

PROCUREMENT CODE: What Districts Need to Know

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What is the first word that comes to mind when you hear the word PROCUREMENT?

Purpose of the Procurement Code

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 safeguard for maintaining a procurement system of quality and integrity.

NMSA 1978, § 13-1-29



What Does the Procurement Code Apply to?

Every expenditure by state agencies and local public bodies for the procurement of items of

1. tangible personal property,
2. services, and
3. construction.



If the procurement involves the expenditure of federal funds, it must be conducted in accordance with mandatory applicable federal law and regulations.

NMSA 1978, § 13-1-30



Exempt from the Procurement Code—



- Purchases from another state agency, local public body, etc.
- Purchases of publicly provided or regulated utilities
- Books, periodicals, training materials from publisher or copyright holder
- Travel by common carrier, meals, lodging
- Contracts for public school transportation services
- Purchases <\$10k for magazine or online subscriptions, conference registration fees, similar purchases where prepayment required
- Contracts for entertainers or works of art
- Advertising
- Purchases or products or services for eligible persons with disabilities pursuant to Rehabilitation Act

NMSA 1978, § 13-1-98



District puts out a Request for Information seeking information about dental providers to provide services to the District's schools. All services to be provided are at no cost to the District. Selected applicants could bill Medicaid, insurance, or work for free. Disappointed Applicant sued for violation of the Procurement Code. Did the District violated the Procurement Code?

Yes

No

Need more
information

Central Purchasing Office

All procurement for a local public body 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. This includes the purchasing division of the general services department.



What is a Chief Procurement Officer (CPO)?

A person.

A person within the local public body's central purchasing office.

A person within the local public body's central purchasing office who is responsible for the control of procurement.

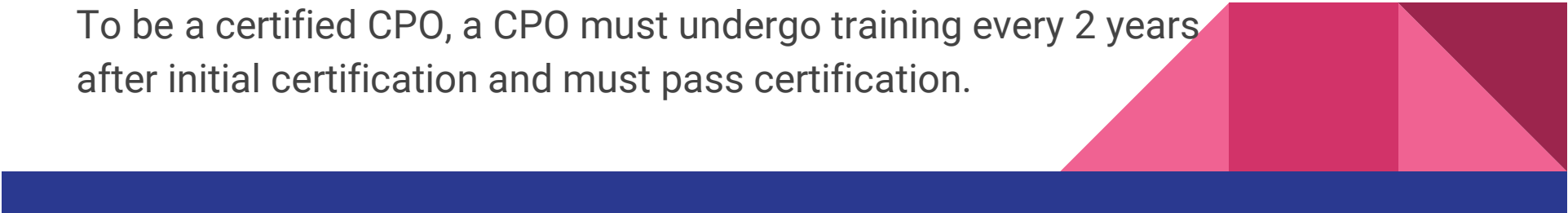
A person within the local public body's central purchasing office who is responsible for the control of procurement of items of tangible personal property, services or construction.

CPO Responsibilities

Only a certified chief procurement officers may do the following, except that persons using procurement cards may continue to issue purchase orders and authorize small purchases:

1. Make determinations, including determinations regarding exceptions, pursuant to the Procurement Code;
2. Issue purchase orders and authorize small purchases pursuant to the Procurement Code; and
3. Approve procurement pursuant to the Procurement Code.

To be a certified CPO, a CPO must undergo training every 2 years after initial certification and must pass certification.



Does this mean that the CPO is the final authority on all procurement done by the District?

Yes

No

Answer: No. CPO determination necessary but not by itself sufficient

NMSA 1978 § 22-5-4 – A local school board shall have the following powers or duties:

J. except for the expenditures for salaries, contract for the expenditure of money according to the provisions of the Procurement Code.

All contracts entered into on behalf of the District must be approved by, and in the name of, the Board of Education of the District. (Exception: non-superintendent employee contracts)

Most Boards have a policy delegating contractual authority to the Superintendent within specified dollar limits. Even these should be ratified by the board.



