

1 SENATE BILL 287

2 **50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012**

3 INTRODUCED BY

4 Sander Rue

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9  
10 AN ACT

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

17  
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. Section 10-16D-3 NMSA 1978 (being Laws 2010,  
20 Chapter 34, Section 3, as amended) is amended to read:

21 "10-16D-3. SUNSHINE PORTAL--DEPARTMENT DUTIES.--

22 A. The department, with the department of finance  
23 and administration, shall develop, operate and maintain a  
24 single internet web site that is free, user-friendly,  
25 searchable and accessible to the public, known as the "sunshine

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1 portal", to host the state's financial information for the  
2 purpose of governmental transparency and accountability to  
3 taxpayers.

4 B. No later than October 1, 2010, the department  
5 shall create the architecture and the information exchange  
6 process for the collection and electronic publication of the  
7 state's financial information.

8 C. No later than July 1, 2011, the sunshine portal  
9 shall be available for public access and include updated  
10 information as required by Subsection D of this section.

11 D. The sunshine portal shall provide, at a minimum,  
12 access to the following information:

13 (1) the state's cash balances by account or  
14 fund;

15 (2) a monthly summary of the state's  
16 investment accounts;

17 (3) annual operating budgets for each state  
18 agency with monthly expenditures by category;

19 (4) contracts that a state agency enters into  
20 for the lease, sale or development of state land and state  
21 contracts that have a total contract price of more than twenty  
22 thousand dollars (\$20,000), naming the recipient of the  
23 contract, the purpose of the contract and the amounts expended;

24 (5) the revenue that the state received in the  
25 preceding month by source, such as type of tax, fee, fine,

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1 administrative fee or other collection category;

2 (6) special appropriations received outside  
3 the general appropriation act by each state agency and the  
4 purpose of those appropriations;

5 (7) approved budget adjustment requests by  
6 state agency and affected budget category;

7 (8) quarterly consensus revenue estimates;

8 (9) reversions and cash balances by state  
9 agency and fund;

10 (10) appropriations for capital projects,  
11 identified by project location, type of project and funding  
12 source;

13 (11) a directory of all employee positions,  
14 other than exempt employee positions, identified only by state  
15 agency, position title and salary;

16 (12) a directory of all exempt employee  
17 positions, identified by state agency, position title, salary  
18 and the name of the individual that holds the position;

19 (13) information relating to local education  
20 providers compiled and published by the public education  
21 department pursuant to Section 10-16D-6 NMSA 1978;

22 (14) a link to an open meeting tracker web  
23 site upon which each state agency shall post open meetings  
24 scheduled for the current month and the next month, including  
25 the time and place of the meeting, the subject of the meeting

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1 and an agenda;

2 (15) a link to the web site maintained by the  
3 regulation and licensing department for the purpose of  
4 accessing information relating to occupational licenses;

5 (16) a link to the state auditor's web site  
6 for the purpose of accessing financial audits;

7 (17) a link to New Mexico's statutes;

8 (18) a link to the New Mexico Administrative  
9 Code;

10 (19) a link to the secretary of state's web  
11 sites for lobbyist regulation;

12 (20) records of sole source and emergency  
13 procurements pursuant to Section 13-1-128 NMSA 1978;

14 [~~(20)~~] (21) an annual summary within three  
15 months after the end of the fiscal year, or as soon thereafter  
16 as the information becomes available, of the state's fiscal  
17 health, including the state budget, revenues and expenditures  
18 for the previous fiscal year and projected revenues and  
19 operating budgets for the current fiscal year; and

20 [~~(21)~~] (22) additional information, as  
21 required by rule of the department of finance and  
22 administration, that will assist the public in understanding  
23 state government operations and the use of taxpayer dollars.

24 E. State agencies shall provide updated financial  
25 information as frequently as possible but at least monthly.

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1           F. The department shall update the web site as new  
2 information is received but at least monthly, include  
3 information from the previous month or year, where relevant,  
4 for comparison purposes and maintain the web site as the  
5 primary source of public information about the activity of the  
6 state government."

