

STATE OF ~~NEW MEXICO~~TEXAS
PROCUREMENT STATUTES

Commented [11]: Add materials used in construction must be made in the USA

Define Agency - recommend use of Agency throughout the Code vs State Purchasing Agent or Central Purchasing Office

DRAFT

ARTICLE 1 Procurement

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13-1-21. Application of preferences.

Commented [12]: Keep Title - Use Reciprocity language

A. For the purposes of this section:

- (1) "resident business" means a ~~New Mexico~~Texas resident business or a New York state business enterprise;
- (2) "~~New Mexico~~Texas resident business" means a business that is authorized to do and is doing business under the laws of this state and:
 - (a) that maintains its principal place of business in the state;
 - (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 that meets the requirements of Subparagraph (a) or (b) of this paragraph. As used in this section, "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;
- (3) "New York state business enterprise" means a business enterprise, including a sole proprietorship, partnership or corporation, that offers for sale or lease or other form of exchange, goods or commodities that are substantially manufactured, produced or assembled in New York state, or services, other than construction services, that are substantially performed within New York state. For purposes of construction services, a New York state business enterprise means a business enterprise, including a sole proprietorship, partnership or corporation, that has its principal place of business in New York state;
- (4) "resident manufacturer" means a person who offers materials grown, produced, processed or manufactured wholly in the state; provided, however, that a New York state business enterprise shall be deemed to be a resident manufacturer solely for the purpose of evaluating the New York state business enterprise's bid against the bid of a resident manufacturer that is not a New York state business enterprise "recycled content goods" means supplies and materials composed in whole or in part of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications; and
- (5) "virgin content goods" means supplies and materials that are wholly composed of
- (6) nonrecycled materials or do not meet minimum recycled content standards required by bid specification.

- 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. When bids are received for virgin content goods only or for recycled content goods only, Subsections B through F of this section shall apply.
- H. When bids are received for both recycled content goods and virgin content goods and the lowest responsible bid is for virgin content goods, the contract shall be awarded to:

- (1) a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .90 is made lower than the otherwise low virgin content goods bid price;
- (2) a resident business offering a bid on recycled content goods of equal quality if:
 - (a) the bid price of no resident manufacturer following application of the preference allowed in Paragraph (1) of this subsection can be made sufficiently low; and
 - (b) the lowest bid price of the resident business when multiplied by a factor of .90 is made lower than the otherwise low virgin content goods bid price; or
- (3) a nonresident business or nonresident manufacturer offering recycled content goods of equal quality if:
 - (a) the bid price of no resident business or resident manufacturer following application of the preference allowed in Paragraph (1) or (2) of this subsection can be made sufficiently low; and
 - (b) the lowest bid price of a nonresident offering recycled content goods when multiplied by a factor of .95 is made lower than the otherwise low virgin content bid price l.

I. When bids are received for both recycled content goods and virgin content goods and the lowest responsible bid is for recycled content goods offered by a nonresident business or nonresident manufacturer, the contract shall be awarded to

- (1) a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price; or
- (2) a resident business offering a bid on recycled content goods of equal quality if:
 - (a) the bid price of no resident manufacturer following application of the preference allowed in Paragraph (1) of this subsection can be made sufficiently low; and
 - (b) the lowest bid price of the resident business when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price offered by a nonresident business or manufacturer.

- J. When bids are received for both recycled content goods and virgin content goods and the lowest responsible bid is for recycled content goods offered by a resident business, the contract shall be awarded to a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price.
- K. 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).
- L. The provisions of this section shall not apply to the purchase of buses from a resident manufacturer or a ~~New Mexico~~Texas resident business that manufactures buses in ~~New Mexico~~Texas. It is the purpose of this subsection to:
 - (1) allow any bus manufacturer or business that manufactures buses to compete openly for public procurement contracts in ~~New Mexico~~Texas without giving preference to a business based on the location of the place of manufacture of the buses;
 - (2) give resident manufacturers and ~~New Mexico~~Texas resident businesses that manufacture buses an equal opportunity to sell their buses in states that have reciprocal preference laws; and
 - (3) eliminate all different treatment of any kind under ~~New Mexico~~Texas law and by all political jurisdictions in the state between ~~New Mexico~~Texas resident businesses and manufacturers that manufacture buses and businesses in other states that manufacture and sell buses.

13-1-21.1. Repealed.

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.

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

13-1-28. Short title.

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

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

- A. The Procurement Code [13-1-28 NMSA 1978] 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

Commented [13]: Tweak for Texas. See new legislation adding GC 2267

13-1-30. Application of the code.

- A. Except as otherwise provided in the Procurement Code [13-1-28 NMSA 1978], that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. That code also applies to concession contracts at the ~~New Mexico~~Texas state fair in excess of twenty thousand dollars (\$20,000), whether those concession contracts generate revenue and earnings or expend funds.
- B. When a procurement involves the expenditure of federal funds, the procurement shall be conducted in accordance with mandatory applicable federal law and regulations. When mandatory applicable federal law or regulations are inconsistent with the provisions of the Procurement Code, compliance with federal law or regulations shall be compliance with the Procurement Code.

Commented [14]: Put at the front

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.

Commented [15]: Tweak

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.

Commented [16]: Leave in

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.

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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.

Commented [18]: Leave in

13-1-35. Definition; business.

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

Commented [19]: legal review. add non-profit?

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.

Commented [110]: Leave in

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,

Commented [111]: Maybe refer to "procurement officer" instead of central purchasing office. Add special districts. Tweak language to say Procurement Officer.....responsibilities include, but not limited to....(add real property and disposal of surplus)

services or construction. "Central purchasing office" includes the purchasing division of the general services department and the state purchasing agent.

13-1-38. Definition; change order.

Commented [112]: Tweak

"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.

13-1-39. Definition; confidential information.

Commented [113]: Keep

"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.

13-1-40. Definition; construction.

