

# CHAPTER 13 PUBLIC PURCHASES AND PROPERTY

## ARTICLE 1 PROCUREMENT

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 Repealed.

#### ANNOTATIONS

**Repeals.** - Laws 1984, ch. 65, § 175, repeals 13-1-1 to 13-1-20 NMSA 1978, relating to public purchases. For provisions of former sections, see 1983 replacement pamphlet.

Laws 1984, ch. 65, § 176, as amended by Laws 1984 (1st S.S.), ch. 2, § 1, makes Laws 1984, ch. 65 effective on November 1, 1984.

### 13-1-21. Application of preferences.

A. For the purposes of this section:

(1) "resident business" means one which is authorized to do and is doing business under the laws of this state and:

(a) which maintains its principal place of business in the state; or

(b) has staffed an office and has paid applicable state taxes for two years prior to the awarding of the bid and has five or more employees who are residents of the state; or

(c) is an affiliate of a business which meets the requirements of Subparagraph (a) or (b) of this paragraph. As used herein, "affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the qualifying business through ownership of voting securities representing a majority of the total voting power of the entity; and

(2) "resident manufacturer" means a person who offers materials grown, produced, processed or manufactured wholly in the state.

B. When bids are received only from nonresident businesses and resident businesses and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident business whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident bidder is made lower than the bid price of the nonresident business when multiplied by a factor of .95.

C. When bids are received only from nonresident businesses and resident manufacturers and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the nonresident business when multiplied by a factor of .95.

D. When bids are received only from resident businesses and resident manufacturers and the lowest responsible bid is from a resident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low resident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the resident business when multiplied by a factor of .95.

E. When bids are received from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a resident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low resident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the resident business when multiplied by a factor of .95.

F. When bids are received from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident manufacturer is evaluated as lower than the bid price of the nonresident business when multiplied by a factor of .95. If there is no resident manufacturer eligible for award under this provision, then the contract shall be awarded to the resident business whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident business is made lower than the bid price of the nonresident business when multiplied by a factor of .95.

G. This section shall not apply when the expenditure of federal funds designated for a specific purchase is involved or for any bid price greater than five million dollars (\$5,000,000).

**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.

## **ANNOTATIONS**

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

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

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

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

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 53, 55, 68, 70.

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, repeals 13-1-21.1 NMSA 1978, as enacted by Laws 1981, ch. 340, § 1, relating to public purchases of American-made motor vehicles. For provisions of former sections, see 1983 replacement pamphlet.

Laws 1984, ch. 65, § 176, as amended by Laws 1984 (1st S.S.), ch. 2, § 1, makes Laws 1984, ch. 65 effective on November 1, 1984.

### **13-1-22. Resident business and manufacturer certification; application; information.**

No resident business or resident manufacturer, as those terms are defined in Subsection A of Section 13-1-21 NMSA 1978, shall be given any preference in the awarding of contracts for furnishing materials or services to a state agency, unless the resident business or resident manufacturer shall have qualified with the state purchasing agent as a resident business or resident manufacturer, or both, by making application to the state purchasing agent and receiving from him a certification number. The procedure for application and certification shall be as follows:

A. the state purchasing agent shall prepare an application form for certification as a resident business or manufacturer, requesting such information and proof as he deems necessary to qualify the applicant under the terms of Section 13-1-21 NMSA 1978;

B. the resident business or resident manufacturer shall complete the application form and submit it to the state purchasing agent, prior to the awarding of any contract in which the resident business or manufacturer desires to be given a preference; and

C. the state purchasing agent shall examine the application and if necessary may seek additional information or proof to assure himself that the prospective business or manufacturer is indeed entitled to the statutory preference. If all is in order, he shall issue the supplier a distinctive certification number, which shall be valid until revoked, and which, when used on bids and other purchasing documents, shall entitle the business or manufacturer to the statutory preference.

**History:** 1953 Comp., § 6-5-32.1, enacted by Laws 1969, ch. 184, § 1; 1979, ch. 72, § 2.

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

#### **ANNOTATIONS**

**Repeals.** - Laws 1984, ch. 65, § 175, repeals 13-1-23 to 13-1-27 NMSA 1978, relating to public purchases. For provisions of former sections, see 1983 replacement pamphlet.

Laws 1984, ch. 65, § 176, as amended by Laws 1984 (1st S.S.), ch. 2, § 1, makes Laws 1984, ch. 65 effective on November 1, 1984.

### **13-1-28. Short title.**

Sections 1 through 172 of this act may be cited as the "Procurement Code."

**History:** Laws 1984, ch. 65, § 1.

#### **ANNOTATIONS**

**Meaning of "this act".** - The term "this act", referred to in this section, means Laws 1984, Chapter 65, Sections 1 through 172 of which appear as 13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978.

**Purpose of act.** - It was the purpose of the former Public Purchases Act to insure the efficient and economical operation of government throughout the state principally by the submission of the great bulk of official purchases to the competitive-bidding process. 1969 Op. Att'y Gen. No. 69-87. See also 1959-60 Op. Att'y Gen. No. 59-78.

**Protection another purpose.** - The former Public Purchases Act was for the protection of the public and its provisions were to be construed as fairly and reasonably as to accomplish such object. 1964 Op. Att'y Gen. No. 64-60.

**Where purpose of act defeated.** - If a party contracting with a state or agency thereof were allowed to compel performance of a contract executed in contravention of state laws using estoppel as a basis, the purpose of the former Public Purchases Act and all other similar restraints on the power of an officer or agency to bind the state would be effectively defeated. 1969 Op. Att'y Gen. No. 69-92.

**Major objective.** - A major objective of the former Public Purchases Act was the close, centralized supervision of purchase orders. 1969 Op. Att'y Gen. No. 69-87.

**Particularly prescribed mode of contracting exclusive.** - Where the mode of contracting by local public bodies is especially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the municipality. *Danley v. City of Alamogordo*, 91 N.M. 520, 577 P.2d 418 (1978).

**Effect on municipal contracts.** - The former Public Purchases Act was essentially to prevent favoritism, fraud, extravagance, and improvidence in the awarding of municipal contracts. 1964 Op. Att'y Gen. No. 64-60.

**On public water utilities.** - If the expenditures encountered in maintaining and operating a public water utility were of such an extent as to come within the provisions of the former Public Purchases Act, such provision had to be followed. 1964 Op. Att'y Gen. No. 64-60.

**On jointly-owned utility.** - Corporation which was authorized to operate a gas public utility system, and which was jointly owned and jointly controlled by three cities, stood on the same footing as a municipal utility under the former Public Purchases Act. 1966 Op. Att'y Gen. No. 66-7.

**Contract to build a private jail** and to house and care for prisoners from a county was subject to the former Public Purchases Act. 1983 Op. Att'y Gen. No. 83-5.

**Company owned by legislator bidding on state contracts.** - Unless otherwise prohibited by N.M. Const., art. IV, § 28, a company owned by a legislator may bid on contracts to supply state agencies with materials and supplies under the competitive bid process set forth in the Procurement Code. 1989 Op. Att'y Gen. No. 89-34.

**Payment of late charges or interest.** - The state is not obligated to pay late charges or interest penalties unless specifically required by the contract and included in the responsive bid or proposal. 1987 Op. Att'y Gen. No. 87-51.

**Directing agency to choose its own auditor.** - In carrying out the requirement set forth in the Audit Act (12-6-1 to 12-6-14 NMSA 1978) to audit the financial affairs of

each state agency on a yearly basis, the procedures employed by the State Auditor in creating a pool of independent auditors and then directing agencies to contract with auditors he designated from the pool violated the requirements of the Procurement Code (13-1-23 et seq. NMSA 1978). 1992 Op. Att'y Gen. No. 92-06.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 8, 10, 12.

Validity, construction, and effect of state and local laws requiring governmental units to give "purchase preference" to goods manufactured or services performed in state, 84 A.L.R.4th 419.

72 Supp. C.J.S. Public Contracts §§ 4 to 17; 81A C.J.S. States § 145.

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

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

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

C. The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.

**History:** Laws 1984, ch. 65, § 2.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

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

### **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.

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.

## ANNOTATIONS

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

**Cooperative formed pursuant to the Joint Powers Agreements Act.** - An agreement entered into by 30 school districts forming a cooperative pursuant to the Joint Powers Agreements Act, 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, 13-1-28 NMSA 1978, et seq. *State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs.*, 115 N.M. 196, 848 P.2d 1123 (Ct. App. 1993).

**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, 13-1-28 to 13-1-199 NMSA 1978, 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.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 1, 30, 34, 67.

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

**13-1-31. Definition; architectural services.**

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

**History:** Laws 1984, ch. 65, § 4.

### **13-1-32. Definition; blind trust.**

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

**History:** Laws 1984, ch. 65, § 5.

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

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

**History:** Laws 1984, ch. 65, § 6.

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

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

**History:** Laws 1984, ch. 65, § 7.

### **13-1-35. Definition; business.**

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

**History:** Laws 1984, ch. 65, § 8.

### **13-1-36. Definition; catalogue price.**

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

A. is regularly maintained by the manufacturer or vendor of an item; and



B. is either published or otherwise available for inspection by a customer.

**History:** Laws 1984, ch. 65, § 9.

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

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

**History:** Laws 1984, ch. 65, § 10.

### **13-1-38. Definition; change order.**

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

**History:** Laws 1984, ch. 65, § 11.

### **13-1-39. Definition; confidential information.**

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

**History:** Laws 1984, ch. 65, § 12.

### **13-1-40. Definition; construction.**

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

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

(6) sewage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;

(7) sewage, water, gas or other pipeline;

(8) transmission line;

(9) radio, television or other tower;

(10) water, oil or other storage tank;

(11) shaft, tunnel or other mining appurtenance;

(12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditioners;

(13) air conditioning conduit, heating or other similar mechanical work; or

(14) similar work, structures or installations.

B. "Construction" shall also include:

(1) leveling or clearing land;

(2) excavating earth;

(3) drilling wells of any type, including seismographic shot holes or core drilling; and

(4) similar work, structures or installations.

**History:** Laws 1984, ch. 65, § 13.

### **13-1-41. 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.

### **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 repeals 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. For provisions of former section, see 1984 Supplement to this pamphlet.

