended use or is unavailable from an original vehicle manufacturer;

(2) alternative fuels are unavailable at a cost within fifteen percent of the cost of conventional fuel within the normal driving range of these vehicles; or

(3) a vehicle suitable for its intended use and capable of operating on alternative fuel or a gas-electric hybrid is not available from an original equipment manufacturer.

C. Equipment and installation procedures shall conform to all applicable state and federal safety and environmental regulations and standards.

D. The agencies and departments of state government, political subdivisions and educational institutions may submit loan applications to the department to acquire loans to facilitate the acquisition of their vehicles.

E. Agencies and departments of state government and educational institutions shall provide to the department by September 1, 2003 and by September 1 of each year thereafter the total number of light duty vehicles acquired in the preceding fiscal year and the number of those light duty vehicles that meet the requirements of Paragraphs (1) through (4) of Subsection A of this section and the make, model, fuel or power type of and corporate average fuel economy rating for each of those vehicles.

History: Laws 1992, ch. 58, § 3; 1994, ch. 130, § 2; 1995, ch. 160, § 2; 2002, ch. 32, § 4; 2009, ch. 110, § 1; 2018, ch. 53, § 2.

ANNOTATIONS

Cross references. — For provision requiring public acquisition of American-made motor vehicles, with gas-electric hybrid exception, *see* 13-1-188 NMSA 1978.

The 2018 amendment, effective July 1, 2018, revised the weight of vehicles that state agencies, departments of state government, and educational institutions may purchase pursuant to this section, and revised the weight of certain vehicles that are exempt from the provisions of the Alternative Fuel Acquisition Act; in Subsection A, after "Seventy-five percent of", added "light duty"; in Subsection B, after "emergency", added "light duty", and after "exempt additional", added "light duty"; and in Subsection E, after "total number of", added "light duty", and after "the number of those", added "light duty".

The 2009 amendment, effective June 19, 2009, in Subsection A, after "vehicles that" deleted "are capable of operating on alternative fuel or", added Paragraph (1), in Paragraph (2) deleted "gas-electric" before "hybrid vehicles", and added Paragraph (4); in Subsection B, added Paragraph (1); and in Subsection E, after "those vehicles that" deleted "are capable of operating on alternative fuel or that are gas-electric hybrid vehicles" and added "meet the requirements of Paragraphs (1) through (4) of Subsection A of this section", after "fuel" added "or power", after "type of" added "and corporate average fuel economy rating for", and after "each of" deleted "the alternative fuel or gas-electric hybrid".

The 2002 amendment, effective July 1, 2002, substituted "acquisition" for "conversion" in the section heading and in present Subsections B and D; deleted former Subsection A, which set out the schedule for agencies and departments of state government and post-secondary institutions to convert vehicles purchased or leased after May 20, 1992 from gasoline to alternative fuel; rewrote former Subsection B, which read: "The agencies and departments of state government and the post-secondary institutions may convert their vehicles to bi-fuel capability or to dedicated engine configurations" as present Subsection A and redesignated the following subsections accordingly; substituted "acquiring entity" for "purchasing entity" in Subsection B; substituted "within fifteen percent of" for "approximately equivalent to" in Paragraph B(1); deleted former Paragraphs B(2) and B(3), which provided exemptions from the provisions of the Alternative Fuel Conversion Act if the conversion payback period was too long to be economically feasible or if the conversion of a vehicle would hamper or interfere with its

intended use; added present Paragraph B(2); substituted "educational" for "post-secondary" in Subsection D; and added Subsection E.

The 1995 amendment, effective June 16, 1995, in Subsection A, substituted "May 20, 1992" for "the effective date of the Alternative Fuel Conversion Act" and made minor stylistic changes in Paragraphs (1) and (2); and in Subsection C, inserted "Certified" and "pursuit vehicles" in the first sentence, redesignated the language beginning with "alternative fuels" as Paragraph (1), substituted "conventional fuel" for "gasoline" therein, and added Paragraphs (2) and (3).

The 1994 amendment, effective May 18, 1994, deleted "transportation" following "alternative" in the second sentence of Subsection C and inserted "political subdivisions" in Subsection E.

13-1B-4. Revolving loan fund created; administration.

A. The "alternative fuel acquisition loan fund" is created in the state treasury as a revolving loan fund. The department shall administer the fund and make loans from the fund in accordance with the Alternative Fuel Acquisition Act.

B. The fund shall consist of earnings on balances in the fund, receipts from the repayment of loans made pursuant to the Alternative Fuel Acquisition Act and appropriations made by the legislature.

C. The fund balance shall not exceed five million dollars ($5,000,000), and any balance in the fund of five million dollars ($5,000,000) or less shall not revert to the general fund at the end of any fiscal year. Interest on cash balances and repayment of loans in excess of the amount necessary to maintain the fund balance at five million dollars ($5,000,000) shall be deposited in the general fund.

D. Administrative costs of the fund shall be paid by the department until interest revenues in the fund are sufficient to cover administrative costs, at which time administrative costs may be paid from the fund.

E. Expenditures from the fund shall be supported by loan documents evidencing the intent of the borrower to repay the loan. The original loan documents shall be filed with the department of finance and administration, and a copy shall be filed with the department.

History: Laws 1992, ch. 58, § 4; 2002, ch. 32, § 5.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, substituted "acquisition" for "conversion" in three places in Subsections A and B.

13-1B-5. Revolving loan fund; loans made from the fund.

A. Money available in the fund may be loaned by the department to reimburse the expenses incurred in acquiring vehicles of the agencies and departments of state government, political subdivisions and educational institutions from gasoline to alternative fuel.

B. A state agency or department, a political subdivision or an educational institution to which a loan is made shall demonstrate the ability to pay back the loan within seven years of the date that its vehicles are acquired.

C. Use of the fund shall be limited to purchases of light duty, medium duty or heavy duty vehicles that use natural gas, liquified petroleum gas, electricity or hydrogen.

D. The maximum amount loaned to acquire a vehicle shall not exceed the actual incremental cost of acquiring the vehicle or:

(1) five thousand dollars ($5,000) for a light duty vehicle;

(2) ten thousand dollars ($10,000) for a medium duty vehicle; or

(3) twenty thousand dollars ($20,000) for a heavy duty vehicle.

History: Laws 1992, ch. 58, § 5; 1994, ch. 130, § 3; 2002, ch. 32, § 6; 2018, ch. 53, § 3.

ANNOTATIONS

The 2018 amendment, effective July 1, 2018, defined the types of vehicles that are eligible for purchase through the alternative fuel acquisition loan fund, and changed the amounts that may be loaned to acquire a vehicle through the fund; added a new Subsection C and redesignated former Subsection C as Subsection D; and in Subsection D, after "exceed the actual", added "incremental", after "acquiring the vehicle or", deleted "three thousand dollars ($3,000), whichever is less", and added Paragraphs D(1) through D(3).

The 2002 amendment, effective July 1, 2002, substituted "acquire", or variants thereof for "convert" throughout the section and substituted "educational institution" for "post-secondary institution" in Subsections A and B.

The 1994 amendment, effective May 18, 1994, inserted "political subdivisions" in Subsection A and "political subdivision" in Subsection B.

13-1B-6. Loan program; duties of the department.

A. The department shall:

(1) administer the provisions of the Alternative Fuel Acquisition Act, except that the provisions of Section 13-1B-3 NMSA 1978 shall be administered by the commission on higher education and the state department of public education for their respective programs;

(2) establish a program to make loans to the agencies and departments of state government, political subdivisions and educational institutions, individually or jointly, to facilitate the acquisition of vehicles of the agencies and departments of state government, political subdivisions and educational institutions in accordance with the Alternative Fuel Acquisition Act;

(3) review, evaluate and approve or reject all loan applications submitted to obtain loans from the fund;

(4) submit an annual report to the governor and the legislature evaluating the status and the effectiveness of the Alternative Fuel Acquisition Act; and

(5) have an annual audit performed on the administration of the fund.

B. The department shall adopt rules and regulations necessary to carry out the purposes of the Alternative Fuel Acquisition Act, including rules and regulations governing:

(1) the procedures and format for submitting loan applications to the department to obtain a loan from the fund;

(2) the criteria to review, evaluate and approve loan applications;

(3) the procedure to determine the distribution of money in the fund; and

(4) the procedure to determine and notify an applicant of the progress on a loan application.

History: Laws 1992, ch. 58, § 6; 1994, ch. 130, § 4; 2002, ch. 32, § 7.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, substituted "acquisition" for "conversion" throughout the section; inserted "and the state department of public education" in Paragraph A(1); and substituted "educational institutions" for "post-secondary institutions" in two places in Paragraph A(2).

The 1994 amendment, effective May 18, 1994, substituted "13-1B-3 NMSA 1978" for "3 of that act" in Paragraph A(1) and inserted "political subdivisions" twice in Paragraph A(2).

13-1B-7. Repayment of loans to the fund.

A. When developing the repayment schedule for loans from the fund, the department shall consider the projected savings from alternative fuel.

B. The department of finance and administration shall collect and account for the loans made from the fund, and it shall have custody of all of the original loan documents, including all notes and contracts evidencing the amounts owed to the fund.

C. Loans shall be made for a period of time not to exceed seven years, with an annual interest rate of zero percent. A loan shall be repaid in equal annual installments, with the first annual installment due within one year of the date on which the loan is issued.

D. Loans shall be made only for eligible items.

History: Laws 1992, ch. 58, § 7; 2002, ch. 32, § 8; 2018, ch. 53, § 4.

ANNOTATIONS

The 2018 amendment, effective July 1, 2018, reduced the interest rate on loans from the alternative fuel acquisition loan fund to zero; and in Subsection C, after "annual interest rate of", deleted "five" and added "zero".

The 2002 amendment, effective July 1, 2002, deleted "conversion to" before "alternative fuel" in Subsection A and substituted "amounts owed to" for "indebtedness of" near the end of Subsection B.

ARTICLE 1C
State Use Act

13-1C-1. Short title.

Sections 1 through 7 of this act [13-1C-1 to 13-1C-7 NMSA 1978] may be cited as the "State Use Act".

History: Laws 2005, ch. 334, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

13-1C-2. Purpose.

The purpose of the State Use Act is to encourage and assist persons with disabilities to achieve maximum personal independence through useful and productive employment by ensuring an expanded and constant market for services delivered by persons with disabilities, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and entitlements.

History: Laws 2005, ch. 334, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

13-1C-3. Definitions.

As used in the State Use Act:

A. "central nonprofit agency" means a nonprofit agency approved pursuant to rules of the council to facilitate the equitable distribution of orders for the services of:

(1) qualified individuals; and

(2) community rehabilitation programs;

B. "community rehabilitation program" means a nonprofit entity:

(1) that is organized under the laws of the United States or this state, operated in the interest of persons with disabilities and operated so that no part of the income of which inures to the benefit of any shareholder or other person;

(2) that complies with applicable occupational health and safety standards as required by federal or state law; and

(3) that, in the provision of services, whether or not procured under the State Use Act, employs during the state fiscal year at least seventy-five percent persons with disabilities in direct labor for the provision of services;

C. "council" means the New Mexico council for purchasing from persons with disabilities;

D. "direct labor" means all work directly relating to the provision of services, but not work required for or relating to supervision, administration or inspection;

E. "local public body" means a political subdivision of the state and the political subdivision's agencies, instrumentalities and institutions;

F. "persons with disabilities" means persons who have a mental or physical impairment that constitutes or results in a substantial impediment to employment as defined by the federal Rehabilitation Act of 1973;

G. "qualified individual" means a person with a disability who is a business owner, or a business that is primarily owned and operated by persons with disabilities that employs at least seventy-five percent persons with disabilities in the provision of direct labor, which has been approved by the council to provide services to state agencies and local public bodies. A person who is receiving services pursuant to an individualized plan of employment from the vocational rehabilitation division of the public education department or from the commission for the blind shall be presumed to be a person with disability, as shall a person who is receiving supplemental security income or social security benefits based on disability;

H. "state agency" 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 government of this state; and

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

History: Laws 2005, ch. 334, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

13-1C-4. Council for purchasing from persons with disabilities; appointment; organization.

A. The "New Mexico council for purchasing from persons with disabilities" is created. The council shall be composed of the following nine members:

(1) the state purchasing agent or the agent's designee;

(2) two persons, appointed by the governor, who represent state agencies that purchase significant amounts of goods and services from the private sector, or their designees;

(3) a person, appointed by the governor, who is a state-employed vocational rehabilitation counselor and who is familiar with employment needs of persons with disabilities and with current pricing and marketing of goods and services; and

(4) two persons with disabilities, a person who is familiar with employment needs of persons with disabilities and with current pricing and marketing of goods and services and two persons who represent community rehabilitation programs that provide employment services to persons with disabilities, all selected by mutual agreement of the persons appointed in Paragraphs (1), (2) and (3) of this subsection.

B. Council members shall be appointed for three-year terms. Vacancies shall be filled in the same manner as for original appointments. A member appointed to fill a vacancy shall serve for the remainder of the term for that vacancy. Council members shall continue to serve beyond the expiration of their terms until new members are appointed.

C. The council shall elect a chair from among its members. Seven members of the council shall constitute a quorum in order to conduct the council's business.

D. Except for the regular pay of public employee members, council members shall serve without compensation or cost reimbursement.

History: Laws 2005, ch. 334, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

Self-dealing by non-state-employed council members does not violate the Governmental Conduct Act or the Procurement Code. — Neither the Governmental Conduct Act nor the Procurement Code prohibits members of the New Mexico council for purchasing from persons with disabilities (council) from voting to approve a contract subject to the State Use Act, 13-1C-1 to 13-1C-7 NMSA 1978, between a state agency or local public body and a council member or a company in which the council member has a financial interest. Most of the members of the council do not receive compensation or cost reimbursements from the state, and therefore are not subject to the Governmental Conduct Act's conflict-of-interest provisions, and because procurements under the State Use Act are exempt from the requirements of the Procurement Code, the Procurement Code's conflict-of-interest section is unavailing. 2020 Op. Ethics Comm'n No. 2020-07.

13-1C-5. Authority and duties of the council; rules.

A. The council shall adopt rules in accordance with the procedure set out in Subsection E of Section 9-1-5 NMSA 1978 that:

(1) determine which services provided by persons with disabilities are suitable for sale to state agencies and local public bodies;

(2) establish, maintain and publish a list of all the services identified in Paragraph (1) of this subsection. The council shall periodically review and revise this list as products or services are added or removed. The council shall make the list available to all purchasing officials of state agencies and local public bodies;

(3) verify the fair market prices of the services identified in Paragraph (1) of this subsection and periodically revise the fair market prices in accordance with changing market conditions to ensure that services offer the best value for state agencies and local public bodies. In verifying the fair market value of services, the council shall consider amounts being paid for similar services purchased by the federal government, the state and local public bodies and by private businesses, and the actual cost of performing the services at a community rehabilitation program, taking into consideration the benefits associated with employing persons with disabilities;

(4) establish a procedure to certify eligible community rehabilitation programs and qualified individuals that have services suitable for procurement by state agencies and local public bodies that will be placed on the list established in Paragraph (2) of this subsection;

(5) establish a procedure for approval of a central nonprofit agency that shall hold contracts, facilitate the equitable distribution of orders for services to be procured by state agencies and local public bodies and market approved services to state agencies and local public bodies;

(6) establish procedures for the operation of the approved central nonprofit agency, including a fee structure for its services;

(7) address any other matter necessary to the proper administration of the State Use Act; and

(8) ensure that the work provides opportunities for integration with nondisabled persons, fair pay and adds value to the service provided.

B. The council shall, not later than one hundred eighty days following the close of each fiscal year, submit to the governor, the legislature and each community rehabilitation program a report that includes the names of the council members serving during the preceding fiscal year, the dates of council meetings during that year and any recommendations for changes to the State Use Act.

History: Laws 2005, ch. 334 , § 5.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

Self-dealing by non-state-employed council members does not violate the Governmental Conduct Act or the Procurement Code. — Neither the Governmental Conduct Act nor the Procurement Code prohibits members of the New Mexico council for purchasing from persons with disabilities (council) from voting to approve a contract subject to the State Use Act, 13-1C-1 to 13-1C-7 NMSA 1978, between a state agency or local public body and a council member or a company in which the council member has a financial interest. Most of the members of the council do not receive compensation or cost reimbursements from the state, and therefore are not subject to the Governmental Conduct Act's conflict-of-interest provisions, and because procurements under the State Use Act are exempt from the requirements of the Procurement Code, the Procurement Code's conflict-of-interest section is unavailing. 2020 Op. Ethics Comm'n No. 2020-07.

13-1C-6. Existing vendor exclusion.

Services provided pursuant to and facilities covered by Section 22-14-27 NMSA 1978 are excluded from the State Use Act.

History: Laws 2005, ch. 334, § 6.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

13-1C-7. Procurement by state agencies and local public bodies; cooperative agreements.

A. A state agency or local public body intending to procure a service on a list published by the council shall, in accordance with rules of the council, procure the service at the price established by the council if the service is available within the period required by the state agency or local public body. Procurement pursuant to the State Use Act [Chapter 14, Article 4 NMSA 1978] is exempt from the provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978].

B. The council and a state agency or local public body may enter into a cooperative agreement for effective coordination of the objectives of the State Use Act and any other law requiring procurement of services from a state agency or local public body.

History: Laws 2005, ch. 334, § 7.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 334 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.

Self-dealing by non-state-employed council members does not violate the Governmental Conduct Act or the Procurement Code. — Neither the Governmental Conduct Act nor the Procurement Code prohibits members of the New Mexico council for purchasing from persons with disabilities (council) from voting to approve a contract subject to the State Use Act, 13-1C-1 to 13-1C-7 NMSA 1978, between a state agency or local public body and a council member or a company in which the council member has a financial interest. Most of the members of the council do not receive compensation or cost reimbursements from the state, and therefore are not subject to the Governmental Conduct Act's conflict-of-interest provisions, and because procurements under the State Use Act are exempt from the requirements of the Procurement Code, the Procurement Code's conflict-of-interest section is unavailing. 2020 Op. Ethics Comm'n No. 2020-07.

ARTICLE 2
Freight Bills - Audit by State (Repealed.)

13-2-1. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch, 75, § 1 repealed 13-2-1 NMSA 1978, as enacted by Laws 1965, ch. 245, § 1, regarding the auditing of freight bills by the public regulation commission, effective June 15, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMOneSource.com.*

ARTICLE 3
Public Printing Contracts (Repealed.)

13-3-1 to 13-3-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1984, ch. 65, § 175, repealed 13-3-1 to 13-3-5 NMSA 1978, as enacted by Laws 1937, ch. 168, §§ 1 to 5, relating to preferences for New Mexico firms in awards of public printing contracts, effective November 1, 1984. For present comparable provisions, *see* 13-1-21 NMSA 1978.

ARTICLE 4
Public Works Contracts

13-4-1. Public works contracts.

It is the duty of every office, department, institution, board, commission or other governing body or officer thereof of this state or of any political subdivision thereof to award all contracts for the construction of public works or for the repair, reconstruction, including highway reconstruction, demolition or alteration thereof, to a resident contractor whenever practicable.

History: Laws 1933, ch. 50, § 1; 1941 Comp., § 6-501; 1953 Comp., § 6-6-1; Laws 1965, ch. 185, § 1; 1984, ch. 66, § 1.

ANNOTATIONS

Cross references. — For county buildings upon change of county seat, *see* 4-34-3 NMSA 1978.

For contracts for courthouses, jails or bridges after approval of bond issue, *see* 4-49-14 NMSA 1978.

For employees to be residents, *see* 10-1-6 to 10-1-9 NMSA 1978.

Award to resident contractor is mandatory. — The formula in Section 13-4-2E NMSA 1978 is a working definition of practicality such that the "whenever practicable" of Section 13-4-1 NMSA 1978 is measured by the formula in Section 13-4-2E NMSA 1978 and if a resident contractor bids within five percent of a nonresident contractor, the governmental entity has no discretion but to award the contract to the resident contractor. *Bradbury & Stamm Constr. v. Board of Cnty. Comm'rs of Bernalillo Cnty.*, 2001-NMCA-106, 131 N.M. 293, 35 P.3d 298.

Resident contractor construed. — The "whenever practicable" language of Section 13-4-1 is measured by the formula set out in Section 13-4-2(E), so that it is no longer necessary for a governmental entity to make a written finding why an award to the resident contractor is not 'practicable' under the circumstances," as prevailing authority before 1984 demanded; if a resident contractor does not bid within 5 percent of a nonresident contractor's low bid, the legislature has decided as a matter of law that the taxpayer will not be burdened with the additional expenditure of a local preference, and the governmental entity need not justify its decision to go out of state. *Ballard v. Chavez*, 1994-NMSC-007, 117 N.M. 1, 868 P.2d 646.

"Practicable" defined. — "Practicable" has been defined by the courts to mean something which is capable of being performed or effected under the prevailing circumstances. In making a determination of practicability or nonpracticability, the public body involved must necessarily consider the availability of funds, reliability of the contractor, time factors involved in the construction and other aspects incident to such construction project. 1965 Op. Att'y Gen. No. 65-05.

When written finding required. — An express written finding is required if a New Mexico contractor is not awarded such contract, spelling out the basis for such finding. 1965 Op. Att'y Gen. No. 65-05.

Effect on Ute dam contracts. — The provisions of this article have definite application to the proposed public works project for the construction of the Ute dam. Consequently, any contract executed in violation of this article is void and of no effect, unless a finding is made and a valid substantiation given as to why such award to a non-New Mexico contractor is not "practicable." 1962 Op. Att'y Gen. No. 62-80.

Effect on New Mexico interstate stream commission. — The provisions of this article have application to a proposed construction project to be awarded by the New Mexico interstate stream commission. 1962 Op. Att'y Gen. No. 62-80.

Legislative intent. — It is apparent that the legislature clearly intended that public construction projects come within the safeguards of the former Public Purchases Act, and be awarded whenever practicable to New Mexico contractors. 1962 Op. Att'y Gen. No. 62-80.

Preclusion from bidding. — New Mexico contractors may not properly be precluded from bidding upon public works construction projects financed from state funds. Under the former Public Purchases Act, however, the state purchasing agent was invested with certain discretion in the awarding or rejection of bids. 1962 Op. Att'y Gen. No. 62-80.

Law reviews. — For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 66 to 69.

Equipment leasing expense as element of construction contractor's damages, 52 A.L.R.4th 712.

Construction and effect of "changed conditions" clause in public works or construction contract with state or its subdivision, 56 A.L.R.4th 1042.

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.

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects, 5 A.L.R.5th 470.

Who is "employee," "workman," or the like, or contractor subject to state statute requiring payment of prevailing wages on public works projects, 5 A.L.R.5th 513.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects, 7 A.L.R.5th 400.

Employers subject to state statutes requiring payment of prevailing wages on public works projects, 7 A.L.R.5th 444.

What projects involve work subject to state statutes requiring payment of prevailing wages on public works projects, 10 A.L.R.5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects, 10 A.L.R.5th 360.

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

20 C.J.S. Counties § 162; 63 C.J.S. Municipal Corporations §§ 900, 901, 910; 72 Supp. C.J.S. Public Contracts §§ 12, 15, 16; 78 C.J.S. Schools and School Districts § 403; 81A C.J.S. States § 157.

13-4-1.1. Definitions; construction contract; contractor.

As used in Chapter 13, Article 4 NMSA 1978:

A. "contract" or "construction contract" includes a construction manager at risk contract entered into pursuant to the Educational Facility Construction Manager At Risk Act [13-1-124.1 to 13-1-124.5 NMSA 1978]; and

B. "contractor" includes a construction manager at risk selected pursuant to the Educational Facility Construction Manager At Risk Act.

History: Laws 2007, ch. 141, § 8.

ANNOTATIONS

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

13-4-2. Application of preference.

A. For the purposes of this section:

(1) "formal bid process" means a competitive sealed bid process;

(2) "formal request for proposals process" means a competitive sealed proposal process, including a competitive sealed qualifications-based proposal process;

(3) "Native American resident contractor" means a person that has a valid Native American resident contractor certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978 but does not include a Native American resident veteran contractor;

(4) "Native American resident veteran contractor" means a person that has a valid Native American resident veteran contractor certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978;

(5) "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;

(6) "public works contract" means a contract for construction, construction management, architectural, landscape architectural, engineering, surveying or interior design services;

(7) "resident contractor" means a person that has a valid resident contractor certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978 but does not include a resident veteran contractor; and

(8) "resident veteran contractor" means a person that has a valid resident veteran contractor certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978.

B. For the purpose of awarding a public works contract using a formal bid process, a public body shall deem a bid submitted by a:

(1) resident contractor or Native American resident contractor to be eight percent lower than the bid actually submitted; or

(2) resident veteran contractor or Native American resident veteran contractor with annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year to be ten percent lower than the bid actually submitted.

C. When a public body awards a contract using a formal request for proposals process, not including contracts awarded on a point-based system, the public body shall award an additional:

(1) eight percent of the total weight of all the factors used in evaluating the proposals to a resident contractor or Native American resident contractor; or

(2) ten percent of the total weight of all the factors used in evaluating the proposals to a resident veteran contractor or Native American resident veteran contractor that has annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year.

D. When a public body makes a purchase using a formal request for proposals process, and the contract is awarded based on a point-based system, the public body shall award an additional of the equivalent of:

(1) eight percent of the total possible points to a resident contractor or Native American resident contractor; or

(2) ten percent of the total possible points to a resident veteran contractor or Native American resident veteran contractor that has annual gross revenues of up to six million dollars ($6,000,000) in the preceding tax year.

E. When a joint bid or joint proposal is submitted by a combination of resident veteran, Native American resident veteran, resident, Native American resident or nonresident contractors, the preference provided pursuant to Subsection B, C or D of this section shall be calculated 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 each contractor as specified in the joint bid or joint proposal.

F. A person shall not benefit from the provisions of this section based on more than one business concurrently.

G. A public body shall not award a contractor both a resident contractor preference and a resident veteran contractor preference or a Native American resident contractor preference and a Native American resident veteran contractor preference.

H. 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.

History: 1978 Comp., § 13-4-2, enacted by Laws 1984, ch. 66, § 2; 1988, ch. 84, § 3; 1989, ch. 310, § 2; 1997, ch. 1, § 3; 1997, ch. 2, § 3; 2001, ch. 174, § 1; 2011 (1st S.S.), ch. 3, § 5; 2012, ch. 56, § 5; 2012, ch. 56, § 6; 2016, ch. 5, § 2; 2022, ch. 6, § 3.

ANNOTATIONS

Repeals. — Laws 2016, ch. 5, § 4, effective July 1, 2016, repealed Laws 2012, ch. 56, § 6, which was to become effective July 1, 2022. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

The 2022 amendment, effective July 1, 2022, increased the preference for New Mexico resident contractors, increased the maximum allowable gross revenue for resident

veteran contractors to qualify for certain preferences, amended existing provisions giving a preference to resident contractors and resident veteran contractors to include Native American resident contractors and Native American resident veteran contractors, defined "Native American resident contractor" and Native American resident veteran contractor" for purposes of this section, and removed a provision that prohibited a business from claiming a preference for more than ten consecutive years; in Subsection A, added new Paragraphs A(3) and A(4) and redesignated former Paragraphs A(3) through A(6) as Paragraphs A(5) through A(8), respectively; in Subsection B, Paragraph B(1), after "resident contractor", added "or Native American resident contractor", after "to be", deleted "five" and added "eight", and in Paragraph B(2), after "resident veteran contractor", added "or Native American resident veteran contractor", and after "annual gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection C, Paragraph C(1), deleted "five" and added "eight", and after "resident contractor", added "or Native American resident contractor", and in Paragraph C(2), after "resident veteran contractor", added "or Native American resident veteran contractor", and after "annual gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection D, in Paragraph D(1), after the paragraph designation, deleted "five" and added "eight", and after "resident contractor", added "or Native American resident contractor", and in Paragraph D(2), after "resident veteran contractor" and added "or Native American resident veteran contractor", and after "annual gross revenues of up to", deleted "three million dollars ($3,000,000)" and added "six million dollars ($6,000,000)"; in Subsection E, after the first occurrence of "resident veteran,", added "Native American resident veteran", and after the next occurrence of "resident", added "Native American resident"; in Subsection F, deleted "A resident veteran contractor shall not benefit from the preference pursuant to this section for more than ten consecutive years. A person that is an owner of a business that is a resident veteran contractor shall not benefit from the preference pursuant to this section for more than ten consecutive years"; and in Subsection G, after "resident veteran contractor preference", added "or a Native American resident contractor preference and a Native American resident veteran contractor preference".

The 2016 amendment, effective July 1, 2016, reduced the maximum revenue that a resident veteran contractor can earn to receive the veteran contractor preference, merged the former tiered preferences into one ten percent preference, set a ten consecutive year maximum time for a vendor to use the resident veteran contractor preference, and limited the benefit to one business concurrently; in Subsection B, in Paragraph (1), after the semicolon, added "or", in Paragraph (2), after "annual", added "gross", and after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4) which provided for a tiered resident veteran contractor preference; in Subsection C, Paragraph (1), after the semicolon, added "or", in Paragraph (2), after "annual", added "gross", and after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4), which provided for a tiered resident veteran contractor preference; in Subsection D, Paragraph (1), after the

semicolon, added "or", in Paragraph (2), after "annual", added "gross", and after "revenues of", deleted "one million dollars ($1,000,000) or less" and added "up to three million dollars ($3,000,000) in the preceding tax year", and deleted Paragraphs (3) and (4), which provided for a tiered resident veteran contractor preference; deleted former Subsection F, which limited the former tiered resident veteran contractor preferences to an aggregate of ten million dollars ($10,000,000) in purchases by public bodies from all resident veteran contractors receiving preferences; and added a new Subsection F.

The 2012 amendment, effective July 1, 2012, gave resident veteran businesses a preference; in the title, deleted "Resident contractor defined"; in Subsection A, in Paragraph (5), after "Section 13-1-22 NMSA 1978", added the remainder of the sentence and added Paragraph (6); in Subsection B, added Paragraphs (2) through (4); in Subsection C, in the introductory sentence, after "proposals process", added the remainder of the sentence, in Paragraph (1), after "evaluating the proposals", deleted "shall be awarded" and after "resident contractor", deleted "based on the resident contractor possessing a valid resident contractor certificate; or", and added Paragraphs (2) through (4); in Subsection D, in the introductory sentence, added "When a public body makes a purchase using a formal request for proposal process, and" and after "point-based system", deleted "a" and added the remainder of the sentence, in Paragraph (1), at the beginning of the sentence, deleted "resident contractor shall be awarded the equivalent of", after "total possible points to", deleted "be awarded based on the" and added "a", and after "resident contractor", deleted "possessing a valid resident contractor certificate", and added Paragraphs (2) through (4); in Subsection E, after "proposal is submitted by", deleted "both resident and" and added "a combination of resident veteran, resident or", after "nonresident contractors, the", deleted "resident contractor", after "Subsection B", deleted "or", after "Subsection B, C", added "or D", after "this section shall be", deleted "reduced" and added "calculated", and after "will be performed by" deleted "a nonresident" and added "each"; and added Subsections F and G.

