

What is the Board's Role in the RFP Process?

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The Board's Contracting Authority

- ❑ "A local school board shall have the following powers or duties:
 - ❑ ...
 - ❑ except for expenditures for salaries, contract for the expenditure of money according to the provisions of the Procurement Code."

NMSA 1978 § 22-5-4(J).



Procurement Code

- ❑ “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.”

NMSA 1978 § 13-1-29.

Procurement Authority

- ❑ “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.”

NMSA 1978 § 13-1-97(C).



Application and Exemptions

- ❑ “Except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978 § 13-1-30(A).
- ❑ The Procurement Code does not apply to 34 categories, including:
 - ❑ Small purchases, NMSA 1978 § 13-1-125;
 - ❑ Sole source procurement, NMSA 1978 § 13-1-126; and
 - ❑ Emergency procurement, NMSA 1978 § 13-1-127.

Small Purchases

- (A) “A central purchasing office shall procure **services, construction or items of tangible personal property having a value not exceeding sixty thousand dollars (\$60,000)**, excluding applicable state and local gross receipts taxes, in accordance with the applicable small purchase rules adopted by . . . a local public body . . . that has the authority to issue rules.
- (B) Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure **professional services having a value not exceeding sixty thousand dollars (\$60,000)**, excluding applicable state and local gross receipts taxes, except for the services of landscape architects or surveyors for state public works projects or local public works projects, in accordance with professional services procurement rules promulgated by the general services department or a central purchasing office with the authority to issue rules.
- (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 twenty thousand dollars (\$20,000)**, excluding applicable state and local gross receipts taxes, **by issuing a direct purchase order to a contractor based upon the best obtainable price.”**

Competitive Procurement

- “All procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978, except procurement achieved pursuant to the following sections of the Procurement Code:
 - (A) Sections 13-1-111 through 13-1-122 NMSA 1978, competitive sealed proposals.”

NMSA 1978 § 13-1-102.



Competitive Procurement

- ❑ “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 [office] 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.”

NMSA 1978 § 13-1-111(A).

Invitation for Bids

- ❑ The bidder who offers the product or service matching the specification at the lowest price wins the award.
- ❑ Negotiation is not allowed.
- ❑ Most effective procurement process for the acquisition of commodities.
- ❑ Not appropriate for the acquisition of professional services or other types of procurements where the evaluation components must be crafted and weighed or where the knowledge, skills, experience and prior performance are factors for consideration.

Request for Proposals (RFP)

- ❑ Cost is one of several weighted evaluation factors.
- ❑ Allows for an award to be made to the responsible offeror(s) whose proposal is *most advantageous* to the entity, taking into consideration the evaluation factors set forth in the request for proposals.
- ❑ Negotiation is allowed.
- ❑ A longer, but often more flexible process.



Evaluation Criteria and Committee

- ❑ When the Board is a “using department” (i.e., user of the service), the Board can have a role in establishing the evaluation criteria.
- ❑ The evaluation committee for any proposal should include users of the services to be procured. NMAC 1.4.1.38(B).
 - ❑ These regulations do not prohibit members of an elected governing body from serving on an evaluation committee when the Board is a user of the services to be procured.
- ❑ The Public Finance Department’s regulations governing contracting of audits also recommends that “representatives of the offices of separately elected officials” be included in the auditor selection process. NMAC 2.2.2.8(F)(5).
 - ❑ This regulation is also consistent with having Board representation (less than a quorum) on the selection committee.

Evaluation Criteria and Committee

- ❑ Determine the “using department” when RFPs will be sought for services.
- ❑ If it is the Board:
 - ❑ The Board or its designee(s) may work with procurement administrators to develop the evaluation criteria, and
 - ❑ A Board representative may be allowed on the evaluation committee, so long as doing so would not create a Governmental Conduct Act conflict of interest or violate the Procurement Code.

Evaluation Criteria

- ❑ *Planning and Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707.
 - ❑ City of Santa Fe solicited proposals for a proposed development.
 - ❑ The evaluation committee ranked the proposals and submitted the most advantageous proposal to the City Council.
 - ❑ The City Council rejected the recommendation, introduced new criteria in evaluating the proposals, awarded the bid to the fourth-ranked offeror, and then rejected all bids.
 - ❑ Planning and Design Solutions, the top-ranked offeror, sued.

Evaluation Criteria

- ❑ *Planning and Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707.
- ❑ The New Mexico Supreme Court held that the City's conduct was arbitrary and capricious and violated the Procurement Code and its own Purchasing Manual.
- ❑ While the City was permitted to reject all proposals before awarding the contract, it could not do so after the contract had been awarded.
- ❑ TAKEAWAY: A local public body may only consider those evaluation criteria set forth in the RFP.

Recommendation from Evaluation Committee

- ❑ Options for the Board:
 - ❑ Approve the contract.
 - ❑ Table the matter.
 - ❑ Appoint a new evaluation committee.
 - ❑ Renegotiate the contract.
 - ❑ Disqualify the top-ranked bidder based on new information.
 - ❑ Reject all bids and readvertise for proposals.

