[TITLE 2 PUBLIC FINANCE
CHAPTER 40 EXPENDITURE OF PUBLIC FUNDS
PART 2 GOVERNING THE APPROVAL OF CONTRACTS FOR THE PURCHASE OF PROFESSIONAL SERVICES

2.40.2.1 ISSUING AGENCY: Department of Finance and Administration (DFA).
[2.40.2.1 NMAC - Rp, 2.40.2.1 NMAC, 7/24/2018]

2.40.2.2 SCOPE:

A. The contracts review bureau of the department of finance and administration shall review and approve all professional services contracts which result in expenditures greater than five thousand dollars ($5,000), including applicable gross receipts tax, and all amendments to those contracts for all state agencies except as provided in Subsections B and C of Section 2.40.2.2 NMAC of this rule. Contracts expending public funds in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978 as amended are included within the scope of this rule.

B. The following state agencies are currently exempt from submitting professional services contracts and amendments through the contracts review bureau of the department of finance and administration:

(1) state agencies within the judicial branch of government as defined by the New Mexico Constitution, Article VI;

(2) state agencies within the legislative branch of government as defined by the New Mexico Constitution, Article IV;

(3) state educational institutions as defined by the New Mexico Constitution, Article XII, Section 11 and Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978;

(4) the state fair for only those contracts exempted pursuant to Subsection H of Section 13-1-99 NMSA 1978;

(5) the New Mexico public school insurance authority pursuant to Subsection F of Section 22-29-6 and 22-29-8 NMSA 1978 for contracts for procuring goods or services and paying for insurance or insurance-related services;

(6) the New Mexico mortgage finance authority pursuant to Section 58-18-20 NMSA 1978; and

(7) other state agencies exempt by statute.

C. Pursuant to Section 6-5-9 NMSA 1978, the secretary of the department of finance and administration may exempt a state agency's contracts from contracts review bureau review and approval when the secretary of the department of finance and administration determines that efficiency or economy so requires. A state agency seeking an exemption must:

(1) apply in writing to the secretary of the department of finance and administration; and

(2) meet all of the following requirements:

(a) issue its own warrants;

(b) be exempt from prior submission of vouchers or purchase orders to the financial control division of the department of finance and administration;

(c) receive the majority of its money from non-general fund sources;

(d) maintain pre-audit and post-audit fiscal accounting controls;

(e) maintain and operate its own administrative unit for procurement and controls its own encumbrance of funds available for professional service contracts;

(f) provide administrative control and review of professional services contracts through its own administrative unit; and

(g) employs in-house counsel to prepare, review, and approve professional services contracts for form and legal sufficiency and to advise the state agency with respect to all applicable laws and regulations; provided, however, that the attorney general shall also review and approve all contracts subject to Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule prior to approval and execution by the state agency.
[2.40.2.2 NMAC - Rp, 2.40.2.2 NMAC, 7/24/2018]

2.40.2.3 STATUTORY AUTHORITY:

A. Sections 13-1-118 and 13-1-125 NMSA 1978 authorize the department of finance and administration to review professional services contracts of state agencies as to form, legal sufficiency, and budgetary requirements if required by its regulations.

B. Section 6-5-3 NMSA 1978 provides that before any state agency enters into a contract expending public funds, the financial control division of the department of finance and administration shall determine the authority for such proposed expenditure. After the authority for the expenditure is determined, the appropriate fund shall be shown by the financial control division to be encumbered to the extent of the proposed expenditure. The financial control division may request, and the state agency shall provide, such documentation and other information as the financial control division deems necessary to justify the state agency's determination of authority. The financial control division may disapprove the proposed expenditure if it determines that the justification is inadequate or is not substantiated by law.

C. Section 6-5-6 NMSA 1978 requires the financial control division of the department of finance and administration to determine that the proposed expenditure does not exceed the state agency's appropriation, does not exceed the periodic allotment made to the state agency or the unencumbered balance of funds at its disposal. The state agency shall determine that a proposed expenditure is for a public benefit and purpose consistent with the related appropriation and is necessary to carry out the statutory mission of the state agency prior to committing the state to the transaction.

D. Subsection E of 9-1-5 and Subsection E of 9-6-5 NMSA 1978 provide that after notice and hearing, the secretary of the department of finance and administration may make and adopt such reasonable administrative and procedural rules and regulations as necessary to carry out the duties of the department of finance and administration and its divisions.