### **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.

### **13-1-54. 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 repeals former 13-1-55 NMSA 1978, as enacted by Laws 1984, ch. 65, § 28, relating to the definition of engineering services, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1988 Replacement Pamphlet.

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

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

**History:** Laws 1984, ch. 65, § 29.

### **13-1-57. Definition; financial interest.**

"Financial interest" means:

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

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

**History:** Laws 1984, ch. 65, § 30.

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

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

**History:** Laws 1984, ch. 65, § 31.

### **13-1-59. Definition; gratuity.**

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

**History:** Laws 1984, ch. 65, § 32.

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

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

**History:** Laws 1984, ch. 65, § 33.

### **13-1-61. Definition; highway reconstruction.**

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

**History:** Laws 1984, ch. 65, § 34.

### **13-1-62. Definition; immediate family.**

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

**History:** Laws 1984, ch. 65, § 35.

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

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

**History:** Laws 1984, ch. 65, § 36.

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

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

**History:** Laws 1984, ch. 65, § 37.

### **13-1-65. Definition; surveying services.**

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

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

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

## **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1989, ch. 69, § 2 repeals former 13-1-65 NMSA 1978, as enacted by Laws 1984, ch. 65, § 38, relating to the definition of land surveying services, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1988 Replacement Pamphlet.

### **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**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

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

"Local public works project" means a project of a local public body which uses 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 five thousand dollars (\$5,000) 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.

#### **ANNOTATIONS**

**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.



**History:** Laws 1984, ch. 65, § 40.

#### **ANNOTATIONS**

**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.

**An intercommunity water supply association** qualified 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-municipal hospital is "local public body"**. 1969 Op. Att'y Gen. No. 69-78.

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

**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. 64-109.

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

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

**History:** Laws 1984, ch. 65, § 42.

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

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

**History:** Laws 1984, ch. 65, § 43.

### **13-1-71. Definition; price agreement.**

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

**History:** Laws 1984, ch. 65, § 44.

### **13-1-72. Definition; price analysis.**

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

**History:** Laws 1984, ch. 65, § 45.

### **13-1-73. Definition; pricing data.**

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

**History:** Laws 1984, ch. 65, § 46.

### **13-1-74. Definition; procurement.**

"Procurement" means:

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

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

**History:** Laws 1984, ch. 65, § 47.

### **13-1-75. Definition; procurement officer.**

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

**History:** Laws 1984, ch. 65, § 48.

### **13-1-76. Definition; professional services.**

"Professional services" means the services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers and persons or businesses providing similar services.

**History:** Laws 1984, ch. 65, § 49; 1989, ch. 69, § 5.

### **13-1-77. Definition; purchase order.**

"Purchase order" means the document issued by the state purchasing agent or a central purchasing office which directs a contractor to deliver items of tangible personal property, services or construction pursuant to an existing contract.

**History:** Laws 1984, ch. 65, § 50.

### **13-1-78. Definition; purchase request.**

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

**History:** Laws 1984, ch. 65, § 51.

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

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

**History:** Laws 1984, ch. 65, § 52.

### **13-1-80. Definition; regulation.**

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

**History:** Laws 1984, ch. 65, § 53.

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

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

**History:** Laws 1984, ch. 65, § 54.

### **13-1-82. Definition; responsible bidder.**

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

**History:** Laws 1984, ch. 65, § 55.

## **ANNOTATIONS**

**Factor affecting adequacy of agent.** - The length of time an insurance agency has been located within the school district may be considered by the school district in determining whether the service, reputation and experience of an agent are adequate. 1969 Op. Att'y Gen. No. 69-19.

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

### **13-1-83. Definition; responsible offeror.**

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

**History:** Laws 1984, ch. 65, § 56.

### **13-1-84. Definition; responsive bid.**

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

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

#### **ANNOTATIONS**

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

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

#### **13-1-85. Definition; responsive offer.**

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

**History:** Laws 1984, ch. 65, § 58.

#### **13-1-86. Definition; secretary.**

"Secretary" means the secretary of general services.

**History:** Laws 1984, ch. 65, § 59.

#### **ANNOTATIONS**

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

#### **13-1-87. Definition; services.**

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

**History:** Laws 1984, ch. 65, § 60.

#### **13-1-88. Definition; small business.**

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

**History:** Laws 1984, ch. 65, § 61.

### **13-1-89. Definition; specification.**

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

**History:** Laws 1984, ch. 65, § 62.

### **13-1-90. Definition; state agency.**

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

**History:** Laws 1984, ch. 65, § 63.

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

"State public works project" means a project of a state agency, not including projects of the state educational institutions, the supreme court building commission, the legislature or local public bodies, which uses 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 five thousand dollars (\$5,000) or more, excluding applicable state and local gross receipts.

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

## **ANNOTATIONS**

**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."

**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.

### **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. 80-7.

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

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

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

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

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

(1) recommend procurement regulations to the secretary;

(2) establish and maintain programs for the development and use of procurement specifications and for the inspection, testing and acceptance of services, construction and items of tangible personal property;

(3) cooperate with the state budget division of the department of finance and administration in the preparation of statistical data concerning the acquisition and usage of all services, construction and items of tangible personal property by state agencies;

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

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

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

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

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

**History:** Laws 1984, ch. 65, § 68.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.



**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 532 to 559; 68 Am. Jur. 2d Schools § 67 et seq.

20 C.J.S. Counties §§ 143 to 149; 63 C.J.S. Municipal Corporations §§ 951, 976; 78 C.J.S. Schools and School Districts §§ 226, 276; 81A C.J.S. States § 154 et seq.

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

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

**History:** Laws 1984, ch. 65, § 69.

### **13-1-97. Centralization of procurement authority.**

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

B. All procurement for state agencies excluded from the requirement of procurement through the office of the state purchasing agent shall be performed by a central purchasing office designated by statute, the governing authority of that state agency or as otherwise provided in the Procurement Code.

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

**History:** Laws 1984, ch. 65, § 70.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

**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.

**Where 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.

**Where 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.

### **13-1-98. 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 which are required to be filed in connection with proceedings before administrative agencies or state or federal courts;
- D. purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services;
- E. purchases of books and periodicals from the publishers or copyright holders thereof;
- F. travel or shipping by common carrier or by private conveyance or to meals and lodging;
- G. purchase of livestock at auction rings or to the procurement of animals to be used for research and experimentation or exhibit;

H. contracts with businesses for public school transportation services;

I. procurement of tangible personal property or services, as defined by Sections 13-I-87 and 13-I-93 NMSA 1978, by the corrections industries division of the corrections department pursuant to regulations adopted by the corrections industries commission which shall be reviewed by the purchasing division of the general services department prior to adoption;

J. minor purchases consisting of magazine subscriptions, conference registration fees and other similar purchases where prepayments are required;

K. municipalities having adopted home rule charters and having enacted their own purchasing ordinances;

L. the issuance, sale and delivery of public securities pursuant to the applicable authorizing statute with the exception of bond attorneys and general financial consultants;

M. contracts entered into by a local public body with a private independent contractor for the operation, or provision and operation, of a jail pursuant to Sections 33-3-26 and 33-3-27 NMSA 1978;

N. contracts for maintenance of grounds and facilities at highway rest stops and other employment opportunities, excluding those intended for the direct care and support of persons with handicaps, entered into by state agencies with private, nonprofit, independent contractors who provide services to persons with handicaps;

O. contracts and expenditures for services 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; or

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

**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.

## ANNOTATIONS

**1991 amendments.** - Laws 1991, ch. 78, § 1, effective April 2, 1991, deleting "industries" following "corrections" the second time the word appears in Subsection I; adding Subsection O identical to that added by Laws 1991, ch. 118, § 1; and making a minor stylistic change in Subsection C and related stylistic changes in Subsections M and N, was approved on April 2, 1991. However, Laws 1991, ch. 118, § 1, effective July 1, 1991, making a minor stylistic change in Subsection N and adding Subsections O

and P, was approved on April 3, 1991. The section is set out as amended by Laws 1991, ch. 118, § 1. See 12-1-8 NMSA 1978.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

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

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

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

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

**Jail facilities exemptions.** - Laws 1987, ch. 348, § 2 amended this section to permit local public bodies to enter into contracts with an independent contractor for construction and operation of a jail facility without competitive bidding. The financing and design of a jail facility are also exempt from this article, as long as the local public body does not have a direct contractual relationship with the parties responsible for designing and financing the facility. 1987 Op. Att'y Gen. No. 87-47.

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

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

### **13-1-99. 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 two hundred fifty dollars (\$250);
- C. emergency procurements;
- D. procurement of highway construction or reconstruction by the state highway and transportation department;
- 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 of information processing resources procured through the information systems council;
- I. procurement by the state fair commission;
- J. procurement by the intertribal Indian ceremonial association;
- K. purchases from the instructional material fund;
- L. procurement by all local public bodies; and
- 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.

**History:** Laws 1984, ch. 65, § 72; 1987, ch. 189, § 1; 1988, ch. 84, § 2.

### **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

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

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

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

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

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

### **ANNOTATIONS**

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

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

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

### **13-1-101. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1985, ch. 90, § 1, repeals 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. For provisions of former section, see 1984 Supplement.

### **13-1-102. Competitive sealed bids required.**

All procurement shall be achieved by competitive sealed bid pursuant to Sections 76 through 83 [13-1-103 to 13-1-110 NMSA 1978] of the Procurement Code, except procurement achieved pursuant to the following sections of the Procurement Code:

- A. Sections 84 through 97 [13-1-111 to 13-1-117, 13-1-118 to 13-1-124 NMSA 1978], competitive sealed proposals;
- B. Section 98 [13-1-125 NMSA 1978], small purchases;
- C. Section 99 [13-1-126 NMSA 1978], sole source procurement;
- D. Section 100 [13-1-127 NMSA 1978], emergency procurements;
- E. Section 102 [13-1-129 NMSA 1978], existing contracts; and

F. Section 103 [13-1-130 NMSA 1978], purchases from antipoverty program businesses.

**History:** Laws 1984, ch. 65, § 75.

## ANNOTATIONS

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

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

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

**On 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.

**On 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.

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

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

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

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 30 to 62.

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 §§ 995 to 1005; 72 Supp. C.J.S. Public Contracts § 9; 78 C.J.S. Schools and School Districts §§ 284 to 289; 81A C.J.S. States § 116.