The 2011 (1st. S.S.) amendment, effective October 5, 2011, provided a five percent advantage to bids and proposals by resident contractors; eliminated the practice of brokering the preference through joint bids or proposals by resident and non-resident contractors by reducing the preference by the percentage of the contract performed by the nonresident contractor; eliminated the preference for New York state business enterprises; provided the procedure for protesting violations of this section; deleted former Sections A through E, which defined "resident contractor", "New Mexico resident contractor", "New York state business enterprise", and "affiliate", provided for awarding a contract to a resident contractor when the bid by the resident contractor is made lower, by the application of a five percent preference, than the lowest bid from a nonresident contractor, and provided for the certification of resident contractors and the issuance of a certification number by the state purchasing agent; and added new Subsections A through E.

The 2001 amendment, effective June 15, 2001, in Subsection B, deleted residency requirements for the majority of stockholders and those who have a beneficial interest in

the corporations, partnerships, and trusts who bid with a New Mexico resident contractor in Paragraphs (1) and (2); deleted "and the individual shall be a citizen of and domiciled in the state" from Paragraph (3); deleted the paragraph designation D(1) and deleted Paragraph D(2), which contained the definition for "beneficially owned" or "beneficial interest".

The 1997 amendment, effective January 24, 1997, inserted "means a New Mexico resident contractor or a New York state business enterprise" in Subsection A; designated Subsection B and added "'New Mexico resident contractor' means" at the beginning; deleted "New Mexico" preceding "Unemployment Compensation Law" in Paragraph B(4); added Subsection C and redesignated former Subsections B through D as Subsections D through F and substituted "Subsection E" for "Subsection C" near the end of Subsection F(3).

Constitutionality. — Plaintiff shareholder's privileges and immunities claim under Article 4, § 2 of the United States Constitution was granted where defendant/state burdened the right to own a business by discriminating against owners solely on the basis of citizenship, and plaintiff was able to establish that § 13-1-21A(2) under the former Procurement Contract Code was a better-tailored statute than this section. *C.S. McCrossan Constr., Inc. v. Rahn*, 96 F. Supp. 2d 1238 (D.N.M. 2000) (decided prior to 2001 amendment, which amended residency requirement provision).

Equal protection. — This section does not violate the equal protection clause of the United States Constitution because encouraging economic development and supporting the state's road construction industry are legitimate purposes of the resident contractor preference statute. *C.S. McCrossan Constr., Inc. v. Rahn*, 96 F. Supp. 2d 1238 (D.N.M. 2000).

Application. — Where a county in New Mexico decided to build a jail and bypassed the resident preference for contractors found in Subsection E, the court of appeals found that the resident preference formula applied to all bids for public works contracts and had to be followed. *Bradbury & Stamm Constr. v. Board of Cnty. Comm'rs*, 2001-NMCA-106, 131 N.M. 293, 35 P.3d 298.

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

72 Supp. C.J.S. Public Contracts §§ 12, 15, 16.

13-4-3. Federal aid projects exempt.

The provisions of Sections 13-4-1 through 13-4-4 NMSA 1978 shall not apply to federal aid construction projects or when the expenditure of federal funds designated for a specific contract is involved.

History: Laws 1933, ch. 50, § 3; 1941 Comp., § 6-503; 1953 Comp., § 6-6-3; 1984, ch. 66, § 3.

13-4-4. [Contracts in violation declared void.]

All contracts executed in violation of this act [13-4-1 to 13-4-4 NMSA 1978] shall be void and of no effect.

History: Laws 1933, ch. 50, § 4; 1941 Comp., § 6-504; 1953 Comp., § 6-6-4.

13-4-5. Use of New Mexico materials.

In all public works within New Mexico, whether constructed or maintained by the state or by a department, board or commission of the state or by any political subdivision of the state, or in any construction or maintenance to which the state or any political subdivision of the state has granted aid, preference shall be given to materials produced, grown, processed or manufactured in New Mexico by citizens or residents of New Mexico. In any case where, in the judgment of the different officers, boards, commissions or other authorities in this state vested with the power of contracting for material used in the construction or maintenance of public works referred to in this section, it appears that an attempt is being made by producers, growers, processors or manufacturers in the state to form a trust or combination of any kind for the purpose of fixing or regulating the price of materials to be used in any public works to the detriment of or loss to the state, the provisions of this section shall not apply.

History: Laws 1933, ch. 19, § 1; 1941 Comp., § 6-505; 1953 Comp., § 6-6-5; Laws 1969, ch. 16, § 1; 1997, ch. 1, § 4; 1997, ch. 2, § 4; 2011 (1st S.S.), ch. 3, § 6.

ANNOTATIONS

The 2011 (1st. S.S.) amendment, effective October 5, 2011, eliminated the preference for New York state business enterprises; in the first sentence, after "resident of New Mexico", deleted "or provided or offered by a New York state business enterprise, and such materials shall be used where they are deemed satisfactory for the intended use"; and deleted former Subsection B, which defined "New York state business enterprise".

The 1997 amendment, effective January 24, 1997, designated the existing language as Subsection A, inserted "of New Mexico or provided or offered by a New York State business enterprise" following "citizens or residents", "they" following "used where", and "in this section" following "referred to"; and added Subsection B.

Provisions outside title not given effect. — The body of this section is broader than the title of the act, and as a result those provisions outside the title will not be given effect. 1934 Op. Att'y Gen. 34-719.

Operation of section. — The operation of this section should be confined to construction of public works in which it would be practicable to give preference to materials produced in New Mexico, and should be left to the discretion of board or commission having control of the work. 1934 Op. Att'y Gen. No. 34-719.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 27, 28.

Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract, 27 A.L.R.2d 917.

Requirement of Buy American Act (41 USCS §§ 10a-10d) that American-made articles be preferred in government contracts, 58 A.L.R. Fed. 312.

Validity, construction, and application of state "Buy American" Acts, 107 A.L.R.5th 673.

72 Supp. C.J.S. Public Contracts § 31.

13-4-6. [Discrimination against New Mexico softwood timber in building codes prohibited.]

It shall be unlawful for any building code or codes of this state or of any county, municipality or township therein, or of any agency, bureau or political division or subdivision of the state government to discriminate in any way against the softwood species of timber, such as Douglas fir and ponderosa pine, grown in New Mexico. All the various grades of lumber produced therefrom, and the softwood species of New Mexico lumber shall be considered, regarded and accepted prima facie as the equal in strength and durability of similar softwood species produced elsewhere, and the burden shall rest upon any person contesting this provision to prove to the contrary in a court of competent jurisdiction by a preponderance of the evidence.

History: Laws 1939, ch. 206, § 2; 1941 Comp., § 6-102; 1953 Comp., § 6-1-1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Buildings § 13.

98 C.J.S. Woods and Forests § 9.

13-4-7. [Use of New Mexico timber in public buildings required.]

In the construction, erection or repair of all of its public buildings and structures the state of New Mexico and all counties, municipalities and townships therein, and all agencies, bureaus or political divisions or subdivisions of the state government are hereby required to use, whenever the species of lumber necessary for such construction or repair work is available in this state, such species of lumber produced from the timber grown in the state of New Mexico; and no person employed to draw specifications therefor shall so word such specifications as to discriminate against any lumber produced from New Mexico as grown timber.

History: Laws 1939, ch. 206, § 3; 1941 Comp., § 6-103; 1953 Comp., § 6-1-2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 27.

Requirement of Buy American Act (41 USCS §§ 10a-10d) that American-made articles be preferred in government contracts, 58 A.L.R. Fed. 312.

13-4-8. Federal aid projects.

The provisions of Section 13-4-7 NMSA 1978 shall not apply to any public works projects in which the United States is interested or which involve participating federal funds.

History: 1953 Comp., § 6-1-2.1, enacted by Laws 1965, ch. 106, § 1.

13-4-9. [Penalty.]

Any person, firm, association or corporation distributing lumber in the state of New Mexico after June 30, 1939, for any of the purposes hereinbefore set forth in this act [13-4-6, 13-4-7, 13-4-9 NMSA 1978] or any contractor in this state using lumber for any of said purposes who shall deliberately violate any of the provisions of this act shall, upon conviction, be subject to a penalty of not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00) or imprisonment in the county jail for not less than thirty (30) nor more than ninety (90) days for each violation hereunder; provided, that in the case of a violation by a firm, association or corporation, the jail sentence, if one is imposed, shall be upon the officer, agent or person of such firm, association or corporation responsible for such violation.

History: Laws 1939, ch. 206, § 4; 1941 Comp., § 6-104; 1953 Comp., § 6-1-3.

13-4-10. Short title.

Sections 13-4-10 through 13-4-17 NMSA 1978 may be cited as the "Public Works Minimum Wage Act".

History: 1953 Comp., § 6-6-10.1, enacted by Laws 1963, ch. 304, § 1; 2009, ch. 206, § 1.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, changed the reference of the act to Sections 13-4-10 through 13-4-17 NMSA 1978.

Law reviews. — For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

13-4-10.1. Definitions.

As used in the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978]:

A. "director" means the director of the division;

B. "division" means the labor relations division of the workforce solutions department;

C. "fringe benefit" means payments made by a contractor, subcontractor, employer or person acting as a contractor, if the payment has been authorized through a negotiated process or by a collective bargaining agreement, for:

(1) holidays;

(2) time off for sickness or injury;

(3) time off for personal reasons or vacation;

(4) bonuses;

(5) authorized expenses incurred during the course of employment;

(6) health, life and accident or disability insurance;

(7) profit-sharing plans;

(8) contributions made on behalf of an employee to a retirement or other pension plan; and

(9) any other compensation paid to an employee other than wages;

D. "labor organization" means an organization of any kind, or an agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning

grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work; and

E. "wage" means the basic hourly rate of pay.

History: 1978 Comp., § 13-4-10.1, as enacted by Laws 2009, ch. 206, § 2.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 206, § 12 made this section effective July 1, 2009.

13-4-11. Prevailing wage and benefit rates determined; minimum wages and fringe benefits on public works; weekly payment; withholding funds.

A. Every contract or project in excess of sixty thousand dollars ($60,000) that the state or any political subdivision thereof is a party to for construction, alteration, demolition or repair or any combination of these, including painting and decorating, of public buildings, public works or public roads of the state and that requires or involves the employment of mechanics, laborers or both shall contain a provision stating the minimum wages and fringe benefits to be paid to various classifications of laborers and mechanics, which shall be based upon the wages and benefits that will be determined by the director to be prevailing for the corresponding classifications of laborers and mechanics employed on contract work of a similar nature in the state or locality, and every contract or project shall contain a stipulation that the contractor, subcontractor, employer or a person acting as a contractor shall pay all mechanics and laborers employed on the site of the project, unconditionally and not less often than once a week and without subsequent unlawful deduction or rebate on any account, the full amounts accrued at time of payment computed at wage rates and fringe benefit rates not less than those determined pursuant to Subsection B of this section to be the prevailing wage rates and prevailing fringe benefit rates issued for the project.

B. Annually, no later than October 1, the director shall determine prevailing wage rates and prevailing fringe benefit rates to take effect the next January 1 for respective classifications of laborers and mechanics employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers that govern predominantly similar classifications of laborers and mechanics for the locality of the public works project and the crafts involved; provided that:

(1) if the prevailing wage rates and prevailing fringe benefit rates cannot reasonably and fairly be determined in a locality because no collective bargaining agreements exist, the director shall determine the prevailing wage rates and prevailing fringe benefit rates for the same or most similar classification of laborer or mechanic in the nearest and most similar neighboring locality in which collective bargaining agreements exist;

(2) the director shall give due regard to information obtained during the director's determination of the prevailing wage rates and the prevailing fringe benefit rates made pursuant to this subsection;

(3) any interested person shall have the right to submit to the director written data, personal opinions and arguments supporting changes to the prevailing wage rate and prevailing fringe benefit rate determination;

(4) prevailing wage rates and prevailing fringe benefit rates determined pursuant to the provisions of this section shall be compiled as official records and kept on file in the director's office, and the records shall be updated in accordance with the applicable rates used in subsequent collective bargaining agreements;

(5) an appeal of the prevailing wage determination pursuant to the provisions of this section shall not have the effect of creating a stay of the implementation of the rate; and

(6) during the pendency of an appeal, whether before the labor and industrial commission or in a court, a court of competent jurisdiction may grant a stay of the implementation of the wage rate based on a motion made by a party or an interested person, provided the court gives an opportunity for any interested person to be heard on the matter.

C. The prevailing wage rates and prevailing fringe benefit rates to be paid shall be posted by the contractor or person acting as a contractor in a prominent and easily accessible place at the site of the work; provided that there shall be withheld from the contractor, subcontractor, employer or a person acting as a contractor so much of accrued payments as may be considered necessary by the director or contracting officer of the state or political subdivision to pay to laborers and mechanics employed on the project the difference between the prevailing wage rates and prevailing fringe benefit rates required by the director to be paid to laborers and mechanics on the work and the wage rates and fringe benefit rates received by the laborers and mechanics and not refunded to the contractor, subcontractor, employer or a person acting as a contractor or the contractor's, subcontractor's, employer's or person's agents.

D. Certified weekly payroll records of a contracting agency are subject to inspection pursuant to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978]; provided that the request shall be fulfilled within twenty days of receipt of the written request. Certified weekly payroll records are subject to record retention requirements applicable to payroll records of a state agency.

E. Notwithstanding any other provision of law applicable to public works contracts or agreements, the director may, with cause:

(1) issue investigative or hearing subpoenas for the production of documents or witnesses pertaining to public works prevailing wage projects; and

(2) attach and prohibit the release of any assurance of payment required under Section 13-4-18 NMSA 1978 for a reasonable period of time beyond the time limits specified in that section until the director satisfactorily resolves any probable cause to believe a violation of the Public Works Minimum Wage Act or its implementing rules has taken place.

F. A person may file with the director a complaint that a contractor, subcontractor, employer or person acting as a contractor on the project has failed to pay the person wages or fringe benefits at the rates required by the Public Works Minimum Wage Act. Within thirty days after the filing of the complaint, either party may request in writing a mediation to resolve the complaint.

G. The director shall, within thirty days of the filing of the complaint, commence an investigation of the allegations contained in the complaint. The director shall, within seventy-five days after the completion of mediation or if no mediation is requested, within seventy-five days after the filing of the complaint, make a determination supported by findings of fact and conclusions of law whether there has been an underpayment of wages or fringe benefits or other violation of the Public Works Minimum Wage Act; provided that if the complaint is of a continuing or significantly complex nature or involves multiple projects or job sites, the director may extend the time in which to make a determination by up to six months by providing written notice and an explanation to all parties of the need to extend the time. Prior to issuing a determination, the director shall provide the contractor, subcontractor, employer or other person against whom the complaint has been filed with an opportunity to respond to the complaint and provide any exculpatory evidence.

H. If the director determines that there has been an underpayment of wages or fringe benefits or a violation of the Public Works Minimum Wage Act, the director shall, in the absence of a voluntary resolution by the parties and within thirty days of making that determination, order the withholding of accrued payments as provided in Subsection C of this section.

I. The director shall issue rules necessary to administer and accomplish the purposes of the Public Works Minimum Wage Act.

History: 1953 Comp., § 6-6-6, enacted by Laws 1965, ch. 35, § 1; 1979, ch. 35, § 1; 1991, ch. 224, § 1; 2005, ch. 253, § 1; 2009, ch. 206, § 3; 2020, ch. 47, § 1; 2022, ch. 5, § 1.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, provided that prevailing wage rates and prevailing fringe benefit rates are to be determined annually by October 1 to take effect the next January 1, provided that an appeal of the prevailing wage determination does not stay implementation of the rate, and provided that during the pendency of an appeal, whether before the labor and industrial commission or in a court, a court of

competent jurisdiction may grant a stay of the implementation of the wage rate upon motion by a party or an interested person, as long as the court gives an opportunity for any interested person to be heard on the matter; and in Subsection B, in the introductory paragraph, after "Annually", added "no later than October 1", and after the first occurrence of "fringe benefit rates", added "to take effect the next January 1", and added Paragraphs B(5) and B(6).

The 2020 amendment, effective May 20, 2020, provided a process to resolve prevailing wage complaints, and increased penalties; in Subsection A, replaced each occurrence of "classes" with "classifications"; in Subsection B, in the introductory clause, added "Annually", after "respective", deleted "classes" and added "classifications", and deleted "classes or" preceding the next occurrence of "classifications", in Paragraph B(1), deleted "class or" preceding "classifications"; in Subsection C, after "provided that there", deleted "may" and added "shall", and after "considered necessary by the", added "director"; added a new Subsection D and redesignated former Subsection D as Subsection E; and added new Subsections F through H and redesignated the succeeding subsection accordingly.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "stating the minimum wages", added "and fringe benefits"; after "based upon the wages", added "and benefits"; after "payment computed at wage rates", added "and fringe benefit rates" and after "not less than those", deleted "stated in the minimum wage rates" and added "determined pursuant to Subsection B of this section to be the prevailing wage rates and prevailing fringe benefit rates"; deleted former Subsection B, which provided that the director shall conduct a continuing program for obtaining and compiling wage-rate information; added Subsection B; and in Subsection C, at the beginning of the sentence, deleted "scale of wages" and added "prevailing wage rates and prevailing fringe benefit rates"; after "the difference between the", deleted "rates of wages" and added "prevailing wage rates and prevailing fringe benefit rates"; and after "mechanics on the work and the", changed "rates received by such laborers" to "wage rates and fringe benefit rates received by the laborers".

The 2005 amendment, effective July 1, 2005, increased the threshold amount of a contract or project from $20,000 to $60,000 in Subsection A and added Subsection D to provide that the director may with cause issue subpoenas for production of documents or witnesses and attach and prohibit the release of any assurance payment until the director resolves any probable cause to believe that a violation has occurred.

The 1991 amendment, effective July 1, 1991, substituted "director of the labor and industrial division of the labor department" for "director" and for "chief of the labor and industrial bureau" throughout the section; inserted "subcontractor, employer or any person acting as a contractor" following "contractor" near the middle of the introductory paragraph and in two places in Subsection B; in the introductory paragraph, substituted "contract or project" for "contract based upon these specifications" near the middle and "minimum wage rates issued for the project" for "advertised specifications" at the end; in Subsection B, inserted "or person acting as a contractor" near the beginning and

substituted "employed on the project the difference between the rates of wages required by the director of the labor and industrial division of the labor department" for "employed by the contractor or subcontractor on the work the difference between the rates of wages required by the contract" near the middle; and made minor stylistic changes throughout the section.

The word "determine" is synonymous with "ascertain". *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

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 "political subdivision" under this section 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.

Procurement Code not applicable to non-state fair concession contracts. — Where plaintiff, a for-profit corporation providing dental services, was awarded a contract to provide dental services for Albuquerque public schools (APS) in response to a request for information (RFI) issued by APS, which stated that all services performed per an award for the RFI must be performed at no cost to APS and that successful applicants would be directed to bill medicaid, other third-party payers or provide services pro bono, and where plaintiff filed a complaint for declaratory judgment requesting an order declaring that the RFI was subject to the Procurement Code, the district court did not err in dismissing plaintiff's complaint, because APS's RFI falls under the definition of a concession contract, and under the clear language of 13-1-30(A) NMSA 1978, non-state fair concession contracts are not covered by the Procurement Code. *Mira Consulting, Inc. v. Board of Educ.*, 2017-NMCA-009.

Section inapplicable when telecommunication system replaced. — This section did not apply to a contract whereby the telecommunications system in a state university was simply replaced without any construction or alteration of the buildings and when cables were installed in preexisting tunnels. *Universal Commc'n Sys. v. Smith*, 1986-NMSC-076, 104 N.M. 754, 726 P.2d 1384.

The director has a nondiscretionary duty to set prevailing wage rates in accordance with collective bargaining agreements. — This section imposes a mandatory, nondiscretionary duty on the director of the labor relations division of the New Mexico department of workforce solutions (director) to set prevailing wage rates and prevailing fringe benefit rates according to collective bargaining agreements for all public works projects costing more than sixty thousand dollars to which the state or any political subdivision is a party. This section also imposes a continuing duty on the director to update the prevailing wage and prevailing benefit rates according to applicable rates used in subsequent collective bargaining agreements. *N.M. Bldg. and Constr. Trades Council v. Dean*, 2015-NMSC-023.

Where petitioners, an alliance of craft unions representing the interests of thousands of New Mexico employees working on public works projects throughout the state, sought a writ of mandamus ordering the director of the labor relations division of the New Mexico department of workforce solutions (director) to set prevailing wage and prevailing benefit rates in accordance with the Public Works Minimum Wage Act, §§ 13-4-10 to -17 NMSA 1978, mandamus was proper because 13-4-11 NMSA 1978 imposes a mandatory, nondiscretionary duty on the director to set prevailing wage rates and prevailing fringe benefit rates according to collective bargaining agreements for all public works projects costing more than sixty thousand dollars to which the state or any political subdivision is a party. *N.M. Bldg. and Constr. Trades Council v. Dean*, 2015-NMSC-023.

Section violated. — Classification of and wage payments to an employee is in violation of this section, when the interpretation and application of standard job classifications and descriptions were not based upon the prevailing wages being paid on contract work of a similar nature to corresponding classes of laborers and mechanics performing the same work as that employee performed. *L.H. Lacy Co. v. State Labor & Indus. Comm'n*, 1976-NMSC-065, 89 N.M. 563, 555 P.2d 684.

Section resembles Davis-Bacon Act. — The New Mexico statute is practically identical with the Davis-Bacon Act (40 U.S.C.S. § 276a), and if a contractor was challenging the law the New Mexico supreme court would readily accept the reasoning of the United States supreme court. *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

Duty to determine prevailing ways. — Before promulgation of an order setting the minimum wage scale to be paid on public works a determination must be made of the prevailing wages being paid in a locality for like work. *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

Employer cannot be ordered to pay additional wages. — This section expressly confers the power to determine the prevailing wage but does grant the power to order an employer to pay the additional wages determined to be due his laborers. If it is determined that a person or firm has failed to pay the prevailing minimum wages, then the certification procedure outlined in Paragraphs [Subsections] A and B of Section 13-4-14 NMSA 1978 must be followed. *Grauerholtz v. New Mexico Labor & Indus. Comm'n*, 1986-NMSC-071, 104 N.M. 674, 726 P.2d 351.

Health benefits are part of prevailing wage. — The health benefits provided pursuant to Executive Order No. 2007-49, issued on October 25, 2007, titled "State of New Mexico Contractor Health Coverage Requirement", which directs executive branch state agencies that solicit and award contracts after January 1, 2008 to require prospective contractors to offer health care coverage to their New Mexico employees as part of their procurement submittal, is a valid, enforceable contract that may be accounted for as part of the prevailing wage. 2008 Op. Att'y Gen. No. 08-05.

Section preempted. — This act is preempted by the federal government's predetermined wage rate only when the New Mexico rate is lower than that predetermined by the federal government. 1971 Op. Att'y Gen. No. 71-114.

When section applies. — When the political subdivision contracts with another entity to carry out public works, the public works minimum wage rates apply. 1967 Op. Att'y Gen. No. 67-100.

When section does not apply. — When a school board acts as both the contractor and political subdivision, this section does not apply. One entity cannot contract with itself under this section. 1967 Op. Att'y Gen. No. 67-100.

Submission of false wage rate data may be perjury or false swearing. 1964 Op. Att'y Gen. No. 63-160.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 216 to 240.

Validity of statute, ordinance, or charter provision requiring that workmen on public works be paid the prevailing or current rate of wages, 18 A.L.R.3d 944.

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects, 5 A.L.R.5th 470.

Who is "employee," "workman," or the like, or contractor subject to state statute requiring payment of prevailing wages on public works projects, 5 A.L.R.5th 513.

What are "prevailing wages," or the like, for purposes of state statute requiring payment of prevailing wages on public works projects, 7 A.L.R.5th 400.

Employers subject to state statutes requiring payment of prevailing wages on public works projects, 7 A.L.R.5th 444.

What projects involve work subject to state statutes requiring payment of prevailing wages on public works projects, 10 A.L.R.5th 337.

Employees' private right of action to enforce state statute requiring payment of prevailing wages on public works projects, 10 A.L.R.5th 360.

51B C.J.S. Labor Relations §§ 1022, 1039.

13-4-12. Repealed.

History: 1953 Comp., § 6-6-6.1, enacted by Laws 1965, ch. 35, § 2; 1991, ch. 224, § 2; 2005, ch. 253, § 2; repealed by Laws 2009, ch. 206, § 11.

ANNOTATIONS

Repeals. — Laws 2009, ch. 206, § 11 repealed 13-4-12 NMSA 1978, as enacted by Laws 1965, ch. 35, §2, relating to the definition of the term "wages", effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com.*

13-4-13. Failure to pay minimum wage; termination of contract.

Every contract within the scope of the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] shall contain further provision that in the event it is determined by the director that any laborer or mechanic employed on the site of the project has been or is being paid a wage rate or fringe benefit rate less than the rates required, and in the absence of a voluntary resolution by the parties, the contracting agency shall, within thirty days of the director's determination, by written notice to the contractor, subcontractor, employer or person acting as a contractor, terminate the right to proceed with the work or the part of the work as to which there has been a failure to pay the required wages or fringe benefits, and the contracting agency shall prosecute the work to completion by contract or otherwise, and the contractor or person acting as a contractor and the contractor's or person's sureties shall be liable to the state for any excess costs occasioned thereby. Any party receiving notice of termination of a project or subcontract pursuant to the provisions of this section may appeal the finding of the director as provided in the Public Works Minimum Wage Act.

History: 1953 Comp., § 6-6-7, enacted by Laws 1965, ch. 35, § 3; 1991, ch. 224, § 3; 2009, ch. 206, § 4; 2020, ch. 47, § 2.

ANNOTATIONS

The 2020 amendment, effective May 20, 2020, strengthened requirements in the event it is determined that a laborer is being paid a wage rate less than the rates required, and required certain entities to act regardless of whether the failure to pay the required wages was willful; and after "in the event it is", deleted "found" and added "determined", after "has been or is being paid", deleted "as a result of a willful violation", after "than the rates required", added "and in the absence of a voluntary resolution by the parties", after "the contracting agency", deleted "may" and added "shall, within thirty days of the director’s determination", deleted "willful" preceding the next occurrence of "failure", and after "the contracting agency", deleted "may" and added "shall".

The 2009 amendment, effective July 1, 2009, after "willful violation a", changed "rate of wages less than the rate of wages" to "wage rate or fringe benefit rate less that the rates"; and after "pay the required wages", added "or fringe benefits".

The 1991 amendment, effective July 1, 1991, substituted "director of the labor and industrial division of the labor department" and "director" for "state labor commissioner"; inserted "employer or person acting as a contractor" and "or person acting as a

contractor"; substituted "project" for "contract" in the second sentence; and made minor stylistic changes throughout the section.

13-4-13.1. Public works contracts; registration of contractors and subcontractors.

A. Except as otherwise provided in this subsection, in order to submit a bid valued at more than sixty thousand dollars ($60,000) in order to respond to a request for proposals or to be considered for award of any portion of a public works project greater than sixty thousand dollars ($60,000) for a public works project that is subject to the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978], the contractor, serving as a prime contractor or not, shall be registered with the division. Bidding documents issued or released by a state agency or political subdivision of the state shall include a clear notification that each contractor, prime contractor or subcontractor is required to be registered pursuant to this subsection. The provisions of this section do not apply to vocational classes in public schools or public post-secondary educational institutions.

B. The state or any political subdivision of the state shall not accept a bid on a public works project subject to the Public Works Minimum Wage Act from a prime contractor that does not provide proof of required registration for itself.

C. Contractors and subcontractors may register with the division on a form provided by the division and in accordance with workforce solutions department rules. The division shall charge a registration fee of four hundred dollars ($400) every two years. The division shall issue to the applicant a certificate of registration within fifteen days after receiving from the applicant the completed registration form and the registration fee.

D. No less than thirty days before the expiration of a registration certificate, the division shall mail or electronically transmit to a registrant's address as reflected in the files of the division a reminder of the approaching expiration date.

E. Registration fees collected by the division shall be deposited in the labor enforcement fund.

History: Laws 2004, ch. 89, § 1; 2005, ch. 98, § 2; 2009, ch. 206, § 5; 2011, ch. 94, § 1.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, changed the registration fee from an annual registration fee of two hundred dollars to a biennial fee of four hundred dollars and required the division to give contractors and subcontractors notice of the approaching expiration of their registration.

The 2009 amendment, effective July 1, 2009, in Subsection A, in two places, changed "fifty thousand dollars ($50,000)" to "sixty thousand dollars ($60,000)".

The 2005 amendment, effective June 17, 2005, inserted in Subsection A that in order to submit a bid valued at more than $50,000, in order to respond to a request for proposals or to be considered for award of any portion of a public works project greater than $50,000, the contractor serving as the prime contractor or not, shall be registered and that bidding documents issued by political subdivisions shall include a clear notification that each contractor, prime contractor or subcontractor is required to be registered.

13-4-14. Payment of wages from funds withheld; list of contractors violating act; additional right of wage earners.

A. The director shall certify to the contracting agency the names of persons or firms the director has found to have failed to pay wages or fringe benefits due employees under the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] and the amount of arrears. The contracting agency shall pay or cause to be paid to the affected laborers and mechanics, from any accrued payments withheld under the terms of the contract or designated for the project, three times the amount of any wages or fringe benefits found due to the workers pursuant to the Public Works Minimum Wage Act. The director shall, after notice to the affected persons, distribute a list to all departments of the state giving the names of persons or firms the director has found to have willfully violated the Public Works Minimum Wage Act. No contract or project shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership or association in which the persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of the persons or firms. A person to be included on the list to be distributed may appeal the finding of the director as provided in the Public Works Minimum Wage Act.

B. If the accrued payments withheld under the terms of the contract, as mentioned in Subsection A of this section, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages or fringe benefits required pursuant to the Public Works Minimum Wage Act, the laborers and mechanics shall have the right of action or intervention or both against the contractor or person acting as a contractor and the contractor's or person's sureties, conferred by law upon the persons furnishing labor and materials, and, in such proceeding, it shall be no defense that the laborers and mechanics accepted or agreed to less than the required rate of wages or voluntarily made refunds. The director shall refer such matters to the district attorney in the appropriate county, and it is the duty and responsibility of the district attorney to bring civil suit for wages and fringe benefits due and other damages provided for in Subsection C of this section.

C. In the event of an aggregate underpayment of wages or fringe benefits greater than five hundred dollars ($500) to an employee subject to the Public Works Minimum Wage Act or implementing rules, the contractor, subcontractor, employer or a person

acting as a contractor responsible for the underpayment shall be liable to any affected employee for three times the amount of the employee's unpaid wages or fringe benefits. In addition, the contractor, subcontractor, employer or person acting as a contractor shall be liable to any affected employee for one hundred dollars ($100) for each calendar day on which a contractor, subcontractor, employer or person acting as a contractor has willfully required or permitted the employee to work in violation of the provisions of the Public Works Minimum Wage Act.

D. In an action brought pursuant to Subsection C of this section, the court shall award, in addition to all other remedies, attorney fees and costs incurred on behalf of an employee adversely affected by a violation of the Public Works Minimum Wage Act by a contractor, subcontractor, employer or person acting as a contractor.

History: 1953 Comp., § 6-6-8, enacted by Laws 1965, ch. 35, § 4; 1991, ch. 224, § 4; 2005, ch. 253, § 3; 2009, ch. 206, § 6; 2020, ch. 47, § 3.