Competitive Procurement-- NMSA§13-1-102

All procurement not exempted from the Procurement Code shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978, except pursuant to the following sections of the Procurement Code

- A. Sections 13-1-111 through 13-1-122 NMSA 1978, *competitive sealed proposals*;
- B. Section 13-1-125 NMSA 1978, *small purchases*;
- C. Section 13-1-126 NMSA 1978, *sole source procurement*;
- D. Section 13-1-127 NMSA 1978, *emergency procurements*;
- E. Section 13-1-129 NMSA 1978, *existing contracts*;
- F. Section 13-1-130 NMSA 1978, *purchases from antipoverty program businesses*; and
- G. The Educational Facility Construction Manager At Risk Act NMSA 1978, Section 13-1-124.



Invitation for Bid

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

Notice must be given no less than 10 days prior to bid opening; bids to be opened in presence of one or more witnesses.



Sealed Bids

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.

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.



Award to Bidder

- 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.
- When done by bid, the award is all about lowest price provided the bidder is a Responsible Bidder who makes a Responsive Bid
- If Bids identical: make multiple source award, apply resident preferences, award by lottery, reject and resolicit bids.



Responsible Bidder

Is a bidder who submits a responsive bid and has furnished, when required, information and data to prove that its 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.



Responsive Bid

Is a bid that 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.



Professional Services are?

Services of architects

Services of medical
doctors

Services of lawyers

Services of
researchers

Services of all of the
above

When do you use Requests for Proposals?

- Shall be used for Professional Services, Design/Build projects, or when CPO makes written determination that bidding is not practicable/advantageous, and contracts for projects whose purpose is to conserve natural resources including guaranteed utility savings contracts
- May be used for construction and facility maintenance, service, repairs
- May be used for Construction Manager At Risk contracts
- Competitive Qualifications based proposals used for architects, engineers, construction managers, and surveyors.



Competitive sealed proposals must 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 form for disclosure of campaign contributions by prospective contractors to applicable public officials.

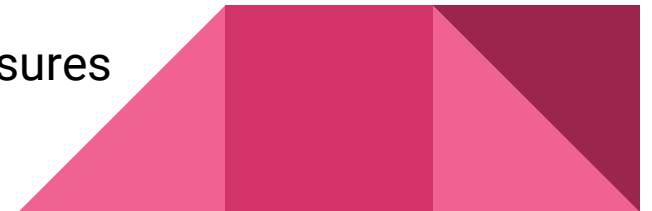
The location where proposals are to be received and the date, time, and place where proposals are to be received and reviewed.

The requirements for complying with any applicable in-state preference provisions as provided by law.

All of the above.

Requests for Proposals (RFP) Professional Services

1. Develop a Scope of Work
2. Develop evaluation criteria and weight to be given to each factor
3. Select the Evaluation Committee
4. Seeking the best value, most qualified and not necessarily the lowest price
5. Negotiations (Best & Final Offers)
6. Include from of contract to be executed by successful offeror and make affirmative acceptance of the terms of the contract a requirement of the proposal
7. Must include form for campaign contribution disclosures



RFP—Awards

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.

NMSA 1978, § 13-1-117



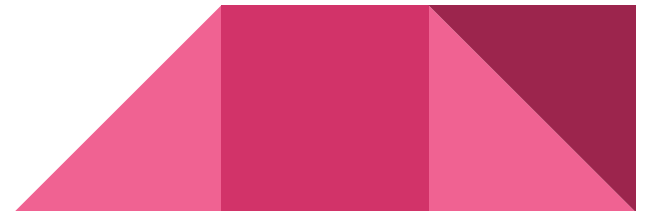
Formal Action to Award RFP Contract

After the Board of Education has approved the award recommendation from the RFP evaluation committee, the award becomes public information. (Board may deliberate on proposals in closed session prior to public action. Section 10-15-1H(6).) Final approval must be made in public.



Competitive Qualifications Based Proposals

- Used for architects, landscape architects, engineers, or surveyors.
- Evaluate statements of qualifications and performance data submitted by at least 3 businesses; may conduct interviews and require public presentations.
- Evaluation committee ranks according to criteria.
- Negotiate contract with highest qualified company at price determined to be fair and reasonable.
- If can't agree, move to next most qualified company.



A central purchasing office shall maintain all records relating to the award of a contract through competitive sealed bid or competitive sealed proposal process for?