Commented [114]: Tweak...includes, but not limited to.....

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

Consider being more general and less specific

- (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.

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

Commented [115]: Texas definitions. See new GC 2267

- A. "Construction management" means consulting services related to the process of management applied to a public works project for any duration from conception to completion of the project for the purpose of controlling time, cost and quality of the project
- B. "Construction manager" means a person who acts as an agent of the state agency or local public body for construction management, for whom the state agency or local public body shall assume all the risks and responsibilities

13-1-41. Definition; contract.

Commented [116]: Expand definition

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

13-1-42. Definition; contract modification.

Commented [117]: Amendment

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

13-1-43. Definition; contractor.

Commented [118]: Keep

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

13-1-44. Definition; cooperative procurement.

Commented [119]: Tweak

"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.

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.

Commented [I20]: Tweak

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.

Commented [I21]: Tweak/expand

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.

Commented [I22]: Tweak

13-1-48. Repealed.

13-1-49. Definition; data.

"Data" means recorded information regardless of form or characteristic

Commented [I23]: ???

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.

Commented [I24]: Keep

13-1-51. Definition; designee.

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

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.

Commented [I25]: Keep as is

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

Commented [126]: procurement

"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.

13-1-53.1. Definition; electronic.

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

13-1-54. Definition; employee.

Commented [128]: Attorney review

"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.

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.

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

Commented [129]: Tweak. Include coops, others, etc.

"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.

13-1-57. Definition; financial interest.

Commented [130]: Compare to Texas statutes

"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.

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

Commented [I31]: Keep

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

13-1-59. Definition; gratuity.

Commented [I32]: Gifts? Look up State statutes

"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.

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

Commented [I33]: Tweak. Remove last part of sentence beginning with which has an aggregate....

"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).~~

13-1-61. Definition; highway reconstruction.

Commented [I34]: Tweak title

"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.

13-1-62. Definition; immediate family.

Commented [I35]: Keep

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

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

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

Commented [I36]: Keep

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

13-1-65. Definition; surveying services.

Commented [137]: Texas definition

"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.

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

Commented [138]: Texas definition

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

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

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

Commented [139]: May not need; see in context of code; compare to 13.1.91

"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.

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

"Local public body" means ~~every-any~~ political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts and local school boards and municipalities, except as exempted pursuant to the Procurement Code [13-1-28 NMSA 1978].

Commented [140]: Tweak. Replace every with any; add special districts

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

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

Commented [141]: Keep

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.

Commented [142]: Tweak. Commodities

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

Commented [143]: Tweak. Written, electronic, printed (posted or advertised)

13-1-71. Definition; price agreement.

"Price agreement" means an ~~estimated quantity 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.

Commented [144]: Tweak. Estimated quantity

13-1-72. Definition; price analysis.

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

Commented [145]: ??

13-1-73. Definition; pricing data.

Commented [146]: ??

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

13-1-74. Definition; procurement.

Commented [147]: Keep

"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.

13-1-75. Definition; procurement officer.

Commented [148]: Keep

"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.

13-1-76. Definition; professional services.

Commented [149]: Look at GC 2253 compare

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

13-1-77. Definition; purchase order.

Commented [150]: Tweak. Replace document with contract

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

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.

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.

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.

Commented [I51]: Don't understand

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

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

Commented [I52]: Replace with language that requires weighted criteria and evaluation factors, price, etc.

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.

Commented [I53]: Keep

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.

Commented [I54]: Tweak. qualifications, experience, construction?

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.

Commented [I55]: Keep

13-1-85. Definition; responsive offer.

Commented [I56]: Tweak. Add routine maintenance

"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.

13-1-86. Definition; ~~secretary.~~

~~"Secretary" means the secretary of general services.~~

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.

Commented [157]: Tweak. Add solicitation

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).~~

Commented [158]: Delete. HUB & other preferences

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.

Commented [159]: Tweak. bids

13-1-90. Definition; ~~state~~ agency.

~~"A~~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.

Commented [160]: Compared to Texas. Move to Agency. Add Special District.

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

~~"~~PState 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

Commented [161]: Compare to 13.1.66

or surveying services requiring professional services costing five thousand dollars (\$5,000) or more, excluding applicable state and local gross receipts.

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

Commented [162]: See 13.1.75

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

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

Commented [163]: Keep

"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.

13-1-94. Definition; using agency.

Commented [164]: Tweak. Change title. add dept, divisions, branch, etc.

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

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

- A. The "purchasing division" is created within the general services department.
- B. Subject to the authority of the secretary, the state purchasing agent shall be the administrator and chief executive of the purchasing division. The state purchasing agent shall be appointed by the secretary with the approval of the governor.
- C. The purchasing division and state purchasing agent shall be responsible for the procurement of services, construction and items of tangible personal property for all state agencies except as otherwise provided in the Procurement Code [13-1-28 NMSA 1978] and shall administer the Procurement Code for those state agencies not excluded from the requirement of procurement through the state purchasing agent.
- D. The state purchasing agent shall have the following additional authority and responsibility to:
 - (1) recommend procurement regulations to the secretary;
 - (2) establish and maintain programs for the development and use of procurement specifications and for the inspection, testing and acceptance of services, construction and items of tangible personal property;

- (3) cooperate with the state budget division of the department of finance and administration in the preparation of statistical data concerning the acquisition and usage of all services, construction and items of tangible personal property by state agencies
- (4) require state agencies to furnish reports concerning usage, needs and stocks on hand of items of tangible personal property, and usage and needs for services or construction;
- (5) prescribe, with consent of the secretary, forms to be used by state agencies to requisition and report the procurement of items of tangible personal property, services and construction;
- (6) provide information to state agencies and local public bodies concerning the development of specifications, quality control methods and other procurement information; and
- (7) collect information concerning procurement matters, quality and quality control of commonly used services, construction and items of tangible personal property.

