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SENATE BILL 182

**51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

INTRODUCED BY

Sander Rue

ENDORSED BY THE LEGISLATIVE FINANCE COMMITTEE

AN ACT

RELATING TO PROCUREMENT; EXEMPTING FROM THE PROCUREMENT CODE  
PROCUREMENTS OTHERWISE EXEMPTED UNDER OTHER LAW; REQUIRING  
ADDITIONAL PROCEDURES FOR SOLE SOURCE AND EMERGENCY  
PROCUREMENT; RESTRICTING WHO MAY MAKE EMERGENCY PROCUREMENTS;  
EXPANDING WHO MAY PROTEST A PROCUREMENT AWARD; INCREASING  
PENALTIES FOR VIOLATING THE PROCUREMENT CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 13-1-98 NMSA 1978 (being Laws 1984,  
Chapter 65, Section 71, as amended) is amended to read:

"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

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1 procurement unit except as otherwise provided in Sections  
2 13-1-135 through 13-1-137 NMSA 1978;

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

5 C. printing and duplicating contracts involving  
6 materials that are required to be filed in connection with  
7 proceedings before administrative agencies or state or federal  
8 courts;

9 D. purchases of publicly provided or publicly  
10 regulated gas, electricity, water, sewer and refuse collection  
11 services;

12 E. purchases of books and periodicals from the  
13 publishers or copyright holders thereof;

14 F. travel or shipping by common carrier or by  
15 private conveyance or to meals and lodging;

16 G. purchase of livestock at auction rings or to the  
17 procurement of animals to be used for research and  
18 experimentation or exhibit;

19 H. contracts with businesses for public school  
20 transportation services;

21 I. procurement of tangible personal property or  
22 services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978,  
23 by the corrections industries division of the corrections  
24 department pursuant to rules adopted by the corrections  
25 industries commission, which shall be reviewed by the

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1 purchasing division of the general services department prior to  
2 adoption;

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

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

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

13 M. contracts entered into by a local public body  
14 with a private independent contractor for the operation, or  
15 provision and operation, of a jail pursuant to Sections  
16 33-3-26 and 33-3-27 NMSA 1978;

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

23 O. contracts and expenditures for services or items  
24 of tangible personal property to be paid or compensated by  
25 money or other property transferred to New Mexico law

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1 enforcement agencies by the United States department of justice  
2 drug enforcement administration;

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

5 Q. contracts with professional entertainers;

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

11 S. contracts for service relating to the design,  
12 engineering, financing, construction and acquisition of public  
13 improvements undertaken in improvement districts pursuant to  
14 Subsection L of Section 3-33-14.1 NMSA 1978 and in county  
15 improvement districts pursuant to Subsection L of Section  
16 4-55A-12.1 NMSA 1978;

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

19 U. contracts entered into by a local public body  
20 with a person, firm, organization, corporation or association  
21 or a state educational institution named in Article 12, Section  
22 11 of the constitution of New Mexico for the operation and  
23 maintenance of a hospital pursuant to Chapter 3, Article 44  
24 NMSA 1978, lease or operation of a county hospital pursuant to  
25 the Hospital Funding Act or operation and maintenance of a

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1 hospital pursuant to the Special Hospital District Act;

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

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

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

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

19 Z. procurement of services from community  
20 rehabilitation programs or qualified individuals pursuant to  
21 the State Use Act;

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

25 BB. procurement, by either the department of health

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1 or Grant county or both, of tangible personal property,  
2 services or construction that are exempt from the Procurement  
3 Code pursuant to Section 9-7-6.5 NMSA 1978;

4 CC. contracts for investment advisory services,  
5 investment management services or other investment-related  
6 services entered into by the educational retirement board, the  
7 state investment officer or the retirement board created  
8 pursuant to the Public Employees Retirement Act;

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

12 EE. contracts entered into by the crime victims  
13 reparation commission to distribute federal grants to assist  
14 victims of crime, including grants from the federal Victims of  
15 Crime Act of 1984 and the federal Violence Against Women Act;  
16 and

17 FF. procurements exempt from the Procurement Code  
18 as otherwise provided by law."

19 SECTION 2. Section 13-1-126 NMSA 1978 (being Laws 1984,  
20 Chapter 65, Section 99, as amended) is amended to read:

21 "13-1-126. SOLE SOURCE PROCUREMENT.--

22 A. A contract may be awarded without competitive  
23 sealed bids or competitive sealed proposals regardless of the  
24 estimated cost when the state purchasing agent or a central  
25 purchasing office ~~[makes a determination, after conducting a~~

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1 ~~good-faith review of available sources and consulting the using~~  
2 ~~agency]~~ determines, in writing, that:

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

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

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

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

17 C. The state purchasing agent or a central  
18 purchasing office shall conduct negotiations, as appropriate,  
19 as to price, delivery and quantity in order to obtain the price  
20 most advantageous to the state agency or a local public body.