[2.40.2.3 NMAC - Rp, 2.40.2.3 NMAC, 7/24/2018]

2.40.2.4 DURATION: Permanent.

[2.40.2.4 NMAC - Rp, 2.40.2.4 NMAC, 7/24/2018]

2.40.2.5 EFFECTIVE DATE: July 24, 2018 unless a later date is cited at the end of a section.

[2.40.2.5 NMAC - Rp, 2.40.2.5 NMAC, 7/24/2018]

2.40.2.6 OBJECTIVE: The purpose of this rule is to establish the procedures state agencies must follow and the requirements state agencies must meet in drafting, entering into, and seeking approval of professional services contracts. These procedures ensure compliance with Sections 6-5-3, 6-5-6, 13-1-118 and 13-1-125 NMSA 1978 as amended.

[2.40.2.6 NMAC - Rp, 2.40.2.6 NMAC, 7/24/2018]

2.40.2.7 DEFINITIONS:

A. **"Bureau"** means the contracts review bureau of the department of finance and administration.

B. **"Contract"** means any agreement for the provision of professional services.

C. **"Contract brief"** means the bureau paper form or electronic version which shall accompany all professional services contracts and amendments submitted to the bureau.

D. **"Contractor"** as defined in Section 13-1-43 NMSA 1978 means any business having a contract with a state agency.

E. **"Department or DFA"** means the department of finance and administration.

F. **"Form"** means, at a minimum, that all contracts and amendments contain the provisions required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures when required and as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

G. **"Legal sufficiency"** means, at a minimum, that all contracts and amendments contain the provisions required by law and that all required signatures have been obtained.

H. **"Procurement"** as defined by Section 13-1-74 NMSA 1978 means purchasing, renting, leasing, lease purchasing or otherwise acquiring items of personal property, services or construction and includes all procurement functions, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of the contract, and contract administration.

I. **"Procurement Code"** means Sections 13-1-28 to 13-1-199 NMSA 1978, as amended.

J. **"Professional services"** as defined by Section 13-1-76 NMSA 1978 means the services of architects, archaeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, and persons or businesses providing similar services, including information

system resources professional services, and other such services which may be designated as professional services by a determination issued by the state purchasing agent or designee.

K. "Regulation" as defined by Section 13-1-80 NMSA 1978 means any rule, order, statement or policy, as amended, issued by a state agency or a local public body that affects persons not members or employees of the issuer.

L. "Retroactive approval to a contract or a contract amendment" means approval of a contract or contract amendment that was submitted to the bureau and approved by the DFA secretary or designee pursuant to 2.40.2.13 NMAC of this rule after the contractor has begun work pursuant to a request to perform work from a state agency employee or public officer with authority to make such a request.

M. "DFA secretary" means the secretary of the department of finance and administration.

N. "Sole source contract or amendment to sole source contract" means a contract or amendment which fulfills the requirements of Sections 13-1-118, 13-1-126 and 13-1-126.1 NMSA 1978, as amended.

O. "State agency" means any department, agency, commission, council, board, advisory board, committee, or institution of the state of New Mexico, and does not include local public bodies.

[2.40.2.7 NMAC - Rp, 2.40.2.7 NMAC, 7/24/2018]

2.40.2.8 DELEGATION OF APPROVAL AUTHORITY:

A. The bureau shall review all contracts and contract amendments for professional services with state agencies as to form, and budgetary requirements.

B. The bureau shall consult with the department's legal counsel as needed regarding any issues of legal sufficiency of a state agency's contracts and contract amendments for professional services.

C. The DFA secretary shall delegate, in writing to certain members of the bureau, the authority to approve professional services contracts which result in expenditures greater than five thousand dollars ($5,000), including gross receipts tax, and all amendments to those contracts except retroactive approval to contracts and contract amendments and sole source contracts and amendments to sole source contracts as provided herein.

[2.40.2.8 NMAC - Rp, 2.40.2.8 NMAC, 7/24/2018]

2.40.2.9 FORM AND SUBMISSION:

A. All contracts and subsequent amendments shall be in a form and contain such provisions as required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures when required and as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

B. All contracts and amendments shall:

(1) be accompanied by a contract brief being in such form and containing such information as may be required by the bureau;

(2) be accompanied by a document prescribed by the financial control division of the department showing that funds have been encumbered to the extent of the contract, including any amendments to that contract; if the contract term includes more than one fiscal year, the contract must be accompanied by an encumbrance for the current fiscal year amount or, up to the total amount of the current appropriation available for that contract;

(3) be accompanied by a written request for approval from the secretary of the contracting state agency or designee if the contract is subject to Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule; and

(4) comply with New Mexico law regarding indemnification and insurance.