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

Commented [165]: This section needs to be significantly revised

13-1-95.1. Electronic transmissions.

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

Commented [166]: Keep

- (1) appropriate security to prevent unauthorized access to electronically submitted bids or proposals prior to the date and time set for opening of bids or the deadline set for receipt for proposals, including the electronic bidding, approval and award process; and
- (2) accurate retrieval or conversion of electronic forms of information into a medium that permits inspection and copying.

Commented [167]: Tweak

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

Commented [168]: Keep

- (1) no hard copy documentation shall be submitted to the central purchasing office prior to the award of the contract, except as specifically identified in the invitation for bids or the request for proposals;
- (2) the invitation for bids or request for proposals shall specify an opening due date and time, a fixed closing date and time and an email account or other secure electronic location to which the electronic bid or proposal shall be submitted;
- (3) sealed bids submitted electronically shall be opened publicly ~~in the presence of one or more witnesses~~ at the time and place designated in the invitation for bids. The amount of each bid and each bid item, if appropriate, and such other relevant information as may be specified by the state purchasing agent or a central purchasing office, together with the name of each bidder, shall be recorded, and the record and each bid shall be open to public inspection; and
- (4) for sealed proposals, the proposals shall be opened, evaluated and the contract awarded as required in the request for proposals and as otherwise provided in the Procurement Code.

Commented [169]: Tweak

Commented [170]: Tweak to change it to due date and time and not use opening date.

Commented [171]: Tweak to remove "in the presence of one or more witnesses"

Commented [172]: Keep

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.~~

13-1-97. Centralization of procurement authority.

Commented [173]: Keep

- A. All procurement for state agencies shall be performed by the state purchasing agent except as otherwise provided in the Procurement Code [13-1-28 NMSA 1978].
- 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.

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;

Commented [174]: Keep and Tweak and simplify

~~B. procurement of tangible personal property or services for the governor's mansion and grounds;~~

~~printing and duplicating contracts involving materials that are required to be filed in connection with proceedings before administrative agencies or state or federal courts;~~

D-B. purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services;

E-C. purchases of books and periodicals from the publishers or copyright holders thereof;

Commented [175]: Keep

~~E. travel or shipping by common carrier or by private conveyance or to meals and lodging;~~

~~E. purchase of livestock at auction rings or to the procurement of animals to be used for research and experimentation or exhibit;~~

~~E. contracts with businesses for public school transportation services;~~

~~E. procurement of tangible personal property or services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978, by the corrections industries division of the corrections department pursuant to rules adopted by the corrections commission, which shall be reviewed by the purchasing division of the general services department prior to adoption;~~

~~E. minor purchases not exceeding five thousand dollars (\$5,000) consisting of magazine subscriptions, conference registration fees and other similar purchases where prepayments are required;~~

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

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

~~E. 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;~~

F-D. 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;

Commented [176]: Tweak – Look at current state law. See how it works with existing state laws.

~~contracts and expenditures for services or items of tangible personal property to be paid or compensated by money or other property transferred to New Mexico law enforcement agencies by the United States department of justice drug enforcement administration;~~

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

~~H.E. contracts with professional entertainers;~~

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

Commented [177]: Keep

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

~~J.G. works of art for museums or for display in public buildings or places;~~

Commented [178]: Keep

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

~~K.H. purchases of advertising in all media, including radio, television, print and electronic;~~

Commented [179]: Keep

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

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

~~K. procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act; and~~

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

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

Commented [180]: Needs to be further reviewed – Bob will review.

The provisions of the Procurement Code [13-1-28 NMSA 1978] shall not apply to procurement of items of tangible personal property or services by a state agency or a local public body through

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

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

Commented [181]: Keep

The provisions of the Procurement Code [13-1-28 NMSA 1978] do not apply to contracts entered into by a local public body with a person, firm, organization, corporation, association or state educational institution named in Article 12, Section 11 of the constitution of ~~New Mexico~~ Texas for:

- A. the operation and maintenance of a hospital pursuant to Chapter 3, Article 44 NMSA 1978;
- B. the lease or operation of a county hospital pursuant to the Hospital Funding Act [4-48B-1 NMSA 1978]; or
- C. the operation and maintenance of a hospital pursuant to the Special Hospital District Act [4-48A-1 NMSA 1978].

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 [13-1-28 NMSA 1978] are the following:

- A. procurement of professional services;

Commented [182]: Keep (as defined)

B. ~~small purchases having a value not exceeding one thousand five hundred dollars (\$1,500);~~

Commented [183]: Keep and align with existing state purchasing delegations

C. ~~emergency procurement;~~

Commented [184]: Keep

~~C. procurement of highway construction or reconstruction by the department of transportation;~~

~~C. procurement by the judicial branch of state government;~~

~~C. procurement by the legislative branch of state government;~~

~~C. procurement by the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico;~~

~~C. procurement by the state fair commission of tangible personal property, services and construction under ten thousand dollars (\$10,000);~~

~~C. purchases from the instructional material fund;~~

D. ~~procurement by all local public bodies;~~

E. ~~procurement by regional education cooperatives;~~

F. ~~procurement by charter schools;~~

G. ~~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 Texas medicaid program; and~~

Commented [185]: Keep. Replace NM with Texas

~~G. procurement by the public school facilities authority.~~

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

Commented [186]: Come back to this section after review of section 13-1-104

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.

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

Commented [187]: Will be re-done after review of section 13-1-104

A. ~~A construction management services contract may be entered into for any construction or state or local public works project when a state agency or local public body makes a determination that it is in the public's interest to utilize construction~~

management services. Construction management services shall not duplicate and are in addition to the normal scope of separate architect or engineer contracts, the need for which may arise due to the complexity or unusual requirements of a project as requested by a state agency or local public body

Commented [188]: Keep and possibly Tweak

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

Commented [189]: Keep and Tweak

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

Commented [190]: Keep and Tweak by adding at the end "regardless of source of funding".