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

24 E. The state purchasing agent or a central  
25 purchasing office shall not circumvent this section by narrowly

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1 drafting specifications so that only one predetermined source  
2 would satisfy those specifications."

3 SECTION 3. Section 13-1-127 NMSA 1978 (being Laws 1984,  
4 Chapter 65, Section 100, as amended) is amended to read:

5 "13-1-127. EMERGENCY PROCUREMENTS.--

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

18 B. An emergency condition is a situation [~~which~~]  
19 that creates a threat to public health, welfare or safety such  
20 as may arise by reason of floods, fires, epidemics, riots, acts  
21 of terrorism, equipment failures or similar events and includes  
22 the planning and preparing for an emergency response. The  
23 existence of the emergency condition creates an immediate and  
24 serious need for services, construction or items of tangible  
25 personal property that cannot be met through normal procurement

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1 methods and the lack of which would seriously threaten:

2 (1) the functioning of government;

3 (2) the preservation or protection of  
4 property; or

5 (3) the health or safety of any person.

6 C. Emergency procurements shall not include the  
7 purchase or lease purchase of heavy road equipment.

8 D. The state purchasing agent or a central  
9 purchasing office shall use due diligence in determining the  
10 basis for the emergency procurement and for the selection of  
11 the particular contractor. The determination shall be in  
12 writing and included in the procurement file.

13 [~~G.~~] E. Money expended for planning and preparing  
14 for an emergency response shall be accounted for and reported  
15 to the legislative finance committee and the department of  
16 finance and administration within sixty days after the end of  
17 each fiscal year."

18 SECTION 4. Section 13-1-128 NMSA 1978 (being Laws 1984,  
19 Chapter 65, Section 101, as amended) is amended to read:

20 "13-1-128. SOLE SOURCE AND EMERGENCY PROCUREMENTS--  
21 PUBLICATION OF AWARD TO AGENCY WEB SITE AND SUNSHINE PORTAL--  
22 CONTENT AND SUBMISSION OF RECORD.--

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

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

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

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

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

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

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

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

23                  E. All central purchasing offices shall maintain,  
24 for a minimum of three years, records of sole source and  
25 emergency procurements. The record of each such procurement

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1 shall be public record and shall contain:

2           ~~[A.]~~ (1) the contractor's name and address;  
3           ~~[B.]~~ (2) the amount and term of the contract;  
4           ~~[C.]~~ (3) a listing of the services,  
5 construction or items of tangible personal property procured  
6 under the contract; ~~and~~

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

9           ~~[D.]~~ (5) the justification for the procurement  
10 method."

11           SECTION 5. Section 13-1-199 NMSA 1978 (being Laws 1984,  
12 Chapter 65, Section 172) is amended to read:

13           "13-1-199. ~~[MISDEMEANOR]~~ PENALTIES--Any business or  
14 person ~~which~~ that willfully violates the Procurement Code is  
15 guilty of:

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

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

20           SECTION 6. A new section of the Procurement Code is  
21 enacted to read:

22           "[NEW MATERIAL] SOLE SOURCE CONTRACTS--NOTICE--PROTEST.--

23                   A. At least thirty days before a sole source  
24 contract is awarded, the state purchasing agent, a central  
25 purchasing office or a designee of either shall post notice of

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1 the intent to award a sole source contract on its web site. If  
2 a central purchasing office does not maintain a web site, it  
3 shall post the notice on the state purchasing agent's web site.

4 The notice shall identify at a minimum:

- 5 (1) the parties to the proposed contract;
- 6 (2) the nature and quantity of the service,  
7 construction or item of tangible personal property being  
8 contracted for; and
- 9 (3) the contract amount.

10 B. Any qualified potential contractor who was not  
11 awarded a sole source contract may protest to the state  
12 purchasing agent or a central purchasing office. The protest  
13 shall be submitted in writing within fifteen calendar days of  
14 the notice of intent to award a contract being posted by the  
15 state purchasing agent or a central purchasing office."

16 SECTION 7. A new section of the Procurement Code is  
17 enacted to read:

18 "[NEW MATERIAL] COMPETITIVE SEALED BIDS AND PROPOSALS--  
19 RECORD MAINTENANCE.--A central purchasing office shall  
20 maintain, for a minimum of three years, all records relating to  
21 the award of a contract through a competitive sealed bid or  
22 competitive sealed proposal process."