The 2020 amendment, effective May 20, 2020, increased the penalties for failure to pay required wage rates; in Subsection A, after "director has found to have", deleted "disregarded their obligations to" and added "failed to pay wages or fringe benefits due", and after "designated for the project", added "three times the amount of"; in Subsection B, after "fringe benefits due and", deleted "liquidated" and added "other"; in Subsection C, after "In the event of", deleted "any violation of" and added "an aggregate underpayment of wages or fringe benefits greater than five hundred dollars ($500) to an employee subject to", after "a contractor responsible for the", deleted "violation" and added "underpayment", after the first occurrence of "any affected employee for", added "three times the amount of", after the next occurrence of "any affected employee for", deleted "liquidated damages beginning with the first day of covered employment in the sum of", and after "willfully required or permitted", deleted "an individual laborer or mechanic" and added "the employee"; and in Subsection D, after "the court", deleted "may" and added "shall", and after "attorney fees and costs", deleted "to" and added "incurred on behalf of".

The 2009 amendment, effective July 1, 2009, in Subsection A, in the second sentence, after "any wages", added "or fringe benefits"; in Subsection B, after "pay the wages", added "or fringe benefits" and in the last sentence, after "civil suit for wages", added "and fringe benefits"; in Subsection C, after "employee's unpaid wages", added "or fringe benefits"; and in Subsection D, after "subcontractor", changed "employee" to "employer".

The 2005 amendment, effective July 1, 2005, changed the amount of liquidated damages in Subsection C from $10 to $100 and added Subsection D to provide that the court may award attorney fees and costs to an employee adversely affected by a violation of the Public Works Minimum Wage Act.

The 1991 amendment, effective July 1, 1991, substituted "director of the labor and industrial division of the labor department" and "director" for "labor commissioner" and

"commissioner" throughout the section; in Subsection A, inserted "or designated for the project" in the second sentence and "or project" in the fourth sentence; in Subsection B, substituted "as mentioned in Subsection A of this section" for "as aforesaid" and inserted "or person acting as a contractor" in the first sentence and substituted "provided for in Subsection C of this section" for "provided herein" at the end of the Subsection; inserted "employer or any person acting as a contractor" in three places in Subsection C; and made minor stylistic changes throughout the section.

Director cannot order employer to pay additional wages, but must follow certification procedure. — Section 13-4-11 NMSA 1978 expressly confers upon the labor commissioner (now director of the labor and industrial division) the power to determine the prevailing wage for purposes of the Public Works Minimum Wage Act. The commissioner (director) does not have the power to order an employer to pay the additional wages determined to be due his laborers. If the commissioner (director) has determined that a person or firm has failed to pay the prevailing minimum wages, then the certification procedure outlined in Subsections A and B must be followed. *Grauerholtz v. New Mexico Labor & Indus. Comm'n*, 1986-NMSC-071, 104 N.M. 674, 726 P.2d 351.

Private right of action. — Where plaintiffs, on behalf of themselves and all others similarly situated, sued under the Public Works Minimum Wage Act, 13-4-10 to -17 NMSA 1978 (1937, as amended through 2011), alleging that they were not compensated the appropriate wage rate for all hours worked on a renovation project for the university of New Mexico, the district court erred in concluding that the act does not confer a private right of action, because the plain language in Subsections C and D contemplate a private right of action in which an employer can be liable to an employee for unpaid wages and attorney fees, separate from the administrative scheme contained in Subsections A and B, and broadly interpreting the act to imply a private right of action under Subsections C and D would further the remedial purpose of the act, rather than frustrate it. *Cates v. Mosher Enterprises, Inc.*, 2017-NMCA-063.

13-4-14.1. Labor enforcement fund; creation; use.

The "labor enforcement fund" is created in the state treasury. The fund shall consist of contractor and subcontractor registration fees collected by the division and all investment and interest income from the fund. The fund shall be administered by the division, and money in the fund is appropriated to the division for administration and enforcement of the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978]. Money in the fund shall not revert to the general fund at the end of a fiscal year.

History: Laws 2004, ch. 89, § 2; 2009, ch. 206, § 7.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, deleted "labor and industrial" before "division" and deleted "of the labor department" after "division".

13-4-14.2. Registration cancellation, revocation, suspension; injunctive relief.

The director may:

A. cancel, revoke or suspend with conditions, including probation, the registration of any party required to be registered pursuant to the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] for failure to comply with the registration provisions or for good cause, subject to appeal pursuant to Section 13-4-15 NMSA 1978; and

B. seek injunctive relief in district court for failure to comply with the registration provisions of the Public Works Minimum Wage Act.

History: Laws 2004, ch. 89, § 3; 2009, ch. 206, § 8.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, after "director", deleted "of the labor and industrial division of the labor department".

13-4-15. Appeals.

A. Any interested person may appeal any determination, finding or action of the director made pursuant to the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] to the labor and industrial commission sitting as the appeals board by filing notice of the appeal with the director within fifteen days after the determination has been issued or notice of the finding or action has been given as provided in the Public Works Minimum Wage Act.

B. The labor and industrial commission, sitting as the appeals board, shall adopt rules as it deems necessary for the prompt disposition of appeals. A copy of the rules shall be filed with the librarian of the supreme court law library.

C. The appeals board, within ten days after the filing of the appeal, shall set the matter for an oral hearing within thirty days and, following the hearing, shall enter a decision within ten days after the close of the hearing and promptly mail copies of the decision to the parties.

D. Decisions of the appeals board may be appealed pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

History: 1953 Comp., § 6-6-8.1, enacted by Laws 1963, ch. 304, § 5; 1991, ch. 224, § 5; 1998, ch. 55, § 25; 1999, ch. 265, § 25; 2009, ch. 206, § 9.

ANNOTATIONS

Cross references. — For State Rules Act, *see* Chapter 14, Article 4 NMSA 1978.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "director", deleted "of the labor and industrial division of the labor department".

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

The 1998 amendment, effective September 1, 1998, in Subsection B, deleted "such" preceding "rules" and "and regulations" following "rules" in two places, inserted "law"; in Subsection C, substituted "the" for "such" and rewrote Subsection D.

The 1991 amendment, effective July 1, 1991, substituted "director of the labor and industrial division of the labor department" for "state labor commissioner" in Subsections A and D; substituted "director" for "commissioner" in Subsection A; and deleted "state" preceding "labor" in Subsections A and B.

Administrative dismissal of untimely appeal. — Where the director of the labor relations division determined that the Public Works Minimum Wage Act applied to two projects that were undertaken by the board of regents, the foundation and the contractor as the builders; on December 6, 2011, the secretary of the workforce solutions department issued a letter reversing the director's determination; in the letter, the secretary named withdrew the directors' certifications, referred to ongoing settlement negotiations between the builders and the director, and stated that no further actions would be taken on those matters; the letter was sent only to the foundation; petitioners were aware of the contents of the secretary's letter on December 26, 2011 when the foundation forwarded the letter to petitioners; petitioners filed an appeal of the secretary's determination on February 3, 2012; the commission determined that the appeal was not timely; the secretary did not violate the act by issuing a determination; and the content of the secretary's letter was sufficient notice to prompt petitioners to inquire into the letter's effect, the commission's dismissal of the appeal was not arbitrary or capricious, was supported by substantial evidence, and was in accordance with the law. *Garcia v. Bd. of Regents*, 2014-NMCA-083.

An illegal provision in a contract may be severed if it is non-essential to an otherwise valid contract. — Where plaintiffs, a class of workers who provided various electrical services on a construction project in which defendants were involved, sued defendants for statutory minimum wage violations, including violation of the Public Works Minimum Wage Act (PWMWA), entered into a settlement agreement with defendants, a condition of which was in violation of federal law regarding income tax and social security withholding for back wages, severance of the non-essential, illegal provision and enforcement of the agreement was the appropriate remedy, because where the purpose and subject matter of a contract are legal, but the contract contains an illegal provision, the general rule is that a court may enforce the valid portions of a contract in favor of a party who has not engaged in serious misconduct if the illegal term

is not an essential part of the agreed exchange. *Garcia v. UNM Bd. of Regents*, 2016-NMCA-052, cert. denied.

Scope of review. — The review by the district court is confined to the record of the proceedings before the labor and industrial commission, and the findings of fact of the commission are binding upon the district court when supported by substantial evidence and supreme court review is confined to the same record. *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, 81 N.M. 288, 466 P.2d 565.

13-4-16. Construction of act.

Sections 13-4-10 through 13-4-17 NMSA 1978 shall not be construed to supersede or impair a more stringent requirement under any authority granted by federal law to provide for the establishment of specified wage rates.

History: Laws 1937, ch. 179, § 4; 1941 Comp., § 6-509; 1953 Comp., § 6-6-9; 1991, ch. 224, § 6.

ANNOTATIONS

The 1991 amendment, effective July 1, 1991, added the catchline; substituted "Sections 13-4-10 through 13-4-17 NMSA 1978" for "This act" at the beginning of the section; and inserted "a more stringent requirement under".

13-4-17. Outstanding contracts and invitations.

The Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] shall not affect a contract existing or a contract that may be entered into pursuant to invitations for bids that are outstanding at the time of enactment of that act.

History: Laws 1937, ch. 179, § 5; 1941 Comp., § 6-510; 1953 Comp., § 6-6-10; 2009, ch. 206, § 10.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, made grammatical changes.

13-4-18. Construction contract performance and payment bonds.

A. When a construction contract is awarded in excess of twenty-five thousand dollars ($25,000), the following bonds or security shall be delivered to the state agency or local public body and shall become binding on the parties upon the execution of the contract. If a contractor fails to deliver the required performance and payment bonds, the contractor's bid shall be rejected, its bid security shall be enforced to the extent of actual damages. Award of the contract shall be made pursuant to the Procurement Code [13-1-28 to 13-1-199 NMSA 1978] in the following manner:

(1) a performance bond satisfactory to the state agency or local public body, executed by a surety company authorized to do business in this state and said surety to be approved in federal circular 570 as published by the United States treasury department or the state board of finance or the local governing authority, in an amount equal to one hundred percent of the price specified in the contract; and

(2) a payment bond satisfactory to the state agency or local public body, executed by a surety company authorized to do business in this state and said surety to be approved in federal circular 570 as published by the United States treasury department or the state board of finance or the local governing authority, in an amount equal to one hundred percent of the price specified in the contract, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

B. The state purchasing agent or the central purchasing office may reduce the amount of the performance bond required prior to solicitation to not less than fifty percent of the contract price if it is determined to be less costly or more advantageous to the state agency or local public body to self-insure a part of the performance of the contractor.

C. The state purchasing agent or the central purchasing office may reduce the amount of the payment bond required prior to solicitation of not less than fifty percent of the contract price if it is determined that it is in the best interest of the state agency or local public body to do so. Factors to be considered in order to make such a determination include, but are not limited to:

(1) the value and number of subcontracts to be awarded by the contractor; and

(2) the value of the contract.

D. Nothing in this section shall be construed to limit the authority of the state agency or local public body to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in Subsection A of this section.

E. For contracts under twenty-five thousand dollars ($25,000) the state agency or local public body may impose in its sole and complete discretion the requirements of Subsections A, B and C of this section.

History: 1978 Comp., § 13-4-18, enacted by Laws 1987, ch. 109, § 1.

ANNOTATIONS

Cross references. — For corporations qualified as sureties, *see* 46-6-1 NMSA 1978.

Repeals and reenactments. — Laws 1987, ch. 109, § 1 repealed former 13-4-18 NMSA 1978, as amended by Laws 1975, ch. 251, § 1, and enacted a new section, effective June 19, 1987.

I. GENERAL CONSIDERATION.

Purpose of Little Miller Act. — The Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] was enacted to protect suppliers of materials under any subcontract involving a state construction project. *State ex rel. Elec. Supply Co. v. Kitchens Constr., Inc.*, 1988-NMSC-013, 106 N.M. 753, 750 P.2d 114.

Bond requirements. — The Little Miller Act [(13-4-18 to 13-4-20 NMSA 1978] requires a bond conditioned for the performance and completion of contract according to its terms, in "compliance with all requirements of law," and also for payment of labor and materials and is more encompassing than the federal Miller Act, 40 U.S.C. § 270A. *Employment Sec. Comm'n v. C.R. Davis Contracting Co.*, 1969-NMSC-174, 81 N.M. 23, 462 P.2d 608.

Section gives remedy comparable to mechanic's lien. — Sections 13-4-18 and 13-4-19 NMSA 1978 are intended to provide a remedy comparable to a mechanic's lien to materialmen who provide supplies for a state government construction project. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186, 656 P.2d 236.

Not a lien statute. — The Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] is not a lien statute; it merely provides a remedy for recovery of monies due for the doing of work or the furnishing of material on a state construction project. *State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc.*, 1987-NMSC-063, 106 N.M. 140, 740 P.2d 690.

Bond required for public highway construction. — This section requires that a bond be given when the state enters into a contract for the construction of a public highway. *Am. Sur. Co. v. Gilmore Oil Co.*, 83 F.2d 249 (10th Cir. 1936).

II. PERSONS AND ENTITIES PROTECTED.

Bond inurement. — Under New Mexico law prior to the passage of this act (Laws 1923, ch. 136), a public contractor's bond inured to the benefit of furnishers of labor, material, and supplies to the principal. *First Nat'l Bank v. Caples*, 17 F.2d 87 (5th Cir. 1927).

Public also protected. — Bond required of road contractor under this section is not only for protection of laborers and materialmen, but also for the protection of the public in tending to lower prices of labor and material by assuring payment of all claims. *Silver v. Fidelity & Deposit Co.*, 1935-NMSC-098, 40 N.M. 33, 53 P.2d 459.

Third-tier suppliers of materials to government construction projects are entitled to protection under New Mexico's Little Miller Act [13-4-18 to 13-4-20 NMSA 1978]. *Nichols Corp. v. Bill Stuckman Constr., Inc.*, 1986-NMSC-077, 105 N.M. 37, 728 P.2d 447.

Section applies to third-tier suppliers. — The Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] applies to suppliers of materials under any subcontract involving a state construction project, including third-tier suppliers. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186, 656 P.2d 236.

When materialman may sue. — A bond to the state, conditioned for the performance by a highway contractor of the obligation of his contract, one of which obligations is to pay for materials used, may be sued on by a materialman. *Southwestern Portland Cement Co. v. Williams*, 1926-NMSC-052, 32 N.M. 68, 251 P. 380.

III. SURETY LIABILITY.

Surety's liability to employee leasing company. — General contractor’s surety was liable to employee leasing company which furnished labor for project covered by surety’s bond since leasing company hired the laborers, paid them weekly, and then billed general contractor in accordance with the terms of their contract. *Eastland Fin. Servs. v. Mendoza*, 2002-NMCA-035, 132 N.M. 24, 43 P.3d 375.

Exceptions to "supplies". — The word "supplies," used in the statute and in a contractor's bond, does not include premiums on workmen's compensation and public liability insurance, and recovery cannot be had against the surety for failure to pay such items. *Anderson v. United States Fid. & Guar. Co.*, 1940-NMSC-054, 44 N.M. 483, 104 P.2d 906.

Surety's liability in absence of bond. — Where surety company signed bond to which the contract was attached, it was bound by the provision in the contract that "the contractor will give bond guaranteeing the payment of labor and materials" as required by statute, although such bond was never actually given, and the surety company was liable to the materialman. *Southwestern Sash & Door Co. v. Am. Employers' Ins. Co.*, 1933-NMSC-025, 37 N.M. 212, 20 P.2d 928.

Rights of surety. — A surety that issues performance and payment bonds, and then satisfies claims against the contractor by paying laborers and materialmen, has superior rights as against the contractor's secured creditors to final progress payments and retainage funds held by the project owner. *New Mexico State Hwy. & Transp. Dep't v. Gulf Ins. Co.*, 2000-NMCA-007, 128 N.M. 634, 996 P.2d 424.

When no release of surety. — Failure of school board to retain 15% of the contract price for a school building from the contractor, until final settlement, does not release the surety from liability to the laborers or materialmen. *Southwestern Sash & Door Co. v. Am. Employers' Ins. Co.*, 1933-NMSC-025, 37 N.M. 212, 20 P.2d 928.

Extension of surety liability. — Although the general rule is that the liability of a surety cannot be extended beyond the fair import of the undertaking in the bond, this rule has certain exceptions: (1) where bonds are given pursuant to statute for a public or quasi-public purpose; or (2) when by special provision of statute the conditions and obligations prescribed in the statute requiring the bond must be read into the bond, whether contained therein or not, and in such cases, the liability of a surety will be determined by the conditions and obligations prescribed in the statute, in the first instance, on principles of public policy, and the second, by force of statutory provision. *Employment Sec. Comm'n v. C.R. Davis Contracting Co.*, 1969-NMSC-174, 81 N.M. 23, 462 P.2d 608.

Punitive damages. — Although statutes requiring the filing of contractor's bonds and the terms of surety bonds, like New Mexico's Little Miller Act, are generally liberally construed to effect legislative intent and the purpose of the bond, clearly the language of the surety bond did not extend to liability for punitive damages. *State ex rel. Conley Lott Nichols Mach. Co. v Safeco Ins. Co. of Am.*, 1983-NMCA-112, 100 N.M. 440, 671 P.2d 1151.

IV. TIME TO SUE.

Unless a governmental entity directly contracts for a shorter time-to-sue provision with either the contractor or the surety, a shorter time-to-sue provision contained in a performance bond is unenforceable. *City of Santa Fe v. Travelers Casualty & Surety Co.*, 2010-NMSC-010, 147 N.M. 699, 228 P.3d 483.

Enforceability of time-to-sue provisions in performance bond. — Where a municipality contracted with a contractor to repair a tank; the contract did not contain a time-to-sue provision; the contractor obtained a performance bond from the surety; the performance bond contained a two year time-to-sue provision; the municipality declared the contractor in default and demanded performance from the surety; and the municipality sued the surety more than two years after the municipality declared the default, the two year time-to-sue provision in the performance bond was unenforceable and the six year statute of limitation under Section 37-1-3 NMSA 1978 applied. *City of Santa Fe v. Travelers Casualty & Surety Co.*, 2010-NMSC-010, 147 N.M. 699, 228 P.3d 483.

Timeliness of notice. — Where contractor furnished bond provided for under this section and timely notice was given to contractor's surety only if a substitute item, the last one furnished on the job, was legally sufficient, notice was too late, since contractor had not been informed of the proposed change as required by contract provisions dealing with changes, and the item, never installed, was held not to be the last item furnished under the contract. *Crane O'Fallon Co. v. Via*, 1952-NMSC-101, 56 N.M. 772, 251 P.2d 260.

Law reviews. — For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Contractors' Bonds §§ 51 to 148.

Loans or advances to building or construction contractor as within coverage of his bond, 164 A.L.R. 782.

Workmen's compensation insurance premiums as within coverage of contractor's bond, 164 A.L.R. 1468.

False receipts or the like as estopping materialmen or laborers from recovering on public work bond, 39 A.L.R.2d 1104.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 A.L.R.2d 899.

Liability of surety on bond for public works, 70 A.L.R.2d 1370.

Labor or material furnished a subcontractor for public work or improvement as within coverage of bond of principal contractor, 92 A.L.R.2d 1250.

Building contractor's liability on bond or other agreement to indemnify owner, for injury or death of third person resulting from owner's negligence, 27 A.L.R.3d 663.

What constitutes "public work" within statute relating to contractor's bond, 48 A.L.R.4th 1170.

State or local government's liability to subcontractors, laborers, or materialmen for failure to require general contractor to post bond, 54 A.L.R.5th 649.

20 C.J.S. Counties § 160; 63 C.J.S. Municipal Corporations § 1176; 72 Supp. C.J.S. Public Contracts §§ 41 to 61; 78 C.J.S. Schools and School Districts § 420 et seq.

13-4-19. Rights of person furnishing labor or materials and right of state with respect to taxes due.

A. The state shall have the right to sue on the payment bond for all taxes due arising out of construction services rendered under a contract, in respect of which a payment bond is furnished under Section 13-4-18 NMSA 1978 by a contractor that does not have its principal place of business in New Mexico, and to prosecute such action to final execution and judgment for the sum due. The court may allow, as part of the costs, interest and reasonable attorney fees.

B. Every person, firm or corporation that has furnished labor or materials in the prosecution of work provided for in a contract, in respect of which a payment bond is furnished under Section 13-4-18 NMSA 1978, and that has not been paid in full for the labor or materials before the expiration of a period of ninety days after the day on which the last of the labor was done or performed or materials were furnished or supplied for which claim is made, shall have the right to sue on the payment bond for the amount of the balance unpaid at the time of the institution of the suit and to prosecute such action to final execution and judgment for the sum or sums justly due for the labor done or performed or materials furnished to be used in the construction of the project; provided, however, that sums justly due shall be determined according to the subcontract or other contractual relationship directly with the contractor furnishing the payment bond. A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond shall have a right of action upon the payment bond upon giving written notice to the contractor, within ninety days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the materials for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed. Notice shall be served by mailing the notice by registered mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence or in any manner in which the service of summons in civil process is authorized by law.

C. The claimant in the suit shall notify the obligee named in the bond of the beginning of such action, stating the amount claimed, and no judgment shall be entered in the action within thirty days after giving notice. The obligee and any person, firm, corporation or the state having a cause of action on the bond may be admitted on motion as a party to the action, and the court shall determine the rights of all parties thereto. If the amount realized on the bond is insufficient to discharge all claims in full, the amount shall be distributed among the parties entitled thereto pro rata.

D. Except for suits by the state with respect to taxes that shall be brought in the name of the revenue processing division of the taxation and revenue department, every suit instituted under this section shall be brought in the name of the state for the use of the person suing in the district court in any judicial district in which the contract was to be performed and executed or where the claimant resides, but no such suit, including one brought by the revenue processing division, shall be commenced after the expiration of one year after the date of final settlement of the contract. The date of final settlement, for purposes of this section, is that date set by the obligee in the final closing and settlement of payment, if any, due the contractor. The state shall not be liable for the payment of any costs or expenses of any such suit.

E. The obligee named in the bond is authorized and directed to furnish to any person, firm or corporation making application therefor that submits an affidavit that the person, firm or corporation has supplied labor or materials for such work and payment has not been made or that the person, firm or corporation is being sued on any such

bond or to furnish to the revenue processing division of the taxation and revenue department a certified copy of the bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution and delivery of the original, and, in case final settlement of the contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such demand upon it. Applicants shall pay for the certified copies and certified statements such fees as the obligee fixes to cover the cost of preparation.

History: Laws 1923, ch. 136, § 2; C.S. 1929, § 17-202; 1941 Comp., § 6-512; Laws 1953, ch. 65, § 1; 1953 Comp., § 6-6-12; Laws 1975, ch. 251, § 2; 2015, ch. 109, § 1.

ANNOTATIONS

The 2015 amendment, effective June 19, 2015, authorized a court to award costs, including interest and reasonable attorney fees when the state sues for taxes due arising out of construction services rendered under a public works contract, and clarified that a person who has furnished labor or materials under a public works contract and has not been paid in full, may sue for the amount due for the labor performed or materials furnished under the public works contract; added new Subsection A and redesignated the succeeding subsections accordingly; in Subsection B, after "firm or corporation", deleted "who" and added "that", after "furnished labor or", deleted "material" and added "materials", after "provided for in", deleted "such" and added "a", after "and", deleted "who" and added "that", after "paid in full", deleted "therfor" and added "for the labor or materials", after "labor was done or performed", deleted "by him", after "or", deleted "material was" and added "materials were", after "furnished or supplied", deleted "by him", after "for which", deleted "such", after "claim is made", deleted "and the state, in respect of which a payment bond is furnished under Section 13-4-18 NMSA 1978, by a contractor who does not have its principal place of business in New Mexico, for all taxes due arising out of construction services rendered under the contract", after "right to sue on", deleted "such" and added "the", after "for the amount of the balance", deleted "thereof", after "institution of", deleted "such" and added "the", after "sums justly due", deleted "him; provided, however, that any" and added "for the labor done or performed or materials furnished to be used in the construction of the project; provided, however, that sums justly due shall be determined according to the subcontract or other contractual relationship directly with the contractor furnishing the payment bond. A", after "person having", added "a", after "contractor furnishing", deleted "such" and added "the", after "right of action upon", deleted "said" and added "the", after "giving written notice to", deleted "said" and added the", after "the date on which", deleted "such" and added "the", after "supplied the last of the", deleted "material" and added "materials", after "for which", deleted "such" and added "the", after "party to whom the", deleted "material was" and added "materials were", after "performed.", deleted "Such", after "served by mailing the", deleted "same" and added "notice", after "contractor at any place", deleted "he" and added "the contractor", after "maintains an office or conducts", deleted "his", and after "business or", deleted "his" and added "at the contractor's"; in Subsection C, at the beginning of the first sentence, added "The", after "claimant in", deleted "such" and added "the", after "judgment shall

be entered in", deleted "such" and added "the", after "thirty days after giving", deleted "such", after "cause of action on", deleted "such" and added "the", after "motion as a party to", deleted "such" and added "the", after "the amount realized on", deleted "such" and added "the", after "bond", deleted "be" and added "is", after "claims in full", deleted "such" and added "the"; in Subsection D, after "respect to taxes", deleted "which" and added "that", after "in the name of the", deleted "bureau of", after "revenue", added "processing division of the taxation and revenue department", after "name of the state", deleted "of New Mexico", after "including one brought by the", deleted "bureau of", after "revenue", added "processing division", after "final settlement of", deleted "such" and added "the", after "final settlement", deleted "herein shall be" and added "for purposes of this section, is", and after "The state", deleted "of New Mexico"; and in Subsection E, after "named in", deleted "said" and added "the", after "application therefor", deleted "who" and added "that", after "affidavit that", deleted "he or it" and added "the person, firm or corporation", after "work and payment", deleted "therefor", after "been made or that", deleted "he or it" and added "the person, firm or corporation", after "such bond or", added "to furnish", after "to the", deleted "bureau of", after "revenue", added "processing division of the taxation and revenue department", after "certified copy of", deleted "such" and added "the, after "final settlement of", deleted "such" and added "the", after "shall pay for", deleted "such" and added "the", and after "cost of preparation", deleted "thereof".

I. GENERAL CONSIDERATION.

Legislative intent. — If no relief is available under this section, the legislature has decreed that the risk of loss must fall on the contractor or subcontractor who undertakes performance of a contract on a state project, rather than on the taxpayers who presumably have already paid all or most of the costs of the project. *Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, 110 N.M. 173, 793 P.2d 855 (1990).

Statutory remedy comparable to mechanic’s lien. — The public policy behind the Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] is to provide protection for suppliers in the public contracts arena similar to the statutory materialmen's lien. *Hasse Constr. Co. v. KBK Fin., Inc.*, 1999-NMSC-023, 127 N.M. 316, 980 P.2d 641.

Section gives remedy comparable to mechanic's lien. — Sections 13-4-18 and 13-4-19 NMSA 1978 are intended to provide a remedy comparable to a mechanic's lien to materialmen who provide supplies for a state government construction project. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186, 656 P.2d 236.

Estoppel as a defense. — Estoppel may be a defense in a Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] case. *State ex rel. Electric Supply Co. v. Kitchens Constr., Inc.*, 1988-NMSC-013, 106 N.M. 753, 750 P.2d 114.

Estoppel. — Supplier was not estopped from pursuing its claim under the Little Miller Act [13-4-18 to 13-4-20 NMSA 1978] against the general contractor and the surety,

where the supplier made no affirmation to the general contractor concerning notification of the subcontractor's failure to make payments, and there was no conduct on the supplier's part for the general contractor to have relied on to its detriment. *State ex rel. Electric Supply Co. v. Kitchens Constr., Inc.*, 1988-NMSC-013, 106 N.M. 753, 750 P.2d 114.

Supplemental complaint after one year allowed where not prejudicial. — A district court's decision to allow the filing of a supplemental complaint to eliminate any alleged jurisdictional defects more than one year after the filing of the initial complaint is in keeping with the remedial nature of the statute, where there is no prejudice shown by the filing of the supplemental complaint. *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, 102 N.M. 22, 690 P.2d 1016.

Notice requirement for a workers' compensation insurer's claim of a lien right against a performance bond, given in connection with a state construction project, was governed by the Mechanic's Lien Act, 48-2-1 NMSA 1978 et seq., and not by the Little Miller Act [13-4-18 to 13-4-20 NMSA 1978]. *State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc.*, 1987-NMSC-063, 106 N.M. 140, 740 P.2d 690.

Burden of proof. — The supplier of materials does not have the burden to prove that the materials were actually delivered to the project. The supplier is not required to prove anything beyond the fact that it supplied the materials to the subcontractor for and in the prosecution of the work provided for in the construction contract and also supplied the material for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Where plaintiff showed that plaintiff supplied material to a subcontractor for installation in a municipal construction project; the invoices for which plaintiff asserted its claim were for material for the project; plaintiff supplied material for the project in prosecution of the work provided for in the contract for the project, plaintiff was entitled to recover its claim for unpaid invoices for material supplied on the surety’s payment bond even though plaintiff failed to prove that plaintiff actually delivered the material and that the material was actually incorporated into the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Attorney fees. — Attorney fees are awardable as a sum or sums justly due under Section 13-4-19 NMSA 1978 where the contract between the subcontractor and supplier provides for an award of attorney fees incurred by the supplier in endeavoring to collect amounts due and unpaid under the supplier’s credit agreement with the subcontractor. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

II. PERSONS AND ENTITIES PROTECTED.

Materialman’s right to payment on bond. — Prompt payment provision, as incorporated in the subcontractor-supplier contract, provided an adequate basis for the

subcontractor to refuse to pay the supplier or its secured creditor and instead pay the materialman who had provided supplies to the supplier. *Hasse Constr. Co. v. KBK Fin., Inc.*, 1999-NMSC-023, 127 N.M. 316, 980 P.2d 641.

Surety's liability to employee leasing company. — General contractor's surety was liable to employee leasing company which furnished labor for project covered by surety's bond since leasing company hired the laborers, paid them weekly, and then billed general contractor in accordance with the terms of their contract. *Eastland Fin. Servs. v. Mendoza*, 2002-NMCA-035, 132 N.M. 24, 43 P.3d 375.

III. NOTICE.

Generally. — The statute is remedial in nature and its principal purpose is to protect the supplier of labor and materials, and it should be liberally construed to effectuate the obvious legislative intent. However, the court cannot, in the guise of liberality, justify completely ignoring the very prerequisite (notice) which the legislature prescribed as a condition precedent to the accrual of any right against the contractor's bond. *State ex rel. Komac Paint & Wallpaper Store v. McBride*, 1964-NMSC-108, 74 N.M. 233, 392 P.2d 577.

Written notice is mandatory as a strict condition precedent to the existence of any right of action upon the payment bond. *State ex rel. State Elec. Supply Co. v. McBride*, 1968-NMSC-146, 79 N.M. 467, 444 P.2d 978.

Purpose of notice requirement. — The requirement under Subsection A that a claimant give written notice within 90 days is a necessary prerequisite to recovery. This notice requirement acts as a protection against unlimited and unascertainable contingent liabilities. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186, 656 P.2d 236.