13-1-101. Repealed.

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 [13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978]:

A. Sections 84 through 97 [13-1-111 to 13-1-117, 13-1-118, 13-1-119, 13-1-120 to 13-1-124 NMSA 1978], competitive sealed proposals;

Commented [191]: Keep

B. Section 98 [13-1-125 NMSA 1978], small purchases

Commented [192]: Keep and Tweak to define Small Purchases

C. Section 99 [13-1-126 NMSA 1978], sole source procurement;

Commented [193]: Keep

D. Section 100 [13-1-127 NMSA 1978], emergency procurements;

Commented [194]: Keep and need definition

E. Section 102 [13-1-129 NMSA 1978], existing contracts; and

Commented [195]: Keep

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

13-1-103. Invitation for bids.

Commented [196]: Keep all

A. An invitation for bids shall be issued and shall include the specifications for the services, construction or items of tangible personal property to be procured, all

contractual terms and conditions applicable to the procurement, the location where bids are to be received and the date, time and place of the bid opening

- B. If the procurement is to be by sealed bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of the bid opening.
- C. If the procurement is to be by sealed bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with the requirements of Section 13-1-95.1 NMSA 1978.

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

- A. An invitation for bids or a notice thereof shall be published not less than ten calendar days prior to the date set forth for the opening of bids. In the case of purchases made by the state purchasing agent, the invitation or notice shall be published at least once in at least three newspapers of general circulation in this state; in addition, an invitation or notice may be published electronically on the state purchasing agent's web site that is maintained for that purpose. In the case of purchases made by other central purchasing offices, the invitation or notice shall be published at least once in a newspaper of general circulation in the area in which the central purchasing office is located. These requirements of publication are in addition to any other procedures that may be adopted by central purchasing offices to notify prospective bidders that bids will be received, including publication in a trade journal, if available. If there is no newspaper of general circulation in the area in which the central purchasing office is located, such other notice may be given as is commercially reasonable.
- B. Central purchasing offices shall send copies of the notice or invitation for bids involving the expenditure of more than twenty thousand dollars (\$20,000) to those businesses that have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and that have paid any required fees. A central purchasing office may set different registration fees for different categories of services, construction or items of tangible personal property, but such fees shall be related to the actual, direct cost of furnishing copies of the notice or invitation for bids to the prospective bidders. The fees shall be used exclusively for the purpose of furnishing copies of the notice or invitation for bids of proposed procurements to prospective bidders.
- C. A central purchasing office may satisfy the requirement of sending copies of a notice or invitation for bids by distributing the documents to prospective bidders through electronic media. Central purchasing offices shall not require that prospective bidders receive a notice or invitation for bids through electronic media.
- B. As used in this section, "prospective bidders" includes persons considering submission of a bid as a general contractor for the construction contract and persons who may submit bids to a general contractor for work to be subcontracted pursuant

Commented [197]: Re-Write to address the need to be able to advertise electronically instead of newspaper

Commented [198]: Re-Write to be up-dated (out of date verbiage)

Commented [199]: Re-Write to work with B.

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

Commented [I100]: Re-Write to work with B and C.

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

- A. Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in the Procurement Code [13-1-28 NMSA 1978]. In addition to the requirement for the prime contractor and subcontractors to be registered as provided in Section 13-4-13.1 NMSA 1978, bids shall be evaluated based on the requirements set forth in the invitation for bids, which requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life-cycle costs that will affect the bid price shall be objectively measurable, which shall be defined by rule. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids. ~~A bid submitted by a prime contractor that was not registered as required by Section 13-4-13.1 NMSA 1978 shall not be considered for award. A bid submitted by a registered prime contractor that includes any subcontractor that is not registered in accordance with that section may be considered for award following substitution of a registered subcontractor for any unregistered subcontractor in accordance with Section 13-4-36 NMSA 1978.~~
- ~~A. 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.~~

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.

Commented [I101]: Re-Write to separate out into two sections for 1) Prior to opening and 2) After opening

- 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.

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.

~~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.~~

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.

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

Commented [I102]: Strike the entire Texas wording and replace using the existing Texas laws for this section.

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

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

- ~~Except as provided in Subsection G of Section 13-1-119.1 NMSA 1978, when a state agency or a local public body is procuring professional services or a design and build project delivery system, or when the state purchasing agent, a central purchasing office or a designee of either officer makes a written determination that the use of competitive sealed bidding for items of tangible personal property or services is either not practicable or not advantageous to the state agency or a local public body, a procurement shall be effected by competitive sealed proposals.~~
- ~~Competitive sealed proposals may also be used for contracts for construction and facility maintenance, service and repairs.~~
- ~~Competitive qualifications based proposals shall be used for procurement of professional services of architects, engineers, landscape architects, construction managers and surveyors who submit proposals pursuant to Sections 13-1-120 through 13-1-124 NMSA 1978.~~
- ~~Competitive sealed proposals shall also be used for contracts for the design and installation of measures the primary purpose of which is to conserve natural resources, including guaranteed utility savings contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [6-23-1 NMSA 1978].~~
- ~~The governor shall appoint an advisory committee to provide assistance in development of rules for the implementation of this section. The advisory committee shall include one representative from the New Mexico building and construction trades council, American federation of labor – congress for industrial organizations, and a representative of:
 - ~~0. the associated general contractors – New Mexico building branch;~~
 - ~~0. the New Mexico chapter of the national electrical contractors association;~~
 - ~~0. the New Mexico sheet metal contractors association;~~
 - ~~0. the mechanical contractors association of New Mexico;~~
 - ~~0. the New Mexico association of counties;~~~~

- ~~0. the New Mexico municipal league;~~
- ~~0. the public education department;~~
- ~~0. the construction industries commission;~~
- ~~0. the Rio Grande underground contractors association;~~
- ~~0. the American subcontractors association of New Mexico;~~
- ~~0. the higher education community; and~~
- ~~0. the general public, who is not associated with the construction industry and who will serve as chair of the committee.~~

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

Commented [I103]: Keep and tweak this section

- A. Competitive sealed proposals, including competitive qualifications-based proposals, shall be solicited through a request for proposals that 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. A request for proposals may, pursuant to Section 13-1-95.1 NMSA 1978, require that all or a portion of a responsive proposal be submitted electronically.
- B. In the case of requests for competitive qualifications-based proposals, price shall be determined by formal negotiations related to scope of work.