See Planning and Design Solutions v. City of Santa Fe, 1994-NMSC-112, ¶ 13, 118 N.M. 707, 711.

Negotiations

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

NMSA 1978 § 13-1-115.

Disclosure of Proposal Contents

- ❑ “The contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.” NMSA 1978 § 13-1-116.
- ❑ *2020 Op. Ethics Comm’n No. 2020-04.*
 - ❑ During Board meeting discussion of school district’s chief procurement officer’s recommendation to contract with an offeror following the issuance of an RFP for cleaning services, a school board member asked the CPO to provide copies of the RFPs and the names of all vendors who received notice.
 - ❑ After receiving this information, the board member contacted local vendors to discuss the cost of the cleaning services requested and asked whether they had received notice of the RFPs.
 - ❑ This was a violation of the Procurement Code because the Code’s duty of confidentiality applies during the “negotiation process,” which is from the time of submission of proposals until the procuring entity awards a contract.



Awarding the Contract

- “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.



Additional Roles of the Board

- ❑ Policy development
- ❑ Finance Subcommittee
 - ❑ “Each local school board shall appoint at least two members of the board as a finance subcommittee to assist the board in carrying out its budget and finance duties.” NMSA 1978 § 22-8-12.3(B).
 - ❑ “The finance subcommittee shall make recommendations to the local school board in the following areas: . . . review of financial statements and periodic monitoring of revenues and expenses . . . and procurement; and serve as an external monitoring committee on budget and other financial matters.” NMSA 1978 § 22-8-12.3(C).

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Ethical Considerations

Ethical Principles of Public Service under the Governmental Conduct Act

- ❑ Treat positions as a public trust.
- ❑ Advance only the public interest, not personal benefits.
- ❑ Earn the confidence of the public.
- ❑ Maintain integrity and act ethically.
- ❑ Fully disclose real and potential conflicts of interest.
- ❑ Do not receive money, anything of value, or a promise in exchange for promised performance of a public act.

NMSA 1978 § 10-16-3.

Further Restrictions on Official Actions

- ❑ Public officers and employees cannot take an official action for the primary purpose of their own financial benefit.
- ❑ If their finances would be affected, they are disqualified from related official acts, unless the financial benefit is proportionately less than the benefit to the general public.
- ❑ Public officers and employees cannot acquire a financial interest that will be affected by their official acts.
 - ❑ A financial interest is defined as an interest held by an individual or the individual's family that is:
 - ❑ An ownership interest in business or property; or
 - ❑ Any employment or prospective employment for which negotiations have already begun.

Conflicts of Interest

- ❑ “A member of the state board [department], a member of a local school board, the state superintendent [secretary], an employee of the department of education, a certified school instructor or a certified school administrator 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 department of education [public education department], school district or public school with which he 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 department of education, school district or public school with which he is associated or employed.”

NMSA 1978 § 22-21-1(A).

Conflicts of Interest

- (A) "A state agency shall not enter into a contract with a public officer or employee of the state, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest unless the public officer or employee has disclosed through public notice the public officer's or employee's substantial interest and unless the contract is awarded pursuant to a competitive process; provided that this section does not apply to a contract of official employment with the state. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this section.
- (B) Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest."

Conflicts of Interest

- ❑ “[I]t is unlawful for any state agency or local public body employee, as defined in the Procurement Code, to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract.” NMSA 1978 § 13-1-190.
- ❑ “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.” NMSA 1978 § 13-1-193.
- ❑ “‘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.” NMSA § 13-1-54.

Conflicts of Interest

- “A state agency or a local public body may grant a waiver from unlawful employee participation pursuant to Section . . . [13-1-190 NMSA 1978] of the Procurement Code, or contemporaneous employment pursuant to Section. . . [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.”

NMSA 1978 § 13-1-194.

Confidential Information

- ❑ “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.” NMSA 1978 § 13-1-195.
- ❑ “No legislator or public officer or employee shall use or disclose confidential information acquired by virtue of the legislator's or public officer's or employee's position with a state agency or local government agency for the legislator's, public officer's or employee's or another's private gain.” NMSA 1978 § 10-16-6.

Possible Penalties under the Governmental Conduct Act

- ❑ “Unless specified otherwise in the Governmental Conduct Act, any person who knowingly and willfully violates any of the provisions of that act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year or both. Nothing in the Governmental Conduct Act shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.” NMSA 1978 § 10-16-17.
- ❑ “The state ethics commission may institute a civil action in district court or refer a matter to the attorney general or a district attorney to institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred fifty dollars (\$250) for each violation not to exceed five thousand dollars (\$5,000).” NMSA 1978 § 10-16-18(B).

Possible Penalties under the Procurement Code

- ❑ “Any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each procurement in violation of any provision of the Procurement Code.” NMSA 1978 § 13-1-196.
- ❑ “The state ethics commission may investigate complaints against a contractor who has a contract with a state agency or a person who has submitted a competitive sealed proposal or competitive sealed bid for a contract with a state agency. The state ethics commission may impose the civil penalties authorized in Sections 13-1-196 through 13-1-198 NMSA 1978 pursuant to the provisions of those sections.” NMSA 1978 § 13-1-196.1.

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