Notice within 90 days from final performance. — Under express language of this section, identical with that of the Miller Act, the supplier who has no direct contractual relation with the general contractor is given a right of action against the bond only upon compliance with the condition precedent to suit " 'upon giving written notice to said contractor' within ninety days from the date of final performance." *State ex rel. Komac Paint & Wallpaper Store v. McBride*, 1964-NMSC-108, 74 N.M. 233, 392 P.2d 577.

Notice "for which such claim is made". — The statute requires written notice of claim within 90 days of the date the last item of material "for which such claim is made" was delivered by the supplier to the subcontractor. *State ex rel. State Elec. Supply Co. v. McBride*, 1968-NMSC-146, 79 N.M. 467, 444 P.2d 978.

Substantial compliance with notice required. — The supplier's right of action to recover on the general contractor's bond comes into being only upon substantial compliance with the notice required by the legislature. *State ex rel. Komac Paint & Wallpaper Store v. McBride*, 1964-NMSC-108, 74 N.M. 233, 392 P.2d 577.

Notice substantially complied with statutory requirements. — Where the supplier of materials for a municipal construction project last supplied material for the project on May 3, 2007; the supplier mailed notices of claim on May 22, 2007 by certified mail to each of the contractor's addresses as reported by the contractor to the New Mexico public regulation commission, as shown by the commission's on-line records; the contractor actually received notice; the amount claimed for material did not include amounts for tools or equipment; and the notice stated that the amounts due were substantially accurate, the supplier substantially complied with the notice requirements of Section 13-4-19 NMSA 1978. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Timeliness of notice. — Supplying an item not called for by plans and specifications or demanded by a change or other authorization or installed as a part of the construction did not provide a basis for determining the last day on which materials were supplied. *Crane O'Fallon Co. v. Via*, 1952-NMSC-101, 56 N.M. 772, 251 P.2d 260.

Timeliness of notice to obligee. — Where the supplier of material for a municipal construction project filed suit against the surety of the payment bond for the project in September 2007; the supplier mailed notice of its claim on the bond to the municipality in July 2009; and the district court entered a judgment in October 2007, the municipality was not prejudiced, because the judgment had not been entered before the municipality received notice. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Early notice deemed timely. — A supplier may give adequate notice to a contractor prior to the expiration of the 90-day time limit of Subsection A and may give notice and file suit for nonpayment prior to delivery of the last items to the contractor. *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, 102 N.M. 22, 690 P.2d 1016.

Sufficiency of notice. — Acknowledgment of receipt of claim of subcontractor for materials and supplies, under contractor's bond, by state highway department was insufficient notice to surety of such claim. *Silver v. Fidelity & Deposit Co.*, 1935-NMSC-098, 40 N.M. 33, 53 P.2d 459.

IV. AMOUNTS RECOVERABLE.

Damages recoverable. — The Little Miller Act clearly and unequivocally limits recovery against a surety to all just claims for labor performed, and materials and supplies furnished; nothing is said about recovery for loss of profits or "delay damages," and the court would decline to extend the meaning and purpose of the statute any further than the clear language would take it. *Herzog Contracting Corp. v. A & S Constr. Co.*, 1988-NMSC-022, 107 N.M. 6, 751 P.2d 690.

Reasonable attorney's fees should be included in a suit on the bond where the written terms of the contract sued upon expressly provided for the allowance of

attorney's fees. *State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 1983-NMCA-112, 100 N.M. 440, 671 P.2d 1151.

Prejudgment interest. — Where the open account credit agreement between the supplier of materials and a subcontractor on a municipal construction project provided for interest at 18% per year, prejudgment interest was awardable as a sum justly due under Section 13-4-19 NMSA 1978 at the rate of 18% per year against the surety on the payment bond for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Subcontractor who held a judgment against contractor for debt owed under contract could sue contractor's surety for all contract liability under the bond, including amounts representing prejudgment interest, those amounts being "justly due" from contractor. *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 1994-NMSC-106, 118 N.M. 558, 883 P.2d 144.

Post-judgment interest. — Where the open account credit agreement between the supplier of materials and a subcontractor on a municipal construction project provided for interest at 18% per year, post-judgment interest was awardable as a sum justly due under Section 13-4-19 NMSA 1978 at the rate of 18% per year against the surety on the payment bond for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Law reviews. — For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Contractors' Bonds §§ 186 to 233.

False receipts or the like as estopping materialmen or laborers from recovering on public work bond, 39 A.L.R.2d 1104.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 A.L.R.2d 899.

Labor or material furnished subcontractor for public work or improvements as within coverage of bond of principal contractor, 92 A.L.R.2d 1250.

State or local government's liability to subcontractors, laborers, or materialmen for failure to require general contractor to post bond, 54 A.L.R.5th 649.

Sufficiency of notice to public works contractor on United States project under Miller Act (40 USCS § 270b(a)), 98 A.L.R. Fed. 778.

63 C.J.S. Municipal Corporations § 1062; 72 Supp. Public Contracts §§ 44, 46 to 50; 78 C.J.S. Schools and School Districts § 420 et seq.; 81A C.J.S. States §§ 186 to 193.

13-4-20. Additional bond in case of insolvency of sureties.

Whenever in its judgment any surety on such bond shall be insolvent, or for any cause is not a proper or sufficient surety, the obligee may require the contractor to furnish a new or additional bond or security within ten days; and thereupon, if the obligee shall so order, all work on said contract shall cease until such new or additional bond or security shall be furnished. If not furnished within said time, the obligee may at its option take over and complete said work as the agent and at the expense of the contractor and sureties, either doing the work on force account or letting the same by contract, and shall be entitled to use any equipment, materials and supplies of the delinquent contractor in completing said work.

History: Laws 1923, ch. 136, § 3; C.S. 1929, § 17-203; 1941 Comp., § 6-513; 1953 Comp., § 6-6-13.

ANNOTATIONS

Section applies to third-tier suppliers. — The "Little Miller Act," 13-4-18 to 13-4-20 NMSA 1978, applies to suppliers of materials under any subcontract involving a state construction project, including third-tier suppliers. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186, 656 P.2d 236.

13-4-21. [Public contracts with nonresident persons or partnerships or unadmitted foreign corporations; agent for service of process.]

That all contracts entered into by the state of New Mexico, any political subdivision of the state of New Mexico or any institution or department of the state of New Mexico, with any person or partnership not a resident of the state of New Mexico, or with any foreign corporation not authorized to do business in the state of New Mexico, for the furnishing of any materials or supplies or for the performance of any public work within the state of New Mexico by such nonresident person, partnership or foreign corporation not authorized to do business in the state of New Mexico, shall contain a specific provision designating an agent of such person, partnership or corporation, resident within the state of New Mexico, with his residence and post-office address, upon whom process and writs in any action or proceeding against any such nonresident person, partnership or corporation may be served in any action arising out of such contract to the same effect as though such person, partnership or corporation were actually and personally served within the state of New Mexico.

History: Laws 1937, ch. 144, § 1; 1941 Comp., § 6-515; 1953 Comp., § 6-6-14.

ANNOTATIONS

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

13-4-22. [Secretary of state as agent for service.]

In the event any such contract shall not contain the provision above set forth in Section 1 [13-4-21 NMSA 1978] of this act, or in the event the agent so designated in such contract shall die or remove from the state of New Mexico, then and in such event, the nonresident person, partnership or foreign corporation, as the case may be, by entering into said contract shall be deemed to have named the secretary of the state of New Mexico, and his successor in office, as the true and lawful agent of such person, partnership or corporation upon whom such legal process or writs may be served in any action arising out of such contract, and when service is made upon the secretary of state in the manner hereinafter provided, such service shall have the same force and effect as though personal service had been made upon such person, partnership or corporation within the state of New Mexico.

History: Laws 1937, ch. 144, § 2; 1941 Comp., § 6-516; 1953 Comp., § 6-6-15.

13-4-23. [Service where there is no designated agent.]

The manner of procuring and serving process in any action brought pursuant to the provisions of this act [13-4-21 to 13-4-24 NMSA 1978] when there has been, either, no designation of an agent in any such public contract, or where the agent named in such contract has died or removed from the state so that service cannot be had upon such agent, shall be as follows, to-wit: - the plaintiff, at the time of filing his complaint shall allege and set forth in his complaint or in an affidavit, to the satisfaction of the judge of the court having jurisdiction, that the defendant is one of the persons, partnerships or corporations contemplated in Section 1 [13-4-21 NMSA 1978] of this act, with the residence of said defendant, if known, and the further fact that said defendant has no designated agent within the state. Upon such showing being made, the judge shall make an order directing that service of process be made upon the defendant by delivering two copies of the process and of the complaint and of said order to the secretary of the state of New Mexico, with instructions and directions to the secretary of the state to forward one copy of said summons, complaint or other process, together with a copy of such order of the court to said defendant by registered mail to the address shown in the complaint or affidavit, as the case may be; and that in addition to making service upon the secretary of the state, the order of the court shall also direct that a copy of the process, together with a copy of the complaint and of said order accompanied by a notice that the same has been served upon the secretary of the state, pursuant to this act, be delivered to the defendant without the state. Proof of such service shall be made by affidavit filed in said action, and service shall be deemed complete thirty days from the date such personal service is made on the defendant.

History: Laws 1937, ch. 144, § 3; 1941 Comp., § 6-517; 1953 Comp., § 6-6-16.

ANNOTATIONS

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

13-4-24. [Continuances.]

The court in which any such action is pending shall, upon affidavit submitted upon behalf of the defendant, grant such additional time to answer, or continuances, as shall be reasonably necessary to allow the defendant full opportunity to plead and prepare for the trial of said action.

History: Laws 1937, ch. 144, § 4; 1941 Comp., § 6-518; 1953 Comp., § 6-6-17.

13-4-25, 13-4-26. Repealed.

ANNOTATIONS

Repeals. — Laws 1984, ch. 65, § 175, repealed 13-4-25 and 13-4-26 NMSA 1978, as amended by Laws 1983, ch. 301, §§ 29, 30, relating to architectural contracts and architect rate schedules for capital projects, effective November 1, 1984. For present comparable provisions, *see* 13-1-123 and 13-1-124 NMSA 1978.

13-4-27 to 13-4-30. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 68, § 12 repealed 13-4-27 to 13-4-30 NMSA 1978, as enacted by Laws 1985, ch. 124, §§ 1, 2, and 4 and Laws 1989, ch. 217, § 1, as amended by Laws 1995, ch. 147, §§ 1 to 3, relating to the payment of public works contracts, effective June 15, 2001. For provisions of former sections, *see* the 2000 NMSA 1978 on *NMOneSource.com.*

13-4-31. Short title.

Sections 1 through 12 [13-4-31 to 13-4-42 NMSA 1978] of this act may be cited as the "Subcontractors Fair Practices Act".

History: Laws 1988, ch. 18, § 1.

ANNOTATIONS

Meaning of "this act". — The term "this act" refers to Laws 1988, Chapter 18, §§ 1 to 12 of which appears as 13-4-31 to 13-4-42 NMSA 1978. Section 13 of Laws 1988, Chapter 18 appears as 13-4-43 NMSA 1978.

13-4-32. Legislative findings.

The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration and repair of public works projects often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among contractors and subcontractors and lead to insolvencies and loss of wages to employees.

History: Laws 1988, ch. 18, § 2.

13-4-33. Definitions.

As used in the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978]:

A. "contractor" means the prime contractor on a public works construction project who contracts directly with the using agency;

B. "subcontractor" means a contractor who contracts directly with the contractor;

C. "listing threshold" means the dollar amount, stipulated in the bidding documents, above which subcontractors must be listed;

D. "notice" means information, advice or a written warning intended to apprise a contractor, subcontractor or using agency of some proceeding in which the contractor's, subcontractor's or using agency's interests are involved or to inform him of some fact that is his right to know. Notice may be sent to a contractor, subcontractor or using agency by certified or registered mail and shall be deemed to be completed upon date of mailing; and

E. "using agency" means any state agency or local public body requiring services or construction.

History: Laws 1988, ch. 18, § 3; 1995, ch. 82, § 2.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in Subsection D, substituted "subcontractor or using agency" for "or subcontractor" twice, substituted "the contractor's, subcontractor's or using agency's" for "his", and substituted "that" for "which".

13-4-34. Listing of subcontractors; requirements.

A. Any using agency taking bids for any public works construction project shall provide in the bidding documents prepared for that project a listing threshold which shall be five thousand dollars ($5,000) or one-half of one percent of the architect's or

engineer's estimate of the total project cost, not including alternates, whichever is greater. If the bidding documents do not include a listing threshold, then the using agency shall supply the listing threshold. If the listing threshold has not been included, the bid opening shall be postponed until the using agency has complied with this section. Any contractor or subcontractor interested in bidding may apply to the district court in the county in which the project will be located for an injunction preventing the bid opening until the using agency has complied with this section. Any person submitting a bid shall in his bid set forth:

(1) the name and the city or county of the place of business of each subcontractor under subcontract to the contractor who will perform work or labor or render service to the contractor in or about the construction of the public works construction project in an amount in excess of the listing threshold; and

(2) the category of the work that will be done by each subcontractor. The contractor shall list only one subcontractor for each category as defined by the contractor in his bid.

B. A bid submitted by a contractor who fails to comply with the provisions of Subsection A of this section is a nonresponsive bid which shall not be accepted by a using agency.

History: Laws 1988, ch. 18, § 4; 1989, ch. 296, § 1; 1995, ch. 82, § 3.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in Subsection A, inserted "not including alternates", added the second through fourth sentences, substituted in Paragraph A(1) "the city or county" for "location", and in Paragraph A(2) substituted "category" for "nature" and "that" for "which"; and in Subsection B, substituted "a contractor who" for "any person which".

Separate categories of work in one bid request. — Although there was only one invitation for bids, since it requested two distinct bids covering a single bid lot and a combination of that bid lot with another, the contractor should have listed the subcontractor who would perform each category of work. *Dynacon, Inc. v. D & S Contracting*, 1995-NMCA-071, 120 N.M. 170, 899 P.2d 613.

Written contract not required for listing as subcontractor. — The absence of a written contract between a general contractor and subcontractor at the time the general contractor submitted its bid did not mean that the general contractor was not obligated to list the subcontractor in the bid. *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996-NMSC-010, 121 N.M. 471, 913 P.2d 659.

13-4-35. Exemption.

With the exclusion of that portion of work covering street lighting and traffic signals, the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978] shall not apply to contracts for the construction, improvement or repair of streets or highways, including bridges, underground utilities within easements including but not limited to water lines, sewer lines and storm sewer lines.

History: Laws 1988, ch. 18, § 5.

13-4-35.1. Application of act.

The Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978] shall not apply to any transaction occurring after the contractor and the listed subcontractor have executed a subcontract unless subsequent action on the subcontract relates to subcontractor listing requirements.

History: Laws 1995, ch. 82, § 1.

13-4-36. Substitution of subcontractor.

A. No contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except that the using agency shall consent to the substitution of another person as a subcontractor in the following circumstances:

(1) when the subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract, when such written contract, based upon the general terms, conditions, plans and specifications for the project involved and the terms of such subcontractor's written bid, is presented to him by the contractor;

(2) when the subcontractor listed in the original bid becomes bankrupt or insolvent prior to execution of a subcontract;

(3) when the using agency refuses to approve the subcontractor listed in the original bid, provided such approval has been reserved in the bidding documents;

(4) when the subcontractor listed in the original bid fails or refuses to perform his subcontract;

(5) when the contractor demonstrates to the using agency or its duly authorized officer that the name of the subcontractor was listed as the result of an inadvertent clerical error;

(6) when a bid alternate accepted by the using agency causes the listed subcontractor's bid not to be low;

(7) when the contractor can substantiate to the using agency that a listed subcontractor's bid is incomplete;

(8) when the listed subcontractor fails or refuses to meet the bond requirements of the contractor;

(9) when it is determined that the listed subcontractor does not have a proper license to perform the work and the contractor has submitted the name of the subcontractor along with proof that the subcontractor bid work for which he was not licensed by the construction industries division of the regulation and licensing department; or

(10) when it is determined by the using agency, the prime contractor or the director of the labor and industrial division of the labor department that a listed subcontractor is not a registered subcontractor on the date bids are unconditionally accepted for consideration.

B. Prior to approval of the contractor's request for substitution of a subcontractor, the using agency shall give notice in writing to the listed subcontractor of the contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified has five working days within which to submit written objections to the substitution to the using agency. Failure to file written objections shall constitute the listed subcontractor's consent to the substitution. If written objections are filed, the using agency shall give at least five working days notice in writing to the listed subcontractor of a hearing by the using agency on the contractor's request for substitution.

C. No contractor whose bid is accepted shall permit any subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid without the consent of the using agency.

D. No contractor whose bid is accepted, other than in the performance of change orders causing changes or deviations from the original contract, shall sublet or subcontract any portion of the work in excess of the listing threshold as to which his original bid did not designate a subcontractor unless:

(1) the contractor fails to receive a bid for a category of work. Under such circumstances, the contractor may subcontract. The contractor shall designate on the listing form that no bid was received; or

(2) the contractor fails to receive more than one bid for a category of work. Under such circumstances, the contractor may subcontract. The contractor shall state on the listing form that only one subcontractor's bid was received, together with the name of the subcontractor. This designation shall not occur more than one time on the subcontractor list.

History: Laws 1988, ch. 18, § 6; 1995, ch. 82, § 4; 2005, ch. 98, § 3.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added Subsection A(10) to permit the using agency to consent to the substitution of a subcontractor when it is determined that a listed subcontractor is not a registered subcontractor on the date bids are unconditionally accepted for consideration.

The 1995 amendment, effective June 16, 1995, in Paragraphs A(2) and A(4) substituted "subcontractor listed in the original bid" for "listed subcontractor", in Paragraph A(2) added "prior to execution of a subcontract", added Paragraph A(3), redesignated former Paragraphs A(3) to A(7) as paragraphs A(4) to A(8), in Paragraph A(6) substituted "listed" for "original low", added Paragraph A(9); in Subsection B inserted "of a subcontractor" in the first sentence; in Subsection D, inserted the Paragraph D(1) designation, added Paragraph D(2); and made minor stylistic changes throughout the section.

Bid alternates. — The provision of Subparagraph [Paragraph] A(6), concerning acceptance of a "bid alternate" by the using agency, did not apply to allow substitution of a listed contractor when the invitation for bids requested two distinct bids covering a single bid lot and a combination of that bid lot with another and the contractor was required to list the subcontractor who would perform each category of work. *Dynacon, Inc. v. D & S Contracting*, 1995-NMCA-071, 120 N.M. 170, 899 P.2d 613.

Contractor could not substitute itself for subcontractor. — Without proper approval by the using agency, a general contractor could not substitute itself for a listed contractor after the using agency had accepted the general contractor's bid. *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996-NMSC-010, 121 N.M. 471, 913 P.2d 659.

13-4-37. Bond requirements.

A. It is the responsibility of each subcontractor submitting a bid to a contractor to be prepared to submit a faithful performance and payment bond if so requested by the contractor.

B. In the event any subcontractor submitting a bid to a contractor does not, upon the request of the contractor and at the expense of the contractor at the established charge or premium therefor, furnish to the contractor a bond issued by a corporate surety authorized to do business in New Mexico in accordance with the New Mexico Insurance Code [Chapter 59A NMSA 1978] and listed in the United States treasury department circular 570 wherein the contractor is named the obligee, guaranteeing prompt and faithful performance of the subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under the subcontract, the contractor may reject the bid and make a substitution of another

subcontractor subject to the provisions of Section 13-4-36 NMSA 1978. Such bond may be required at the expense of the subcontractor only if the contractor in his written or published request for subcontract bids:

(1) specifies that the expense for the bond shall be borne by the subcontractor; and

(2) clearly specifies the amount and requirements of the bond.

History: Laws 1988, ch. 18, § 7; 1995, ch. 82, § 5.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in Subsection A, substituted "a bid" for "bids" and inserted "a" preceding "faithful"; in Subsection B, substituted "a corporate" for "an admitted", and inserted the language beginning "authorized" and ending "circular 570"; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State or local government's liability to subcontractors, laborers, or materialmen for failure to require general contractor to post bond, 54 A.L.R.5th 649.

13-4-38. Failure to specify subcontractor.

If a contractor fails to list a subcontractor in excess of the listing threshold and he does not state that no bid was received or that only one bid was received, he represents that he is fully qualified to perform that portion of the work himself and that he shall perform that portion of the work himself. If after the award of the contract the contractor subcontracts any portion of the work, except as provided in the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978], the contractor shall be guilty of violation of the Subcontractors Fair Practices Act and subject to the penalties provided in Section 13-4-41 NMSA 1978.

History: Laws 1988, ch. 18, § 8; 1995, ch. 82, § 6.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in the first sentence, substituted "list" for "specify", inserted "and he does not state that no bid was received or that only one bid was received", inserted "of the work" following "portion" twice; and made minor stylistic changes throughout the section.

13-4-39. Inadvertent clerical error.

A. The contractor, as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor, shall, within four working days after the time of the prime bid

opening by the using agency, give written notice to the using agency and to both the subcontractor he claims to have listed in error and the subcontractor who had bid to the contractor prior to bid opening.

B. Any listed subcontractor who has been notified by the contractor in accordance with the provisions of this section as to an inadvertent clerical error shall be allowed twelve working days from the time of the prime bid opening within which to submit to the using agency and to the contractor written objection to the contractor's claim of inadvertent clerical error. Failure of the listed subcontractor to file written notice within the twelve working days shall be primary evidence of his agreement that an inadvertent clerical error was made.

C. The using agency shall, in the absence of an objection to the contrary by the listed subcontractor in the original bid, consent to the substitution of the intended subcontractor if:

(1) the contractor, the listed subcontractor listed in error and the intended subcontractor each submit an affidavit to the using agency, along with such additional evidence as the parties may wish to submit, that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within twelve working days from the time of the prime bid opening; or

(2) affidavits are filed by both the contractor and the intended subcontractor within the specified time but the subcontractor whom the contractor claims to have listed in error does not submit, within twelve working days from the time of prime bid opening, to the using agency and to the contractor written objection to the contractor's claim of inadvertent clerical error as provided in this section.

D. If affidavits are filed by both the contractor and the intended subcontractor but the listed subcontractor has, within twelve working days from the time of the prime bid opening, submitted to the using agency and to the contractor written objection to the contractor's claim of inadvertent clerical error, the using agency shall investigate the claims of the parties and hold a hearing to determine the validity of the claims, within thirty days after the receipt of the contractor's written objection. Any determination made shall be based on facts contained in the affidavits submitted by all three parties and supported by testimony under oath and subject to cross-examination. The using agency may, on its motion or that of any other party, admit testimony of other contractors, any bid registries or depositories or any other party in possession of facts that may have a bearing on the decision of the using agency.

History: Laws 1988, ch. 18, § 9; 1995, ch. 82, § 7.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in Subsection A, substituted "four" for "two"; in Subsection B, substituted "twelve" for "six" two times; rewrote the beginning of

Subsection C, in Paragraph C(1) inserted "listed" preceding the first "subcontractor" and substituted "twelve" for "eight", in Paragraph C(2) substituted "twelve" for "six" and inserted "from the time of prime bid opening"; in Subsection D, substituted "twelve" for "six", deleted "public" preceding "hearing", inserted "within thirty days after the receipt of the contractor's written objection"; and made minor stylistic changes throughout the section.

13-4-40. Emergency subcontracting.

Subcontracting any portion of the work in excess of the listing threshold as to which no subcontractor was designated in the original bid shall be permitted only in the case of public emergency or necessity and then only upon a written finding by the using agency setting forth the facts constituting the emergency or necessity.

History: Laws 1988, ch. 18, § 10.

13-4-41. Penalties.

A. When a contractor violates any provision of the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978] except Section 13-4-34 NMSA 1978, the using agency shall:

(1) in the case of a contractor who substitutes another subcontractor in violation of Section 13-4-36 NMSA 1978, for the subcontractor originally included in the bid, assess the contractor a penalty in an amount equal to the greater of ten percent of the amount bid by the listed subcontractor or the difference between the amount bid by the listed subcontractor and the amount bid by the substituted subcontractor;

(2) in the case of a contractor substituting a listed subcontractor for another subcontractor, and the substituted subcontractor knowingly participated in a violation of Section 13-4-36 NMSA 1978, assess the substituted subcontractor a penalty in an amount equal to the greater of ten percent of the amount bid by the listed subcontractor and the difference between the amount bid by the listed subcontractor and the substituted subcontractor; or

(3) in the case of a contractor who fails to list a subcontractor in excess of the listing threshold as defined in Section 13-4-38 NMSA 1978, assess the contractor a penalty of eight percent of the amount of the subcontract issued for the first violation and thirty percent of the amount of the subcontract issued for any violation thereafter, on any one project.

B. Penalties assessed pursuant to the provisions of this section shall be deposited into the fund from which the contract was awarded.

C. In a proceeding under this section, the contractor shall be entitled to a hearing after notice.

D. A violation of the provisions of the Subcontractors Fair Practices Act constitutes grounds for disciplinary action against a contractor or a subcontractor, pursuant to regulations of the construction industries division of the regulation and licensing department.

E. A contractor or a subcontractor who attempts to circumvent the provisions of the Subcontractors Fair Practices Act shall be subject to the penalties established pursuant to this section.

F. Any listed subcontractor removed in violation of the Subcontractors Fair Practices Act may bring an action in the district court for damages, injunctive or other relief.

History: Laws 1988, ch. 18, § 11; 1989, ch. 296, § 2; 1995, ch. 82, § 8.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, rewrote the beginning of Subsection A, deleted former Paragraph A(1), rewrote and redesignated former Paragraph A(2) as Paragraph A(1), added Paragraphs A(2) and A(3), added Subsections B and C, redesignated former Subsections B to D as Subsections D to E, and in Subsections D and E, inserted "or a subcontractor".

13-4-42. Coverage of home rule municipalities.

Any home rule municipality or H class county chartered under the provisions of Article 10, Section 6 of the constitution of New Mexico is expressly denied authority to legislate regulation of the subject matter covered in the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978] that conflicts with the provisions of that act.

History: Laws 1988, ch. 18, § 12.

ANNOTATIONS

Cross references. — For Municipal Charter Act, *see* 3-15-1 to 3-15-16 NMSA 1978.

For H class counties, *see* 4-44-3 NMSA 1978.

13-4-43. Dispute resolution.

Once the using agency has determined the existence of a valid claim under the provisions of the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978], the using agency or agent of the using agency may:

A. hold a public hearing for the purpose of providing an informal resolution of the dispute by preparing a "form of dispute" which shall be available to all parties. The form

shall state concisely, in numbered paragraphs, the matter at issue or dispute which the complainant expects to be determined. The agent or the using agency shall evaluate the issues presented by both sides of the dispute and render a decision within ten days after the hearing, and provide the parties with a written copy of the decision by certified mail, return receipt requested; or

B. refer the matter in dispute to be resolved through arbitration.

History: Laws 1988, ch. 18, § 13.

ANNOTATIONS

Cross references. — For the Uniform Arbitration Act, *see* 44-7A-1 NMSA 1978. For public works mediation, *see* Chapter 13, Article 4C NMSA 1978.

ARTICLE 4A
Art in Public Places

13-4A-1. Short title.

This act [13-4A-1 to 13-4A-11 NMSA 1978] may be cited as the "Art in Public Places Act".

History: Laws 1986, ch. 11, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-2. Legislative declaration.

The legislature declares it to be a policy of the state that a portion of appropriations for capital expenditures be set aside for the acquisition or commissioning of works of art to be used in, upon or around public buildings.

History: Laws 1986, ch. 11, § 2.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-3. Definitions.

As used in the Art in Public Places Act:

A. "agency" means all state departments and agencies, boards, councils, institutions, commissions and quasi-public corporations, including all state educational institutions enumerated in Article 12, Section 11 of the constitution of New Mexico, and all statutorily created post-secondary educational institutions;

B. "architect" means the person or firm designing the project for the contracting agency to which the one percent provision pursuant to Section 13-4A-4 NMSA 1978 applies;

C. "contracting agency" means the agency having the control, management and power to enter into contracts for new construction or renovation of any public building;

D. "division" means the arts division of the cultural affairs department;

E. "public buildings" means those buildings under the control and management of the facilities management division of the general services department, the department of game and fish, the energy, minerals and natural resources department, the department of transportation, the state fair commission, the supreme court, the commissioner of public lands, the cultural affairs department, the governing boards of the state educational institutions and statutorily created post-secondary educational institutions, the public education department and the legislature or all buildings constructed with funds appropriated by the legislature. For the purposes of the Art in Public Places Act, "public buildings" does not include such auxiliary buildings as maintenance plants, correctional facilities, warehouses or temporary structures; and

F. "work of art" means any work of visual art, including but not limited to a drawing, painting, mural, fresco, sculpture, mosaic or photograph; a work of calligraphy; a work of graphic art, including an etching, lithograph, offset print, silk screen or a work of graphic art of like nature; works in clay, textile, fiber, wood, metal, plastic, glass and like materials; or mixed media, including a collage or assemblage or any combination of the foregoing art media that is chosen to be included in or immediately adjoining the public building under consideration. Under special circumstances, the term may include environmental landscaping if approved by the division.

History: Laws 1986, ch. 11, § 3; 1989, ch. 178, § 1; 2013, ch. 115, § 11.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

The 2013 amendment, effective June 14, 2013, changed the name of the property control division of the general services department to the facilities management division; in Subsection E, deleted "property control" and added "facilities management" before

"division"; in Subsections D and E, changed "office of cultural affairs" to "cultural affairs department"; and in Subsection E, changed "state highway and transportation department" to "department of transportation" and changed "state department of public education" to "public education department".

13-4A-4. Allocation of construction costs.

A. All agencies shall allocate as a nondeductible item an amount of money equal to one percent or two hundred thousand dollars ($200,000), whichever is less, of the amount of money appropriated for new construction or any major renovation exceeding one hundred thousand dollars ($100,000), to be expended for the acquisition and installation of works of art for the new building to be constructed or the building in which the major renovation is to occur.

B. An amount of money equal to one percent or two hundred thousand dollars ($200,000), whichever is less, allocated from appropriations for new construction or major renovations of excluded structures pursuant to Subsection E of Section 3 [13-4A-3 NMSA 1978] of the Art in Public Places Act shall be accounted for separately and expended for acquisition and installation of art for existing public buildings. The division shall determine the amount, not to exceed fifty thousand dollars ($50,000), to be made available for the purchase of art in existing buildings in consultation with the contracting agency. The selection process for art for existing buildings shall follow guidelines established by the division pursuant to the Art in Public Places Act.

History: Laws 1986, ch. 11, § 4.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-5. Art in public places fund; creation.

There is created in the state treasury the "art in public places fund" which shall be administered by the division pursuant to the Art in Public Places Act.

History: Laws 1986, ch. 11, § 5; 1989, ch. 324, § 5.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-6. Works of art.

The works of art acquired pursuant to the Art in Public Places Act may be an integral part of the building, attached to the building, detached within or outside the structure or placed on public lands, part of a temporary exhibition or loaned or exhibited by the agency in other public facilities.

History: Laws 1986, ch. 11, § 6.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-7. Administration of the program.