### **13-1-103. Competitive sealed bids; invitation for bids.**

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 and the date, time and place of the bid opening.

**History:** Laws 1984, ch. 65, § 76.

### **ANNOTATIONS**

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

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

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

A. The 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 must be published at least once in at least three newspapers of general circulation in this state. 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 which may be adopted by central purchasing offices to notify prospective bidders that bids will be received, including but not limited to 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. The state purchasing agent and all central purchasing offices shall send copies of the notice or invitation for bids involving the expenditure of more than five thousand dollars (\$5,000) to those businesses which have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and which have paid any required fees. The state purchasing agent or 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. The state purchasing agent and all central purchasing offices shall make copies of invitations for bids for construction contracts available to prospective bidders. The state purchasing agent or 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 state purchasing agent or central purchasing office, whichever is applicable.

**History:** Laws 1984, ch. 65, § 77; 1989, ch. 275, § 1.

#### **ANNOTATIONS**

**Cross-references.** - As to publication of public notices, see 14-11-1 NMSA 1978 et seq.

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

Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in the Procurement Code. 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 regulation. 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. 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.

#### **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

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

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**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts § 83.

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

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

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

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

**History:** Laws 1984, ch. 65, § 80.

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

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

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

#### **ANNOTATIONS**

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

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

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

**History:** Laws 1984, ch. 65, § 82.

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

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

A. award pursuant to the multiple source award provisions of Sections 126 and 127 [13-1-153 and 13-1-154 NMSA 1978] of the Procurement Code;

B. award to a resident business if the identical low bids are submitted by a resident business and a nonresident business;

C. award to a resident manufacturer if the identical low bids are submitted by a resident manufacturer and a resident business;

D. award by lottery to one of the identical low bidders; or

E. reject all bids and resolicit bids or proposals for the required services, construction or items of tangible personal property.

**History:** Laws 1984, ch. 65, § 83.

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

When a state agency or a local public body is procuring professional services or when the state purchasing agent, a central purchasing office or a designee of either officer makes a determination that the use of competitive sealed bidding 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. Competitive qualifications-based proposals shall be used for procurement of professional services of 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, § 84; 1989, ch. 69, § 7.

#### **ANNOTATIONS**

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

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

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

A. Competitive sealed proposals, including competitive qualifications-based proposals, shall be solicited through a request for proposals which shall be issued and shall include the specifications for the services or items of tangible personal property to be procured, all contractual terms and conditions applicable to the procurement, the location where proposals are to be received and the date, time and place where proposals are to be received and reviewed.

B. 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.

### **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.

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

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

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

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

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

**History:** Laws 1984, ch. 65, § 89.

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

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

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

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 41, 43.

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.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

### **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 [61-24B to 61-24B-17 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 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.

**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".

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

All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the general services department or the department of finance and administration if required by the regulations of either or both of the departments. This section shall not apply to contracts entered into by the

legislative branch of state government, the judicial branch of state government or the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico.

**History:** Laws 1984, ch. 65, § 91.

## **ANNOTATIONS**

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

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

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

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

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

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

A. For each proposed state public works project or local public works project, the architect, engineer, landscape architect 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 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 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; and

(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.

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 committee may:

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

(2) recommend termination of the selection process and sending out of new notices of the proposed procurement pursuant to Section 13-1-104 NMSA 1978.

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, final ranking and evaluation scores for all proposals shall become public information. Businesses which have not been selected shall be so notified in writing within twenty-one days after an award is made.

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

## ANNOTATIONS

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

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

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

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

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

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

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

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

**ANNOTATIONS**

**Cross-references.** - As to director of property control division of general services department, see 15-3-1 NMSA 1978.

As to position of staff architect, see 15-3-13 NMSA 1978.

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

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

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

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

#### **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.

### **13-1-123. 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.** - As to property control division generally, see 15-3-1 NMSA 1978 et seq.

### **13-1-124. Architect rate schedule.**

The secretary shall adopt by regulation an architect rate schedule which shall set the highest permissible rates for each building-type group, which shall be defined in the regulations. The rate schedule shall be in effect upon the approval of the state board of finance and compliance with the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 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.** - As to state board of finance generally, see 6-1-1 NMSA 1978 et seq.

### **13-1-125. Small purchases.**

A. The state purchasing agent or central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding five thousand dollars (\$5,000) in accordance with the applicable small purchase regulations adopted by the secretary, a local public body or a central purchasing office which has the authority to issue regulations.

B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding

twenty thousand dollars (\$20,000) excluding applicable state and local gross receipts taxes, except for the services of architects, landscape architects, engineers or surveyors for state public works projects or local public works projects, in accordance with professional services procurement regulations promulgated by the department of finance and administration, the general services department or a central purchasing office with the authority to issue regulations.

C. Notwithstanding the requirements of Subsection A of this section, a central purchasing office for a state educational institution named in Article 12, Section 11 of the constitution of New Mexico may procure services, construction or items of tangible personal property having a value not exceeding ten thousand dollars (\$10,000) in accordance with regulations promulgated by a central purchasing office with the authority to issue regulations.

D. 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 five hundred dollars (\$500) by issuing a direct purchase order to a contractor based upon the best obtainable price.

E. 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.

## ANNOTATIONS

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

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

### **13-1-126. Sole source procurement.**

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

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

### **13-1-127. Emergency procurements.**

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

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

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

**History:** Laws 1984, ch. 65, § 100; 1987, ch. 348, § 10.

### **ANNOTATIONS**

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

**Reason for exceptions.** - Only 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 § 39.

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

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

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

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

#### **ANNOTATIONS**

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

**Reason for exceptions.** - Only 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.

### **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**

**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 under the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978].

B. 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.

### **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 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

**Data processing and data communications planning council.** - Pursuant to Laws 1984, ch. 64, the data processing and data communications planning council, referred to in Subsection A, was renamed the information systems council. See Laws 1984, ch. 64, § 15 and 15-1-1 NMSA 1978 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 72 Am. Jur. 2d States §§ 67, 68.

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.

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

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

- A. the procurement is based on competitive sealed bid;
- B. the contract price is based on established catalogue prices or market prices;
- C. the contract price is set by law or regulation;
- D. the contract is for professional services; or
- E. the contract is awarded pursuant to the Public Building Energy Efficiency Act [6-23-1 to 6-23-10 NMSA 1978].

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

## ANNOTATIONS

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

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

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

**History:** Laws 1984, ch. 65, § 113.

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

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

**History:** Laws 1984, ch. 65, § 114.

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

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

**History:** Laws 1984, ch. 65, § 115.

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

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

**History:** Laws 1984, ch. 65, § 116.

### **13-1-144. Cost or price analysis.**

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

**History:** Laws 1984, ch. 65, § 117.

### **13-1-145. Cost principles; regulations.**

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

**History:** Laws 1984, ch. 65, § 118.

### **13-1-146. Requirement for bid security.**

Bid security shall be required of bidders for construction contracts procured by competitive sealed bid 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.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts § 60.

72 Supp. C.J.S. Public Contracts §§ 41 to 43.

### **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.

### **13-1-149. 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 13-4-1 NMSA 1978 et seq.

**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.

**Where 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 multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under twenty-five thousand dollars (\$25,000), may be entered into for any period of time deemed to be in the best interests of the state agency or a local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is twenty-five thousand dollars (\$25,000) or more, the term shall not exceed eight years, including all extensions and renewals, except that for any such contract entered into pursuant to the Public Building Energy Efficiency Act [6-23-1 to 6-23-10 NMSA 1978], the term shall not exceed ten years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore. A contract for professional services, except for services required to support or operate federally certified medicaid, financial assistance and child support enforcement management information or payment systems, may not exceed a term of four years, including all extensions and renewals, except that 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.

**History:** Laws 1984, ch. 65, § 123; 1987, ch. 348, § 14; 1993, ch. 225, § 1; 1993, ch. 231, § 13.

## ANNOTATIONS

**The 1993 amendments.** - Identical amendments to this section were enacted by Laws 1993, ch. 225, § 1, and Laws 1993, ch. 231, § 13, both approved April 6, 1993 and both effective June 18, 1993, adding the language beginning "except that for any such contract" at the end of the second sentence, and inserting the language beginning ", except for services required" and ending "or payment systems," in the fourth sentence. This section is set out as amended by Laws 1993, ch. 231, § 13. See 12-1-8 NMSA 1978.

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

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

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

A. the estimated requirements cover the period of the contract and are reasonably firm and continuing; and

B. the contract will serve the best interests of the state agency or a local public body.

**History:** Laws 1984, ch. 65, § 124.

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

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

**History:** Laws 1984, ch. 65, § 125.

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

A multiple source award may be made pursuant to Section 83 [13-1-110 NMSA 1978] of the Procurement Code 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.

**History:** Laws 1984, ch. 65, § 126.

### **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.

### **13-1-155. Procurement of used items; appraisal required.**

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.

**History:** Laws 1984, ch. 65, § 128; 1987, ch. 348, § 15.

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



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

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

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

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

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

### **13-1-157. Receipt; inspection; acceptance or rejection of deliveries.**

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

**History:** Laws 1984, ch. 65, § 130.

### **13-1-158. Payments for purchases.**

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

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 state central purchasing office or state 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 by the state, the state central purchasing office or state 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. Upon certification by the state central purchasing office or the state 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 sixty days of the date of certification. After the sixtieth 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.

D. 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.

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

## ANNOTATIONS

**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.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

**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**

**Health and environment department.** - Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, referred to in this section, and enacts a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 creates the department of environment.

### **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.

**History:** Laws 1984, ch. 65, § 137.

### **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 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:

A. the unilateral right of a state agency or a local public body to order in writing:

- (1) changes in the work within the scope of the contract; and
- (2) temporary stoppage of the work or the delay of performance;

- B. variations occurring between estimated quantities of work in a contract and actual quantities;
- C. liquidated damages;
- D. permissible excuses for delay or nonperformance;
- E. termination of the contract for default;
- F. termination of the contract in whole or in part for the convenience of the state agency or a local public body;
- G. 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;
- H. identification of subcontractors by bidders in bids; and
- I. uniform subcontract clauses in contracts.

**History:** Laws 1984, ch. 65, § 143.

### **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**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts § 86; 65 Am. Jur. 2d Public Works and Contracts § 145.

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.