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

Commented [I104]: Keep (assuming we are tweaking 13-1-104)

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.

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

Commented [I105]: Keep as is.

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

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

Commented [I106]: Keep and review the last sentence.

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.

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, ~~up to and including execution of contract.~~

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

Commented [I107]: Keep as is.

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.

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

- ~~Each agency within the legislative branch of government operating under the provisions of the Procurement Code [13-1-28 NMSA 1978] and each local public body shall adopt regulations regarding its selection and award of professional services contracts.~~
- ~~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.~~

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

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

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

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

~~(0) — 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 advise the local public body in giving public notice of requests for proposals;~~

~~(0) — 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~~

~~(0) — assist in contract negotiations.~~

~~A. — 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.~~

~~A. — 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.~~

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

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

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

Commented [1108]: Replace this section with a unified version of our current Texas law/language which will be tweaked during future reviews.

~~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.~~

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.

Commented [I109]: Keep and tweak this section

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

Commented [I110]: Take the existing Texas Design and Build language from all codes; tweak it to create a unified version to best serve everyone.

- A. Except for road and highway construction or reconstruction projects, a design and build project delivery system may be authorized when the state purchasing agent or a central purchasing office makes a determination in writing that it is appropriate and in the best interest of the state or local public body to use the system on a specific project with a maximum allowable construction cost of more than ten million dollars (\$10,000,000). The determination shall be issued only after the state purchasing or central purchasing office has taken into consideration the following criteria, which shall be used as the minimum basis in determining when to use the design and build process:
- (1) the extent to which the project requirements have been or can be adequately defined;
 - (2) time constraints for delivery of the project;
 - (3) the capability and experience of potential teams with the design and build process;
 - (4) the suitability of the project for use of the design and build process as concerns time, schedule, costs and quality; and
 - (5) the capability of the using agency to manage the project, including experienced personnel or outside consultants, and to oversee the project with persons who are familiar with the design and build process.
- B. When a determination has been made by the state purchasing agent or a central purchasing office that it is appropriate to use a design and build project delivery

system, the design and build team shall include, as needed, a ~~New Mexico~~Texas registered engineer or architect and a contractor properly licensed in ~~New Mexico~~Texas for the type of work required.

- C. Except as provided in Subsections F and G of this section, for each proposed state or local public works design and build project, a two-phase procedure for awarding design and build contracts shall be adopted and shall include at a minimum the following:
- (1) during phase one, and prior to solicitation, documents shall be prepared for a request for qualifications by a registered engineer or architect, either in-house or selected in accordance with Sections 13-1-120 through 13-1-124 NMSA 1978, and shall include minimum qualifications, a scope of work statement and schedule, documents defining the project requirements, the composition of the selection committee and a description of the phase-two requirements and subsequent management needed to bring the project to completion. Design and build qualifications of responding firms shall be evaluated and a maximum of five firms shall be short-listed in accordance with technical and qualifications-based criteria; and
 - (2) during phase two, the short-listed firms shall be invited to submit detailed specific technical concepts or solutions, costs and scheduling. Unsuccessful firms may be paid a stipend to cover proposal expenses. After evaluation of these submissions, selection shall be made and the contract awarded to the highest ranked firm.
- D. Except as provided in Subsections F and G of this section, to ensure fair, uniform, clear and effective procedures that will strive for the delivery of a quality project on time and within budget, the secretary, in conjunction with the appropriate and affected professional associations and contractors, shall promulgate rules applicable to all using agencies, which shall be followed by all using agencies when procuring a design and build project delivery system
- E. A state agency shall make the decision on a design and build project delivery system for a state public works project, and a local public body shall make that decision for a local public works project. A state agency shall not make the decision on a design and build project delivery system for a local public works project.
- F. The requirements of Subsections C and D of this section and the minimum construction cost requirement of Subsection A of this section do not apply to a design and build project delivery system and the services procured for the project if:
- (1) the maximum allowable construction cost of the project is four hundred thousand dollars (\$400,000) or less; and
 - (2) the only requirement for architects, engineers, landscape architects or surveyors is limited to either site improvements or adaption for a pre-engineered building or system.

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

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

Commented [I111]: Tweak this section; look at this and use the best of this and our current Texas language.

- A. For each proposed state public works project, local public works project or construction management contract, the architect, engineer, landscape architect, construction management and surveyor selection committee, state highway and transportation department selection committee or local selection committee, as appropriate, shall evaluate statements of qualifications and performance data submitted by at least three businesses in regard to the particular project and may conduct interviews with and may require public presentation by all businesses applying for selection regarding their qualifications, their approach to the project and their ability to furnish the required services.
- B. The appropriate selection committee shall select, ranked in the order of their qualifications, no less than three businesses deemed to be the most highly qualified to perform the required services, after considering the following criteria together with any criteria, except price, established by the using agency authorizing the project:
- (1) specialized design and technical competence of the business, including a joint venture or association, regarding the type of services required;
 - (2) capacity and capability of the business, including any consultants, their representatives, qualifications and locations, to perform the work, including any specialized services, within the time limitations;
 - (3) past record of performance on contracts with government agencies or private industry with respect to such factors as control of costs, quality of work and ability to meet schedules;
 - (4) proximity to or familiarity with the area in which the project is located;
 - (5) the amount of design work that will be produced by a ~~New Mexico~~Texas business within this state;
 - (6) the volume of work previously done for the entity requesting proposals which is not seventy-five percent complete with respect to basic professional design services, with the objective of effecting an equitable distribution of contracts among qualified businesses and of assuring that the interest of the public in having available a substantial number of qualified businesses is protected; provided, however, that the principle of selection of the most highly qualified businesses is not violated; and

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

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

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

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

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

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

Commented [1112]: Concept of this is needed...keep and tweak for Texas

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

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

(2) the director of the property control division of the general services department who shall be chairman;

(3) one member designated by the architect-engineer-landscape architect joint practice committee; and

(4) one member designated by the secretary.