The division shall determine the amount to be made available for the purchase of art, in consultation with the contracting agency responsible for the building to be constructed or renovated, and payments thereof shall be made in accordance with law. All agencies shall notify the division in writing upon legislative approval of construction budgets. One percent of the total appropriation for new construction or renovation of any building shall be deposited into the art in public places fund after the issuance of the appropriate bonds. If the entire one percent of the total funds appropriated for a particular building is not required for the project, the remainder shall accumulate in the art in public places fund and shall be accounted for separately and expended for the acquisition of art for existing buildings, as determined by the division. Any money remaining in the fund at the end of each fiscal year shall not revert but shall remain in the art in public places fund to be used to implement the purposes of the Art in Public Places Act.

History: Laws 1986, ch. 11, § 7.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-8. Artist selection.

The division shall establish guidelines for the art selection process. This process shall provide for participation from representatives of the contracting agency, the user agency, the division, the project architect, visual artists or design professionals and interested members of the community.

History: Laws 1986, ch. 11, § 8.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-9. Separate contracts.

Expenditures for works of art as provided in Section 7 [13-4A-7 NMSA 1978] of the Art in Public Places Act shall be contracted for separately from all other items in the new construction of the public building.

History: Laws 1986, ch. 11, § 9.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-10. Division; rules and regulations.

The selection, execution, placement and acceptance of works of art for a construction project shall be the responsibility of the division in consultation with the contracting agency. The division shall adopt rules and regulations to govern the selection, execution, placement and acceptance of the works of art to be acquired in accordance with this section and other rules, regulations and procedures necessary to implement the Art in Public Places Act. Administrative costs incurred by the division for the implementation of the Art in Public Places Act may be charged against the art in public places fund, provided that such costs have been properly budgeted and the budget has been approved by the state cultural affairs officer and the secretary of finance and administration.

History: Laws 1986, ch. 11, § 10.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

13-4A-11. Maintenance.

The contracting agency or its designee is responsible for inventory, maintenance, repair and security of art work. Any maintenance or repair work shall be done in consultation with the division.

History: Laws 1986, ch. 11, § 11.

ANNOTATIONS

Compiler's notes. — Laws 1986, ch. 11, § 13, which was to repeal this article effective January 1, 1990, was repealed by L. 1989, ch. 178, § 2.

ARTICLE 4B
Fine Art in Public Buildings

13-4B-1. Findings.

The legislature finds that the physical alteration or destruction of fine art, which is an expression of the personality of the artist, is detrimental to the reputation of the artist and artists therefore have an interest in protecting their works of fine art against such alteration or destruction. The legislature also finds that there is a public interest in preserving the integrity of cultural and artistic creations.

History: Laws 1987, ch. 70, § 1.

ANNOTATIONS

Law reviews. — For note, "Advancing the Arts Community in New Mexico through Moral Rights and Droit De Suite: The International Impetus and Implications of Preemption Analysis," *see* 36 N.M.L. Rev. 713 (2006).

13-4B-2. Definitions.

As used in this act [13-4B-1 to 13-4B-3 NMSA 1978]:

A. "artist" means the natural person who actually creates a work of fine art but does not include art created by an employee within the scope of his employment. In case of a joint creation of a work of art, each joint creator shall have the rights of an artist with respect to the work of fine art as a whole;

B. "fine art" means any original work of visual or graphic art of any media including any painting, print, drawing, sculpture, craft, object, photograph, audio or video tape, film, hologram or any combination of such media of recognized quality;

C. "gross negligence" means the exercise of so slight a degree of care as to justify the belief that there was indifference to the particular work of fine art;

D. "public building" means a building owned by the state or any of its branches, agencies, departments, boards, instrumentalities or institutions or a building owned by any political subdivision of the state or any of its agencies, instrumentalities or institutions; and

E. "public view" means on the exterior of a public building or in an interior area of a public building.

History: Laws 1987, ch. 70, § 2.

13-4B-3. Fine art; alteration or destruction prohibited; injunctive relief; damages; exceptions.

A. No person except an artist who owns or possesses a work of fine art which the artist has created shall intentionally commit or authorize the intentional commission of any physical defacement, mutilation, alteration or destruction of a work of fine art in public view. As used in this section, "intentional physical defacement, mutilation, alteration or destruction" includes any such action taken deliberately or through gross negligence.

B. The artist shall retain the right to claim and receive credit under his own name or under a reasonable pseudonym or, for just and valid reason, to disclaim authorship of his work of fine art. Credit shall be determined in accord with the medium of expression and the nature and extent of the contribution of the artist to the work of fine art.

C. The artist or any bona fide union or other artists' organization authorized in writing by the artist for such purpose may commence an action in district court without having as prerequisites to a suit any need for:

(1) damages already incurred;

(2) a showing of special damages, if any; or

(3) general damages in any monetary amount to recover or obtain any of the following:

(a) injunctive relief or declaratory relief;

(b) actual damages;

(c) reasonable attorneys' and expert witness fees and all other costs of the action; or

(d) any other relief which the court deems proper.

D. In determining whether a work of fine art is of recognized quality, the court shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art and other persons involved with the creation or marketing of fine art.

E. The provisions of this section shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, continue until the fiftieth anniversary of the death of such artist, and continue in addition to any other rights and duties which may now or in the future be applicable and, except as provided in

Subsection F of this section, may not be waived except by an instrument in writing expressly so providing which is signed by the artist and refers to specific works with identification and such waiver shall only apply to work so identified.

The attorney general may, if the artist is deceased, assert the rights of the artist on the artist's behalf and commence an action for injunctive relief with respect to any work of art which is in public view.

F. If a work of fine art in public view cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded prior to the installation of such art, shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

G. If the owner of a building wishes to remove a work of fine art which is a part of that building but which can be removed from the building without substantial harm to such fine art, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist or, if the artist is deceased, his heir, legatee or personal representative in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within ninety days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee or personal representative, title to the fine art shall be deemed to be in such person.

History: Laws 1987, ch. 70, § 3.

ARTICLE 4C
Public Works Mediation

13-4C-1. Short title.

Chapter 13, Article 4C NMSA 1978 may be cited as the "Public Works Mediation Act".

History: 1978 Comp., § 13-4C-1, enacted by Laws 1992, ch. 63, § 1.

13-4C-2. Definitions.

As used in the Public Works Mediation Act:

A. "interested person" means a person with an association to a dispute related to the performance of a public works project, when that association arises out of the same transaction or occurrence underlying the dispute;

B. "mediator" means an individual or organization, independent of a dispute related to the performance of a public works project, that acts to assist persons in the resolution of the dispute;

C. "person" means the state, political subdivision of the state, including any home rule municipality chartered pursuant to the provisions of Article 10, Section 6 of the constitution of New Mexico, institution or department of the state, local public body, contractor, subcontractor, supplier, architect, engineer, surety or project manager; and

D. "public works project" means a project of the state, including highway projects of the state highway and transportation department, a project of a political subdivision of the state, including any home rule municipality chartered pursuant to the provisions of Article 10, Section 6 of the constitution of New Mexico, a project of an institution or department of the state or a project of a local public body to construct, repair, alter, demolish, install or extend an improvement on real property or to improve real property owned, used or leased by the state, political subdivision of the state, an institution or department of the state or a local public body.

History: 1978 Comp., § 13-4C-2, enacted by Laws 1992, ch. 63, § 2.

13-4C-3. Application.

The Public Works Mediation Act applies to all disputes related to the performance of a public works project.

History: 1978 Comp., § 13-4C-3, enacted by Laws 1992, ch. 63, § 3.

13-4C-4. Mediation requirement; exemptions.

A. Except as provided in Subsections B, C and D of this section, a person who seeks to resolve a dispute related to the performance of a public works project shall exhaust the mediation procedures set forth in the Public Works Mediation Act before seeking judicial relief in a court of law.

B. A dispute that arises under an arbitration clause of a contract for a public works project that includes a clause in the contract that requires arbitration is exempt from the provisions of the Public Works Mediation Act.

C. The provisions of the Public Works Mediation Act shall not apply to:

(1) any disputes between employers and employees, including disputes arising pursuant to the provisions of the Public Works Minimum Wage Act [13-4-10 to 13-4-17 NMSA 1978] or the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978]; or

(2) any disputes regarding an apprenticeship, including disputes arising pursuant to the provisions of Sections 50-7-1 through 50-7-7 NMSA 1978.

D. All contractual alternative dispute resolution remedies shall be exhausted prior to application of the provisions of the Public Works Mediation Act.

History: 1978 Comp., § 13-4C-4, enacted by Laws 1992, ch. 63, § 4.

13-4C-5. Notice of mediation session; service of notice.

A. An interested person may convene a mediation session for the purpose of resolving disputes related to the performance of a public works project. Mediation of a dispute related to the performance of a public works project shall take place within thirty days after an interested person has provided notice of the mediation session to other interested persons.

B. When an interested person receives notice of a mediation session, that person may notify other interested persons of the mediation session. A person who receives notice of a mediation session shall provide notice:

(1) to other interested persons no later than five days following receipt of the original notice; and

(2) that other interested persons have been notified to the interested person who convened the mediation session no later than five days following receipt of the original notice.

C. An interested person providing notice of a mediation session shall include the following information within the notice:

(1) the name and mailing address of the mediator;

(2) the date, time and location of the mediation session;

(3) a brief summary of all issues concerning a dispute related to the performance of a public works project;

(4) a brief statement regarding an interested person's association to a dispute related to the performance of a public works project, when the interested person has been provided with notice of a mediation session; and

(5) the cost for an eight-hour mediation session and the responsibility for payment of the costs pursuant to the provisions of Section 13-4C-11 NMSA 1978.

D. Service of the notice required pursuant to the provisions of Subsection B of this section shall be made by:

(1) mailing a certified letter, return receipt requested, to an interested person's residence, principal office or place of business; or

(2) delivering a copy of the notice to interested persons.

History: 1978 Comp., § 13-4C-5, enacted by Laws 1992, ch. 63, § 5.

13-4C-6. Location of mediation session.

The mediation session shall be conducted at a neutral site that affords no advantage to any person attending the mediation session. The mediation session shall be held in the county where the public works project is located unless otherwise agreed to by all persons attending the session. In no event shall the mediation session be held at the residence, office or place of business of any person attending the mediation session unless otherwise agreed to by all persons attending the session. A mediator has final authority regarding the location of a mediation session if the persons attending a session are unable to agree on a location.

History: 1978 Comp., § 13-4C-6, enacted by Laws 1992, ch. 63, § 6.

13-4C-7. Written materials.

Each interested person properly notified of a mediation session shall prepare a summary of his position relative to issues concerning a dispute related to the performance of a public works project. The summary shall not exceed four pages in length. The summary shall be provided to the mediator at least four days prior to the mediation session. A mediator may request additional information or materials from persons properly notified of the mediation session.

History: 1978 Comp., § 13-4C-7, enacted by Laws 1992, ch. 63, § 7.

13-4C-8. Attendance.

All interested persons or representatives of interested persons properly notified of a mediation session shall attend the session for a minimum of eight hours unless otherwise agreed to by all persons attending the session. An interested person or a representative of an interested person attending a mediation session shall have the authority to enter into a settlement of disputes related to the performance of a public works project. A person may be accompanied by an attorney during the mediation session.

History: 1978 Comp., § 13-4C-8, enacted by Laws 1992, ch. 63, § 8.

13-4C-9. Recording of agreements; compromise and offers to compromise.

A. Following the completion of a mediation session, the mediator shall record any agreements entered into by persons during the session. Agreements shall be recorded in writing or by an audio or video tape recording; provided that all persons entering into the agreement shall indicate their assent to the agreement.

B. Evidence of offers to compromise a dispute or disclosures made during a mediation session shall not be admissible in subsequent judicial proceedings.

History: 1978 Comp., § 13-4C-9, enacted by Laws 1992, ch. 63, § 9.

13-4C-10. Mediation clause in a contract; application of federal law.

A. When persons include a mediation clause in a contract for performance of a public works project, the provisions of the mediation clause shall not conflict with the provisions of the Public Works Mediation Act. Any language in a mediation clause that conflicts with the provisions of the Public Works Mediation Act shall be unenforceable at law.

B. When a public works project involves the expenditure of federal funds, the mediation process 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 Public Works Mediation Act, compliance with federal law or regulations shall constitute compliance with the Public Works Mediation Act.

History: 1978 Comp., § 13-4C-10, enacted by Laws 1992, ch. 63, § 10.

13-4C-11. Costs.

A. The costs of a mediation session shall be borne equally by all interested persons properly notified of a mediation session. When an interested person who has been properly notified of a mediation session fails to appear for that session or fails to remain for the duration of a session, that interested person shall be wholly responsible for the costs of the mediation session.

B. When a person files a lawsuit subsequent to exhausting the procedures set forth in the Public Works Mediation Act, the court may assess costs against any interested person who was properly notified of a mediation session and who failed to pay his share of the costs of the mediation session.

C. The mediator shall determine whether a person is an interested person for the purpose of sharing the costs of a mediation session.

History: 1978 Comp., § 13-4C-11, enacted by Laws 1992, ch. 63, § 11.

ARTICLE 4D
Public Works Apprenticeship and Training

13-4D-1. Short title.

Chapter 13, Article 4D NMSA 1978 may be cited as the "Public Works Apprentice and Training Act".

History: Laws 1992, ch. 74, § 1; 2007, ch. 200, § 15.

ANNOTATIONS

Cross references. — For Apprenticeship Assistance Act, *see* 21-19A-1 NMSA 1978 et seq.

For apprenticeship council, *see* 50-7-3 NMSA 1978.

The 2007 amendment, effective July 1, 2007, changed the statutory reference to the act.

13-4D-2. Purpose.

The purpose of the Public Works Apprentice and Training Act is to ensure funding, through contributions made by employers, to establish an apprenticeship program that will develop skilled building trades craftsmen in occupations recognized by the bureau of apprenticeship and training of the United States department of labor or the New Mexico apprenticeship council. The funding will ensure adequate training during economic downturns, increase the number of New Mexicans possessing skills that will enhance their opportunities for employment and maintain the high standards of craftsmanship in our state.

History: Laws 1992, ch. 74, § 2.

13-4D-3. Definitions.

As used in the Public Works Apprentice and Training Act:

A. "approved apprentice and training programs" means building trades apprenticeship and training programs in New Mexico that are recognized by the office of apprenticeship of the employment and training administration of the United States department of labor or the New Mexico apprenticeship council;

B. "compliance statement" means a monthly record of an employer's contributions paid into an approved apprentice and training program in New Mexico or into the public works apprentice and training fund; and

C. "employer" means a contractor, subcontractor or any person acting as a contractor on a public works project, as that term is defined in the provisions of the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978].

History: Laws 1992, ch. 74, § 3; 2007, ch. 200, § 16; 2024, ch. 5, § 2.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, revised the definition of "approved apprentice and training programs" and removed the definition of "director" or "division"; in Subsection A, after "recognized by the," deleted "bureau of apprenticeship and training" and added "office of apprenticeship of the employment and training administration"; and deleted former Subsection C, which provided the definition of "director" or "division" and redesignated former Subsection D as Subsection C.

The 2007 amendment, effective July 1, 2007, defined "division" as the labor relations division of the workforce solutions department.

13-4D-4. Administration.

A. The Public Works Apprentice and Training Act shall be administered by the workforce solutions department. The department shall collect employers' contributions in accordance with that act, review employers' compliance statements, review certified payroll reports to verify training contributions, investigate allegations of and impose penalties for employer noncompliance and disburse funds as provided in Section 13-4D-5 NMSA 1978.

B. Public works construction projects, except for street, highway, bridge, road, utility or maintenance contracts with employers who elect not to participate in training, shall not be constructed unless an employer agrees to make contributions to approved apprentice and training programs in New Mexico in which the employer is a participant or to the public works apprentice and training fund administered by the workforce solutions department. Contributions shall be made in the same manner and in the same amount as apprentice and training contributions required pursuant to wage rate determinations made by the department.

C. The workforce solutions department shall adopt rules and regulations necessary to implement the provisions of the Public Works Apprentice and Training Act.

History: Laws 1992, ch. 74, § 4; 2024, ch. 5, § 3.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, transferred the administration of the Public Works Apprentice and Training Act from the public works bureau of the labor and industrial division of the labor department to the workforce solutions department, and

made certain technical and conforming changes; in Subsection A, after "administered by the" deleted "public works bureau of the labor and industrial division of the labor" and added "workforce solutions" after "The", deleted "bureau" and added "department" and after "Section" deleted "5 of the Public Works Apprentice and Training Act" and added "13-4D-5 NMSA 1978"; in Subsection B, after "administered by the" deleted "public works bureau of the labor and industrial division of the labor" and added "workforce solutions" and after "determinations made by the" deleted "director" and added "department"; and in Subsection C, after "The", deleted "director" and added "workforce solutions department".

13-4D-5. Fund created; disbursement of funds.

There is created the "public works apprentice and training fund" in the workforce solutions department. Money in the fund shall be distributed in the following manner:

A. no more than fifteen percent of the funds may be used by the workforce solutions department to hire staff to administer the funds collected by the department; and

B. the remainder of the funds shall be used for approved apprentice and training programs in New Mexico. The workforce solutions department shall develop an annual budget and, subject to appropriation by the legislature in the general appropriation act, shall disburse funds to approved apprentice and training programs in New Mexico, taking into account participant contact hours of classroom instruction and on-the-job training for the preceding year, to be not less than ninety percent of one hundred forty-four contact hours of classroom instruction per participant per school year and not less than one thousand hours of on-the-job training per twelve-month period; provided that funds shall not be distributed to programs not in compliance with their approved standards. Notwithstanding any language in the general appropriation act that otherwise limits budget adjustments, if the fund balance available for disbursement to approved programs exceeds the amount appropriated, pursuant to Sections 6-3-23 through 6-3-25 NMSA 1978, the workforce solutions department may request budget increases up to the excess fund balance for distribution to the programs.

History: Laws 1992, ch. 74, § 5; 2005, ch. 95, § 1; 2024, ch. 5, § 4.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, transferred the administration of the public works apprentice and training fund from the labor and industrial division of the labor department to the workforce solutions department, and provided that funds in the public works apprentice and training fund shall not be distributed to programs that are not in compliance with their approved standards; substituted "workforce solutions" for "labor and industrial division of the labor" throughout the section; in the introductory paragraph, deleted "Contributions into the fund shall be provided under the provisions of Section 13-4D-4 NMSA 1978. Funds contributed under the provisions of the Public Works Apprentice and Training Act" and added "Money in the fund"; in Subsection A,

after "collected by the" deleted "division" and added "department"; and in Subsection B after "period", added "provided that funds shall not be distributed to programs not in compliance with their approved standards".

The 2005 amendment, effective June 17, 2005, provided in Subsection B that disbursement of funds is subject to appropriation by the legislature in the general appropriation act and that notwithstanding the general appropriation act that limits budget adjustment, if the fund balance available for disbursement exceeds the amount appropriated the labor department may request budget increases up to the excess fund balance for distribution.

13-4D-6. Notice to employers; publication of programs.

A. An employer's contribution requirement under the provisions of the Public Works Apprentice and Training Act shall be included with all minimum wage determinations issued by the workforce solutions department on all public works construction projects. The department shall provide the contribution rate for approved apprentice and training programs, and that information shall be part of the public works construction projects.

B. The workforce solutions department shall publish a list of approved apprentice and training programs in New Mexico.

History: Laws 1992, ch. 74, § 6; 2024, ch. 5, § 5.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, substituted the workforce solutions department for the labor and industrial division of the labor department as the agency required to issue minimum wage determinations, which include employer's contribution requirements and contribution rates for approved apprentice and training programs, and as the agency required to publish a list of approved apprentice and training programs in New Mexico; substituted "workforce solutions" for "labor and industrial division of the labor" throughout the section; and in Subsection A, after "The", deleted "director shall also" and added "department shall".

13-4D-7. Noncompliance; penalties.

An employer who willfully and knowingly fails to comply with the requirements of the Public Works Apprentice and Training Act shall be subject to the following penalties:

A. a noncomplying employer shall pay a civil penalty of ten dollars ($10.00) for every calendar day of noncompliance, and the penalty shall be imposed and collected for deposit into the public works apprentice and training fund by the public works bureau of the labor and industrial division of the labor department;

B. a noncomplying employer shall have the unpaid contributions, as required under the provisions of the Public Works Apprentice and Training Act, withheld as provided in Subsections A and B of Section 13-4-14 NMSA 1978; and

C. a noncomplying employer shall not be permitted to bid on any public works contracts as provided in Subsections A and B of Section 13-4-14 NMSA 1978.

History: Laws 1992, ch. 74, § 7.

13-4D-8. Appeals.

An alleged noncomplying employer may appeal any of the penalties imposed upon him under the provisions of Section 7 of the Public Works Apprentice and Training Act by seeking an appeal as provided under the provisions of Section 13-4-15 NMSA 1978.

History: Laws 1992, ch. 74, § 8.

ARTICLE 5
Insurance on Public Buildings

13-5-1. State agency public property; insurance; reserves for losses of state agencies; public property reserve fund created.

A. The risk management division of the general services department shall purchase a blanket insurance policy for public buildings of state agencies against loss or damage by fire, windstorm, hail, smoke, explosion, riot or civil commotion. The risk management division may provide coverage to covered educational entities under the public property reserve fund through blanket or individual policies. The risk management division shall create a reserve for the uninsured value of any such public building and for the uninsured loss or damage to any such building by flood, subject to any deductible that the risk management advisory board determines shall be borne by individual state agencies or covered educational entities.

B. Subject to any deductible to be borne by individual state agencies or covered educational entities, the risk management division of the general services department may purchase insurance, establish reserves or provide a combination of insurance and reserves to cover, in any amount not to exceed replacement cost:

(1) buildings of state agencies or covered educational entities destroyed or damaged by any peril other than a peril set forth in Subsection A of this section;

(2) personal property that is destroyed or damaged by any peril; or

(3) personal property that is stolen.

C. Any insurance purchased pursuant to Subsections A and B of this section may be purchased with such deductible provisions as may be deemed desirable by the risk management advisory board.

D. The director of the risk management division of the general services department shall include in his annual report to the legislature an inventory of all public buildings insured by the division, the estimated total value of the buildings, the total insured value of the buildings and the amount of any deductible or maximum loss provisions in the current insurance policy covering the buildings.

E. There is created in the state treasury the "public property reserve fund". The fund shall consist of assessments of state agencies and covered educational entities deposited in the fund, money appropriated to the fund, income earned by the fund and money received as proceeds of insurance purchased pursuant to this section. The fund may be used to:

(1) purchase property insurance;

(2) pay any claim covered by a certificate of coverage issued by the director of the risk management division of the general services department; provided such claims shall only be paid to the extent of actual expenses that have been or will be incurred to repair, reconstruct and replace covered property;

(3) pay the cost of repair, reconstruction and replacement of property and expense incidental thereto arising from damage or destruction covered pursuant to this section;

(4) enter into consulting and other contracts as may be necessary or desirable in carrying out the provisions of this section; and

(5) pay costs and expenses incurred in carrying out the provisions of this section.

F. The director of the legislative council service may elect to cover all or any part of public buildings or property under his jurisdiction through the public property reserve fund by giving written notice of such election to the director of the risk management division of the general services department and paying assessments that the director of the risk management division prescribes.

G. For purposes of this section, "state agency" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions.

H. For the purposes of this section, "covered educational entities" means school districts as defined in Section 22-1-2 NMSA 1978 and educational institutions established pursuant to Chapter 21, Articles 13, 16 and 17 [repealed] NMSA 1978 that request and are granted coverage from the risk management division of the general

services department, if the coverage is commercially unavailable; except that coverage shall be provided to a school district only through the public school insurance authority or its successor unless the district has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services.

History: 1978 Comp., § 13-5-1, enacted by Laws 1981, ch. 101, § 1; 1983, ch. 301, § 31; 1986, ch. 102, § 4; 1989, ch. 324, § 6; 1996 (1st S.S.), ch. 3, § 3; 2000, ch. 27, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1977, ch. 385, § 11, repealed former 6-1-4, 1953 Comp., relating to insurance for public buildings, and enacted a new 6-1-4, 1953 Comp.

Laws 1981, ch. 101, § 1, repealed former 13-5-1 NMSA 1978, relating to insurance for public buildings, and enacted a new 13-5-1 NMSA 1978.

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

Article 17 of Chapter 21 NMSA 1978 was repealed by Laws 1995, ch. 224, § 29 and Laws 1999, ch. 219, § 21. *See* notes following Chapter 21, Article 17 NMSA 1978.

Cross references. — For insurance of building housing legislature, *see* 2-3-5 NMSA 1978.

For insurance of state library building, *see* 2-3-7 NMSA 1978.

The 2000 amendment, effective March 6, 2000, added the last sentence in Subsection A; in Subsection B, added "establish reserves or provide a combination of insurance and reserves to cover, in any amount not to exceed placement cost" to the end of the introductory language; deleted "cover, in any amount not to exceed replacement cost" from the beginning of Paragraph (1), and deleted "cover, in any amount not to exceed replacement cost, any" from the beginning of Paragraphs (2) and (3); and deleted Subsection I, concerning excess cash balances in the public property reserve fund.

The 1996 amendment, effective March 21, 1996, deleted the last sentence of Subsection A which provided that the risk management division would create a reserve for uninsured value of public property, inserted "of the general services department" in Subsections B, D, E, and F, deleted "establish reserves or provide a combination of insurance and reserves" following "purchase insurance" in Subsection B, inserted "income earned by the fund" preceding "and money" in the second sentence of Subsection E, rewrote Subsection I, and made several substitutions for "which" throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions, § 548.

Availability of proceeds of insurance on public building for purpose other than restoring or replacing the building damaged or destroyed, 65 A.L.R. 1124.

Right or duty to carry insurance on public property, 100 A.L.R. 600.

81A C.J.S. States § 147.

13-5-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1978, ch. 166, § 17, repealed 6-1-4.1, 1953 Comp. (13-5-2 NMSA 1978), relating to insurance and reserves for losses as to public property of institutions of higher education, effective March 31, 1978.

13-5-3. Public property; local public bodies; insurance; reserves for losses.

A. Local public bodies shall purchase insurance for public buildings under their control against loss or damage by fire, windstorm, hail, smoke, explosion, riot or civil commotion in an amount not less than eighty percent of the replacement cost or actual cash value of the building.

B. Local public bodies may purchase insurance, establish reserves or provide a combination of insurance and reserves to:

(1) repair or replace their buildings if damaged by any peril other than a peril set forth in Subsection A of this section;

(2) repair or replace any personal property which is destroyed or damaged by any peril; or

(3) replace any personal property which is stolen.

C. Any insurance purchased pursuant to Subsections A and B of this section may be purchased with such deductible provisions as may be deemed desirable.

D. For purposes of this section, "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions.

History: 1953 Comp., § 6-1-4.2, enacted by Laws 1977, ch. 385, § 13.

13-5-3.1. Public buildings; compliance with the national flood insurance program.

A. The homeland security and emergency management department, as the state coordinating agency for the national flood insurance program, is designated as the state agency responsible for compliance oversight of that program and shall adopt rules to implement standards for meeting federal floodplain management regulations as set forth in 44 C.F.R. Sections 60.3 through 60.5.

B. The construction industries division of the regulation and licensing department is the state agency designated to review, permit and enforce floodplain management rules for all buildings that are owned or funded, in whole or in part, by the state.

C. Development that is owned or funded, in whole or in part, by the state shall obtain:

(1) floodplain review by a certified floodplain management professional prior to the start of development; and

(2) required permits prior to the start of development.

D. Development that is owned or funded, in whole or in part, by the state shall comply with the most stringent criteria of locally adopted community floodplain management regulations and floodplain management rules adopted by the homeland security and emergency management department.

E. As used in this section, "development" has the meaning set forth in 44 C.F.R. Section 59.1.

History: Laws 2003, ch. 310, § 2; 2021, ch. 97, § 1.

ANNOTATIONS

The 2021 amendment, effective July 1, 2022, provided for state compliance with the national flood insurance program; deleted the former first paragraph, "A building that receives state appropriations for its construction or that is repaired or improved with state appropriations in an amount greater than fifty percent of the building's value before the repair or improvement shall comply with standards of the national flood insurance program and Section 3-18-7 NMSA 1978."; and added Subsections A through E.

ARTICLE 6
Sale of Public Property

13-6-1. Disposition of obsolete, worn-out or unusable tangible personal property.

A. The governing authority of each state agency, local public body, school district and state educational institution may dispose of any item of tangible personal property belonging to that authority and delete the item from its public inventory upon a specific finding by the authority that the item of property is:

(1) of a current resale value of five thousand dollars ($5,000) or less; and

(2) worn out, unusable or obsolete to the extent that the item is no longer economical or safe for continued use by the body.

B. The governing authority shall, as a prerequisite to the disposition of any items of tangible personal property:

(1) designate a committee of at least three officials of the governing authority to approve and oversee the disposition; and

(2) give notification at least thirty days prior to its action making the deletion by sending a copy of its official finding and the proposed disposition of the property to the state auditor and the appropriate approval authority designated in Section 13-6-2 NMSA 1978, duly sworn and subscribed under oath by each member of the authority approving the action.

C. A copy of the official finding and proposed disposition of the property sought to be disposed of shall be made a permanent part of the official minutes of the governing authority and maintained as a public record subject to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978].

D. The governing authority shall dispose of the tangible personal property by negotiated sale to any governmental unit of an Indian nation, tribe or pueblo in New Mexico or by negotiated sale or donation to other state agencies, local public bodies, school districts, state educational institutions or municipalities or through the central purchasing office of the governing authority by means of competitive sealed bid or public auction or, if a state agency, through the surplus property bureau of the transportation services division of the general services department.

E. A state agency shall give the surplus property bureau of the transportation services division of the general services department the right of first refusal when disposing of obsolete, worn-out or unusable tangible personal property of the state agency.

F. If the governing authority is unable to dispose of the tangible personal property pursuant to Subsection D or E of this section, the governing authority may sell or, if the

property has no value, donate the property to any organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.

G. If the governing authority is unable to dispose of the tangible personal property pursuant to Subsection D, E or F of this section, it may order that the property be destroyed or otherwise permanently disposed of in accordance with applicable laws.

H. If the governing authority determines that the tangible personal property is hazardous or contains hazardous materials and may not be used safely under any circumstances, the property shall be destroyed and disposed of pursuant to Subsection G of this section.

I. No tangible personal property shall be donated to an employee or relative of an employee of a state agency, local public body, school district or state educational institution; provided that nothing in this subsection precludes an employee from participating and bidding for public property at a public auction.

J. This section shall not apply to any property acquired by a museum through abandonment procedures pursuant to the Abandoned Cultural Properties Act [18-10-1 to 18-10-5 NMSA 1978].

K. Notwithstanding the provisions of Subsection A of this section, the department of transportation may sell through public auction or dispose of surplus tangible personal property used to manage, maintain or build roads that exceeds five thousand dollars ($5,000) in value. Proceeds from sales shall be credited to the state road fund. The department of transportation shall notify the department of finance and administration regarding the disposition of all property.

L. If the secretary of public safety finds that the K-9 dog presents no threat to public safety, the K-9 dog shall be released from public ownership as provided in this subsection. The K-9 dog shall first be offered to its trainer or handler free of charge. If the trainer or handler does not want to accept ownership of the K-9 dog, then the K-9 dog shall be offered to an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 free of charge. If both of the above fail, the K-9 dog shall only be sold to a qualified individual found capable of providing a good home to the animal.