### **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.

### **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.

### **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.

### **13-1-176. Protest; notice of determination.**

A copy of the determination issued under Section 148 [13-1-175 NMSA 1978] of the Procurement Code shall immediately be mailed to the protestant and other bidders or offerors involved in the procurement.

**History:** Laws 1984, ch. 65, § 149.

### **13-1-177. Authority to debar or suspend.**

The state purchasing agent or a central purchasing office, after reasonable notice to the business involved, shall have authority to recommend to the governing authority of a state agency or a local public body the suspension or debarment of a business for cause from consideration for award of contracts, other than contracts for professional services. The debarment shall not be for a period of more than three years, and a suspension shall not exceed three months. The authority to debar or suspend shall be exercised by the governing authority of a state agency or a local public body in accordance with regulations which shall provide for reasonable notice and a fair hearing prior to suspension or debarment.

**History:** Laws 1984, ch. 65, § 150.

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

The causes for debarment or suspension occurring within three years of a procurement include but are not limited to the following:

A. conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

B. conviction of a bidder, offeror or contractor under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records or receiving stolen property;

C. conviction of a bidder, offeror or contractor under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation by a bidder, offeror or contractor of contract provisions, as set forth in this subsection, of a character which is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action:

(1) willful failure to perform in accordance with one or more contracts, provided that this failure has occurred within a reasonable time preceding the decision to impose debarment; or

(2) a history of failure to perform, or of unsatisfactory performance of, one or more contracts, provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

E. any other cause occurring within three years of a procurement which the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

F. for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code within three years of a procurement.

**History:** Laws 1984, ch. 65, § 151.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

### **13-1-179. Debarment or suspension; determination.**

The governing authority of a state agency or a local public body shall issue a written determination to debar or suspend. The determination shall:

A. state the reasons for the action taken; and

B. inform the debarred or suspended business involved of its rights to judicial review pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

**History:** Laws 1984, ch. 65, § 152.

### **13-1-180. Debarment or suspension; notice of determination.**

A copy of the determination under Section 152 [13-1-179 NMSA 1978] of the Procurement Code shall immediately be mailed to the debarred or suspended business.

**History:** Laws 1984, ch. 65, § 153.

### **13-1-181. Remedies prior to award.**

If, prior to award, the state purchasing agent or a central purchasing office makes a determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be cancelled.

**History:** Laws 1984, ch. 65, § 154.

### **13-1-182. Ratification or termination after an award.**

If, after an award, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of a contract is in violation of law and if the business awarded the contract has not acted 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 business awarded the contract 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.

### **13-1-183. Judicial review; limitation; venue.**

A. All actions authorized by the Procurement Code for judicial review of a determination shall be based upon the records of the central purchasing office and all evidence submitted by the protestant and other interested parties. All actions for judicial review must be filed within thirty days of receipt of notice of the determination as follows:

(1) in the first judicial district court in Santa Fe county when the decision to be reviewed is made by a state agency located in Santa Fe county; or

(2) in the district court in which a state agency or a local public body is located when the decision to be reviewed is made by a local public body or a state agency not located in Santa Fe county.

B. All determinations under the Procurement Code made by a state agency or a local public body shall be sustained unless arbitrary, capricious, contrary to law, clearly erroneous or not based upon substantial evidence.

**History:** Laws 1984, ch. 65, § 156.

#### **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

#### **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.** - As to 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.

#### **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

### **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 purchases of American-made motor vehicles required.**

Any state agency shall only purchase cars and trucks assembled in north America.

**History:** Laws 1984, ch. 65, § 161.

### **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.

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.** - As to powers and duties of corrections industries commission, see 33-8-6 NMSA 1978.

**Correction Industries Act.** - See 33-8-1 NMSA 1978 and notes thereto.

### **13-1-190. Unlawful employee participation prohibited.**

A. Except as permitted by the University Research Park Act [21-28-1 to 21-28-25 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.

### **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts § 26.

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.** - As to bribery of public officer or public employee, see 30-24-1 NMSA 1978.

As to demanding or receiving bribe by public officer or public employee, see 30-24-2 NMSA 1978.

As to soliciting or receiving illegal kickback, see 30-41-1 to 30-41-3 NMSA 1978.

### **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 attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of any provision of the Procurement Code. Any penalty collected under the provisions of this section shall be credited to the general fund of the political subdivision in which the violation occurred and on whose behalf the suit was brought.

**History:** Laws 1984, ch. 65, § 169.

## **ANNOTATIONS**

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

### **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.

## **ANNOTATIONS**



**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

### **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.** - As to soliciting or receiving illegal kickbacks, bribes or rebates, see 30-41-1 NMSA 1978 et seq.

### **13-1-199. Misdemeanor.**

Any business or person which violates the Procurement Code is guilty of a misdemeanor.

**History:** Laws 1984, ch. 65, § 172.

#### **ANNOTATIONS**

**Cross-references.** - As to sentencing for misdemeanors, see 31-19-1 NMSA 1978.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

## **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 [13-1A-1 to 13-1A-4 NMSA 1978] 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 [13-1A-1 to 13-1A-4 NMSA 1978], "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 [13-1A-1 to 13-1A-4 NMSA 1978] 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 CONVERSION**

### **13-1B-1. Short title.**

Sections 1 through 7 [13-1B-1 to 13-1B-7 NMSA 1978] of this act may be cited as the "Alternative Fuel Conversion Act".

**History:** Laws 1992, ch. 58, § 1.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### 13-1B-2. Definitions.

As used in the Alternative Fuel Conversion Act [13-1B-1 to 13-1B-7 NMSA 1978]:

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

B. "department" means the general services department;

C. "fund" means the alternative fuel conversion loan fund;

D. "post-secondary institution" means two- and four-year public post-secondary institutions; and

E. "vehicle" means a passenger car or light duty truck.

**History:** Laws 1992, ch. 58, § 2.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### 13-1B-3. Conversion of vehicles; exemptions.

A. The agencies and departments of state government and the post-secondary institutions shall convert vehicles that are purchased or leased after the effective date of the Alternative Fuel Conversion Act [13-1B-1 to 13-1B-7 NMSA 1978] from gasoline to alternative fuel according to the following schedule:

(1) if three or more vehicles are purchased in the eighty-second fiscal year or leased in the eighty-second fiscal year by a lease initiated in that year, then thirty percent of these vehicles shall be converted;

(2) if three or more vehicles are purchased in the eighty-third fiscal year or leased in the eighty-third fiscal year by a lease initiated in that year, then sixty percent of these vehicles shall be converted; and

(3) one hundred percent of the vehicles that are purchased in the eighty-fourth fiscal year or leased in the eighty-fourth fiscal year by a lease initiated in that year, and in each of the following fiscal years, shall be converted.

B. 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.

C. Law enforcement and emergency vehicles are exempt from the provisions of the Alternative Fuel Conversion Act. The department may exempt additional vehicles from the requirements of Subsection A of this section upon demonstration by the purchasing entity that alternative transportation fuels are unavailable at a cost approximately equivalent to the cost of gasoline within the normal driving range of these vehicles.

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

E. The agencies and departments of state government and the post-secondary institutions may submit loan applications to the department to acquire loans to facilitate the conversion of their vehicles.

**History:** Laws 1992, ch. 58, § 3.

## **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

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

A. The "alternative fuel conversion 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 Conversion Act [13-1B-1 to 13-1B-7 NMSA 1978].

B. The fund shall consist of earnings on balances in the fund, receipts from the repayment of loans made pursuant to the Alternative Fuel Conversion 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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **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 converting vehicles of the agencies and departments of state government and the post-secondary institutions from gasoline to alternative fuel.

B. A state agency or department or a post-secondary 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 converted.

C. The maximum amount loaned to convert a vehicle shall not exceed the actual cost of converting the vehicle or three thousand dollars (\$3,000), whichever is less.

**History:** Laws 1992, ch. 58, § 5.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

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

A. The department shall:

(1) administer the provisions of the Alternative Fuel Conversion Act [13-1B-1 to 13-1B-7 NMSA 1978], except that the provisions of Section 3 of that act shall be administered by the commission on higher education for its respective programs;

(2) establish a program to make loans to the agencies and departments of state government and the post-secondary institutions, individually or jointly, to facilitate the conversion of vehicles of the agencies and departments of state government and the post-secondary institutions in accordance with the Alternative Fuel Conversion 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 Conversion 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 Conversion 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.

## **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **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 conversion to 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 indebtedness of the fund.

C. Loans shall be made for a period of time not to exceed seven years with an annual interest rate of five 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.

## **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

## **ARTICLE 2 FREIGHT BILLS - AUDIT BY STATE**

### **13-2-1. [Freight bills; audit by state corporation commission.]**

All original freight bills paid by state agencies, educational institutions and other state institutions shall, immediately after payment, be forwarded to the state corporation commission for audit.

**History:** 1953 Comp., § 6-5-11.1, enacted by Laws 1965, ch. 245, § 1.

## **ARTICLE 3 PUBLIC PRINTING CONTRACTS**

**(Repealed by Laws 1984, ch. 65, § 175.)**

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

## **ANNOTATIONS**

**Repeals.** - Laws 1984, ch. 65, § 175, repeals 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. For provisions of former sections, see 1983 replacement pamphlet. For present comparable provisions, see 13-1-21 and 13-1-122 NMSA 1978.

Laws 1984, ch. 65, § 176, as amended by Laws 1984 (1st S.S.), ch. 2, § 1, makes Laws 1984, ch. 65 effective November 1, 1984.

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

As to county buildings upon change of county seat, see 4-34-3 NMSA 1978.

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

**"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. 65-5.

**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. 65-5.

**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." 1961-62 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. 1961-62 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. 1961-62 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. 1961-62 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 §§ 67 to 70.

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.

20 C.J.S. Counties § 162; 63 C.J.S. Municipal Corporations § 979; 72 Supp. C.J.S. Public Contracts §§ 12, 15, 16; 78 C.J.S. Schools and School Districts § 277; 81A C.J.S. States § 157.