1 year

2 years

3 years

4 years

Always

Small Purchases—Exempt from sealed bids or proposals

All Boards are required by the Procurement Code to have a small purchases regulation, governing purchases, which are exempt from the bidding or RFP process. See, NMSA 1978, Section 13-1-125.

- Up to \$20,000, best obtainable price
- Up to \$60,000 for services, construction or tangible personal property, per small purchase rules
- Up to \$60,000 for professional services (except landscape architects or surveyors for public works projects), per professional services procurement rules
- May not artificially divide requirements to make it a small purchase.



A sole source procurement is?

Where there is only one source for the required service, construction, or item of tangible personal property.

The service, construction, or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract.

Other similar services, construction, or items of tangible personal property cannot meet the intended purpose of the contract.

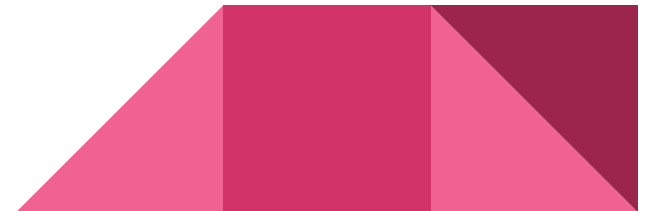
All of the above.

Sole Source Procurement– Exempt from competitive seals bid and proposal requirements regardless of price

- Only one source for service, construction, or tangible personal property
- Service, construction, or property is unique, and uniqueness substantially related to intended purpose of contract
- Other services, construction, or property can't meet intended purpose
- CPO must document due diligence in determining only one source
- Negotiate price, delivery and quantity to obtain price most advantageous.
- May not circumvent rules by narrowly drafting specifications so that only one source would satisfy specifications.
- Must give notice on website of intent to make award 30 or more days prior to award; Other qualified potential contractors may protest.

Emergency Procurements—Exempt from competition requirements.

- When a threat to public health, welfare, safety, or property
- Procurements should be made with as much competition as practicable
- Without procurement, serious threat to functioning of government, preservation of property, health or safety of any person.
- CPO use documented due diligence in determining basis of emergency and selection of contractor
- Within 3 days of award must post on website: contractor's name, amount and term of the contract, services or goods procured, justification for procurement method.



Procurement under existing contracts—Exempt from competitive procurement

- At a price equal to contractor's current federal supply contract price
- With a business that has a price agreement with the state purchasing agent or a central purchasing office for the item, service, or construction
- PO must identify contract relied upon
- The idea is that the competitive procurement has already been done.



Award versus Contract Approval

- Unless the notice of award is accompanied by a form of contract which was incorporated into the RFP or other bid documents, and the successful bidder or offeror accepted the terms as a condition of the bid or response, the notice of award is not the final action.
- IF contract terms are still to be negotiated, the Board's award is not approval of a contract.

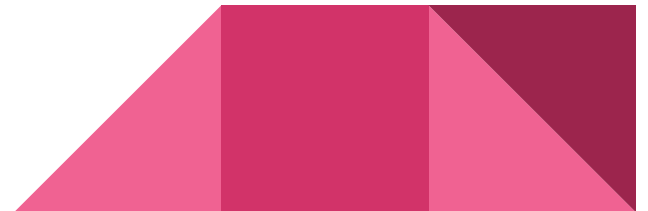


When Contracts Require Outside Approval

PSFA– Construction Contracts.

- Approval required to construct or enter into contracts to construct school buildings or related school structure or
- Entering into a lease-purchase agreement for a building to be used as a school building or related school structure

Other approvals necessary to sell, trade or lease District real or personal property.



What is the permitted length of procurement contracts?

4 years

10 years

100 years

It
depends

Permitted Length of Contracts

- For tangible personal property, construction or services, except professional services, and when the contract amount is less than \$25k, any length of time deemed in the District's best interest not to exceed 4 years.
- Contracts exceeding \$25k, not to exceed 10 years.
- Professional services, not to exceed 4 years.
- Prior to use of multi-term contracts, determination must be made that:
 - Estimated requirements cover the period of the contract and are reasonably firm and continuing, and
 - Contract in the best interest of the District.



Can a District hire more than one law firm?