History: 1953 Comp., § 6-1-7.1, enacted by Laws 1961, ch. 100, § 1; 1979, ch. 195, § 2; 1984, ch. 47, § 1; 1987, ch. 15, § 1; 1989, ch. 211, § 6; 1995, ch. 181, § 1; 1998, ch. 16, § 1; 2001, ch. 317, § 1; 2007, ch. 57, § 4; 2012, ch. 10, § 1; 2013, ch. 9, § 1.

ANNOTATIONS

Cross references. — For managing surplus properties, *see* 15-4-2 and 15-4-3 NMSA 1978.

For Section 501(c)(3) of the Internal Revenue Code of 1986, *see* 26 U.S.C.S. § 501(c)(3).

The 2013 amendment, effective June 14, 2013, provided for the disposition of state-owned K-9 dogs and added Subsection L.

The 2012 amendment, effective May 16, 2012, authorized the department of transportation to dispose of surplus tangible personal property that exceeds five thousand dollars in value, and added Subsection K.

The 2007 amendment, effective July 1, 2007, required state agencies to give the surplus property bureau the right of first refusal when disposing of surplus property.

The 2001 amendment, effective June 15, 2001, inserted current Subsection E; redesignated the subsequent subsections; inserted "or E" to current Subsection F; inserted "or F" to current Subsection G; and updated the subsection reference in current Subsection H.

The 1998 amendment, effective May 20, 1998, substituted "or unusable tangible personal property" for "and unusable personal property" in the section heading; inserted "tangible" preceding "personal" in Subsection A; rewrote Subsection B; at the end of Subsection C, inserted "and maintained as a public record subject to the Inspection of Public Records Act"; in Subsection D, substituted "tangible personal property" for "item" following "the", inserted "to any governmental unit of an Indian nation, tribe or pueblo in New Mexico or by negotiated sale" preceding "or donation", inserted "of the governing authority" following "office" and "if a state agency" at the end of the subsection; and added Subsections E through H, and redesignated former Subsection E as Subsection I.

The 1995 amendment, effective June 16, 1995, inserted "or donation" in Subsection D.

Board member may not purchase. — A member of a local board of education may not lawfully bid or purchase school property which is offered for sale by a school district, irrespective of whether such property is or is not in excess of $50.00 in value, and any such contract of purchase would be void as against public policy. 1964 Op. Att'y Gen. No. 64-13.

Who may dispose. — If a state agency or department wishes the purchasing agent to dispose of its surplus property, he may do so. If the agency wishes to dispose of such property itself, it may do so. 1962 Op. Att'y Gen. No. 62-26.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 549; 72 Am. Jur. 2d States, Territories, and Dependencies § 66.

20 C.J.S. Counties § 149; 63 C.J.S. Municipal Corporations §§ 882 to 892; 81A C.J.S. States § 149.

13-6-2. Sale of property by state agencies or local public bodies; authority to sell or dispose of property; approval of appropriate approval authority.

A. Providing a written determination has been made, a state agency, local public body, school district or state educational institution may sell or otherwise dispose of real or tangible personal property belonging to the state agency, local public body, school district or state educational institution.

B. A state agency, local public body, school district or state educational institution may sell or otherwise dispose of real property:

(1) by negotiated sale or donation to an Indian nation, tribe or pueblo located wholly or partially in New Mexico, or to a governmental unit of an Indian nation, tribe or pueblo in New Mexico, that is authorized to purchase land and control activities on its land by an act of congress or to purchase land on behalf of the Indian nation, tribe or pueblo;

(2) by negotiated sale or donation to other state agencies, local public bodies, school districts or state educational institutions;

(3) through the central purchasing office of the state agency, local public body, school district or state educational institution by means of competitive sealed bid, public auction or negotiated sale to a private person or to an Indian nation, tribe or pueblo in New Mexico; or

(4) if a state agency, through the surplus property bureau of the transportation services division of the general services department.

C. A state agency shall give the surplus property bureau of the transportation services division of the general services department the right of first refusal to dispose of tangible personal property of the state agency. A school district may give the surplus property bureau the right of first refusal to dispose of tangible personal property of the school district.

D. Except as provided in Section 13-6-2.1 NMSA 1978 requiring state board of finance approval for certain transactions, sale or disposition of real or tangible personal property having a current resale value of more than five thousand dollars ($5,000) may be made by a state agency, local public body, school district or state educational institution if the sale or disposition has been approved by the state budget division of the department of finance and administration for state agencies, the local government division of the department of finance and administration for local public bodies, the

public education department for school districts and the higher education department for state educational institutions.

E. Prior approval of the appropriate approval authority is not required if the tangible personal property is to be used as a trade-in or exchange pursuant to the provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978].

F. The appropriate approval authority may condition the approval of the sale or other disposition of real or tangible personal property upon the property being offered for sale or donation to a state agency, local public body, school district or state educational institution.

G. The appropriate approval authority may credit a payment received from the sale of such real or tangible personal property to the governmental body making the sale. The state agency, local public body, school district or state educational institution may convey all or any interest in the real or tangible personal property without warranty.

H. This section does not apply to:

(1) computer software of a state agency;

(2) those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico;

(3) the New Mexico state police division of the department of public safety;

(4) the state land office or the department of transportation;

(5) property acquired by a museum through abandonment procedures pursuant to the Abandoned Cultural Properties Act [18-10-1 NMSA 1978];

(6) leases of county hospitals with any person pursuant to the Hospital Funding Act [4-48B-1 NMSA 1978];

(7) property acquired by the economic development department pursuant to the Statewide Economic Development Finance Act [6-25-1 NMSA 1978]; and

(8) the state parks division of the energy, minerals and natural resources department.

History: 1978 Comp., § 13-6-2, enacted by Laws 1979, ch. 195, § 3; 1980, ch. 89, § 17; 1984, ch. 47, § 2; 1987, ch. 15, § 2; 1989, ch. 211, § 7; 1989, ch. 380, § 3; 2001, ch. 291, § 9; 2001, ch. 317, § 2; 2003, ch. 203, § 1; 2003, ch. 349, § 21; 2004, ch. 95, § 1; 2007, ch. 57, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1979, ch. 195, § 3, repealed former 13-6-2 NMSA 1978, relating to the sale of property by state agencies or local public bodies, and enacted a new section.

Cross references. — For sales subject to approval of legislature, *see* 13-6-3 NMSA 1978.

For general powers and duties of state board of finance, *see* 6-1-1 NMSA 1978.

The 2007 amendment, effective July 1, 2007, permitted state agencies to dispose of property through the surplus property bureau.

Temporary provision. — Laws 2007, ch. 57, § 6 transferred money in the surplus property revolving fund to the surplus property fund.

The 2004 amendments, effective March 9, 2004, deleted the last sentence of Subsection A relating to the disposal of real or tangible personal property by negotiated sale or donation, added Subsection B to the compiled version, redesignated former Subsections B through G as Subsections C through H and added Paragraph (8) of Subsection H to exclude the state parks division.

The 2003 amendment, effective June 20, 2003, added Paragraphs G(6) and (7).

The 2001 amendment, effective June 15, 2001, in Subsection A, substituted "Providing a written determination has been made, a" for "Any" and "may" for "is empowered to" at the beginning of the subsection; in Subsections A, C, E, and F, inserted "tangible" preceding "personal property"; inserted a new Subsection B; redesignated as Subsection C language from former Subsection A; redesignated former Subsections B to D as D to F; inserted "or donation" to Subsection E; in Subsection F, substituted "may" for "shall have the power to" preceding "credit"; redesignated former Subsections E and F as Subsection G; deleted "or hardware" from Paragraph G(1); inserted the current Paragraph G(3); and added current Paragraph G(5).

Sections 13-6-2 and 67-2-6 NMSA 1978 must be construed and applied together to give effect to both sections. *State ex rel. Madrid v. UU Bar Ranch*, 2005-NMCA-079, 137 N.M. 719, 114 P.3d 399, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Highway department must get permission. — Where the highway department did not obtain board of finance approval for the abandonment of a road, the lack of board of finance approval invalidated the attempted abandonment of the road. *State ex rel. Madrid v. UU Bar Ranch*, 2005-NMCA-079, 137 N.M. 719, 114 P.3d 399, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Transportation commission's authority. — The exclusion of the Transportation commission from Section 13-6-2A NMSA 1978, as it existed in 2000 does not mean that

the commission has express authority to sell or otherwise dispose of and thus convey real property and thus roads; the plain meaning of the statutory exclusion in Section 13-6-2F (1989) is that any authority to dispose of roads under Section 13-6-2 NMSA 1978 is not granted to the commission by the section. *Piedra, Inc. v. N.M. Transp. Comm'n*, 2008-NMCA-089, 144 N.M. 382, 188 P.3d 106, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Any building owned by any state agency is, in fact, the property of the state of New Mexico, as no department, agency or other arm of the state can be held to be independent of the state. 1956 Op. Att'y Gen. No. 56-62.

Generally. — This section contemplates some change in ownership of the property, not the mere creation of a lien against it. State institutions may not create security interests in their property by way of mortgage or pledge to secure a loan of money. 1960 Op. Att'y Gen. No. 60-187.

Who may dispose of property. — If a state agency or department wishes the purchasing agent to dispose of its surplus property, he may do so. If the agency wishes to dispose of such property itself, it may do so in accordance with the provisions. 1962 Op. Att'y Gen. No. 62-26.

Oil and gas leaseholds are regarded as real property in New Mexico. 1980 Op. Att'y Gen. No. 80-10.

Sale may be either private or public. 1963 Op. Att'y Gen. No. 63-95.

Nature of disposition affecting need for approval. — In instances where a local school board desires to enter into a lease of real property to any private party or religious group and proposes to give exclusive right of possession and occupancy to school lands or buildings, the state board of finance must give its approval pursuant to statute. Where, however, the use permitted is temporary or brief and limited to hours when the property is not needed for school purposes, the approval of the state board of finance is not necessary, and the local board of education may or may not authorize such usage according to its discretion. 1963 Op. Att'y Gen. No. 63-106.

Agreements should contain express condition regarding approval requirement. — The board of regents of the New Mexico school for the deaf could solicit bids from purchasers for the sale of property over $50.00 (now $5,000) in value and could enter into an agreement of sale with individuals, subject to the express provision that such sale would not be final or binding upon the institution until or unless approved by the state board of finance. 1963 Op. Att'y Gen. No. 63-95.

Veto power over gratis property transfers. — Subsection A (now Subsection C) gives the secretary of finance and administration or the state board of finance veto power over any gratis transfer of property. 1980 Op. Att'y Gen. No. 80-5.

Realty leases of state fair commission. — This section empowers the New Mexico state fair commission to enter into leases of realty contingent upon express approval of the state board of finance. 1964 Op. Att'y Gen. No. 64-92.

Extension of leases. — State law does not require the state fair commission to use a bid or request for proposal when extending leases beyond the term of an existing contract. However, if the current resale value of the property leased exceeds $5,000, the department of finance and administration must, pursuant to this section, approve any extensions. And, if a lease is extended so that it extends beyond the 25-year period specified in 13-6-3 NMSA 1978, legislative approval is required. 1987 Op. Att'y Gen. No. 87-57.

Exclusive rights to private or religious group. — If the public body concerned desires to enter into a lease of real property to any private party or religious group and proposes to give exclusive right of possession and occupancy to lands and buildings, the state board of finance must give its approval pursuant to this section. 1964 Op. Att'y Gen. No. 64-92.

State parks division must get permission. — This section gives the state park commission (now state parks division of the natural resources department), as well as any other commission or agency of the state, the authority to sell, or otherwise dispose of, any property owned by the state, subject to the approval of the state board of finance. 1961 Op. Att'y Gen. No. 61-123.

Insofar as a soil conservation district (now soil and water conservation district) does have power of sale of its assets, this power is subject to regulation by the legislature. 1963 Op. Att'y Gen. No. 63-125.

When permission not necessary. — When the use permitted by lease of a public body is temporary or brief, and limited to hours when the property is not needed for public purposes, the approval of the state board of finance is not necessary, and the public body may or may not authorize such usage according to its discretion. 1964 Op. Att'y Gen. No. 64-92.

Municipalities and counties need not obtain approval before disposing of property not needed for a public purpose. 1978 Op. Att'y Gen. No. 78-21.

When purchase against public policy. — A member of a local board of education may not lawfully bid or purchase school property which is offered for sale by a school district, irrespective of whether such property is or is not in excess of $50.00 (now $5,000) in value, and any such contract of purchase would be void as against public policy. 1964 Op. Att'y Gen. No. 64-13.

When reimbursement necessary. — Because of the requirement of N.M. Const., art. IX, § 14, it is incumbent upon any public agency or commission to obtain reimbursement

for any actual expenses occasioned by reason of permitted private use of public facilities. 1964 Op. Att'y Gen. No. 64-92.

Long-term lease with boys school permissible. — A municipality may enter into a long-term lease with the New Mexico boys school for land and buildings for the purpose of setting up a recreation center for the community and the surrounding area, and which will be under the control and supervision of the municipality. 1968 Op. Att'y Gen. No. 68-33.

Most agency leasing forms need not comply with 19-10-3 NMSA 1978. — The form for leasing oil and gas lands belonging to agencies other than the office of the commissioner of public lands need not comply with the terms and conditions of 19-10-3 NMSA 1978, even where such leases are offered through the facilities of the commissioner as an accommodation to another state agency. 1980 Op. Att'y Gen. No. 80-10.

Power to credit where no specific directions. — In the absence of a specific direction the director (secretary) of the department of finance and administration has the power to credit the money received from a sale of the state police headquarters to whatever fund of the state police he deems appropriate. 1969 Op. Att'y Gen. No. 69-56.

Highway department condemnation proceeds. — Even though legislative approval prior to condemnation by the state highway department is not necessary under 42-2-3 NMSA 1978, this section still controls the distribution of proceeds from the sale or condemnation. 1969 Op. Att'y Gen. No. 69-144.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions §§ 549 to 553; 63C Am. Jur. 2d Public Lands § 33; 72 Am. Jur. 2d States, Territories, and Dependencies §§ 64 to 67.

Constitutional prohibition of municipal corporation lending its credit or making donation as applicable to sale or leasing of its property, 161 A.L.R. 518.

Constitutionality of classification of purchaser in statutes respecting sale of public property, 169 A.L.R. 1399.

Power of municipal corporation to exchange its real property, 60 A.L.R.2d 220.

Power of municipality to sell, lease, or mortgage public utility plant or interest therein, 61 A.L.R.2d 595.

Power of municipal corporation to lease or sublet property owned or leased by it, 47 A.L.R.3d 19.

62 C.J.S. Municipal Corporations § 185; 81A C.J.S. States §§ 148 to 150.

13-6-2.1. Sales, trades or leases; state board of finance approval.

A. Except as provided in Section 13-6-3 NMSA 1978, for state agencies, any sale, trade or lease for a period of more than five years of real property belonging to a state agency, local public body or school district or any sale, trade or lease of such real property for a consideration of more than twenty-five thousand dollars ($25,000) shall not be valid unless it is approved prior to its effective date by the state board of finance.

B. The provisions of this section shall not be applicable to:

(1) those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico;

(2) the state land office;

(3) the state transportation commission;

(4) the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act [6-25-1 NMSA 1978]; or

(5) a school district when leasing facilities to a locally chartered or state-chartered charter school.

History: 1978 Comp., § 13-6-2.1, enacted by Laws 1989, ch. 380, § 1; 2001, ch. 122, § 1; 2003, ch. 142, § 3; 2003, ch. 349, § 22; 2011, ch. 69, § 1.

ANNOTATIONS

The 2011 amendment, effective July 1, 2011, exempted school districts that lease facilities to locally chartered or state-chartered charter schools.

The 2003 amendment, effective June 20, 2003, in Subsection B, updated the reference to the state transportation commission and added "or the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act".

The 2001 amendment, effective June 15, 2001, inserted "Sales, trades or" in the section heading; in Subsection A, inserted "Except as provided in Section 13-6-3 NMSA 1978, for state agencies", deleted "but less than twenty-five years in duration" following "five years", deleted "or state educational institution" following "school district", and deleted "but less than one hundred thousand dollars" preceding "shall not be valid".

13-6-3. Sale, trade or lease of real property by state agencies; approval of legislature; exceptions.

A. Any sale, trade or lease for a period exceeding twenty-five years in duration of real property belonging to any state agency, which sale, trade or lease shall be for a consideration of one hundred thousand dollars ($100,000) or more, shall be subject to the ratification and approval of the state legislature prior to the sale, trade or lease becoming effective. The provision specified in Section 13-6-2 NMSA 1978 requiring approval of the state budget division of the department of finance and administration as a prerequisite to consummating such sales or dispositions of realty shall not be applicable in instances wherein the consideration for the sale, trade or lease shall be for a consideration of one hundred thousand dollars ($100,000) or more and wherein a state agency not specifically excepted by Subsection B of this section is a contracting party, and, in every such instance, the legislature shall specify its approval prior to the sale, trade or lease becoming effective.

B. The provisions of this section shall not be applicable as to those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico, the state land office, the state transportation commission or the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act [Chapter 6, Article 25 NMSA 1978].

History: 1953 Comp., § 6-1-8.1, enacted by Laws 1961, ch. 41, § 1; 1979, ch. 195, § 4; 1987, ch. 15, § 3; 2003, ch. 142, § 4; 2003, ch. 349, § 23.

ANNOTATIONS

2003 Multiple Amendments. — Laws 2003, ch. 142, § 4 and Laws 2003, ch. 349, § 23 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2003, ch. 349, § 23, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2003, ch. 142, § 4 and Laws 2003, ch. 349, § 23 are described below. To view the session laws in their entirety, *see* the 2003 session laws on *NMOneSource.com*.

Laws 2003, ch. 349, § 23, effective June 20, 2003, in Subsection B, updated the reference to the state transportation commission and added "or the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act".

Laws 2003, ch. 142, § 4, effective July 1, 2003, changed the reference to the highway commission to the transportation commission in Subsection B.

Effect of section. — This section is in effect a specific exception to the power of the board of finance to approve other sales of real or personal property belonging to state agencies. 1969 Op. Att'y Gen. No. 69-56.

Generally. — If the consideration for any sale, trade or lease by a state agency, board, department, commission or institution shall be for consideration of $100,000 or more (and for a period exceeding 25 years), it is subject to the ratification and approval of the

state legislature prior to such sale, trade or lease becoming effective. 1964 Op. Att'y Gen. No. 64-143.

Condemnation is sale of property. 1969 Op. Att'y Gen. No. 69-144.

99-year lease. — Lease of 99 years entered into by board of directors of Los Lunas hospital and training school had to be approved pursuant to the provisions of this section. Under this section the duration of the lease and remuneration could be negotiated by the parties subject to the approval of either the legislature or the state board of finance depending upon the amount of money involved. 1966 Op. Att'y Gen. No. 66-28.

When other party is also public agency. — Requirement under this section for prior approval by the state legislature is applicable even though the other party to such agreement may be another public agency such as the state land office or the state highway commission [state transportation commission], since the statutory exemption applies only to such bodies. 1964 Op. Att'y Gen. No. 64-143.

State fair commission. — This section necessitates legislative confirmation of any lease of realty of the New Mexico state fair commission for a period exceeding 25 years and which involves a consideration of $100,000 or more. 1964 Op. Att'y Gen. No. 64-92.

Extension of leases. — State law does not require the state fair commission to use a bid or request for proposal when extending leases beyond the term of an existing contract. However, if the current resale value of the property leased exceeds $5,000, the department of finance and administration must, pursuant to this section, approve any extensions. And, if a lease is extended so that it extends beyond the 25-year period specified in this section, legislative approval is required. 1987 Op. Att'y Gen. No. 87-57.

When approval not needed. — The state highway department (now state highway and transportation department [department of transportation]) may condemn lands belonging to the intertribal Indian ceremonial association without legislative approval if the provisions of 42-2-3 NMSA 1978 are complied with. 1969 Op. Att'y Gen. No. 69-144.

School districts not mentioned. — School districts are not here mentioned at all and certainly it cannot be argued that local school districts are agencies, boards, departments, commissions or institutions of this state. 1962 Op. Att'y Gen. No. 62-54.

13-6-4. Definitions.

As used in Chapter 13, Article 6 NMSA 1978:

A. "local public body" means all political subdivisions, except municipalities and school districts, of the state and their agencies, instrumentalities and institutions;

B. "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions other than state educational institutions;

C. "state educational institutions" means those institutions designated by Article 12, Section 11 of the constitution of New Mexico; and

D. "school districts" means those political subdivisions of the state established for the administration of public schools, segregated geographically for taxation and bonding purposes and governed by the Public School Code [Chapter 22 NMSA 1978].

History: 1978 Comp., § 13-6-4, enacted by Laws 1979, ch. 195, § 5; 1987, ch. 15, § 4; 2001, ch. 317, § 3.

ANNOTATIONS

Cross references. — For definition of "municipality," *see* 3-1-2 NMSA 1978.

The 2001 amendment, effective June 15, 2001, substituted "Chapter 13, Article 6" for "Sections 13-6-1 through 13-6-4".

13-6-5. Sale of real property by state agencies; land grant right of first refusal.

A. Notwithstanding the provisions of Section 13-6-2 or 67-3-8.2 NMSA 1978, a state agency shall give the board of trustees of a community land grant governed pursuant to the provisions of Chapter 49, Article 1 NMSA 1978 or by statutes specific to the named land grant the right of first refusal when selling real property belonging to the state agency if the property is land that is located within the boundaries of that community land grant as shown in the United States patent to the grant.

B. If the board of trustees of the community land grant elects not to purchase the land offered for sale or does not respond to the notice of sale within forty-five days of receipt of the notice, the state agency may otherwise dispose of the property in accordance with applicable law.

C. The provisions of this section do not apply to lands held in trust pursuant to the Enabling Act and for which that act prescribes how that land may be disposed of.

D. The provisions of this section do not apply to the conveyance or transfer of state highways to local government entities.

History: Laws 2005, ch. 251 , § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 251 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.

13-6-6. Surplus property bureau created; duties; powers.

A. The "surplus property bureau" is created in the transportation services division of the general services department. The surplus property bureau is designated as the New Mexico agency responsible for distribution of federal surplus personal property, excepting food commodities, in accordance with subdivision (j) of Section 203 of the Federal Property and Administrative Services Act of 1949. The surplus property bureau is also designated as the agency for distribution or disposal of state surplus property.

B. The surplus property bureau shall:

(1) develop a detailed state plan of operation for the management and administration of surplus property acquired from the federal government that complies with the Federal Property and Administrative Services Act of 1949 and regulations promulgated in accordance with that act;

(2) cooperate with the federal government and its agencies in securing the expeditious and equitable distribution of federal surplus personal property, excepting food commodities, to eligible institutions in New Mexico, and assist those institutions in securing that property;

(3) dispose of unusable federal surplus property in accordance with subdivision (j) of Section 203 of the Federal Property and Administrative Services Act of 1949; and

(4) manage a program to recycle, donate, sell or dispose of state surplus tangible personal property.

C. The surplus property bureau may:

(1) enter into agreements with the federal government or its agencies for the purchase, lease, receipt as a loan or gift or any other means of acquisition of any real or personal property without regard to provisions of state law that require:

(a) the posting of notices or public advertising for bids;

(b) the inviting or receiving of competitive bids; or

(c) the delivery of purchases before payment;

(2) enter into cooperative agreements for the sale, transfer or disposal of federal surplus property that has not been distributed;

(3) enter into contracts with other state agencies for the purpose of acquiring or disposing of any tangible personal property originally purchased with state money as specified by rule of the transportation services division of the general services department; and

(4) designate the representative of a user to enter a bid at a sale of real or personal property owned by the United States government or any agency or department thereof and authorize that person to make payment required in connection with the bidding.

History: Laws 2007, ch. 57, § 1.

ANNOTATIONS

Cross references. — For the transportation services division, *see* 9-17-3 NMSA 1978.

Effective dates. — Laws 2007, ch. 57, § 8 made the section effective July 1, 2007.

13-6-7. Surplus property fund; created; expenditures.

A. The "surplus property fund" is created as a nonreverting fund in the state treasury. The fund consists of money received from the sale of surplus property by the surplus property bureau of the transportation services division of the general services department. The surplus property bureau shall administer the fund, and money in the fund is subject to appropriation by the legislature to carry out activities relating to the acquisition, transfer and sale of surplus government property. Money in the fund shall be disbursed on vouchers approved and warrants signed by the director of the transportation services division of the general services department or the director's authorized representative.

B. Money in the surplus property fund attributable to the sale of federal property shall be held and accounted for separately from money attributable to the purchase or sale of state property.

History: Laws 2007, ch. 57, § 2.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 57, § 8 made the section effective July 1, 2007.

13-6-8. Disposition of state property.

The surplus property bureau of the transportation services division of the general services department may dispose of tangible personal property, except property acquired from the United States government, by advertising the availability of the property as follows:

A. for the first forty-five-day period, to any agency that has entered into an agreement with the bureau;

B. for the second forty-five-day period, to any agency or tax-exempt entity that has filed its written certificate of tax exemption with the bureau;

C. for the third forty-five-day period, to any agency or tax-exempt entity or to the public through a storefront operation on days and at times specified by rule of the bureau; and

D. after the third forty-five-day period, by auction or any other means of disposal in compliance with environmental standards for disposal of tangible personal property.

History: Laws 2007, ch. 57, § 3.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 57, § 8 made the section effective July 1, 2007.

ARTICLE 7
Health Care Purchasing

13-7-1. Short title.

Chapter 13, Article 7 NMSA 1978 may be cited as the "Health Care Purchasing Act".

History: Laws 1997, ch. 74, § 1; 2003, ch. 391, § 1.

ANNOTATIONS

Compiler's notes. — The Health Care Purchasing Act was enacted by Laws 1997, ch. 74, §§ 1 to 4 and codified as 13-7-1 to 13-7-4 NMSA 1978. Laws 2001, ch. 351, §§ 1 to 3 added three new sections to the Health Care Purchasing Act, which were codified as 13-7-5 to 13-7-7 NMSA 1978.

The 2003 amendment, effective June 20, 2003, substituted "Chapter 13, Article 7 NMSA 1978" for "Sections 1 through 4 of this act".

13-7-2. Purpose of act.

The purpose of the Health Care Purchasing Act is to ensure public employees, public school employees and retirees of public employment and the public schools access to more affordable and enhanced quality of health insurance through cost containment and savings effected by procedures for consolidating the purchasing of publicly financed health insurance.

History: Laws 1997, ch. 74, § 2.

13-7-3. Definitions.

As used in the Health Care Purchasing Act:

A. "consolidated purchasing" means a single process for the procurement of all health care benefits by the publicly funded insurance agencies in compliance with the Procurement Code [13-1-28 to 13-1-199 NMSA 1978] and includes associated activities related to the procurement such as actuarial, cost containment, benefits consultation and analysis; and

B. "publicly funded health care agency" means the:

(1) risk management division and the group benefits committee of the general services department;

(2) retiree health care authority;

(3) public school insurance authority; and

(4) publicly funded health care program of any public school district with a student enrollment in excess of sixty thousand students.

History: Laws 1997, ch. 74, § 3.

13-7-4. Mandatory consolidated purchasing.

A. The agencies shall enter into a cooperative consolidated purchasing effort to provide plans of health care benefits for the benefit of eligible participants of the respective agencies. The request for proposal shall set forth one or more plans of health care benefits and shall include accommodation of fully funded arrangements as well as varying degrees of self-funded pool options.

B. A consolidated purchasing request for proposals for all health care benefits by the publicly funded health care agencies shall be issued on or before July 1, 1999 and any contracts for health care benefits renewed or issued on or after July 1, 2000 shall be the result of consolidated purchasing.

C. All requests for proposals issued as part of the consolidated purchasing shall include at least one distinct service area consisting of the Albuquerque metropolitan area. Proposals on a distinct service area shall be evaluated separately.

History: Laws 1997, ch. 74, § 4.

13-7-5. Consolidated purchasing for other persons.

A. Counties, municipalities, state educational institutions and other political subdivisions that wish to use the consolidated purchasing single process for the procurement of health care benefits shall create or enter into an existing association, cooperative or other mutual alliance to create larger pools of eligible participants.

B. Counties, municipalities, state educational institutions and other political subdivisions that wish to use the consolidated purchasing single process shall, through their respective association, cooperative or mutual alliance, participate in the subsequent consolidated purchasing single process with the publicly funded health care agencies.

History: Laws 2001, ch. 351, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 351 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

13-7-6. Use of social security numbers.

The publicly funded health care agencies, political subdivisions and other persons providing health care benefits through the consolidated purchasing single process, in compliance with state and federal law, shall not require the use of participants' social security numbers as health care benefit plan identification numbers.

History: Laws 2001, ch. 351, § 2.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 351 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

13-7-7. Consolidated administrative functions; benefit.

A. The publicly funded health care agencies, political subdivisions and other persons participating in the consolidated purchasing single process pursuant to the Health Care Purchasing Act may enter into a joint powers agreement pursuant to the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] with the publicly funded health care agencies and political subdivisions to determine assessments or provisions of resources to consolidate, standardize and administer the consolidated purchasing single process and subsequent activities pursuant to the Health Care Purchasing Act. The publicly funded health care agencies, political subdivisions and other persons participating in the consolidated purchasing single process pursuant to the Health Care Purchasing Act may enter into contracts with nonpublic persons to provide the service

of determining assessments or provision of resources for consolidation, standardization and administrative activities.

B. Each agency shall retain its responsibility to determine policy direction of the benefit plans, plan development, training and coordination with respect to participants and its benefits staff, as well as to respond to benefits eligibility inquiries and establish and enforce eligibility rules.

C. Notwithstanding Subsection B of this section, publicly funded health care agencies, political subdivisions and other persons participating in the consolidated purchasing single process pursuant to the Health Care Purchasing Act shall provide coverage for children, from birth through three years of age, for or under the family, infant, toddler program administered by the early childhood education and care department, provided eligibility criteria are met, for a maximum benefit of three thousand five hundred dollars ($3,500) annually for medically necessary early intervention services provided as part of an individualized family service plan and delivered by certified and licensed personnel who are working in early intervention programs approved by the early childhood education and care department. No payment under this subsection shall be applied against any maximum lifetime or annual limits specified in the policy, health benefits plan or contract.

History: Laws 2001, ch. 351, § 3; 2005, ch. 157, § 1; 2019, ch. 48, § 14.

ANNOTATIONS

The 2019 amendment, effective July 1, 2020, required publicly funded health agencies participating in the consolidated purchasing single process pursuant to the Health Care Purchasing Act to provide health coverage for eligible children under the family, infant, toddler program administered by the early childhood education and care department; deleted former Subsections A and B, which related to expired deadlines for certain publicly funded health care agencies, and redesignated former Subsections C through E as Subsections A through C, respectively; in Subsection B, after "Each agency", deleted "will" and added "shall"; and in Subsection C, after "family, infant, toddler program administered by the", added "early childhood education and care", after "department", deleted "of health", after "personnel", deleted "as defined in 7.30.8 NMAC", after "early intervention programs approved by the", added "early childhood education and care", and after "department", deleted "of health".

The 2005 amendment, effective July 1, 2005, added Subsection E to require coverage for children from birth through three years of age under the family, infant, toddler program for a maximum benefit of $3,500 for medically necessary early intervention services.