### **13-4-2. Resident contractor defined; application of preference.**

A. A "resident contractor" is any person, firm, corporation or other legal entity if, at the time the contract is advertised for bids and at the time bids are opened, it has all required licenses and meets the following requirements:

(1) if the bidder is a corporation, it shall be incorporated in New Mexico and maintain its principal office and place of business in New Mexico and a majority of its outstanding shares shall be beneficially owned by one or more individual citizens who are domiciled in the state;

(2) if the bidder is a partnership, general or limited, or other legal entity, it shall maintain its principal office and place of business in New Mexico, and the partners or associates owning a majority beneficial interest shall be domiciled in the state. If one or more partners or associates are corporations, a majority of the outstanding shares of each corporation shall be beneficially owned by individual citizens who are domiciled in the state. If the entity is a trust, a majority of the beneficial interest of the trust shall be owned by individual citizens who are domiciled in the state;

(3) if the bidder is an individual, he shall maintain his principal office and place of business in New Mexico, and the individual shall be a citizen of and domiciled in the state; or

(4) if a bidder who is a telecommunications company as defined by Subsection M of Section 63-9A-3 NMSA 1978 or an affiliate of a telecommunications company has paid unemployment compensation to the employment security division of the labor department at the applicable experience rate for that employer pursuant to the New Mexico Unemployment Compensation Law [Chapter 51 NMSA 1978] on no fewer than ten employees who have performed services subject to contributions for the two-year period prior to issuance of notice to bid, the bidder will be considered to have fulfilled the requirements of Paragraph (1), (2) or (3) of this subsection. A successor to a previously qualified New Mexico contractor or resident contractor, where the creation of the bidder resulted from a court order, is entitled to credit for qualifying contributions paid by the previously qualified New Mexico contractor or resident contractor.

B. For purposes of this section:

(1) "affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with a telecommunications company through ownership of voting securities representing a majority of the total voting power of that entity; and

(2) "beneficially owned" or "beneficial interest" means exercising actual management and control of all operations including but not limited to financial decisions, financial liability, labor relations, supervision of field operations, purchases of goods, supplies and services, marketing and sales.

C. When bids are received only from nonresident contractors and resident contractors and the lowest responsible bid is from a nonresident contractor, the contract shall be awarded to the resident contractor whose bid is nearest to the bid price of the otherwise low nonresident contractor if the bid price of the resident contractor is made lower than the bid price of the nonresident contractor when multiplied by a factor of .95.

D. No contractor shall be treated as a resident contractor in the awarding of public works contracts by a state agency or a local public body unless the contractor has qualified with the state purchasing agent as a resident contractor pursuant to this section by making application to the state purchasing agent and receiving from him a certification number. The procedure for application and certification is as follows:

(1) the state purchasing agent shall prepare an application form for certification as a resident contractor, requiring such information and proof as he deems necessary to qualify the applicant under the terms of this section;

(2) the contractor seeking to qualify as a resident contractor shall complete the application form and submit it to the state purchasing agent prior to the submission of a bid on which the contractor desires to be given a preference;

(3) the state purchasing agent shall examine the application and if necessary may seek additional information or proof so as to be assured that the prospective contractor is indeed entitled to certification as a resident contractor. If the application is in proper form, the state purchasing agent shall issue the contractor a distinctive certification number which is valid until revoked and which, when used on bids and other purchasing documents for state agencies or local public bodies, entitles the contractor to treatment as a resident contractor under Subsection C of this section; and

(4) the certification number issued pursuant to Paragraph (3) of this subsection shall be revoked by the state purchasing agent upon making a determination that the contractor no longer meets the requirements of a resident contractor as defined in this section.

**History:** 1978 Comp., § 13-4-2, enacted by Laws 1984, ch. 66, § 2; 1988, ch. 84, § 3; 1989, ch. 310, § 2.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1984, ch. 66, § 2, repeals former 13-4-2 NMSA 1978, as amended by Laws 1965, ch. 185, § 2. For provisions of former section, see 1983 replacement pamphlet.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 67 to 70.

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, a board, a commission of the state or by any political subdivision thereof, or in any construction or maintenance to which the state, or any political subdivision thereof, has granted aid, preference shall be given to materials produced, grown, processed or manufactured in New Mexico by citizens or residents thereof; and such materials shall be used where the same are deemed satisfactory for the intended use. In any case where, in the judgment of the different officers, boards, commissions or other authority in this state, now or hereafter vested with the power of contracting for material used in the construction or maintenance of public works hereinabove referred to, 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, then 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.

## **ANNOTATIONS**

**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. 1933-34 Op. Att'y Gen. 109.

**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. 1933-34 Op. Att'y Gen. 109.

**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.

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 13-4-11 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.

## **ANNOTATIONS**

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

### **13-4-11. Minimum wages on public works; weekly payment; posting wage scale; withholding funds.**

Every contract or project in excess of twenty thousand dollars (\$20,000) to which the state or any political subdivision thereof is a party 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 which requires or involves the employment of mechanics, laborers or both shall contain a provision stating the minimum wages to be paid to various classes of laborers and mechanics, which shall be based upon the wages that will be determined by the director of the labor and industrial division of the labor department to be prevailing for the corresponding classes 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 any 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 not less than those stated in the minimum wage rates issued for the project.

A. For the purpose of making wage determinations, the director of the labor and industrial division of the labor department shall conduct a continuing program for the obtaining and compiling of wage-rate information and shall encourage the voluntary submission of wage-rate data by contractors, contractors' associations, labor organizations, interested persons and public officers. Before making a determination of wage rates for any project, he shall give due regard to the information thus obtained. Whenever the director deems that the data at hand are insufficient to make a wage determination, he may have a field survey conducted for the purpose of obtaining sufficient information upon which to make determination of wage rates. Any interested person shall have the right to submit to the director written data, views and arguments why the wage determination should be changed.

B. The scale of wages 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; and it is further provided that there may be withheld from the contractor, subcontractor, employer or any person acting as a contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics 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 to be paid to laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractor, employer or any person acting as a contractor or their agents.

C. The director of the labor and industrial division of the labor department shall have authority to issue rules and regulations necessary to administer and accomplish the purposes of the Public Works Minimum Wage Act [13-4-11 to 13-4-17 NMSA 1978].

**History:** 1953 Comp., § 6-6-6, enacted by Laws 1965, ch. 35, § 1; 1979, ch. 35, § 1; 1991, ch. 224, § 1.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1965, ch. 35, § 1, repeals 6-6-6, 1953 Comp., relating to withholding wages and the Minimum Wage Act, and enacts the above section.

**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.

**Chief of the labor and industrial bureau.** - Section 9-8-10B NMSA 1978, which created the labor and industrial bureau within the employment services division of the human services department, the head of which bureau was designated a chief by 9-8-10A NMSA 1978, was repealed by Laws 1981, Chapter 88. Laws 1979, Chapter 204 establishes a labor and industrial commission, headed by a labor commissioner, and provides that all personnel, etc., of the labor and industrial bureau of the employment services division of the human services department are transferred to the labor and industrial commission. Laws 1987, ch. 342, § 33C provides that all references in law to the labor commissioner shall be construed as references to the director of the labor and industrial division of the department of labor.

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

**Where 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.

**Does not apply.** - Where 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.



**Section inapplicable where 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 where cables were installed in preexisting tunnels. *Universal Communications Sys. v. Smith*, 104 N.M. 754, 726 P.2d 1384 (1986).

**Is 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*, 89 N.M. 563, 555 P.2d 684 (1976).

**Is 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.

**Resembles Davis-Bacon Act.** - The New Mexico statute is practically identical with the Davis-Bacon Act (40 U.S.C. § 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*, 64 N.M. 204, 326 P.2d 1088 (1958).

**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*, 64 N.M. 204, 326 P.2d 1088 (1958).

**Employer cannot be ordered to pay additional wages.** - This section expressly confers the power to determine the prevailing wage but does not 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 A and B of 13-4-14 NMSA 1978 must be followed. *Grauerholtz v. New Mexico Labor & Indus. Comm'n*, 104 N.M. 674, 726 P.2d 351 (1986).

**Submission of false wage rate data may be perjury or false swearing.** - See 1963-64 Op. Att'y Gen. No. 63-160.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 65 Am. Jur. 2d Public Works and Contracts §§ 204 to 233.

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. Definition of the term "wages".**

A. As used in Section 13-4-11 NMSA 1978, "wages", "scale of wages", "wage rates", "minimum wages" and "prevailing wages" include:

(1) the basic hourly rate of pay; and

(2) the amount of:

(a) the rate of contribution irrevocably made by a contractor, subcontractor, employer or any person acting as a contractor to a trustee or a third person pursuant to a fund, plan or program; and

(b) the rate of costs to a contractor, subcontractor, employer or any person acting as a contractor which reasonably may be anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected for: 1) medical or hospital care; 2) pensions on retirement or death; 3) compensation for injuries or illness resulting from occupational activity; or 4) insurance to provide for any of the foregoing; and for: 5) unemployment benefits; 6) life insurance; 7) disability and sickness insurance; 8) accident insurance; 9) vacation and holiday pay; 10) costs of apprenticeship or other similar programs; or for 11) other bona fide fringe benefits; but only where the contractor, subcontractor, employer or any person acting as a contractor is not required by other federal, state or local law to provide any of the foregoing or similar benefits.

B. The obligation of a contractor, subcontractor, employer or person acting as a contractor to make payment in accordance with the prevailing wage determinations of the director of the labor and industrial division of the labor department, insofar as

Section 13-4-11 NMSA 1978 or other sections of legislative acts incorporating Section 13-4-11 NMSA 1978 are concerned, may be discharged by:

- (1) the making of payments in cash;
- (2) the making of contributions of a type referred to in Subparagraph (a) of Paragraph (2) of Subsection A of this section; or
- (3) the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in Subparagraph (b) of Paragraph (2) of Subsection A of this section or any combination thereof where the aggregate of any payments or contributions and costs therefor is not less than the rate of pay described in Section 13-4-11 NMSA 1978 plus the amount referred to in this section.

C. The provisions of this section shall not affect existing contracts or contracts resulting from bids outstanding on July 15, 1965.

**History:** 1953 Comp., § 6-6-6.1, enacted by Laws 1965, ch. 35, § 2; 1991, ch. 224, § 2.

### ANNOTATIONS

**The 1991 amendment**, effective July 1, 1991, substituted "Section 13-4-11 NMSA 1978" for "Section 6-6-6 New Mexico Statutes Annotated, 1953 Compilation" throughout the section; inserted "employer or any person acting as a contractor" following "subcontractor" throughout the section; in Subsection B, substituted "director of the labor and industrial division of the labor department" for "state labor commissioner" in the introductory paragraph, "Subparagraph (a) of Paragraph (2) of Subsection A of this section" for "Subsection A (2a)" in Paragraph (2), and "Subparagraph (b) of Paragraph (2) of Subsection A of this section" for "Subsection A (2b)" in Paragraph (3); and made minor stylistic changes throughout the section.