7           **SECTION 2.** Section 13-1-98 NMSA 1978 (being Laws 1984,  
8 Chapter 65, Section 71, as amended) is amended to read:

9           "13-1-98. EXEMPTIONS FROM THE PROCUREMENT CODE.--The  
10 provisions of the Procurement Code shall not apply to:

11           A. procurement of items of tangible personal  
12 property or services by a state agency or a local public body  
13 from a state agency, a local public body or external  
14 procurement unit except as otherwise provided in Sections  
15 13-1-135 through 13-1-137 NMSA 1978;

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

18           C. printing and duplicating contracts involving  
19 materials that are required to be filed in connection with  
20 proceedings before administrative agencies or state or federal  
21 courts;

22           D. purchases of publicly provided or publicly  
23 regulated gas, electricity, water, sewer and refuse collection  
24 services;

25           E. purchases of books and periodicals from the

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1 publishers or copyright holders thereof;

2 F. travel or shipping by common carrier or by  
3 private conveyance or to meals and lodging;

4 G. purchase of livestock at auction rings or to the  
5 procurement of animals to be used for research and  
6 experimentation or exhibit;

7 H. contracts with businesses for public school  
8 transportation services;

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

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

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

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

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1 M. contracts entered into by a local public body  
2 with a private independent contractor for the operation, or  
3 provision and operation, of a jail pursuant to Sections  
4 33-3-26 and 33-3-27 NMSA 1978;

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

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

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

18 Q. contracts with professional entertainers;

19 R. contracts and expenditures for litigation  
20 expenses in connection with proceedings before administrative  
21 agencies or state or federal courts, including experts,  
22 mediators, court reporters, process servers and witness fees,  
23 but not including attorney contracts;

24 S. contracts for service relating to the design,  
25 engineering, financing, construction and acquisition of public

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1 improvements undertaken in improvement districts pursuant to  
2 Subsection L of Section 3-33-14.1 NMSA 1978 and in county  
3 improvement districts pursuant to Subsection L of Section  
4 4-55A-12.1 NMSA 1978;

5 T. works of art for museums or for display in  
6 public buildings or places;

7 U. contracts entered into by a local public body  
8 with a person, firm, organization, corporation or association  
9 or a state educational institution named in Article 12, Section  
10 11 of the constitution of New Mexico for the operation and  
11 maintenance of a hospital pursuant to Chapter 3, Article 44  
12 NMSA 1978, lease or operation of a county hospital pursuant to  
13 the Hospital Funding Act or operation and maintenance of a  
14 hospital pursuant to the Special Hospital District Act;

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

17 W. purchases of promotional goods intended for  
18 resale by the tourism department;

19 X. procurement of printing services for materials  
20 produced and intended for resale by the cultural affairs  
21 department;

22 Y. procurement by or through the public education  
23 department from the federal department of education relating to  
24 parent training and information centers designed to increase  
25 parent participation, projects and initiatives designed to

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1 improve outcomes for students with disabilities and other  
2 projects and initiatives relating to the administration of  
3 improvement strategy programs pursuant to the federal  
4 Individuals with Disabilities Education Act; provided that the  
5 exemption applies only to procurement of services not to exceed  
6 two hundred thousand dollars (\$200,000);

7 Z. procurement of services from community  
8 rehabilitation programs or qualified individuals pursuant to  
9 the State Use Act;

10 AA. purchases of products or services for eligible  
11 persons with disabilities pursuant to the federal  
12 Rehabilitation Act of 1973;

13 BB. procurement, by either the department of health  
14 or Grant county or both, of tangible personal property,  
15 services or construction that are exempt from the Procurement  
16 Code pursuant to Section 9-7-6.5 NMSA 1978;

17 CC. contracts for investment advisory services,  
18 investment management services or other investment-related  
19 services entered into by the educational retirement board, the  
20 state investment officer or the retirement board created  
21 pursuant to the Public Employees Retirement Act;

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

25 EE. contracts entered into by the crime victims

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1 reparation commission to distribute federal grants to assist  
2 victims of crime, including grants from the federal Victims of  
3 Crime Act of 1984 and the federal Violence Against Women Act;  
4 and

5 FF. procurements exempt from the Procurement Code  
6 as otherwise provided by law."

7 SECTION 3. Section 13-1-126 NMSA 1978 (being Laws 1984,  
8 Chapter 65, Section 99, as amended) is amended to read:

9 "13-1-126. SOLE SOURCE PROCUREMENT.--

10 A. A contract may be awarded without competitive  
11 sealed bids or competitive sealed proposals regardless of the  
12 estimated cost when the state purchasing agent or a central  
13 purchasing office [~~makes a determination, after conducting a~~  
14 ~~good-faith review of available sources and consulting the using~~  
15 ~~agency~~] determines, in writing, that:

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

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

21 and

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

25 B. The state purchasing agent or a central

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1 purchasing office shall use due diligence in determining the  
2 basis for the sole source procurement, including reviewing  
3 available sources and consulting the using agency, and shall  
4 include its written determination in the procurement file.