[2.40.2.9 NMAC - Rp, 2.40.2.9 NMAC, 7/24/2018]

2.40.2.10 REVIEW PROCEDURES:

A. State agencies must submit to the bureau for review:

(1) sole source contracts;

(2) amendments to sole source contracts;

(3) retroactive approval to contracts; and

(4) retroactive approval to contract amendments.

B. Bureau review:

(1) The bureau shall review all contracts or contract amendments for form, budgetary requirements and compliance with the requirements prescribed on the contract brief.

(2) No contract or contract amendment shall become binding or effective until signed and dated by a member of the bureau with contract approval authority.

C. Other review:

(1) Prior to the bureau's review and at the bureau's request, the attorney general shall review all contracts which may violate conflict of interest provisions of the Governmental Conduct Act, Sections 10-16-1 to 10-16-18 NMSA 1978.

(2) The bureau may submit any contract or amendment to the attorney general or other legal counsel for review if the bureau is aware of legal issues concerning the contract or the amendment.

[2.40.2.10 NMAC - Rp, 2.40.2.10 NMAC, 7/24/2018]

2.40.2.11 SMALL PURCHASES: A contract for professional services having a value over five thousand dollars ($5,000) excluding applicable gross receipts taxes, but not exceeding the amount set forth in Section 13-1-125 NMSA 1978 except for the services of architects, landscape architects engineers, or surveyors for state public works projects, may be procured in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978.

[2.40.2.11 NMAC - Rp, 2.40.2.11 NMAC, 7/24/2018]

2.40.2.12 SOLE SOURCE CONTRACT OR AMENDMENT TO SOLE SOURCE CONTRACT:

A. A contract may be awarded without competitive sealed proposals, regardless of the estimated cost, when a central purchasing office of a contracting state agency makes a written determination, signed by the secretary of the contracting state agency or designee, which states that a good-faith review of available sources has been conducted and that there is only one source for the required professional services. The written determination and the dollar amount of the contract shall be submitted to the bureau for review and approval by the DFA secretary or designee and shall include the following information:

(1) a detailed, sufficient explanation of the reasons, qualifications, proprietary rights, or unique capabilities that make the prospective contractor a sole source;

(2) an explanation of the criteria developed and specified by the state agency as necessary to perform the contract and upon which the state agency reviewed available sources;

(3) a description of the procedures used by the state agency in conducting a good faith review of available sources, including without limitation, a narrative description of all steps taken by the state agency as evidence of the good-faith review performance such as:

(a) researching trade publications and industry newsletters;

(b) reviewing telephone books or other advertisements;

(c) reviewing current contract;

(d) contacting similar service providers; and

(e) reviewing the state purchasing agents vendor list; and

(4) a list of all businesses contacted and an explanation of why those businesses could not perform the contract, or, a reasonable explanation of why the state agency has determined that no businesses, besides the prospective contractor, exist.

B. The bureau must obtain written approval of the agency's sole source determination from the DFA secretary or designee prior to approving a sole source contract or amendment to a sole source contract.

[2.40.2.12 NMAC - Rp, 2.40.2.12 NMAC, 7/24/2018]

2.40.2.13 RETROACTIVE APPROVAL FOR A CONTRACT OR CONTRACT AMENDMENT:

A. The Procurement Code, Section 13-1-102, NMSA 1978, as amended, requires that all non-exempt procurement (Section 13-1-98 NMSA 1978) by state agencies shall be achieved by competitive sealed bids or competitive sealed proposals except for small purchases, sole source procurements, emergency procurements, existing contracts and procurements from antipoverty program business. For professional services, the proposal and procurement process are not complete until a written contract or contract amendment is signed by the agency and the contractor and is approved by the DFA secretary or designee and approved by the bureau.

B. For retroactive approval of contracts and contract amendments which fulfill all of the requirements of this rule and the Procurement Code, DFA will approve the date requested in writing by the agency on the brief accompanying the document as long as the requested approval date is within thirty days of the first day of each fiscal year.