**State labor commissioner.** - Pursuant to Laws 1987, ch. 342, § 33, all references in law to the labor commissioner shall be construed as references to the director of the labor and industrial division of the department of labor.

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

Every contract within the scope of the Public Works Minimum Wage Act [13-4-11 to 13-4-17 NMSA 1978] shall contain further provision that in the event it is found by the director of the labor and industrial division of the labor department that any laborer or mechanic employed on the site of the project has been or is being paid as a result of a willful violation a rate of wages less than the rate of wages required, the contracting agency may, by written notice to the contractor, subcontractor, employer or person acting as a contractor terminate their right to proceed with the work or such part of the work as to which there has been a willful failure to pay the required wages, and the contracting agency may prosecute the work to completion by contract or otherwise, and

the contractor or person acting as a contractor and his sureties shall be liable to the state for any excess costs occasioned thereby. Any party receiving notice of termination of his project or subcontract under 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.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1965, ch. 35, § 3, repeals 6-6-7, 1953 Comp., relating to failure to pay minimum wage, and enacts the above section.

**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.

**State labor commissioner.** - Pursuant to Laws 1987, ch. 342, § 33, all references in law to the labor commissioner shall be construed as references to the director of the labor and industrial division of the department of labor.

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

A. The director of the labor and industrial division of the labor department shall certify to the contracting agency the names of persons or firms he has found to have disregarded their obligations to employees under the Public Works Minimum Wage Act [13-4-11 to 13-4-17 NMSA 1978] and the amount of arrears. The contracting agency is authorized and directed to 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, any wages found due such workmen 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 he 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. Any 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 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

his sureties, conferred by law upon such 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 of the labor and industrial division of the labor department 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 due and liquidated damages provided for in Subsection C of this section.

C. In the event of any violation of the Public Works Minimum Wage Act, the contractor, subcontractor, employer or any person acting as a contractor responsible for the violation shall be liable to any affected employee for his unpaid wages. In addition, the contractor, subcontractor, employer or any person acting as a contractor shall be liable to any affected employee for liquidated damages in the sum of ten dollars (\$10.00) for each calendar day on which a contractor, subcontractor, employer or any person acting as a contractor has willfully required or permitted an individual laborer or mechanic to work in violation of the provisions of the Public Works Minimum Wage Act.

**History:** 1953 Comp., § 6-6-8, enacted by Laws 1965, ch. 35, § 4; 1991, ch. 224, § 4.

### **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1965, ch. 35, § 4, repeals 6-6-8, 1953 Comp., relating to payment of wages wrongfully withheld and rights of workers, and enacts the above section.

**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.

**State labor commissioner.** - Pursuant to Laws 1987, ch. 342, § 33, all references in law to the labor commissioner shall be construed as references to the director of the labor and industrial division of the department of labor.

**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, 104 N.M. 674, 726 P.2d 351 (1986).

### **13-4-15. Appeals.**

A. Any interested person may appeal any determination, finding or action of the director of the labor and industrial division of the labor department made pursuant to the Public Works Minimum Wage Act [13-4-11 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 such rules and regulations as it deems necessary for the prompt disposition of appeals. A copy of the rules and regulations shall be filed with the librarian of the supreme court 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 such 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 reviewed by the district court in Santa Fe county or in the county in which the contract affected is to be performed. Proceedings for review shall be instituted by filing a petition in the court within thirty days after mailing notice of the final decision of the board. Copies of the petition shall be served upon the director of the labor and industrial division of the labor department and all parties of record. The review shall be conducted by the court without a jury and shall be confined to the record of the proceedings before the board. The findings of fact of the board shall be binding upon the district court when supported by substantial evidence. The court may affirm the decision of the board or remand the case for further proceedings. The court may reserve or modify the decision because the administrative findings, inferences, conclusions or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the board;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion.

An aggrieved party may obtain a review of any final judgment of the district court made pursuant to the Public Works Minimum Wage Act by appeal to the supreme court, which shall be taken as in other civil cases.

**History:** 1953 Comp., § 6-6-8.1, enacted by Laws 1963, ch. 304, § 5; 1991, ch. 224, § 5.

## ANNOTATIONS

**Cross-references.** - For filing of rules and regulations, see 14-4-1 NMSA 1978 et seq.

**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.

**State labor commissioner.** - Pursuant to Laws 1987, ch. 342, § 33, all references in law to the labor commissioner shall be construed to as references to the director of the labor and industrial division of the department of labor.

**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*, 81 N.M. 288, 466 P.2d 565 (1970).

### 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 to bid.]

This act [13-4-11 to 13-4-17 NMSA 1978] shall not effect [affect] any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this act.

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

### **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 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 repeals former 13-4-18 NMSA 1978, as amended by Laws 1975, ch. 251, § 1, and enacts the above section, effective June 19, 1987. For the provisions of the former section, see the 1985 Replacement Pamphlet.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.

**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. Electric Supply Co. v. Kitchens Constr., Inc.*, 106 N.M. 753, 750 P.2d 114 (1988).

**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.*, 40 N.M. 33, 53 P.2d 459 (1935).

**Bond requirements.** - "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.*, 81 N.M. 23, 462 P.2d 608 (1969).

**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.*, 99 N.M. 186, 656 P.2d 236 (1982).

**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., 106 N.M. 140, 740 P.2d 690 (1987).

**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., 99 N.M. 186, 656 P.2d 236 (1982).

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., 105 N.M. 37, 728 P.2d 447 (1986).

**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., 44 N.M. 483, 104 P.2d 906 (1940).

**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. American Sur. Co. v. Gilmore Oil Co., 83 F.2d 249 (10th Cir. 1936).

**Where 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, 32 N.M. 68, 251 P. 380 (1926).

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. American Employers' Ins. Co., 37 N.M. 212, 20 P.2d 928 (1933).

**Where 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. American Employers' Ins. Co., 37 N.M. 212, 20 P.2d 928 (1933).

**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, 56 N.M. 772, 251 P.2d 260 (1952).

**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.*, 81 N.M. 23, 462 P.2d 608 (1969).

**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.

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 § 297.

**13-4-19. Rights of person furnishing labor or material and right of state with respect to taxes due.**

A. Every person, firm or corporation who has furnished labor or material in the prosecution of work provided for in such contract, in respect of which a payment bond is furnished under Section 13-4-18 NMSA 1978, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, 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, shall have the right to sue on such payment bond for the amount of the balance thereof unpaid at the time of the institution of such suit, and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the contractor furnishing such payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed, and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or his residence, or in any manner in which the service of summons in civil process is authorized by law.

B. Claimant in such 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 such action within thirty days after giving such notice. The obligee and any person, firm, corporation or the state having a cause of action on such bond may be admitted on motion as a party to such action, and the court shall determine the rights of all parties thereto. If the amount realized on such bond be insufficient to discharge all claims in full, such amount shall be distributed among the parties entitled thereto pro rata.

C. Except for suits by the state with respect to taxes, which shall be brought in the name of the bureau of revenue [abolished], every suit instituted under this section shall be brought in the name of the state of New Mexico 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 bureau of revenue [abolished], shall be commenced after the expiration of one year after the date of final settlement of such contract. The date of final settlement herein shall be that date set by the obligee in the final closing and settlement of payment, if any, due the contractor. The state of New Mexico shall not be liable for the payment of any costs or expenses of any such suit.

D. The obligee named in said bond is authorized and directed to furnish to any person, firm or corporation making application therefor who submits an affidavit that he or it has supplied labor or materials for such work and payment therefor has not been made or that he or it is being sued on any such bond, or to the bureau of revenue [abolished], a

certified copy of such 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 such 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 such certified copies and certified statements such fees as the obligee fixes to cover the cost of preparation thereof.

**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.

## ANNOTATIONS

**Meaning of "bureau of revenue".** - The bureau of revenue, referred to in Subsections C and D, was abolished, and its jurisdiction, powers and duties were transferred to the revenue division of the taxation and revenue department. See Laws 1977, ch. 249, §§ 3, 4 and 5. However, Laws 1986, ch. 20, § 122 amended 9-11-4 NMSA 1978 to delete reference to the revenue division in the taxation and revenue department. See 9-11-4 NMSA 1978.

**Legislative intent.** - Where 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*, 110 N.M. 173, 793 P.2d 855 (1990).

**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.*, 99 N.M. 186, 656 P.2d 236 (1982).

**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*, 74 N.M. 233, 392 P.2d 577 (1964).

**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*, 79 N.M. 467, 444 P.2d 978 (1968).

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.*, 99 N.M. 186, 656 P.2d 236 (1982).

**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, 74 N.M. 233, 392 P.2d 577 (1964).

**And be "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, 79 N.M. 467, 444 P.2d 978 (1968).

**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, 74 N.M. 233, 392 P.2d 577 (1964).

**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, 56 N.M. 772, 251 P.2d 260 (1952).

**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., 102 N.M. 22, 690 P.2d 1016 (1984).

**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., 40 N.M. 33, 53 P.2d 459 (1935).

**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., 106 N.M. 753, 750 P.2d 114 (1988).

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., 106 N.M. 753, 750 P.2d 114 (1988).

**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., 102 N.M. 22, 690 P.2d 1016 (1984).

**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., 106 N.M. 140, 740 P.2d 690 (1987).

**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., 100 N.M. 440, 671 P.2d 1151 (Ct. App. 1983).

**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.

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 § 1178; 72 Supp. Public Contracts §§ 44, 46 to 50; 78 C.J.S. Schools and School Districts § 297; 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., 99 N.M. 186, 656 P.2d 236 (1982).

### **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, repeals 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. For provisions of former sections, see 1983 replacement pamphlet. For present comparable provisions, see 13-1-123 and 13-1-124 NMSA 1978.

Laws 1984, ch. 65, § 176, as amended by Laws 1984 (1st S.S.), ch. 2, § 1, makes Laws 1984, ch. 65 effective November 1, 1984.