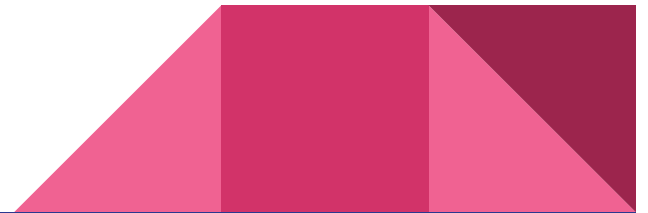
Yes

No

Why would
it want to

Multiple Source Award

- Allowed when two or more bidders or offerors are necessary for adequate delivery or service.
- Shall not be used when a single award will meet needs without sacrificing economy or service.
- Limited to the least number of suppliers in area needed to meet requirements.
- Based on lowest responsible bid or proposal unless made in response to a qualifications based proposal.
- Possibility of multisource award must be in ITB or RFP.



Protests

- Disappointed bidder or offeror may protest to CPO within 15 days.
- In event of protest, CPO shall not proceed without determination that award is necessary to protect substantial interests of district.
- CPO resolves protests in accordance with rules of CPO; may appeal to district court.



If Procurement Code Violated

- If determination is made prior to contract that a solicitation or proposed award violates law, the solicitation or award shall be cancelled.
- If determination is made after contract execution, and contractor did not act fraudulently or in bad faith:
 - Contract may be ratified if a written determination is made that it is in best interests of district or
 - The contract may be terminated and the contractor compensated for actually expenses reasonably incurred plus a reasonable profit prior to termination.



Does the Government Conduct Act (GCA) apply to the procurement process?

Yes

No

Maybe

What is
the GCA?

Government Conduct Act

NMSA 1978, Section 10-16-1 through 18

This Act includes provisions which need to be considered when entering into the procurement process. At the heart of the act, is the principle that public entities and their employees shall not benefit financially from the procurement process.



Conflicts of Interest NMSA 1978, § 13-1-190

It is unlawful for any local public body employee, as defined in the Procurement Code, to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract.

The Procurement Code includes non-salaried public officials under the employee definition.

APPLIES TO BOARD MEMBERS



Conflicts of Interest NMSA 1978, § 13-1-193

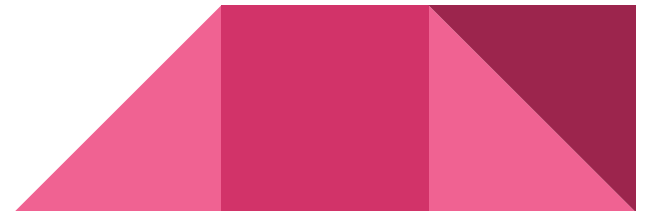
It is unlawful for any local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.



Conflicts of Interest NMSA 1978, § 13-1-194


A local public body may grant a waiver from unlawful employee participation or contemporaneous employment 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 participating is in the best interests of the state agency or a local public body.



Conflicts of Interest NMSA 1978, § 22-21-1(A)

A member of a local school board, a member of the governing body of a charter school, or a school employee shall not, directly or indirectly, sell or be a party to any transaction to sell any instructional material, furniture, equipment, insurance, school supplies or work under contract to the school district or public school with which such person is associated or employed. No such person shall receive any commission or profit from the sale or any transaction to sell any instructional material, furniture, equipment, insurance, school supplies or work under contract to the school district or public school with which the person is associated or employed.



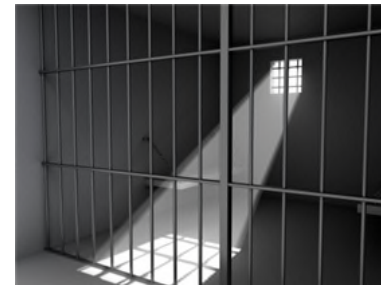
Can a public official receive jail time for conspiring to favor a bidder?

Yes

No

Penalties for violation

- Any person, firm, or corporation that knowingly the Procurement Code is subject to civil penalty of not more than \$1000 for each violation
- An amount equal to the value of anything transferred or received may be imposed as civil penalty
- If a subcontractor pays a kickback, that amount is imposed as penalty
- A person who willfully violates Procurement Code is guilty of:
 - A misdemeanor if \$50k or less
 - A 4th degree felony if more than \$50k



Questions & Comments

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