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

C. The members of the architect, engineer, landscape architect and surveyor selection committee shall be reimbursed by the property control division for per diem and

mileage in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 NMSA 1978].

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

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.

Commented [I113]: Keep and tweak this section for Texas; working to unify the agencies current wording.

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,

Commented [I114]: Keep and tweak this section

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.

13-1-124. Architect rate schedule.

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

Commented [I115]: Keep and tweak this section

13-1-125. Small purchases.

- A. A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding twenty thousand dollars (~~\$20,000~~\$50,000) in accordance with the applicable small purchase regulations adopted by the secretary, a local public body or a central purchasing office that has the authority to issue regulations.
- B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding thirty thousand dollars (~~\$30,000~~\$50,000), 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 state agency or a local public body may procure services, construction or items of tangible personal property having a value not exceeding five thousand dollars (\$5,000) by issuing a direct purchase order to a contractor based upon the best obtainable price.
- D. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

Commented [I116]: Keep and tweak this section
Section A change the \$ amount from 20 to 50K
Section B change the \$ amount from 30 to 50K
Section C change to reflect Texas limits (do we leave this at \$5,000?)

Commented [I117]: Section D expand this to include "separate, sequential or component purchases" (using our Texas language)

13-1-126. Sole source procurement.

Commented [I118]: Look at Texas codes and write a unified "Sole Source procurement; keeping in the wording "We have a good faith effort review of available sources"

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

13-1-127. Emergency procurements.

- A. The state purchasing agent, a central purchasing office or a designee of either may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, safety or property requiring procurement under emergency conditions; provided that emergency procurements shall be made with competition as is practicable under the circumstances. A written determination of the basis for the emergency procurement and for the selection of the particular contractor or vendor shall be included in the procurement file. ~~Emergency procurements shall not include the purchase or lease purchase of heavy road equipment~~
- B. An emergency condition is a situation which creates a threat to public health, welfare or safety such as may arise by reason of ~~floods, fires, epidemics, riots, acts of terrorism, equipment failures or similar events~~ force majeure and includes the planning and preparing for an emergency response. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:
- (1) the functioning of government;
 - (2) the preservation or protection of property; or
 - (3) the health or safety of any person.
- ~~B. — Money expended for planning and preparing for an emergency response shall be accounted for and reported to the legislative finance committee and the department of finance and administration within sixty days after the end of each fiscal year.~~

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:

Commented [I119]: Keep and modify (tweak) this section; striking the last part of the title and "for..." in the first paragraph.

- 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.

13-1-129. Procurement under existing contracts.

Commented [1120]: Tweak section 2a

- 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.

~~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.~~

~~A. 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.~~

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

Commented [I121]: Analyze wording of the first sentence

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.

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.

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.

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. ~~If used,~~ Mailing lists of potential bidders or offerors shall include but shall not be limited to such prequalified businesses.

13-1-135. Cooperative procurement authorized.

A. Any state agency or local public body may either participate in, sponsor or administer a cooperative procurement agreement for the procurement of any

services, construction or items of tangible personal property with any other state agency, local public body or external procurement unit in accordance with an agreement entered into and approved by the governing authority of each of the state agencies, local public bodies or external procurement units involved. The cooperative procurement agreement shall be on file with the participating agencies clearly specify the purpose of the agreement and the method by which the purpose will be accomplished.

- B. Any power exercised under a cooperative procurement agreement entered into pursuant to this subsection shall be limited to the central purchasing authority common to the contracting parties, even though one or more of the contracting parties may be located outside this state. An approved and signed copy of all cooperative procurement agreements entered into pursuant to this subsection shall be filed with the state purchasing agent. A cooperative procurement agreement entered into pursuant to this subsection is limited to the procurement of items of tangible personal property, services or construction.
- C. Notwithstanding the provisions of Subsection A of this section, a cooperative procurement agreement providing for mutually held funds or for other terms and conditions involving public funds or property included in Section 11-1-4 NMSA 1978 shall be entered into pursuant to the provisions of the Joint Powers Agreements Act [11-1-1 NMSA 1978].
- D. 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

Commented [1122]: Use current Texas law

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

- A. Beginning July 1, 1995, each central purchasing office shall, whenever its price, quality, quantity, availability and delivery requirements are met, purchase recycled content goods through contracts established by the purchasing division of the general services department or with other central purchasing offices
- B. For purposes of this section, "recycled content goods" means supplies and materials composed in whole or in part of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications

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

Commented [1123]: 13-1-136 Strike all

~~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.~~

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

Commented [I124]: Strike A and B but keep general language

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:

- ~~— in accordance with an agreement entered into with the approval of the state board of finance or the data processing and data communications planning council [information technology commission systems council]; or~~
- ~~— subject to the provisions of Sections 3-46-1 through 3-46-15; 3-54-1 through 3-54-3; 3-60-1 through 3-60-37 and 3-60A-1 through 3-60A-48 NMSA 1978~~

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~~

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:~~

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

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).~~

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.~~

~~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.~~

~~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.~~

~~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.~~

~~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.~~

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.