Only procedural law may be adopted by reference. *Ballew v. Denson*, 1958-NMSC-002, 63 N.M. 370, 320 P.2d 382; *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*, 1953-NMSC-035, 57 N.M. 287, 258 P.2d 391; *Yeo v.*

Tweedy, 1929-NMSC-033, 34 N.M. 611, 286 P. 970; *State v. Armstrong*, 1924-NMSC-089, 31 N.M. 220, 243 P. 333.

13-7-8. Maximum age of dependent.

Any group health care coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act on or after July 1, 2003 that offers coverage of an insured's dependent shall not terminate coverage of an unmarried dependent by reason of the dependent's age before the dependent's twenty-fifth birthday, regardless of whether the dependent is enrolled in an educational institution.

History: Laws 2003, ch. 391, § 2.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 391 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.

13-7-9. General anesthesia and hospitalization for dental surgery.

A. Group health care coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for hospitalization and general anesthesia provided in a hospital or ambulatory surgical center for dental surgery for the following:

(1) insureds exhibiting physical, intellectual or medically compromising conditions for which dental treatment under local anesthesia, with or without additional adjunctive techniques and modalities, cannot be expected to provide a successful result and for which dental treatment under general anesthesia can be expected to produce superior results;

(2) insureds for whom local anesthesia is ineffective because of acute infection, anatomic variation or allergy;

(3) insured children or adolescents who are extremely uncooperative, fearful, anxious or uncommunicative with dental needs of such magnitude that treatment should not be postponed or deferred and for whom lack of treatment can be expected to result in dental or oral pain or infection, loss of teeth or other increased oral or dental morbidity;

(4) insureds with extensive oral-facial or dental trauma for which treatment under local anesthesia would be ineffective or compromised; or

(5) other procedures for which hospitalization or general anesthesia in a hospital or ambulatory surgical center is medically necessary.

B. The provisions of this section do not apply to short-term travel, accident-only or limited or specified disease policies.

C. Coverage for dental surgery may be subject to copayments, deductibles and coinsurance subject to network and prior authorization requirements consistent with those imposed on other benefits under the same group health care coverage, including any form of self-insurance.

History: Laws 2007, ch. 218, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 218, § 6 made this section effective July 1, 2007.

13-7-10. Hearing aid coverage for children required.

A. Group health care coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for a hearing aid and any related service for the full cost of one hearing aid per hearing-impaired ear up to two thousand two hundred dollars ($2,200) every thirty-six months for hearing aids for insured children under eighteen years of age or under twenty-one years of age if still attending high school. The insured may choose a higher priced hearing aid and may pay the difference in cost above the two-thousand-two-hundred-dollar ($2,200) limit as provided in this subsection without financial or contractual penalty to the insured or to the provider of the hearing aids.

B. Each insurer that delivers, issues for delivery or renews under the Health Care Purchasing Act any group health care coverage, including any form of self-insurance, may make available to the policyholder the option of purchasing additional hearing aid coverage that exceeds the services described in this section.

C. Hearing aid coverage offered shall include fitting and dispensing services, including providing ear molds as necessary to maintain optimal fit, provided by an audiologist, a hearing aid dispenser or a physician, licensed in New Mexico.

D. The provisions of this section do not apply to short-term travel, accident-only or limited or specified disease policies.

E. Coverage for hearing aids may be subject to deductibles and coinsurance consistent with those imposed on other benefits under the same group health care coverage, including any form of self-insurance.

F. For the purposes of this section, "hearing aid" means durable medical equipment that is of a design and circuitry to optimize audibility and listening skills in the environment commonly experienced by children.

History: Laws 2007, ch. 356, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 356, § 6 made this section effective July 1, 2007.

13-7-11. Required coverage of patient costs incurred in cancer clinical trials.

Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage pursuant to Section 59A-22-43 NMSA 1978 for routine patient care costs incurred as a result of the patient's participation in cancer clinical trials.

History: Laws 2009, ch. 212, § 1.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 212 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

13-7-12. Coverage for orally administered anticancer medications; limits on patient costs.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for cancer treatment shall provide coverage for a prescribed, orally administered anticancer medication that is used to kill or slow the growth of cancerous cells on a basis no less favorable than intravenously administered or injected cancer medications that are covered as medical benefits by the plan.

B. A group health plan shall not increase patient cost-sharing for anticancer medications in order to achieve compliance with the provisions of this section.

C. Coverage of orally administered anticancer medication shall not be subject to any prior authorization, dollar limit, copayment, deductible or coinsurance provision that does not apply to intravenously administered or injected anticancer medication used to kill or slow the growth of cancerous cells.

History: Laws 2011, ch. 55, § 1.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 55, § 7 made Laws 2011, ch. 55, § 1 effective June 17, 2011.

Applicability. — Laws 2011, ch. 55, § 6 provided that the provisions of this act apply to insurance policies that provide coverage for cancer treatment and that are delivered, issued for delivery, amended, renewed or continued in this state on or after January 1, 2012.

13-7-13. Coverage of prescription eye drop refills.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for prescription eye drops shall not deny coverage for a renewal of prescription eye drops when:

(1) the renewal is requested by the insured at least twenty-three days for a thirty-day supply of eye drops, forty-five days for a sixty-day supply of eye drops or sixty-eight days for a ninety-day supply of eye drops from the later of the date that the original prescription was dispensed to the insured or the date that the last renewal of the prescription was dispensed to the insured; and

(2) the prescriber indicates on the original prescription that additional quantities are needed and that the renewal requested by the insured does not exceed the number of additional quantities needed.

B. As used in this section, "prescriber" means a person who is authorized pursuant to the New Mexico Drug, Device and Cosmetic Act [Chapter 26, Article 1 NMSA 1978] to prescribe prescription eye drops.

History: Laws 2012, ch. 27, § 1.

ANNOTATIONS

Effective dates. — Laws 2012, ch. 27, § 7 provided that Laws 2012, ch. 27, § 1 was effective January 1, 2013.

Applicability. — Laws 2012, ch. 27, § 6 provided that the provisions of Laws 2012, ch. 27, §§ 1 to 5 apply to insurance policies that provide coverage for prescription eye drops and that are delivered, issued for delivery, amended, renewed or continued in this state on or after January 1, 2013.

13-7-14. Coverage for telemedicine services.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for services provided via telemedicine to the same extent that the group health plan covers the same services when those services are provided via in-person consultation or contact.

A group health plan shall not impose any unique condition for coverage of services provided via telemedicine.

B. A group health plan shall not impose an originating-site restriction with respect to telemedicine services or distinguish between telemedicine services provided to patients in rural locations and those provided to patients in urban locations; provided that the provisions of this section shall not be construed to require coverage of an otherwise noncovered benefit.

C. A determination by a group health plan that health care services delivered through the use of telemedicine are not covered under the plan shall be subject to review and appeal pursuant to the Patient Protection Act [Chapter 59A, Article 57 NMSA 1978].

D. The provisions of this section shall not apply in the event that federal law requires the state to make payments on behalf of enrollees to cover the costs of implementing this section.

E. Nothing in this section shall require a health care provider to be physically present with a patient at the originating site unless the consulting telemedicine provider deems it necessary.

F. A group health plan shall not limit coverage of services delivered via telemedicine only to those health care providers who are members of the group health plan provider network where no in-network provider is available and accessible, as availability and accessibility are defined in network adequacy standards issued by the superintendent of insurance.

G. A group health plan may charge a deductible, copayment or coinsurance for a health care service delivered via telemedicine if it does not exceed the deductible, copayment or coinsurance applicable to a service delivered via in-person consultation or contact.

H. A group health plan shall not impose any annual or lifetime dollar maximum on coverage for services delivered via telemedicine, other than an annual or lifetime dollar maximum that applies in the aggregate to all items and services covered under the group health plan, or impose upon any person receiving benefits pursuant to this section any copayment, coinsurance or deductible amounts, or any plan year, calendar year, lifetime or other durational benefit limitation or maximum for benefits or services, that is not equally imposed upon all terms and services covered under the group health plan.

I. A group health plan shall reimburse for health care services delivered via telemedicine on the same basis and at least the same rate that the group health plan reimburses for comparable services delivered via in-person consultation or contact.

J. Telemedicine used to provide clinical services shall be encrypted and shall conform to state and federal privacy laws.

K. The provisions of this section shall not apply to group health coverage intended to supplement major medical group-type coverage, such as medicare supplement, long-term care, disability income, specified disease, accident-only, hospital indemnity or any other limited-benefit health insurance policy.

L. As used in this section:

(1) "consulting telemedicine provider" means a health care provider that delivers telemedicine services from a location remote from an originating site;

(2) "health care provider" means a duly licensed hospital or other licensed facility, physician or other health care professional authorized to furnish health care services within the scope of the professional's license;

(3) "in real time" means occurring simultaneously, instantaneously or within seconds of an event so that there is little or no noticeable delay between two or more events;

(4) "originating site" means a place at which a patient is physically located and receiving health care services via telemedicine;

(5) "store-and-forward technology" means electronic information, imaging and communication, including interactive audio, video and data communications, that is transferred or recorded or otherwise stored for asynchronous use; and

(6) "telemedicine" means the use of telecommunications and information technology to provide clinical health care at a site distinct from the patient. "Telemedicine" allows health care professionals to evaluate, diagnose and treat patients in remote locations using telecommunications and information technology in real time or asynchronously, including the use of interactive simultaneous audio and video or store-and-forward technology, or remote patient monitoring and telecommunications in order to deliver health care services to a site where the patient is located, along with the use of electronic media and health information. "Telemedicine" allows patients in remote locations to access medical expertise without travel.

History: Laws 2013, ch. 105, § 1; 2019, ch. 255, § 1.

ANNOTATIONS

The 2019 amendment, effective June 14, 2019, prohibited certain restrictions on and established new requirements for coverage of services provided via telemedicine; in Subsection A, deleted "allow covered benefits to be provided through telemedicine services. Coverage for health care services provided through telemedicine shall be

determined in a manner consistent with coverage for health care services provided through in person consultation" and added "provide coverage for services provided via telemedicine to the same extent that the group health plan covers the same services when those services are provided via in-person consultation or contact. A group health plan shall not impose any unique condition for coverage of services provided via telemedicine"; in Subsection B, added "A group health plan shall not impose an originating-site restriction with respect to telemedicine services or distinguish between telemedicine services provided to patients in rural locations and those provided to patients in urban locations; provided that the"; added new Subsections F through I and redesignated former Subsections F through H as Subsections J through L, respectively; and in Subsection L, Paragraph L(6), deleted "interactive simultaneous audio and video or store-and-forward technology using information and telecommunications technologies by a health care provider to deliver health care services at a site other than the site where the patient is located, including the use of electronic media for consultation relating to the health care diagnosis or treatment of the patient in real time or through the use of store-and-forward technology" and added the remainder of the paragraph.

13-7-15. Prescription drugs; prohibited formulary changes; notice requirements.

A. As of January 1, 2014, group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for prescription drugs categorized or tiered for purposes of cost-sharing through deductibles or coinsurance obligations shall not make any of the following changes to coverage for a prescription drug within one hundred twenty days of any previous change to coverage for that prescription drug, unless a generic version of the prescription drug is available:

(1) reclassify a drug to a higher tier of the formulary;

(2) reclassify a drug from a preferred classification to a non-preferred classification, unless that reclassification results in the drug moving to a lower tier of the formulary;

(3) increase the cost-sharing, copayment, deductible or co-insurance charges for a drug;

(4) remove a drug from the formulary;

(5) establish a prior authorization requirement;

(6) impose or modify a drug's quantity limit; or

(7) impose a step-therapy restriction.

B. The administrator for the group health coverage shall give the affected enrollee at least sixty days' advance written notice of the impending change when it is determined that one of the following modifications will made to a formulary:

(1) reclassification of a drug to a higher tier of the formulary;

(2) reclassification of a drug from a preferred classification to a non-preferred classification, unless that reclassification results in the drug moving to a lower tier of the formulary;

(3) an increase in the cost-sharing, copayment, deductible or coinsurance charges for a drug;

(4) removal of a drug from the formulary;

(5) addition of a prior authorization requirement;

(6) imposition or modification of a drug's quantity limit; or

(7) imposition of a step-therapy restriction for a drug.

C. Notwithstanding the provisions of Subsections A and B of this section, the administrator for group health coverage may immediately and without prior notice remove a drug from the formulary if the drug:

(1) is deemed unsafe by the federal food and drug administration; or

(2) has been removed from the market for any reason.

D. The administrator for group health coverage prescription drug benefits shall provide to each affected enrollee the following information in plain language regarding prescription drug benefits:

(1) notice that the group health plan uses one or more drug formularies;

(2) an explanation of what the drug formulary is;

(3) a statement regarding the method the group health plan uses to determine the prescription drugs to be included in or excluded from a drug formulary; and

(4) a statement of how often the group health plan administrator reviews the contents of each drug formulary.

E. As used in this section:

(1) "formulary" means the list of prescription drugs covered by group health coverage; and

(2) "step therapy" means a protocol that establishes the specific sequence in which prescription drugs for a specified medical condition and medically appropriate for a particular patient are to be prescribed.

History: Laws 2013, ch. 138, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 138 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

13-7-16. Coverage for autism spectrum disorder diagnosis and treatment; permissible limitations.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for:

(1) well-baby and well-child screening for diagnosing the presence of autism spectrum disorder; and

(2) treatment of autism spectrum disorder through speech therapy, occupational therapy, physical therapy and applied behavioral analysis.

B. Coverage required pursuant to Subsection A of this section:

(1) shall be limited to treatment that is prescribed by the insured's treating physician in accordance with a treatment plan;

(2) shall not be denied on the basis that the services are habilitative or rehabilitative in nature;

(3) may be subject to other general exclusions of the group health coverage, including coordination of benefits, participating provider requirements, restrictions on services provided by family or household members and utilization review of health care services, including the review of medical necessity, case management and other managed care provisions; and

(4) may be limited to exclude coverage for services received under the federal Individuals with Disabilities Education Improvement Act of 2004 and related state laws that place responsibility on state and local school boards for providing specialized education and related services to children three to twenty-two years of age who have autism spectrum disorder.

C. Coverage for treatment of autism spectrum disorder through speech therapy, occupational therapy, physical therapy and applied behavioral analysis shall not be denied to an enrollee on the basis of the enrollee's age.

D. The coverage required pursuant to Subsection A of this section shall not be subject to deductibles or coinsurance provisions that are less favorable to a covered individual than the deductibles or coinsurance provisions that apply to physical illnesses that are generally covered under the group health coverage, except as otherwise provided in Subsection B of this section.

E. A group health plan shall not deny or refuse health coverage for medically necessary services or refuse to contract with, renew, reissue or otherwise terminate or restrict health coverage for an individual because the individual is diagnosed as having autism spectrum disorder.

F. The treatment plan required pursuant to Subsection B of this section shall include all elements necessary for the group health coverage to pay claims appropriately. These elements include:

(1) the diagnosis;

(2) the proposed treatment by types;

(3) the frequency and duration of treatment;

(4) the anticipated outcomes stated as goals;

(5) the frequency with which the treatment plan will be updated; and

(6) the signature of the treating physician.

G. This section shall not be construed as limiting benefits and coverage otherwise available to an insured under group health coverage.

H. The provisions of this section shall not apply to policies intended to supplement major medical group-type coverages such as medicare supplement, long-term care, disability income, specified disease, accident-only, hospital indemnity or other limited-benefit health insurance policies.

I. As used in this section:

(1) "autism spectrum disorder" means:

(a) a condition that meets the diagnostic criteria for autism spectrum disorder published in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the American psychiatric association; or

(b) a condition diagnosed as autistic disorder, Asperger's disorder, pervasive development disorder not otherwise specified, Rett's disorder or childhood disintegrative disorder pursuant to diagnostic criteria published in a previous edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the American psychiatric association;

(2) "habilitative or rehabilitative services" means treatment programs that are necessary to develop, maintain and restore to the maximum extent practicable the functioning of an individual; and

(3) "high school" means a school providing instruction for any of the grades nine through twelve.

History: Laws 2013, ch. 185, § 1; 2019, ch. 119, § 1.

ANNOTATIONS

The 2019 amendment, effective June 14, 2019, prohibited age limits on services related to autism spectrum disorder, and made conforming changes; in Subsection A, in the introductory clause, deleted "an eligible individual who is nineteen years of age or younger, or an eligible individual who is twenty-two years of age or younger and is enrolled in high school, for"; added a new Subsection C and redesignated former Subsections C through H as Subsections D through I, respectively; in Subsection I, Paragraph I(1), added subparagraph designations "(a)" and "(b)", in Subparagraph I(1)(a), after "diagnostic criteria", deleted "for the pervasive development disorders" and added "for autism spectrum disorder", in Subparagraph I(1)(b), added "a condition diagnosed as", and after "disintegrative disorder", added "pursuant to diagnostic criteria published in a previous edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the American psychiatric association".

13-7-17. Pharmacy benefits; prescription synchronization.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a prescription drug benefit shall allow an enrollee to fill or refill a prescription for less than a thirty-day supply of the prescription drug, and apply a prorated daily copayment or coinsurance for the fill or refill, if:

(1) the prescribing practitioner or the pharmacist determines the fill or refill to be in the best interest of the patient;

(2) the patient requests or agrees to receive less than a thirty-day supply of the prescription drug; and

(3) the reduced fill or refill is made for the purpose of synchronizing the patient's prescription drug fills.

B. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a prescription drug benefit shall not:

(1) deny coverage for the filling of a chronic medication when the fill is made in accordance with a plan to synchronize multiple prescriptions for the enrollee pursuant to Subsection A of this section established among the group health plan, the prescribing practitioner and a pharmacist. The group health plan shall allow a pharmacy to override any denial indicating that a prescription is being refilled too soon for the purposes of medication synchronization; and

(2) prorate a dispensing fee to a pharmacy that fills a prescription with less than a thirty-day supply of prescription drug pursuant to Subsection A of this section. The group health plan shall pay in full a dispensing fee for a partially filled or refilled prescription for each prescription dispensed, regardless of any prorated copayment or coinsurance that the enrollee may pay for prescription synchronization services.

History: Laws 2015, ch. 65, § 1.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 65 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

13-7-18. Prescription drug coverage; step therapy protocols; clinical review criteria; exceptions.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for prescription drugs for which any step therapy protocols are required shall establish clinical review criteria for those step therapy protocols. The clinical review criteria shall be based on clinical practice guidelines that:

(1) recommend that the prescription drugs subject to step therapy protocols be taken in the specific sequence required by the step therapy protocol;

(2) are developed and endorsed by an interdisciplinary panel of experts that manages conflicts of interest among the members of the panel of experts by:

(a) requiring members to: 1) disclose any potential conflicts of interest with group health plan administrators, insurers, health maintenance organizations, health care plans, pharmaceutical manufacturers, pharmacy benefits managers and any other entities; and 2) recuse themselves if there is a conflict of interest; and

(b) using analytical and methodological experts to work to provide objectivity in data analysis and ranking of evidence through the preparation of evidence tables and facilitating consensus;

(3) are based on high-quality studies, research and medical practice;

(4) are created pursuant to an explicit and transparent process that:

(a) minimizes bias and conflicts of interest;

(b) explains the relationship between treatment options and outcomes;

(c) rates the quality of the evidence supporting recommendations; and

(d) considers relevant patient subgroups and preferences; and

(5) take into account the needs of atypical patient populations and diagnoses.

B. In the absence of clinical guidelines that meet the requirements of Subsection A of this section, peer-reviewed publications may be substituted.

C. When a group health plan restricts coverage of a prescription drug for the treatment of any medical condition through the use of a step therapy protocol, an enrollee and the practitioner prescribing the prescription drug shall have access to a clear, readily accessible and convenient process to request a step therapy exception determination. A group health plan may use its existing medical exceptions process in accordance with the provisions of Subsections D through I of this section to satisfy this requirement. The process shall be made easily accessible for enrollees and practitioners on the group health plan's publicly accessible website.

D. A group health plan shall expeditiously grant an exception to the group health plan's step therapy protocol, based on medical necessity and a clinically valid explanation from the patient's prescribing practitioner as to why a drug on the plan's formulary that is therapeutically equivalent to the prescribed drug should not be substituted for the prescribed drug, if:

(1) the prescription drug that is the subject of the exception request is contraindicated or will likely cause an adverse reaction by or physical or mental harm to the patient;

(2) the prescription drug that is the subject of the exception request is expected to be ineffective based on the known clinical characteristics of the patient and the known characteristics of the prescription drug regimen;

(3) while under the enrollee's current health coverage or previous health coverage, the enrollee has tried the prescription drug that is the subject of the exception

request or another prescription drug in the same pharmacologic class or with the same mechanism of action as the prescription drug that is the subject of the exception request and that prescription drug was discontinued due to lack of efficacy or effectiveness, diminished effect or an adverse event; or

(4) the prescription drug required pursuant to the step therapy protocol is not in the best interest of the patient, based on clinical appropriateness, because the patient's use of the prescription drug is expected to:

(a) cause a significant barrier to the patient's adherence to or compliance with the patient's plan of care;

(b) worsen a comorbid condition of the patient; or

(c) decrease the patient's ability to achieve or maintain reasonable functional ability in performing daily activities.

E. Upon the granting of an exception to a group health plan's step therapy protocol, the group health plan administrator shall authorize continuing coverage for the prescription drug that is the subject of the exception request for no less than the duration of the therapeutic effect of the drug. The group health plan shall include in its evidence of coverage language describing an enrollee's rights pursuant to this subsection.

F. A group health plan shall respond with its decision on an enrollee's exception request within seventy-two hours of receipt. In cases where exigent circumstances exist, a group health plan shall respond within twenty-four hours of receipt of the exception request. In the event the group health plan does not respond to an exception request within the time frames required pursuant to this subsection, the exception request shall be granted.

G. A group health plan administrator's denial of a request for an exception for step therapy protocols shall be subject to review and appeal pursuant to the Patient Protection Act [Chapter 59A, Article 57 NMSA 1978].

H. After an enrollee has made an exception request in accordance with the provisions of this section, a group health plan shall authorize continued coverage of a prescription drug that is the subject of the exception request pending the determination of the exception request.

I. The provisions of this section shall not be construed to prevent a:

(1) group health plan from requiring a patient to try a biosimilar, interchangeable biologic or generic equivalent of a prescription drug before providing coverage for the equivalent brand-name prescription drug; or

(2) practitioner from prescribing a prescription drug that the practitioner has determined to be medically necessary.

J. As used in this section, "medical necessity" or "medically necessary" means health care services determined by a practitioner, in consultation with the group health plan administrator, to be appropriate or necessary according to:

(1) any applicable, generally accepted principles and practices of good medical care;

(2) practice guidelines developed by the federal government or national or professional medical societies, boards or associations; or

(3) any applicable clinical protocols or practice guidelines developed by the group health plan consistent with federal, national and professional practice guidelines. These standards shall be applied to decisions related to the diagnosis or direct care and treatment of a physical or behavioral health condition, illness, injury or disease.

History: Laws 2018, ch. 9, § 1; 2024, ch. 42, § 1.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, modified the guidelines relating to step therapy for prescription drug coverage, required group health plans, upon the granting of an exception to step therapy protocol, to authorize continuing coverage for the prescription drug that is the subject of the exception request for no less than the duration of the therapeutic effect of the drug, and provided that in addition to a group health plan's current authority to require a patient to try a generic equivalent of a prescription drug before providing coverage for the equivalent brand-name prescription drug, the group health plan may now require a patient to try a biosimilar, interchangeable biologic drug before providing coverage for a brand-name prescription; in Subsection E, after "shall authorize", added "continuing", and added "for no less than the duration of the therapeutic effect of the drug. The group health plan shall include in its evidence of coverage language describing an enrollee's rights pursuant to this subsection."; in Subsection I, Paragraph I(1), after "to try a, added "biosimilar, interchangeable biologic or"; and deleted former Subsection J and redesignated former Subsection K as Subsection J.

Applicability. — Laws 2024, ch. 42, § 7 provided that the provisions of Sections 1 and 3 through 6 [13-7-18, 59A-22-53.1, 59A-22B-8, 59A-46-52.1, and 59A-47-47.1 NMSA 1978] of this act do not apply to short-term plans subject to the Short-Term Health Plan and Excepted Benefit Act [Chapter 59A, Article 23G NMSA 1978].

Laws 2024, ch. 42, § 8 provided that the provisions of Laws 2024, ch. 42 apply to group health insurance policies, health care plans or certificates of health insurance, other

than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2025.

13-7-19. Prior authorization for gynecological or obstetrical ultrasounds prohibited.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for gynecological or obstetrical ultrasounds shall not require prior authorization for gynecological or obstetrical ultrasounds.

B. Nothing in this section shall be construed to require payment for a gynecological or obstetrical ultrasound that is not:

(1) medically necessary; or

(2) a covered benefit.

C. As used in this section, "prior authorization" means advance approval that is required as a condition precedent to payment for medical care or related benefits rendered to a covered person, including prospective or utilization review conducted prior to the provision of covered medical care or related benefits.

History: Laws 2019, ch. 182, § 1

ANNOTATIONS

Emergency clauses. — Laws 2019, ch. 182, § 7 contained an emergency clause and was approved April 3, 2019.

13-7-20. Prior Authorization Act.

Benefits administrators of group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act are subject to and shall comply with the Prior Authorization Act [59A-22B-1 to 59A-22B-5 NMSA 1978].

History: Laws 2019, ch. 187, § 1

ANNOTATIONS

Effective dates. — Laws 2019, ch. 187 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

13-7-21. Physical rehabilitation services; limits on cost sharing.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers coverage of physical rehabilitation services shall not impose a member cost share for physical rehabilitation services that is greater than that for primary care services on a coinsurance percentage basis when coinsurance is applied or on an absolute dollar amount when a copay is applied.

B. As used in this section:

(1) "physical rehabilitation services" means services aimed at maximizing an individual's level of function, returning to a prior level of function or maintaining or slowing the decline of function, which services are provided by or under the direction of a licensed physical therapist, occupational therapist or speech therapist; and

(2) "primary care services" means the first level of basic or general health care for a person's health needs, including diagnostic and treatment services, initiation of referrals for other health care services and maintenance of the continuity of care when appropriate.

History: Laws 2019, ch. 188, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 188, § 6 made Laws 2019, ch. 188, § 1 effective January 1, 2020.

13-7-22. Coverage for contraception.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that provides coverage for prescription drugs shall provide, at a minimum, the following coverage:

(1) at least one product or form of contraception in each of the contraceptive method categories identified by the federal food and drug administration;

(2) a sufficient number and assortment of oral contraceptive pills to reflect the variety of oral contraceptives approved by the federal food and drug administration; and

(3) clinical services related to the provision or use of contraception, including consultations, examinations, procedures, ultrasound, anesthesia, patient education, counseling, device insertion and removal, follow-up care and side-effects management.

B. Except as provided in Subsection C of this section, the coverage required pursuant to this section shall not be subject to:

(1) enrollee cost sharing;

(2) utilization review;

(3) prior authorization or step therapy requirements; or

(4) any other restrictions or delays on the coverage.

C. A group health plan may discourage brand-name pharmacy drugs or items by applying cost sharing to brand-name drugs or items when at least one generic or therapeutic equivalent is covered within the same method of contraception without patient cost sharing; provided that when an enrollee's health care provider determines that a particular drug or item is medically necessary, the group health plan shall cover the brand-name pharmacy drug or item without cost sharing. Medical necessity may include considerations such as severity of side effects, differences in permanence or reversibility of contraceptives and ability to adhere to the appropriate use of the drug or item, as determined by the attending provider.

D. A group health plan administrator shall grant an enrollee an expedited hearing to appeal any adverse determination made relating to the provisions of this section. The process for requesting an expedited hearing pursuant to this subsection shall:

(1) be easily accessible, transparent, sufficiently expedient and not unduly burdensome on an enrollee, the enrollee's representative or the enrollee's health care provider;

(2) defer to the determination of the enrollee's health care provider; and

(3) provide for a determination of the claim according to a time frame and in a manner that takes into account the nature of the claim and the medical exigencies involved for a claim involving an urgent health care need.

E. A group health plan shall not require a prescription for any drug, item or service that is available without a prescription.

F. A group health plan shall provide coverage and shall reimburse a health care provider or dispensing entity on a per-unit basis for dispensing a six-month supply of contraceptives at one time; provided that the contraceptives are prescribed and self-administered.

G. Nothing in this section shall be construed to:

(1) require a health care provider to prescribe six months of contraceptives at one time; or

(2) permit a group health plan to limit coverage or impose cost sharing for an alternate method of contraception if an enrollee changes contraceptive methods before exhausting a previously dispensed supply.

H. The provisions of this section shall not apply to short-term travel, accident-only, hospital-indemnity-only, limited-benefit or disease-specific group health plans.

I. For the purposes of this section:

(1) "contraceptive method categories identified by the federal food and drug administration":

(a) means tubal ligation; sterilization implant; copper intrauterine device; intrauterine device with progestin; implantable rod; contraceptive shot or injection; combined oral contraceptives; extended or continuous use oral contraceptives; progestin-only oral contraceptives; patch; vaginal ring; diaphragm with spermicide; sponge with spermicide; cervical cap with spermicide; male and female condoms; spermicide alone; vasectomy; ulipristal acetate; levonorgestrel emergency contraception; and any additional method categories of contraception approved by the federal food and drug administration; and

(b) does not mean a product that has been recalled for safety reasons or withdrawn from the market;

(2) "cost sharing" means a deductible, copayment or coinsurance that an enrollee is required to pay in accordance with the terms of a group health plan; and

(3) "health care provider" means an individual licensed to provide health care in the ordinary course of business.

History: Laws 2019, ch. 263, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 263 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

13-7-23. Pharmacist prescriptive authority services; reimbursement parity.

A group health plan shall reimburse a participating provider that is a certified pharmacist clinician or pharmacist certified to provide a prescriptive authority service who provides a service at the standard contracted rate that the group health plan reimburses, for the same service under that group health plan, any licensed physician or physician assistant licensed pursuant to the Medical Practice Act [Chapter 61, Article

6 NMSA 1978] or any advanced practice certified nurse practitioner licensed pursuant to the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978].

History: Laws 2020, ch. 58, § 1; 2021, ch. 54, § 2.

ANNOTATIONS

The 2021 amendment, effective June 18, 2021, after "Medical Practice Act", deleted "or the Osteopathic Medicine Act".

13-7-24. Heart artery calcium scan coverage.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for eligible insureds to receive a heart artery calcium scan.

B. Coverage provided pursuant to this section shall:

(1) be limited to the provision of a heart artery calcium scan to an eligible insured to be used as a clinical management tool;

(2) be provided every five years if an eligible insured has previously received a heart artery calcium score of zero; and

(3) not be required for future heart artery calcium scans if an eligible insured receives a heart artery calcium score greater than zero.

C. At its discretion or as required by law, an insurer may offer or refuse coverage for further cardiac testing or procedures for eligible insureds based upon the results of a heart artery calcium scan.

D. The provisions of this section shall not apply to short-term travel, accident-only or limited or specified-disease policies, plans or certificates of health insurance.