### **13-4-27. Definitions.**

As used in Sections 13-4-27 through 13-4-30 NMSA 1978:

A. "central purchasing office" means the governing authority of a state agency or local public body that enters into a public works contract pursuant to applicable state laws. The term "owner" may be used in contract documents and will have the same meaning as central purchasing office;

B. "contractor" means a person or other legal entity entering into a public works contract with the state;

C. "public works" means a construction project of the state, not including highway projects of the state highway department, to construct, repair, alter or extend an improvement on real property or to improve real property owned, used or leased by the state;

D. "retainage" means the amount of money otherwise due to a contractor or subcontractor under a public works contract that may be withheld by a contracting authority to secure performance of the contract; and

E. "subcontractor" means a person or other legal entity who contracts with a contractor to work, or who has fulfilled an obligation to a contractor by contributing toward the completion of work, on a public works project.

**History:** Laws 1985, ch. 124, § 1; 1987, ch. 324, § 1.

### **13-4-28. Prompt payment; public works contracts.**

Unless the contracting parties agree otherwise, public works contracts shall provide that all payment for amounts due and owing shall be paid monthly or within twenty-one

working days after receipt of the request for payment by the central purchasing office. The contract shall also provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts due and owing within five working days after receipt of payment from the central purchasing office or the contractor or subcontractor.

**History:** Laws 1985, ch. 124, § 2.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 99, 108.

72 Supp. C.J.S. Public Contracts §§ 31, 33.

### **13-4-29. Retainage.**

A. Unless good cause exists, the central purchasing office shall not withhold an amount in excess of five percent of payments due and owing a contractor and shall not withhold an amount in excess of two percent of the total contract price as retainage after it determines that the contract is substantially completed.

B. 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 require retainage provisions in conflict with the provisions of this subsection.

C. On completion and acceptance of each separate building, public work or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

**History:** 1978 Comp., § 13-4-29, enacted by Laws 1989, ch. 217, § 1.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1989, ch. 217, § 1 repeals former 13-4-29 NMSA 1978, as amended by Laws 1987, ch. 324, § 2, relating to retainage, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1988 Replacement Pamphlet.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Works and Contracts §§ 100 to 104.

72 Supp. C.J.S. Public Contracts §§ 32 to 39.

### **13-4-30. Bad-faith disputes.**

If a court of competent jurisdiction determines that the central purchasing office or a contractor has disputed an amount due under a public works contract, without a reasonable basis, the prevailing party is entitled to receive reasonable attorney's fees and court costs.

**History:** Laws 1985, ch. 124, § 4.

### **13-4-31. Short title.**

Sections 1 through 12 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:

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 or subcontractor of some proceeding in which his interests are involved or to inform him of some fact which is his right to know. Notice may be sent to a contractor or

subcontractor 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.

## **ANNOTATIONS**

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

### **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, whichever is greater. Any person submitting a bid shall in his bid set forth:

(1) the name and location 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 nature of the work which 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 any person which fails to comply with the provisions of Subsection A of this section is a non-responsive bid which shall not be accepted by a using agency.

**History:** Laws 1988, ch. 18, § 4; 1989, ch. 296, § 1.

### **13-4-35. Exemption.**

With the exclusion of that portion of work covering street lighting and traffic signals, the Subcontractors Fair Practices Act 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.

## **ANNOTATIONS**

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

### **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 listed subcontractor becomes bankrupt or insolvent;

(3) when the listed subcontractor fails or refuses to perform his subcontract;

(4) 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;

(5) when a bid alternate accepted by the using agency causes the original low subcontractor's bid not to be low;

(6) when the contractor can substantiate to the using agency that a listed subcontractor's bid is incomplete; or

(7) when the listed subcontractor fails or refuses to meet the bond requirements of the contractor.

B. Prior to approval of the contractor's request for such substitution, the using agency shall give notice in writing to the listed subcontractor of the contractor's request to substitute and of the reasons for such request. Such 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 such 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 such 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 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.

**History:** Laws 1988, ch. 18, § 6.

### **13-4-37. Bond requirements.**

A. It shall be the responsibility of each subcontractor submitting bids 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 therefore, furnish to such contractor a bond issued by an admitted surety wherein the contractor shall be named the obligee, guaranteeing prompt and faithful performance of such 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 such subcontract, the contractor may reject such bid and make a substitution of another subcontractor subject to the provisions of Section 6 [13-4-36 NMSA 1978] of the Subcontractors Fair Practices Act. 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 such bond shall be borne by the subcontractor; and

(2) clearly specifies the amount and requirements of such bond.

**History:** Laws 1988, ch. 18, § 7.

### **13-4-38. Failure to specify subcontractor.**

If a contractor fails to specify a subcontractor in excess of the listing threshold, he represents that he is fully qualified to perform that portion himself and that he shall perform that portion 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, the contractor shall be guilty of violation of the Subcontractors Fair Practices Act and subject to the penalties provided in Section 11 [13-4-41 NMSA 1978] of the Subcontractors Fair Practices Act.

**History:** Laws 1988, ch. 18, § 8.

## **ANNOTATIONS**

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

### **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 two 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 six 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 such listed subcontractor to file such written notice within six working days shall be primary evidence of his agreement that an inadvertent clerical error was made.

C. The using agency shall, after a public hearing and in the absence of compelling reasons to the contrary, consent to the substitution of the intended contractor:

(1) if the contractor, the 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 eight working days from the time of the prime bid opening; or

(2) if such affidavits are filed by both the contractor and the intended subcontractor within such specified time but the subcontractor whom the contractor claims to have listed in error does not submit within six working days 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 such affidavits are filed by both the contractor and the intended subcontractor but the listed subcontractor has within six 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 public hearing to determine the validity of such claims. 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 which may have a bearing on the decision of the using agency.

**History:** Laws 1988, ch. 18, § 9.



### **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. A contractor who violates the provisions of the Subcontractors Fair Practices Act violates his own contract and the using agency shall:

(1) cancel the contract; or

(2) assess the contractor a penalty in an amount of not more than ten percent of the amount bid by the listed subcontractor, but in no case less than the difference of the amount between the listed subcontractor and the subcontractor used, which penalty shall be deposited into the fund out of which the contract is awarded. In any proceeding under this section, the contractor shall be entitled to a hearing after notice.

B. A violation of the provisions of the Subcontractors Fair Practices Act constitutes grounds for disciplinary action against a contractor, pursuant to regulations of the construction industries division of the regulation and licensing department.

C. A contractor, who attempts to circumvent the provisions of the Subcontractors Fair Practices Act shall be subject to the penalties established pursuant to this section.

D. 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.

### **ANNOTATIONS**

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

### **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 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. As to H class counties, see 4-44-3 NMSA 1978.

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

### 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, 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

**Subcontractors Fair Practices Act.** - See 13-4-31 NMSA 1978 and notes thereto.

## 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 [13-4A-1 to 13-4A-11 NMSA 1978]:

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 office of cultural affairs;

E. "public buildings" means those buildings under the control and management of the property control division of the general services department, the department of game and fish, the energy, minerals and natural resources department, the state highway and transportation department, the state fair commission, the supreme court, the commissioner of public lands, the office of cultural affairs, the governing boards of the state educational institutions and statutorily created post-secondary educational institutions, the state department of public education 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 which is chosen to be included in or immediately adjoining the

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.

#### **ANNOTATIONS**

**Compiler's note.** - Laws 1986, ch. 11, § 13, which had repealed this article effective January 1, 1990, was repealed by Laws 1989, ch. 178, § 2.

#### **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 [13-4A-1 to 13-4A-11 NMSA 1978].

**History:** Laws 1986, ch. 11, § 4.

#### **ANNOTATIONS**

**Appropriations.** - Laws 1993, ch. 367, § 72, effective April 8, 1993, provides that the appropriations authorized in that act include one percent for the art in public places fund pursuant to Section 13-4A-4 NMSA 1978, where applicable.

**Compiler's note.** - Laws 1986, ch. 11, § 13, which had repealed 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 [13-4A-1 to 13-4A-11 NMSA 1978].

**History:** Laws 1986, ch. 11, § 5; 1989, ch. 324, § 5.

### **ANNOTATIONS**

**Appropriations.** - Laws 1991, ch. 259, § 36, effective April 5, 1991, provides that, notwithstanding Section 13-4A-4 NMSA 1978 and where applicable, the appropriations authorized in the act shall not include one percent for the art in public places fund.

Laws 1991, ch. 261, § 16, effective April 5, 1991, provides that, pursuant to Section 13-4A-4 NMSA 1978 and where applicable, the appropriations authorized in the act include one percent for the art in public places fund.

Laws 1992, ch. 113, § 42, effective March 10, 1992, provides that, pursuant to 13-4A-4 NMSA 1978 and where applicable, the appropriations authorized in the act include one percent for the art in public places fund.

**Compiler's note.** - Laws 1986, ch. 11, § 13, which had repealed 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 [13-4A-1 to 13-4A-11 NMSA 1978] 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 [13-4A-1 to 13-4A-11 NMSA 1978].

**History:** Laws 1986, ch. 11, § 7.

#### **ANNOTATIONS**

**Compiler's note.** - Laws 1986, ch. 11, § 13, which had repealed 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 [13-4A-1 to 13-4A-11 NMSA 1978]. 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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 note.** - Laws 1986, ch. 11, § 13, which had repealed 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.

#### **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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

#### **13-4C-2. Definitions.**

As used in the Public Works Mediation Act [this article]:

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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

#### **13-4C-3. Application.**

The Public Works Mediation Act [this article] 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.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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 [this article] 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 [13-4-11 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.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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.

## **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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.

#### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

#### **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.

#### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

#### **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.

#### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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.

#### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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 [this article]. 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.

#### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

### **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 [this article], 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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 63, § 12 makes the Public Works Mediation Act effective on July 1, 1992.

## **ARTICLE 4D PUBLIC WORKS APPRENTICESHIP AND TRAINING**

### **13-4D-1. Short title.**

This act [13-4D-1 to 13-4D-8 NMSA 1978] may be cited as the "Public Works Apprenticeship and Training Act".

**History:** Laws 1992, ch. 74, § 1.

### **ANNOTATIONS**

**Cross-references.** - As to Apprenticeship Assistance Act, see 21-19A-1 NMSA 1978 et seq. As to apprenticeship council, see 50-7-3 NMSA 1978.