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

Commented [I125]: Substitute Texas law

- A. Except to the extent necessary to ensure that a surety company meets the requirements of Subsection A of Section 13-4-18 NMSA 1978, an employee of the state or its political subdivisions, or a person acting or purporting to act on behalf of that employee, shall not require a bidder or an offeror in a procurement for a construction contract pursuant to the Procurement Code [13-1-28 NMSA 1978] to make application or furnish financial data for a surety bond or to obtain a surety bond from a particular surety company, insurance company, broker or agent in connection with the bid or proposal
- B. A person who violates Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

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~~ would render the bid non-responsive
- B. If a bidder is permitted to withdraw its bid before award due date, no action shall be had against the bidder or the bid security

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.

Commented [I126]: Use Texas law

13-1-148.1. Bonding of subcontractors.

Commented [I127]: Use Texas law

A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is fifty thousand dollars (\$50,000) or more.

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.

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

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

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

- ~~(0) services required to support or operate federally certified medicaid, financial assistance and child support enforcement management information or payment systems;~~
- ~~(0) services to design, develop or implement the taxation and revenue information management systems project authorized by Laws 1997, Chapter 125;~~
- ~~(0) 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; and~~
- ~~(0) services relating to the implementation, operation and administration of the Education Trust Act [21-21K-1 NMSA 1978].~~

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.

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.

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.

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.

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

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

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

- (1) the commercial auction company shall have been in business for at least three years preceding the date of purchase and shall conduct at least five auctions annually;
- (2) the value of each piece of equipment shall be appraised prior to the auction by a qualified disinterested appraiser retained and paid by the county, who shall make a written appraisal report stating the basis for the appraisal, including the age, condition and comparable sales, and stating that the appraiser has exercised his independent judgment without prior understanding or agreement with any person as to a target value or range of value;
- (3) an independent "certificate of working condition" shall be obtained prior to the auction from a qualified mechanic who shall have made a detailed inspection of each major working or major functional part and certified the working condition of each; and
- (4) the price paid, including all auction fees and buyer's surcharges, shall not exceed the appraised value.

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

13-1-158. Payments for purchases.

- A. No warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications or unless prepayment is permitted under Section 13-1-98 NMSA 1978 by exclusion of the purchase from the Procurement Code [13-1-28 NMSA 1978].
- B. Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation for bids, request for proposals or other solicitation, within fifteen days from the date the central purchasing office or using agency receives written notice from the contractor that payment is requested for services or construction completed or

items of tangible personal property delivered on site and received, the central purchasing office or using agency shall issue a written certification of complete or partial acceptance or rejection of the services, construction or items of tangible personal property.

- C. Except as provided in Subsection D of this section, upon certification by the central purchasing office or the using agency that the services, construction or items of tangible personal property have been received and accepted, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month. For purchases funded by state or federal grants to local public bodies, if the local public body has not received the funds from the federal or state funding agency, payments shall be tendered to the contractor within five working days of receipt of funds from that funding agency.
- D. If the central purchasing office or the using agency finds that the services, construction or items of tangible personal property are not acceptable, it shall, within thirty days of the date of receipt of written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site, provide to the contractor a letter of exception explaining the defect or objection to the services, construction or delivered tangible personal property along with details of how the contractor may proceed to provide remedial action.
- E. Late payment charges that differ from the provisions of Subsection C of this section may be assessed if specifically provided for by contract or pursuant to tariffs approved by the ~~New Mexico~~Texas public utility commission or the state corporation commission [public regulation commission].

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.

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.

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.

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;
 - (5) two persons representing other state departments; and
 - (6) 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.

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.

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.

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.

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.

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.

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.

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.

13-1-170. Uniform contract clauses.

- A. A state agency, local public body or central purchasing office with the power to issue regulations may require by regulation that contracts include uniform clauses providing for termination of contracts, adjustments in prices, adjustments in time of performance or other contract provisions as appropriate, including but not limited to the following subjects:
 - (1) the unilateral right of a state agency or a local public body to order in writing:
 - (a) changes in the work within the scope of the contract; and
 - (b) temporary stoppage of the work or the delay of performance;
 - (2) variations occurring between estimated quantities of work in a contract and actual quantities;
 - (3) liquidated damages;
 - (4) permissible excuses for delay or nonperformance;

- (5) termination of the contract for default;
 - (6) termination of the contract in whole or in part for the convenience of the state agency or a local public body;
 - (7) assignment clauses providing for the assignment by the contractor to the state agency or a local public body of causes of action for violation of state or federal antitrust statutes;
 - (8) identification of subcontractors by bidders in bids; and
 - (9) uniform subcontract clauses in contracts.
- B. A state agency, local public body or central purchasing office with the power to issue regulations shall require by regulation that contracts include a clause imposing late payment charges against the state agency or local public body in the amount and under the conditions stated in Section 13-1-158 NMSA 1978.

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.

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.

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.

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.

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.

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

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.

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

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

- A. conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- B. conviction of a bidder, offeror or contractor under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records or receiving stolen property;
- C. conviction of a bidder, offeror or contractor under state or federal antitrust statutes arising out of the submission of bids or proposals;
- D. violation by a bidder, offeror or contractor of contract provisions, as set forth in this subsection, of a character which is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action:
 - (1) willful failure to perform in accordance with one or more contracts, provided that this failure has occurred within a reasonable time preceding the decision to impose debarment; or
 - (2) a history of failure to perform, or of unsatisfactory performance of, one or more contracts, provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
- E. any other cause occurring within three years of a procurement which the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or
- F. for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code [13-1-28 NMSA 1978] within three years of a procurement.

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.

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.

13-1-181. Remedies prior to execution of contract.

If prior to the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or proposed award of the proposed contract is in violation of law, then the solicitation or proposed award shall be canceled.

13-1-182. Ratification or termination after execution of contract.

If after the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of the contract was in violation of law and if the business awarded the contract did not act fraudulently or in bad faith:

- A. the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interests of a state agency or a local public body; or
- B. the contract may be terminated, and the contractor shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

13-1-183. Judicial review.