5 C. The state purchasing agent or a central  
6 purchasing office shall conduct negotiations, as appropriate,  
7 as to price, delivery and quantity in order to obtain the price  
8 most advantageous to the state agency or a local public body.

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

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

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

18 "13-1-127. EMERGENCY PROCUREMENTS.--

19 A. The state purchasing agent or a central  
20 purchasing office [~~or a designee of either~~] may make [~~or~~  
21 ~~authorize others to make~~] emergency procurements when there  
22 exists a threat to public health, welfare, safety or property  
23 requiring procurement under emergency conditions; provided that  
24 emergency procurements shall be made with competition as is  
25 practicable under the circumstances. [~~A written determination~~

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1 ~~of the basis for the emergency procurement and for the~~  
2 ~~selection of the particular contractor or vendor shall be~~  
3 ~~included in the procurement file. Emergency procurements shall~~  
4 ~~not include the purchase or lease purchase of heavy road~~  
5 ~~equipment.]~~

6 B. An emergency condition is a situation [which]  
7 that creates a threat to public health, welfare or safety such  
8 as may arise by reason of floods, fires, epidemics, riots, acts  
9 of terrorism, equipment failures or similar events and includes  
10 the planning and preparing for an emergency response. The  
11 existence of the emergency condition creates an immediate and  
12 serious need for services, construction or items of tangible  
13 personal property that cannot be met through normal procurement  
14 methods and the lack of which would seriously threaten:

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

19 C. Emergency procurements shall not include the  
20 purchase or lease purchase of heavy road equipment.

21 D. The state purchasing agent or a central  
22 purchasing office shall use due diligence in determining the  
23 basis for the emergency procurement and for the selection of  
24 the particular contractor. The determination shall be in  
25 writing and included in the procurement file.

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1           [~~G-~~] E. Money expended for planning and preparing  
2 for an emergency response shall be accounted for and reported  
3 to the legislative finance committee and the department of  
4 finance and administration within sixty days after the end of  
5 each fiscal year."

6           SECTION 5. Section 13-1-128 NMSA 1978 (being Laws 1984,  
7 Chapter 65, Section 101, as amended) is amended to read:

8           "13-1-128. SOLE SOURCE AND EMERGENCY PROCUREMENTS--  
9 PUBLICATION OF AWARD TO AGENCY WEB SITE AND SUNSHINE PORTAL--  
10 CONTENT AND SUBMISSION OF RECORD.--

11           A. Prior to award of a sole source procurement  
12 contract, the state purchasing agent shall:

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

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

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

23           C. Within three business days of awarding an  
24 emergency procurement contract, the state purchasing agent  
25 shall:

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

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

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

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

16                   [~~A-~~] (1) the contractor's name and address;  
17                   [~~B-~~] (2) the amount and term of the contract;  
18                   [~~C-~~] (3) a listing of the services,  
19 construction or items of tangible personal property procured  
20 under the contract; [~~and~~]

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

23                   [~~D-~~] (5) the justification for the procurement  
24 method."

25                   SECTION 6. Section 13-1-172 NMSA 1978 (being Laws 1984,

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1 Chapter 65, Section 145, as amended) is amended to read:

2 "13-1-172. RIGHT TO PROTEST.--Any bidder or offeror who  
3 is aggrieved in connection with a solicitation or award of a  
4 contract, or any qualified potential contractor who was not  
5 awarded a sole source or emergency procurement contract, may  
6 protest to the state purchasing agent or a central purchasing  
7 office. The protest shall be submitted in writing within  
8 fifteen calendar days after knowledge of the facts or  
9 occurrences giving rise to the protest."

10 SECTION 7. Section 13-1-199 NMSA 1978 (being Laws 1984,  
11 Chapter 65, Section 172) is amended to read:

12 "13-1-199. [~~MISDEMEANOR~~] PENALTIES.--Any business or  
13 person [~~which~~] that willfully violates the Procurement Code is  
14 guilty of:

15 A. a misdemeanor if the transaction involves two  
16 hundred fifty thousand dollars (\$250,000) or less; or

17 B. a fourth degree felony if the transaction  
18 involves more than two hundred fifty thousand dollars  
19 (\$250,000)."

20 SECTION 8. A new section of the Procurement Code is  
21 enacted to read:

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

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1 competitive sealed proposal process, including any evaluation  
2 scoring documents used in the process. The records, excluding  
3 any proprietary information, shall be public records available  
4 for public inspection."

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