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **13-4D-2. Purpose.**

The purpose of the Public Works Apprenticeship and Training Act [13-4D-1 to 13-4D-8 NMSA 1978] 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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

#### **13-4D-3. Definitions.**

As used in the Public Works Apprentice and Training Act [13-4D-1 to 13-4D-8 NMSA 1978]:

A. "approved apprentice and training programs" means building trades apprenticeship and training programs in New Mexico that are recognized by the bureau of apprenticeship and training 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;

C. "director" means the director of the labor and industrial division of the labor department; and

D. "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.

### **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

#### **13-4D-4. Administration.**

A. The Public Works Apprentice and Training Act shall be administered by the public works bureau of the labor and industrial division of the labor department. The bureau shall collect employers' contributions in accordance with this 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 5 [13-4D-5 NMSA 1978] of the Public Works Apprenticeship and Training Act.

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 apprenticeship and training programs in New Mexico in which the employer is a participant or to the public works apprenticeship and training fund administered by the public works bureau of the labor and industrial division of the labor department. Contributions shall be made in the same manner and in the same amount as apprenticeship and training contributions required pursuant to wage rate determinations made by the director.

C. The director shall adopt rules and regulations necessary to implement the provisions of the Public Works Apprenticeship and Training Act [13-4D-1 to 13-4D-8 NMSA 1978].

**History:** Laws 1992, ch. 74, § 4.

### ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **13-4D-5. Fund created; disbursement of funds.**

There is created the "public works apprenticeship and training fund" in the labor and industrial division of the labor department. Contributions into the fund shall be as provided under the provisions of Section 4 [13-4D-4 NMSA 1978] of the Public Works Apprenticeship and Training Act. Funds contributed under the provisions of the Public Works Apprenticeship and Training Act [13-4D-1 to 13-4D-8 NMSA 1978] shall be distributed in the following manner:

A. no more than fifteen percent of the funds may be used by the public works bureau of the labor and industrial division of the labor department to hire staff to administer the funds collected by the division; and

B. the remainder of the funds shall be used for approved apprenticeship and training programs in New Mexico. The labor and industrial division of the labor department shall develop an annual budget to disburse funds to approved apprenticeship 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.

**History:** Laws 1992, ch. 74, § 5.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **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 [13-4D-1 to 13-4D-8 NMSA 1978] shall be included with all minimum wage determinations issued by the labor and industrial division of the labor department on all public works construction projects. The director shall also provide the contribution rate for approved apprentice and training programs, and that information shall be part of the public works construction projects.

B. The labor and industrial division of the labor department shall publish a list of approved apprentice and training programs in New Mexico.

**History:** Laws 1992, ch. 74, § 6.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **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 [13-4D-1 to 13-4D-8 NMSA 1978] 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.

## ANNOTATIONS

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

### **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 Apprenticeship and Training Act [13-4D-1 to 13-4D-8 NMSA 1978] by seeking an appeal as provided under the provisions of Section 13-4-15 NMSA 1978.

**History:** Laws 1992, ch. 74, § 8.

## **ANNOTATIONS**

**Effective dates.** - Laws 1992, ch. 74 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

## **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 which 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 may purchase insurance, establish reserves or provide a combination of insurance and reserves to:

(1) cover, in any amount not to exceed replacement cost, 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) cover, in any amount not to exceed replacement cost, any personal property which is destroyed or damaged by any peril; or

(3) cover, in any amount not to exceed replacement cost, 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 by the risk management advisory board.

D. The director of the risk management division shall include in his annual report to the legislature an inventory of all public buildings insured by the division, the estimated total value of such buildings, the total insured value of such buildings and the amount of any deductible or maximum loss provisions in the current insurance policy covering such 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 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; provided such claims shall only be paid to the extent of actual expenses which 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 such consulting and other contracts as may be necessary or desirable in carrying out the provisions of this section; and

(5) pay any 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 any 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 and paying assessments which 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 NMSA 1978 which 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 group 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.

I. The provisions of this section are effective July 1, 1990.

**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.

### ANNOTATIONS

**Cross-references.** - For insurance of building housing legislature, see 2-3-5 NMSA 1978.

As to insurance of state library building, see 2-3-7 NMSA 1978.

**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.

**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, repeals 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.

## **ARTICLE 6**

### **SALE OF PUBLIC PROPERTY**

#### **13-6-1. Disposition of obsolete, worn-out and unusable 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 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 personal property, give notification at least thirty days prior to its action making such deletion by sending a copy of its official finding and the proposed disposition of the property to the state auditor, 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.

D. The governing authority shall dispose of the item by negotiated sale to other state agencies, local public bodies, school districts, state educational institutions or municipalities or through the central purchasing office by means of competitive sealed bid or public auction or through the federal property assistance bureau of the general services department.

E. 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].

**History:** 1953 Comp., § 6-1-7.1, enacted by Laws 1961, ch. 100, § 1; Laws 1979, ch. 195, § 2; 1984, ch. 47, § 1; 1987, ch. 15, § 1; 1989, ch. 211, § 6.

## ANNOTATIONS

**Cross-references.** - As to managing surplus properties, see 15-4-2 and 15-4-3 NMSA 1978.

**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. 1961-62 Op. Att'y Gen. No. 62-26.

**But 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. 1963-64 Op. Att'y Gen. No. 64-13.

**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 § 67.

20 C.J.S. Counties § 149; 63 C.J.S. Municipal Corporations §§ 961 to 971; 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. Any state agency, local public body, school district or state educational institution is empowered to sell or otherwise dispose of real or personal property belonging to the state agency, local public body, school district or state educational institution. 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 personal property having a current resale value of more than five thousand dollars (\$5,000) may be made by any 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 state department of public education for school districts and the commission on higher education for state educational institutions.

B. Prior approval of the appropriate approval authority is not required if the property is to be used as a trade-in or exchange pursuant to the provisions of the Procurement Code.

C. The appropriate approval authority may condition the approval of the sale or other disposition of any real or personal property upon the property being offered for sale to a state agency, local public body, school district or state educational institution.

D. The appropriate approval authority shall have the power to credit any payment received from the sale of any such real or 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 personal property without warranty.

E. This section shall not apply to any computer software or hardware of any state agency.

F. 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 or the state highway commission.

**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.

## **ANNOTATIONS**

**Cross-references.** - As to sales subject to approval of legislature, see 13-6-3 NMSA 1978.

As to general powers and duties of state board of finance, see 6-1-1 NMSA 1978.

**Repeals and reenactments.** - Laws 1979, ch. 195, § 3, repeals former 13-6-2 NMSA 1978, relating to the sale of property by state agencies or local public bodies, and enacts the above section.

**Procurement Code.** - See 13-1-28 NMSA 1978 and notes thereto.



**Lease Authorization** - Senate Joint Resolution No. 16 (Laws 1993) authorizes the general services department to enter into a lease with the county of Bernalillo of certain property for the purpose of constructing a water retention pond until that county is able to negotiate an acceptable exchange for or purchase of the property with the department, provided the lease authorized shall not exceed five years.

**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. 1955-56 Op. Att'y Gen. No. 65-62.

**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. 1959-60 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. 1961-62 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.** 1963-64 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. 1963-64 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 \$500) 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. 1963-64 Op. Att'y Gen. No. 63-95.

**Veto power over gratis property transfers.** - Subsection A 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.

**Where 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 park and recreation division and others must get permission.** - This section gives the state park commission (now state park and recreation 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. 1961-62 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. 1963-64 Op. Att'y Gen. No. 63-125.

**Where permission not necessary.** - Where 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.

**Where 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 \$500) in value, and any such contract of purchase would be void as against public policy. 1963-64 Op. Att'y Gen. No. 64-13.

**Where 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; 63A Am. Jur. 2d Public Lands § 58; 72 Am. Jur. 2d States, Territories, and Dependencies §§ 66 to 70.

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 § 189; 81A C.J.S. States §§ 148 to 150.

### **13-6-2.1. Leases; board of finance approval.**

A. Any sale, trade or lease for a period of more than five years but less than twenty-five years in duration of real property belonging to any state agency, local public body, school district or state educational institution or any sale, trade or lease of such real property for a consideration of more than twenty-five thousand dollars (\$25,000) but less than one hundred thousand dollars (\$100,000) 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 as to those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico, the state land office or the state highway commission.

**History:** 1978 Comp., § 13-6-2.1, enacted by Laws 1989, ch. 380, § 1.

### **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 or the state highway commission.

**History:** 1953 Comp., § 6-1-8.1, enacted by Laws 1961, ch. 41, § 1; 1979, ch. 195, § 4; 1987, ch. 15, § 3.

### **ANNOTATIONS**

**Compiler's note.** - H.J.R. No. 7 (Laws 1990) approves and ratifies the transfer of the real property and improvements comprising the Rio Grande Gorge and Valley of Fires state parks from the energy, minerals and natural resources department to the bureau of land management.

H.J.R. No. 13 (Laws 1990) approves and ratifies the proposed trade of the Wortley hotel as consideration for the Montano store and corral pursuant to 13-6-3A NMSA 1978.

S.J.R. No. 2 (Laws 1990) resolves that the energy, minerals and natural resources department shall cause sale and liquidation of the state's real property located in King county, Washington and further resolves that the secretary of energy, minerals and natural resources is empowered hereby to take all actions necessary or expedient to accomplish sale of the real property at a reasonable price in the near future and use the proceeds to conduct the reclamation work, and that this resolution fulfills all the approval and ratification prerequisites for this sale of real property by the energy, minerals and natural resources department set forth in Paragraph A of 13-6-3 NMSA 1978.

**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.

**Also where 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.

**And where 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, since the statutory exemption applies only to such bodies. 1964 Op. Att'y Gen. No. 64-143.

**Such as 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.

**Where approval not needed.** - The state highway department (now state highway and transportation department) 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. 1961-62 Op. Att'y Gen. No. 62-54.

### **13-6-4. Definitions.**

As used in Sections 13-6-1 through 13-6-4 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, as amended.

**History:** 1978 Comp., § 13-6-4, enacted by Laws 1979, ch. 195, § 5; 1987, ch. 15, § 4.

### **ANNOTATIONS**

**Cross-references.** - As to definition of "municipality," see 3-1-2 NMSA 1978.

**Public School Code.** - See 22-1-1 NMSA 1978 and notes thereto.