All actions authorized by the Procurement Code [13-1-28 NMSA] for judicial review of a determination shall be filed pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

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.

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.

13-1-186. Assistance to small business; bid bonds; reduction.

The state purchasing agent or central purchasing office may reduce bid bond, performance bond or payment bond requirements authorized by the Procurement Code [13-1-28 NMSA 1978] to encourage procurement from small businesses.

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.

13-1-188. Public acquisition of American-made motor vehicles required.

A state agency shall only acquire motor vehicles assembled in North America except for gas-electric hybrid vehicles until these vehicles are assembled in North America. For the purposes of this section, "motor vehicle" means a light duty vehicle under 8,500 pounds.

13-1-189. Procurements pursuant to the Corrections Industries Act.

- A. All state agencies shall purchase and all local public bodies may purchase items of tangible personal property and services offered pursuant to the provisions of the Corrections Industries Act [33-8-1 NMSA 1978
- B. The corrections industries commission shall prepare a catalogue containing an accurate and complete description of all items of tangible personal property and services available. A copy of the catalogue shall be provided to each state agency and local public body. The catalogue shall contain an approximate time required for delivery of each item of tangible personal property and service.
- C. The state purchasing agent or a central purchasing office shall purchase available items of tangible personal property and services from the catalogue unless a determination is made that:
 - (1) an emergency exists requiring immediate action to procure the items of tangible personal property or service
 - (2) the specifications for the items of tangible personal property or service, including quality, quantity and delivery requirements, cannot be met within a reasonable time by the corrections department; or
 - (3) the price to be paid to the corrections department for the items of tangible personal property or service is higher than the bid price of comparable items of tangible personal property or services

13-1-190. Unlawful employee participation prohibited.

- A. Except as permitted by the University Research Park Act [21-28-1 NMSA 1978], it is unlawful for any state agency or local public body employee, as defined in the Procurement Code [13-1-28 NMSA 1978], to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract
- B. An employee or any member of an employee's immediate family who holds a financial interest in a disclosed blind trust shall not be deemed to have a financial interest with regard to matters pertaining to that trust.

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.

13-1-191.1. Campaign contribution disclosure and prohibition.

- A. This section applies to prospective contractors with the state or a local public body.

- B. A prospective contractor subject to this section shall disclose all campaign contributions given by the prospective contractor or a family member or representative of the prospective contractor to an applicable public official of the state or a local public body during the two years prior to the date on which a proposal is submitted or, in the case of a sole source or small purchase contract, the two years prior to the date on which the contractor signs the contract, if the aggregate total of contributions given by the prospective contractor or a family member or representative of the prospective contractor to the public official exceeds two hundred fifty dollars (\$250) over the two-year period
- C. The disclosure shall indicate the date, the amount, the nature and the purpose of the contribution. The disclosure statement shall be on a form developed and made available electronically by the department of finance and administration to all state agencies and local public bodies. The form shall be filed with the state agency or local public body as part of the competitive sealed proposal, or in the case of a sole source or small purchase contract, on the date on which the contractor signs the contract
- D. A prospective contractor submitting a disclosure statement pursuant to this section who has not contributed to an applicable public official, whose family members have not contributed to an applicable public official or whose representatives have not contributed to an applicable public official shall make a statement that no contribution was made.
- E. No campaign contribution or other thing of value shall be given by a prospective contractor or a family member or representative of the prospective contractor to an applicable public official or the applicable public official's employees during the pendency of the procurement process or during the pendency of negotiations for a sole source or small purchase contract.
- F. A solicitation or proposed award for a proposed contract shall be canceled or a contract that is executed is void if:
- (1) a prospective contractor fails to submit a fully completed disclosure statement pursuant to this section; or
 - (2) a prospective contractor or family member or representative of the prospective contractor gives a campaign contribution or other thing of value to an applicable public official or the applicable public official's employees during the pendency of the procurement process.
- G. As used in this section:
- (1) "applicable public official" means a person elected to an office or a person appointed to complete a term of an elected office, who has the authority to award or influence the award of the contract for which the prospective contractor is submitting a competitive sealed proposal or who has the authority to negotiate a sole source or small purchase contract that may be awarded without submission of a sealed competitive proposal;

- (2) "family member" means spouse, father, mother, child, father-in-law, mother-in-law, daughter-in-law or son-in-law;
- (3) "pendency of the procurement process" means the time period commencing with the public notice of the request for proposals and ending with the award of the contract or the cancellation of the request for proposals;
- (4) "prospective contractor" means a person who is subject to the competitive sealed proposal process set forth in the Procurement Code [13-1-28 NMSA 1978] or is not required to submit a competitive sealed proposal because that person qualifies for a sole source or small purchase contract; and
- (5) "representative of the prospective contractor" means an officer or director of a corporation, a member or manager of a limited liability corporation, a partner of a partnership or a trustee of a trust of the prospective contractor.

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.

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.

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.

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.

13-1-196. Civil penalty.

Any person, firm or corporation that knowingly violates any provision of the Procurement Code [13-1-28 NMSA 1978] is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement in violation of any provision of the Procurement Code. The attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of any provision of the Procurement Code. Any penalty collected under the provisions of this section shall be credited to the general fund of the political subdivision in which the violation occurred and on whose behalf the suit was brought.

13-1-197. Recovery of value transferred or received; additional civil penalty.

An amount equal to the value of anything transferred or received in violation of the provisions of the Procurement Code [13-1-28 NMSA 1978] by a transferor and transferee may be imposed as a civil penalty upon both the transferor and transferee. The civil penalty provided for in this section is imposed in addition but pursuant to the terms and conditions of Section 169 [13-1-196 NMSA 1978] of the Procurement Code.

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.

13-1-199. Misdemeanor.

Any business or person which violates the Procurement Code [13-1-28 NMSA 1978] is guilty of a misdemeanor.