E. As used in this section:

(1) "eligible insured" means an insured who:

(a) is a person between the ages of forty-five and sixty-five; and

(b) has an intermediate risk of developing coronary heart disease as determined by a health care provider based upon a score calculated from an evidence-based algorithm widely used in the medical community to assess a person's ten-year cardiovascular disease risk, including a score calculated using a pooled cohort equation;

(2) "health care provider" means a physician, physician assistant, nurse practitioner or other health care professional authorized to furnish health care services within the scope of the professional's license; and

(3) "heart artery calcium scan" means a computed tomography scan measuring coronary artery calcium for atherosclerosis and abnormal artery structure and function.

History: Laws 2020, ch. 79, § 1.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 79 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

Applicability. — Laws 2020, ch. 79, § 6 provided that the provisions of Laws 2020, ch. 79, are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2021.

13-7-25. Coverage for individuals with diabetes; insulin for diabetes; cost-sharing cap.

A. Group health care coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall cap the amount an insured is required to pay for a preferred formulary prescription insulin drug or a medically necessary alternative at an amount not to exceed a total of twenty-five dollars ($25.00) per thirty-day supply and shall provide coverage for individuals with diabetes as required by law for each health care insurer, including:

(1) group health insurance policies, health care plans, certificates of health insurance and managed health care plans delivered or issued for delivery in New Mexico;

(2) group health plans provided through a cooperative;

(3) group health maintenance organization contracts delivered or issued for delivery in New Mexico; and

(4) health benefit plans.

B. As used in this section, "health care insurer" means a person who provides health insurance in this state, including a licensed insurance company, a licensed fraternal benefit society, a prepaid hospital or medical service plan, a health maintenance organization, a managed care organization, a nonprofit health care

organization, a multiple-employer welfare arrangement or any other person providing a plan of health insurance subject to state regulation.

History: Laws 2020, ch. 36, § 1; 2023, ch. 50, § 1.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, required group health coverage to include coverage for individuals with diabetes, and defined "health care insurer"; in the section heading, added "Coverage for individuals with diabetes"; in Subsection A, after "thirty-day supply", added "and shall provide coverage for individuals with diabetes as required by law for each health care insurer, including", and added Paragraphs A(1) through A(4); and added Subsection B.

Applicability. — Laws 2023, ch. 50, § 7 provided that Laws 2023, ch. 50 apply to self-insurance provided pursuant to the Health Care Purchasing Act, individual and group health insurance policies, health care plans, certificates of health insurance, managed health care plans, contracts of health insurance, group health plans provided through a cooperative, individual and group health maintenance organization contracts, health benefit plans and group health coverage that are offered, delivered or issued for delivery, renewed, extended or amended in New Mexico on or after January 1, 2024.

Temporary provisions. — Laws 2023, ch. 50, § 6 provided:

A. By October 1, 2023, the office of superintendent of insurance shall convene a diabetes insurance coverage work group composed of:

(1) a representative of the office who shall serve as the chairperson of the working group;

(2) a representative of the New Mexico health insurance exchange who is not an employee or board member of a health insurance issuer or qualified health plan;

(3) a representative of a qualified health plan that offers a health benefit plan on the New Mexico health insurance exchange;

(4) a representative of a diabetes advisory council that represents individuals and groups across New Mexico that are trying to reduce the burden of diabetes on individuals, families, communities, the health care system and the state;

(5) a representative of a New Mexico podiatric and medical association with expertise in the treatment and management of diabetes and its complications;

(6) a representative of a New Mexico medical society with expertise in the treatment and management of diabetes and its complications;

(7) a physician specializing in the treatment and management of diabetes and its complications who is affiliated with a New Mexico medical school;

(8) a representative of the university of New Mexico health sciences center with expertise in the treatment and management of diabetes and its complications;

(9) a representative of a New Mexico advanced practice nurses' association with expertise in the treatment and management of diabetes and its complications;

(10) a person diagnosed with type 1 diabetes or family member of a person diagnosed with type 1 diabetes;

(11) a person diagnosed with type 2 diabetes or family member of a person diagnosed with type 2 diabetes;

(12) an advocate for populations disproportionately impacted by diabetes; and

(13) a representative of the risk management division of the general services department with expertise in health care insurance and finance.

B. By August 1, 2024, the work group shall report to the interim legislative health and human services committee regarding its findings and recommendations for expanding and updating New Mexico's essential health benefit benchmark plan to better address the needs of New Mexicans for services, equipment, supplies, appliances and drugs to treat and manage diabetes and its complications.

13-7-26. Behavioral health services; elimination of cost sharing.

A. Until January 1, 2027, group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers coverage of behavioral health services shall not impose cost sharing on those behavioral health services.

B. For the purposes of this section:

(1) "behavioral health services" means professional and ancillary services for the treatment, habilitation, prevention and identification of mental illnesses, substance abuse disorders and trauma spectrum disorders, including inpatient, detoxification, residential treatment and partial hospitalization, intensive outpatient therapy, outpatient and all medications, including brand-name pharmacy drugs when generics are unavailable;

(2) "coinsurance" means a cost-sharing method that requires an enrollee to pay a stated percentage of medical expenses after any deductible amount is paid; provided that coinsurance rates may differ for different types of services under the same group health plan;

(3) "copayment" means a cost-sharing method that requires an enrollee to pay a fixed dollar amount when health care services are received, with the plan administrator paying the balance of the allowable amount; provided that there may be different copayment requirements for different types of services under the same group health plan; and

(4) "cost sharing" means a copayment, coinsurance, deductible or any other form of financial obligation of an enrollee other than a premium or a share of a premium, or any combination of any of these financial obligations, as defined by the terms of a group health plan.

History: Laws 2021, ch. 136, § 3.

ANNOTATIONS

Effective dates. — Laws 2021, ch. 136, § 11 made Laws 2021, ch. 136, § 3 effective January 1, 2022.

13-7-27. Diagnostic and supplemental breast examinations.

A. Group health coverage, including self-insurance, offered, issued, amended, delivered or renewed under the Health Care Purchasing Act that provides coverage for diagnostic and supplemental breast examinations shall not impose cost sharing for diagnostic and supplemental breast examinations.

B. The provisions of this section do not apply to excepted benefit plans as provided pursuant to the Short-Term Health Plan and Excepted Benefit Act [Chapter 59A, Article 23G NMSA 1978], catastrophic plans as defined pursuant to 42 USCA Section 18022(e) or high deductible health plans with health savings accounts until an eligible insured's deductible has been met, unless otherwise allowed pursuant to federal law.

C. As used in this section:

(1) "cost sharing" means a deductible, coinsurance, copayment and any maximum limitation on the application of such a deductible, coinsurance, copayment or similar out-of-pocket expense;

(2) "diagnostic breast examination" means a medically necessary and clinically appropriate examination of the breast using diagnostic mammography, breast magnetic resonance imaging or breast ultrasound that evaluates an abnormality:

(a) seen or suspected from a screening examination for breast cancer; or

(b) detected by another means of examination; and

(3) "supplemental breast examination" means a medically necessary and clinically appropriate examination of the breast using breast magnetic resonance imaging or breast ultrasound that is:

(a) used to screen for breast cancer when there is no abnormality seen or suspected; and

(b) based on personal or family medical history or additional factors that may increase the individual's risk of breast cancer.

History: Laws 2023, ch. 12, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 12, § 8 provided that Laws 2023, ch. 12 apply to health insurance policies, health care plans, certificates of health insurance and health maintenance organization contracts that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-28. Chiropractic physician services; limits on cost sharing and coinsurance.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers coverage of the services of a chiropractic physician shall not impose a copayment or coinsurance on those chiropractic physician services that exceeds the copayment or coinsurance imposed for primary care services.

B. As used in this section, "primary care services" means the first level of basic or general health care for a person's health needs, including diagnostic and treatment services, initiation of referrals for other health care services and maintenance of the continuity of care when appropriate.

History: Laws 2023, ch. 51, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 51, § 6 made Laws 2023, ch. 51, § 1 effective January 1, 2024.

13-7-29. Sexually transmitted infection care; cost sharing eliminated.

A. Group health coverage, including self-insurance, offered, issued, amended, delivered or renewed under the Health Care Purchasing Act, that offers coverage for preventive care or treatment of sexually transmitted infections shall not impose cost sharing on eligible insureds.

B. Pursuant to this section, preventive care or treatment of sexually transmitted infections shall not be conditioned upon the gender identity of the insured.

C. The provisions of Subsection A of this section do not apply to high-deductible health care plans with health savings accounts until an eligible insured's deductible has been met, unless otherwise allowed pursuant to federal law.

D. For the purposes of this section:

(1) "cost sharing" means policy deductibles, copayments or coinsurance;

(2) "preventive care" means screening, testing, examination or counseling and the administration, dispensing or prescribing of drugs, devices or supplies incidental to the prevention of a sexually transmitted infection;

(3) "sexually transmitted infection" means chlamydia, syphilis, gonorrhea, HIV and relevant types of hepatitis, as well as any other sexually transmitted infection regardless of mode of transportation, as designated by rule upon making a finding that the particular sexually transmitted infection is contagious; and

(4) "treatment" means medically necessary care for the management of an existing sexually transmitted infection.

History: Laws 2023, ch. 99, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 99 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 99, § 7 provided that the provisions of Laws 2023, ch. 99 apply to health insurance policies, health care plans, certificates of health insurance or health maintenance organization contracts that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-30. Definitions.

As used in Sections 1 through 9 [13-7-30 to 13-7-38 NMSA 1978] of this 2023 act:

A. "generally recognized standards" means standards of care and clinical practice established by evidence-based sources, including clinical practice guidelines and recommendations from mental health and substance use disorder care provider professional associations and relevant federal government agencies, that are generally recognized by providers practicing in relevant clinical specialties, including:

(1) psychiatry;

(2) psychology;

(3) social work;

(4) clinical counseling;

(5) addiction medicine and counseling; or

(6) family and marriage counseling; and

B. "mental health or substance use disorder services" means:

(1) professional services, including inpatient and outpatient services and prescription drugs, provided in accordance with generally recognized standards of care for the identification, prevention, treatment, minimization of progression, habilitation and rehabilitation of conditions or disorders listed in the current edition of the American psychiatric association's Diagnostic and Statistical Manual of Mental Disorders, including substance use disorder; or

(2) professional talk therapy services, provided in accordance with generally recognized standards of care, provided by a marriage and family therapist licensed pursuant to the Counseling and Therapy Practice Act [Chapter 61, Article 9A NMSA 1978].

History: Laws 2023, ch. 114, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-31. Benefits required.

Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for all mental health or substance use disorder services required by generally recognized standards of care.

History: Laws 2023, ch. 114, § 2.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-32. Parity for coverage of mental health and substance use disorder services.

A. The office of superintendent of insurance shall ensure that an insurer complies with federal and state laws, rules and regulations applicable to coverage for mental health or substance use disorder services.

B. An insurer shall not impose quantitative treatment limitations, financial restrictions, limitations or requirements on the provision of mental health or substance use disorder services that are more restrictive than the predominant restrictions, limitations or requirements that are imposed on substantially all of the coverage of benefits for other conditions.

C. An insurer shall not impose non-quantitative treatment limitations for the treatment of mental health or substance use disorders or conditions unless factors, including the processes, strategies or evidentiary standards used in applying the non-quantitative treatment limitation, as written and in operation, are comparable to and are applied no more restrictively than the factors used in applying the limitation to medical or surgical benefits in the classification.

History: Laws 2023, ch. 114, § 3.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-33. Provider network adequacy.

A. An insurer shall maintain an adequate provider network to provide mental health and substance use disorder services.

B. The superintendent of insurance shall ensure access to mental health and substance use disorder services providers, including parity with medical and surgical services provider access, through regulation and review of claims processing, provider reimbursement procedures, network adequacy and provider reimbursement rate adequacy.

C. An insurer shall ensure that the process by which reimbursement rates for mental health and substance use disorder services are determined is comparable to and no more stringent than the process for reimbursement of medical or surgical benefits. In developing provider reimbursement rates, an insurer shall demonstrate that it has performed a comparability analysis of provider:

(1) reimbursement rates in surrounding states;

(2) reimbursement rates between mental health and substance use disorder providers and medical or surgical providers; and

(3) credentialing processes for mental health and substance use disorder providers and medical or surgical providers.

D. An insurer shall undertake all efforts, including increasing provider reimbursement rates through the processes and strategies described in Subsection C of this section, to ensure state-mandated network adequacy for the provision of mental health or substance use disorder services.

E. When in-network access to mental health or substance use disorder services is not reasonably available, an insurer shall provide access to out-of-network services with the same cost-sharing obligations to the insured as those required for in-network services.

History: Laws 2023, ch. 114, § 4.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-34. Utilization review of mental health or substance use disorder services.

A. An insurer shall, at least monthly, review and update the insurer's utilization review process to reflect the most recent evidence and generally recognized standards of care.

B. When performing a utilization review of mental health or substance use disorder services, including level of care placement, continued stay, transfer and discharge, an insurer shall apply criteria in accordance with generally recognized standards of care.

C. An insurer shall provide utilization review training to staff and contractors undertaking activities related to utilization review.

D. An insurer shall:

(1) develop utilization review policies regarding quantitative and non-quantitative limitations for mental health and substance use disorder services coverage that are no more restrictive than the utilization review policies regarding quantitative and non-quantitative limitations for medical and surgical care; and

(2) make utilization review policies available to providers or plan members.

History: Laws 2023, ch. 114, § 5.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-35. Prohibited exclusions of coverage for mental health or substance use disorder services.

An insurer shall not exclude provider prescribed coverage for mental health or substance use disorder services otherwise included in its coverage when:

A. it is available pursuant to federal or state law for individuals with disabilities;

B. it is otherwise ordered by a court or administrative agency;

C. it is available to an insured through a public benefit program; or

D. an insured has a concurrent diagnosis.

History: Laws 2023, ch. 114, § 6.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-36. Level of care determinations for the provision of mental health or substance use disorder services.

A. An insurer shall provide coverage for all in-network mental health or substance use disorder services, consistent with generally recognized standards of care, including placing an insured into a medically necessary level of care.

B. Changes in level and duration of care shall be determined by the insured's provider in consultation with the insurer.

C. Level of care determinations shall include placement of an insured into a facility that provides detoxification services, a hospital, an inpatient rehabilitation treatment facility or an outpatient treatment program.

D. Level of care services for an insured with a mental health or substance use disorder shall be based on the mental health or substance use disorder needs of the insured rather than arbitrary time limits.

History: Laws 2023, ch. 114, § 7.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-37. Coordination of care.

An insurer may facilitate communication between mental health or substance use disorder services providers and the insured's designated primary care provider to ensure coordination of care to prevent any conflicts of care that could be harmful to the insured.

History: Laws 2023, ch. 114, § 8.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-38. Confidentiality provisions.

An insurer shall protect the confidentiality of an insured receiving mental health or substance use disorder services.

History: Laws 2023, ch. 114, § 9.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-39. Exceptions.

The provisions of Sections 1 through 9 [13-7-30 to 13-7-38 NMSA 1978] of this 2023 act do not apply to short-term plans subject to the Short-Term Health Plan and Excepted Benefit Act [Chapter 59A, Article 23G NMSA 1978].

History: Laws 2023, ch. 114, § 10.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 114 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 114, § 46 provided that the provisions of Laws 2023, ch. 114 are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-40. Biomarker testing insurer coverage.

A. Group health coverage, including self-insurance, offered, issued, amended, delivered or renewed under the Health Care Purchasing Act shall provide coverage for insureds to receive biomarker testing.

B. Coverage provided pursuant to this section shall be for the purposes of diagnosis, treatment, appropriate management or ongoing monitoring of an insured's disease or condition when the test is supported by medical and scientific evidence, including:

(1) labeled indications for a United States food and drug administration-approved or -cleared test;

(2) indicated tests for a United States food and drug administration-approved drug;

(3) warnings and precautions on United States food and drug administration labels;

(4) federal centers for medicare and medicaid services national coverage determinations or medicare administrative contractor local coverage determinations; or

(5) nationally recognized clinical practice guidelines.

C. An insurer providing coverage for biomarker testing pursuant to this section shall ensure that:

(1) coverage is provided in a manner that limits disruptions in care, including coverage for multiple biopsies or biospecimen samples; and

(2) a patient and a practitioner who prescribes biomarker testing have clear, accessible and convenient processes to request an appeal of a benefit denial by the insurer and that those processes are accessible on the insurer's website.

D. Coverage for biomarker testing may be subject to deductibles and coinsurance consistent with those imposed on other benefits under the same group health care coverage, including any form of self-insurance.

E. The provisions of this section do not apply to accident-only or limited or specified disease policies, plans or certificates of health insurance.

F. As used in this section:

(1) "biomarker" means a characteristic that is objectively measured and evaluated as an indicator of normal biological processes, pathogenic processes or pharmacologic responses to a specific therapeutic intervention, including known gene-drug interactions for medications being considered for use or already being administered. "Biomarker" includes gene mutations, characteristics of genes or protein expression;

(2) "biomarker testing" means analysis of a patient's tissue, blood or other biospecimen for the presence of a biomarker and includes single-analyte tests, multi-plex panel tests, protein expression and whole exome, whole genome and whole transcriptome sequencing; and

(3) "nationally recognized clinical practice guidelines" means evidence-based clinical practice guidelines that are:

(a) developed by independent organizations or medical professional societies using a transparent methodology and reporting structure and with a conflict-of-interest policy; and

(b) used to establish standards of care informed by a systematic review of evidence and an assessment of the benefits and risks of alternative care options and include recommendations intended to optimize patient care.

History: Laws 2023, ch. 138, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 138 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 138, § 7 provided that the provisions of Laws 2023, ch. 138 apply to health insurance policies, health care plans, certificates of health insurance or health maintenance organization contracts that are delivered, issued for delivery or renewed in this state on or after January 1, 2024.

13-7-41. Dental coverage; prior authorization.

A. For purposes of this section, "prior authorization" means a written communication indicating whether a specific service is covered or multiple services are covered and reimbursable at a specific amount, subject to applicable coinsurance and deductibles, and issued in response to a request submitted by a provider using a format prescribed by a dental plan.

B. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall provide a prior authorization upon the submission of a properly formatted request from the insured.

C. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall not deny any claim subsequently submitted for services included in a prior authorization unless one of the following circumstances applies for each service denied:

(1) benefit limitations, including annual maximums or frequency limitations, not applicable at the time of the prior authorization, are reached due to the insured's utilization subsequent to issuance of the prior authorization;

(2) the documentation submitted for the claim clearly fails to support the claim as originally authorized;

(3) subsequent to the issuance of a prior authorization, new services are provided to the insured or a change in the insured's condition occurs that would cause prior-authorized services to no longer be medically necessary, based on prevailing standards of care;

(4) subsequent to the issuance of a prior authorization, new services are provided to the insured or a change in the insured's condition occurs such that the prior-authorized procedure would at that time require disapproval pursuant to the terms and conditions for coverage under the insured's plan in effect at the time the request for prior authorizations was made; or

(5) denial of the claim was due to one of the following reasons:

(a) another entity is responsible for payment;

(b) the provider has already been paid for the services identified on the claim;

(c) the claim submitted was fraudulent;

(d) the prior authorization was based on erroneous information provided to the dental plan by the provider, the insured or other person; or

(e) the insured was not eligible for the service on the date it was provided and the provider did not know, or with the exercise of reasonable care, could not have known the insured's eligibility status.

History: Laws 2023, ch. 169, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 169 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 169, § 12 provided that the provisions of Laws 2023, ch. 169 apply to dental plans issued for delivery or renewed in this state on or after January 1, 2024.

13-7-42. Dental coverage; designation of payment.

A. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall provide for the direct payment of covered benefits to a provider, specified by the insured, regardless of the provider's network or contractual status with the dental plan.

B. A dental plan shall provide for the direct payment of covered benefits to a provider, specified by the insured, by including on its claim forms an:

(1) option for the designation of payment from the insured to the provider; and

(2) an attestation to be completed by the insured.

History: Laws 2023, ch. 169, § 2.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 169 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 169, § 12 provided that the provisions of Laws 2023, ch. 169 apply to dental plans issued for delivery or renewed in this state on or after January 1, 2024.

13-7-43. Dental coverage; erroneously paid claims; restrictions on recovery.

A. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall establish policies and procedures for payment recovery, including providing:

(1) notice to the provider that identifies the error made in the processing or payment of the claim;

(2) an explanation of the recovery being sought; and

(3) an opportunity for the provider to appeal the recovery being sought as set forth in Subsection C of this section.

B. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall not initiate payment recovery procedures more than twenty-four months after the original payment for a claim was made unless the claim was fraudulent or intentionally misrepresented.

C. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall not attempt to recover an erroneously paid claim by withholding or reducing payment for a different claim unless the plan:

(1) notifies the provider, in writing, within twelve months of the erroneously paid claim; and

(2) advises the provider that an automatic deduction shall occur within forty-five days of receiving notification unless the provider submits a written appeal to the plan pursuant to the grievance rules prescribed by the superintendent of insurance.

D. The provisions of this section shall not apply to duplicate payments.

History: Laws 2023, ch. 169, § 3.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 169 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 169, § 12 provided that the provisions of Laws 2023, ch. 169 apply to dental plans issued for delivery or renewed in this state on or after January 1, 2024.

13-7-44. Dental coverage; methods of payment.

A. For purposes of this section, "credit card payment" means a type of electronic funds transfer whereby:

(1) an insurer issues a single-use series of numbers associated with the payment of services rendered by the provider and chargeable to a predetermined amount; and

(2) the provider is responsible for processing the payment by using a credit card terminal or internet portal.

B. Group coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act that offers a dental plan shall not place restrictions on a provider regarding acceptable methods of payment, including designating credit card payments as the only acceptable form of payment.

C. When transmitting a payment to a provider using an electronic funds transfer, other than one made through the automated clearinghouse network, an insurer:

(1) shall not charge a fee to the provider solely to transmit a payment without the provider's consent;

(2) shall notify the provider of any other fees associated with transmitting a payment; and

(3) shall provide a provider with a fee-free method of transmitting a payment and provide instructions for utilizing the method.

History: Laws 2023, ch. 169, § 4.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 169 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 169, § 12 provided that the provisions of Laws 2023, ch. 169 apply to dental plans issued for delivery or renewed in this state on or after January 1, 2024.

13-7-45. Dental coverage; provider network leasing.

A. For purposes of this section:

(1) "contracting entity" means any person or entity that enters into direct contracts with a provider for the delivery of services in the ordinary course of business;

(2) "provider" means a person acting within the scope of licensure to provide dental services or supplies;

(3) "provider network contract" means a contract between a contracting entity and a provider specifying the rights and responsibilities of the contracting entity and providing for the delivery of and payment for services to the insured; and

(4) "third party" means a person or entity that enters into a contract with a contracting entity or with another third party to gain access to the services or contractual discounts of a provider network contract.

B. At a time when a contract relevant to granting access to a provider network to a third party is entered into or renewed, or when there are material modifications made, a contracting entity shall not require a provider to participate in third-party access to the provider network contract or contract directly with a third party that acquired the provider network. If a provider opts out, the contracting entity shall not cancel or otherwise end a contractual relationship with the provider. When initially contracting with a provider, a contracting entity must accept a qualified provider even if the provider rejects a network lease provision.

C. A contracting entity shall not grant a third party access to a provider network contract, a provider's services or discounts provided pursuant to a provider network contract unless:

(1) the provider network contract states that the contracting entity may enter into an agreement with a third party, allowing the third party to obtain the insurer's rights and responsibilities as though the third party were the contracting entity;

(2) the third party accessing the provider network contract agrees to comply with all of the terms of the provider network contract; and

(3) the contracting entity:

(a) identifies all third parties with which it contracts in a list on its website that is updated every ninety days;

(b) notifies a provider that a new third party is planning to lease or purchase the provider network contract, at least thirty business days before the lease or purchase takes effect;

(c) requires the third party to identify the source of the discount on all remittances or explanation of benefits under which the discount is taken; and

(d) makes available a copy of the provider network contract relied upon in the adjudication of a claim to a provider within thirty days of the provider's request.

D. A third party's right to a provider's discounted rate shall cease upon the termination date of the provider network contract.

E. The provisions of this section shall not apply if access to a provider network contract is granted to a dental carrier of an entity operating in accordance with the same brand licensee program as the contracting entity or to an entity that is an affiliate of the contracting entity. A list of the contracting entity's affiliates shall be made available to a provider on the contracting entity's website.

History: Laws 2023, ch. 169, § 5.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 169 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

Applicability. — Laws 2023, ch. 169, § 12 provided that the provisions of Laws 2023, ch. 169 apply to dental plans issued for delivery or renewed in this state on or after January 1, 2024.

13-7-46. Prosthetic devices; custom orthotic devices; minimum coverage.

A. Group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act shall provide coverage for prosthetics and custom orthotics that is at least equivalent to that coverage currently provided by the federal medicare program and no less favorable than the terms and conditions that the group health plan offers for medical and surgical benefits.

B. A group health plan shall cover the most appropriate prosthetic or custom orthotic device determined to be medically necessary by the enrollee's treating physician and associated medical providers to restore or maintain the ability to complete activities of daily living or essential job-related activities and that is not solely for the comfort or convenience of the enrollee. This coverage shall include all services and

supplies necessary for the effective use of a prosthetic or custom orthotic device, including:

(1) formulation of its design, fabrication, material and component selection, measurements, fittings and static and dynamic alignments;

(2) all materials and components necessary to use it;

(3) instructing the enrollee in the use of it; and

(4) the repair and replacement of it.

C. A group heath plan shall cover a prosthetic or custom orthotic device determined by the enrollee's provider to be the most appropriate model that meets the medical needs of the enrollee for performing physical activities, including running, biking and swimming and to maximize the enrollee's upper limb function. This coverage shall include all services and supplies necessary for the effective use of a prosthetic or custom orthotic device, including:

(1) formulation of its design, fabrication, material and component selection, measurements, fittings and static and dynamic alignments;

(2) all materials and components necessary to use it;

(3) instructing the enrollee in the use of it; and

(4) the repair and replacement of it.

D. A group health plan's reimbursement rate for prosthetic and custom orthotic devices shall be at least equivalent to that currently provided by the federal medicare program and no more restrictive than other coverage under the group health plan.

E. Prosthetic and custom orthotic device coverage shall be comparable to coverage for other medical and surgical benefits under the group health plan, including restorative internal devices such as internal prosthetic devices, and shall not be subject to spending limits or lifetime restrictions.

F. Prosthetic and custom orthotic device coverage shall not be subject to separate financial requirements that are applicable only with respect to that coverage. A group health plan may impose cost sharing on prosthetic or custom orthotic devices; provided that any cost-sharing requirements shall not be more restrictive than the cost-sharing requirements applicable to the plan's medical and surgical benefits, including those for internal devices.

G. A group health plan may limit the coverage for, or alter the cost-sharing requirements for, out-of-network coverage of prosthetic and custom orthotic devices;

provided that the restrictions and cost-sharing requirements applicable to prosthetic or custom orthotic devices shall not be more restrictive than the restrictions and requirements applicable to the out-of-network coverage for a group health plan's medical and surgical coverage.

H. In the event that medically necessary covered orthotics and prosthetics are not available from an in-network provider, the insurer shall provide processes to refer a member to an out-of-network provider and shall fully reimburse the out-of-network provider at a mutually agreed upon rate less member cost sharing determined on an in-network basis.

I. A group health plan shall not impose any annual or lifetime dollar maximum on coverage for prosthetic or custom orthotic devices, other than an annual or lifetime dollar maximum that applies in the aggregate to all terms and services covered under the group health plan.

J. If coverage is provided through a managed care plan, an enrollee shall have access to medically necessary clinical care and to prosthetic and custom orthotic devices and technology from not less than two distinct prosthetic and custom orthotic providers in the managed care plan's provider network located in the state.

K. Coverage for prosthetic and custom orthotic devices shall be considered habilitative or rehabilitative benefits for purposes of any state or federal requirement for coverage of essential health benefits, including habilitative and rehabilitative benefits.

L. If coverage for prosthetic or custom orthotic devices is provided, payment shall be made for the replacement of a prosthetic or custom orthotic device or for the replacement of any part of such devices, without regard to continuous use or useful lifetime restrictions, if an ordering health care provider determines that the provision of a replacement device, or a replacement part of such a device, is necessary because of any of the following:

(1) a change in the physiological condition of the patient;

(2) an irreparable change in the condition of the device or in a part of the device; or

(3) the condition of the device, or the part of the device, requires repairs and the cost of such repairs would be more than sixty percent of the cost of a replacement device or of the part being replaced.

M. Confirmation from a prescribing health care provider may be required if the prosthetic or custom orthotic device or part being replaced is less than three years old.

N. A group health plan subject to the Health Care Purchasing Act shall not discriminate against individuals based on disability, including limb loss, absence or malformation.

History: Laws 2023, ch. 196, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 196, § 7 made Laws 2023, ch. 196, § 1 effective January 1, 2024.

13-7-47. Calculating an enrollee's cost-sharing obligation for prescription drug coverage.

A. When calculating an enrollee's cost-sharing obligation for covered prescription drugs, pursuant to group health coverage, including any form of self-insurance, offered, issued or renewed under the Health Care Purchasing Act, the insurer shall credit the enrollee for the full value of any discounts provided or payments made by third parties at the time of the prescription drug claim.

B. Beginning on or after January 1, 2024, an insurer shall not charge a different cost-sharing amount for:

(1) prescription drugs or pharmacy services obtained at a non-affiliated pharmacy; or

(2) administration of prescription drugs at different infusion sites; provided that an insurer may communicate with an insured regarding lower-cost sites of service.

C. Beginning on or after January 1, 2024, an insurer shall not require an insured to make a payment at the point of sale for a covered prescription drug in an amount greater than the least of the:

(1) applicable cost-sharing amount for the prescription drug;

(2) amount an insured would pay for the prescription drug if the insured purchased the prescription drug without using a health benefits plan or any other source of prescription drug benefits or discounts;

(3) total amount the pharmacy will be reimbursed for the prescription drug from the insurer, including the cost-sharing amount paid by an insurer; or

(4) value of the rebate from the manufacturer provided to the insurer or its pharmacy benefits manager for the prescribed drug.

D. Beginning on or after January 1, 2024, if a prescription drug rebate is more than the amount needed to reduce the insured's copayment to zero on a particular drug, the remainder shall be credited to the insurer.

E. Beginning on or after January 1, 2024, any rebate amount shall be counted toward the insured's out-of-pocket prescription drug costs.

F. For purposes of this section, "cost sharing" means any:

(1) copayment;

(2) coinsurance;

(3) deductible;

(4) out-of-pocket maximum amount;

(5) other financial obligation, other than a premium or share of a premium; or

(6) combination thereof.

G. The provisions of this section do not apply to excepted benefit plans as provided pursuant to the Short-Term Health Plan and Excepted Benefit Act [Chapter 59A, Article 23G NMSA 1978], catastrophic plans, tax-favored plans or high-deductible health plans with health savings accounts until an eligible insured's deductible has been met, unless otherwise allowed pursuant to federal law.

History: Laws 2023, ch. 206, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 206 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

ARTICLE 8
Public Building Plaques

13-8-1. Public buildings; acknowledgment of taxpayers when elected officials acknowledged.

On every new public building plaque that lists, acknowledges or thanks the elected officials who were in office at the time the building was funded, constructed or renovated, there shall be included a statement of equal size and visibility that thanks the taxpayers of New Mexico for their contribution in funding the construction or renovation.

History: Laws 2001, ch. 85, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 85 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.