C. For retroactive approval of contracts and contract amendments apart from the approval given pursuant to the provisions 2.40.2.13 NMAC of this rule, DFA may grant additional retroactive approval to a contract

~~or contract amendment, based upon rare and exceptional circumstances, where all of the following conditions are met:~~

~~**(1)** the professional services performed without DFA's prior approval of the contract did not occur as the result of repeated agency mistakes or willful misconduct;~~

~~**(2)** the failure to obtain DFA's retroactive approval will prevent the state agency from fulfilling its statutory obligations;~~

~~**(3)** the state agency provides to DFA a written, factual, detailed explanation of the matters described in Paragraphs (1) and (2) of Subsection C of 2.40.2.13 NMAC, certified to be true by signature of the head of the state agency;~~

~~**(4)** the state agency requested, through a public officer or employee with authority to make such a request, the contractor to perform professional services that were then actually performed by the contractor in good faith reliance that it would be paid for those professional services.~~

~~**D.** The Procurement Code, Section 13-1-182 NMSA 1978, as amended, governs situations in which DFA has denied a request for retroactive approval of a contract or contract amendment due to the state agency's failure to meet the requirements of Subsections B or C of 2.40.2.13 NMAC of this rule.~~

~~[2.40.2.13 NMAC - Rp, 2.40.2.13 NMAC, 7/24/2018]~~

~~**2.40.2.14 EMERGENCY PROCUREMENT:** An emergency procurement of professional services may be made under the conditions provided in the Procurement Code. Records of any emergency procurement of professional services, including the written determination of the basis for the emergency procurement being relied on by the state agency as justification for the emergency procurement, shall be maintained by the state agency for a minimum of three years and shall be made available by the state agency to the financial control division upon request.~~

~~[2.40.2.14 NMAC - Rp, 2.40.2.14 NMAC, 7/24/2018]~~

~~**2.40.2.15 COMPLIANCE:** State agencies must comply with federal and state statutes, rules, regulations and policies and shall have their state agency's legal counsel review all contracts and contract amendments certifying in writing that they are legally sufficient prior to submission to the bureau. Wrongful or mistaken approval by the bureau shall not be a defense to an action brought by or against the state agency on a contract.~~

~~[2.40.2.15 NMAC - Rp, 2.40.2.15 NMAC, 7/24/2018]~~

~~**2.40.2.16 RECORDS:**~~

~~**A.** Record inspection, record retention and record destruction relating to contracts shall be conducted in accordance with the Inspection of Public Records Act, Sections 14-2-1 to 14-2-12 NMSA 1978; the Public Records Act, Sections 14-3-1 to 14-3-23 NMSA 1978; and with Section 13-1-128 NMSA pertaining to sole source and emergency procurement; and Section 13-1-116 NMSA 1978 of the Procurement Code.~~

~~**B.** The bureau will retain original contracts, any subsequent amendments, and contract briefs in accordance with provisions of the Inspection of Public Records and Public Records Act.~~

~~[2.40.2.16 NMAC - Rp, 2.40.2.16 NMAC, 7/24/2018]~~

~~**2.40.2.17 RULE FILING:** This rule shall be filed in accordance with the State Rules Act, Sections 14-4-1 to 14-4-11 NMSA 1978 and shall become effective upon publication in the New Mexico Register.~~

~~[2.40.2.17 NMAC - Rp, 2.40.2.17 NMAC, 7/24/2018]~~]

HISTORY OF 2.40.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:

DFA 76-3, Technical and Professional Services and State Highway Department Contracts, June 25, 1976, filed 7/13/1976.

DFA 77-6, Technical and Professional Service Contracts, August 15, 1977, filed 8/22/1977.

DFA 78-2.1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6/30/1978.

DFA Rule No. 84-3, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6/28/1984.

DFA Rule No. 85-1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 7/10/1985.

DFA 87-1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6/30/1987.

History of Repealed Material: 2.40.2 NMAC - Governing the Approval of Contracts for the Purchase of Professional Services, filed 12/23/2004 - Repealed effective 7/24/2018.

NMAC History:
2.40.2 NMAC - Governing the Approval of Contracts for the Purchase of Professional Services, filed (12/23/2004) was replaced by 2.40.2 NMAC - Governing the Approval of Contracts for the Purchase of Professional Services effective 7/24/2018.