TITLE 2 PUBLIC FINANCE
CHAPTER 91 GRANTS
PART 4 ANTI-DONATION COMPLIANCE REQUIREMENTS

2.91.4.1 ISSUING AGENCY: Department of Finance and Administration (DFA).
[2.91.4.1 NMAC - N, XX/XX/XXXX]

2.91.4.2 SCOPE: This rule applies to all state agencies, local governments, tribal governments, special districts, nonprofit organizations, and any other entities that receive or administer capital outlay or special purpose appropriations involving the acquisition, construction, use, leasing, or operation of public assets by non-governmental entities.
[2.91.4.2 NMAC - N, XX/XX/XXXX]

2.91.4.3 STATUTORY AUTHORITY: NMSA 1978 Sections 6-3B-1 to 6-3B-6; NMSA 1978, NMSA 1978, Section 6-4-1.1; and Subsection E of NMSA 1978 Section 9-6-5.
[2.91.4.3 NMAC - N, XX/XX/XXXX]

2.91.4.4 DURATION: Permanent.
[2.91.4.4 NMAC - N, XX/XX/XXXX]

2.91.4.5 EFFECTIVE DATE: XX/XX/XXXX, unless a later date is cited at the end of a section.
[2.91.4.5 NMAC - N, XX/XX/XXXX]

2.91.4.6 OBJECTIVE: The objective of this rule is to ensure that all capital outlay appropriations comply with the Anti-Donation Clause, including requirements for fair market value (FMV), procurement, private-use restrictions, documentation, and DFA approval of private-entity involvement in capital projects. This rule establishes statewide standards to protect public funds, prevent unconstitutional donations, and ensure transparency.
[2.91.4.6 NMAC - N, XX/XX/XXXX]

2.91.4.7 DEFINITIONS: As used in this rule:

A. "**Anti-Donation Clause**" means Article IX, Section 14 of the New Mexico Constitution prohibiting the donation of public funds or assets to private entities except under legally permissible arrangements.

B. "**Private use**" means use, control, benefit, or operational involvement of a non-governmental entity in a publicly funded asset.

C. "**Fair market value (FMV)**" means the monetary value of goods, services, or property as determined by appraisal or comparable methods.

D. "**FMV services**" means services provided by a private entity in exchange for public investment, valued objectively and documented.

E. "**Lease or operating agreement**" means a contract between a public entity and a private entity establishing terms of access, operation, or use of a public asset.

F. "**Procurement compliance**" means adherence to state or local procurement laws for the selection of private partners or vendors.

G. "**Public asset**" means any infrastructure, building, or equipment funded wholly or partly with state capital funds.
[2.91.4.7 NMAC - N, XX/XX/XXXX]

2.91.4.8 GENERAL ANTI-DONATION REQUIREMENTS:

A. Prohibition. Public funds may not be donated to private entities unless:

(1) FMV compensation is provided;
(2) a valid procurement process is followed;
(3) the arrangement complies with statutory exceptions; and
(4) DFA approves the documentation.

B. Ownership or Retained Secured Interest.

a. Public assets funded by capital outlay shall be owned by an eligible governmental entity.

b. As an alternative to ownership under Paragraph (1) of this subsection, if title to a public asset is held by, or is to be conveyed to, a non-governmental entity, the eligible governmental entity shall retain a reversionary interest, property interest, or other legal interest in the public asset sufficient to protect the public investment. The retained interest shall be secured by one or more of the following recorded and enforceable instruments:

(a) a lien on the public asset;
(b) a deed of trust;
(c) a recordable and enforceable covenant running with the land; or
(d) other security approved by DFA as adequate to protect the public investment.

c. A retained interest and securing instrument under Paragraph (2) of this subsection shall:

(a) be executed and recorded in the real property records of the county in which the public asset is located, or otherwise perfected as appropriate for the type of asset, before any state funds are disbursed;

(b) entitle the eligible governmental entity to claw back the public asset, or in the alternative to recover the public contribution or state funds, upon the non-governmental entity's failure to provide FMV compensation, diversion of the public asset to an impermissible or non-public use, transfer in violation of Subsection C of 2.91.4.11 NMAC, or any other noncompliance with this rule or the grant agreement;

(c) remain in effect for the useful life of the public asset, the period required by the appropriation, or the period required for the eligible governmental entity to receive FMV compensation for the public contribution, whichever is longer; and

(d) be reviewed and approved by DFA under 2.91.4.11 and 2.91.4.13 NMAC, together with the FMV documentation required by 2.91.4.9 NMAC, before the state funds are expended.

d. An alternative arrangement under this subsection does not relieve the public entity of the FMV, procurement, documentation, and DFA-approval requirements of this rule, and does not authorize any uncompensated benefit prohibited by Subsection C of this section.

C. No Uncompensated Benefit. Private entities may not receive uncompensated benefit from publicly funded property.
[2.91.4.8 NMAC - N, XX/XX/XXXX]

2.91.4.9 FMV REQUIREMENTS:

A. FMV Must Be Demonstrated. If any private entity benefits from or uses a publicly funded project, the public entity must:

(1) obtain an FMV appraisal or valuation; and
(2) demonstrate that the private entity provides FMV-equivalent compensation in cash or services.

B. FMV Services Documentation. FMV-equivalent services must:

(1) be itemized;
(2) include objective valuation methodology for the services;
(3) include a methodology for reporting the credit generated per unit of service; and
(4) relate directly to the project.

C. Prohibited FMV Arrangements. FMV may not be satisfied through:
(1) vague or speculative "community benefits";
(2) non-tangible considerations; or
(3) below-market leases without justification.

[2.91.4.9 NMAC - N, XX/XX/XXXX]

2.91.4.10 PROCUREMENT REQUIREMENTS:

A. Competitive Procurement Required. If a private entity owns, operates, or delivers services related to a publicly funded project, procurement law must be followed.
B. Procurement Records. Documentation must include:

(1) solicitation materials;
(2) evaluation records; and
(3) contract or lease agreements.

C. Non-Competitive Procurement. Non-competitive procurement may be permitted only when expressly allowed by law and must be justified in writing.
[2.91.4.10 NMAC - N, XX/XX/XXXX]

2.91.4.11 LEASE AND OPERATING AGREEMENTS WITH PRIVATE ENTITIES:

A. Required Agreement Elements. All leases or operating agreements involving private entities must include:

(1) responsibilities of each party;

(2) term limits;
(3) FMV-based compensation requirements;
(4) use restrictions consistent with appropriation purpose;
(5) maintenance obligations; and
(6) termination and compliance provisions.

B. DFA Review Required. DFA must approve:
(1) FMV valuations;
(2) draft agreements; and
(3) anti-donation compliance forms.

C. Prohibition on Unauthorized Transfers. Public entities may not transfer ownership or control of publicly funded assets to private entities without statutory authority and FMV compensation.
[2.91.4.11 NMAC - N, XX/XX/XXXX]

2.91.4.12 REQUIRED DOCUMENTATION:

A. Documentation required for anti-donation compliance includes:

(1) FMV appraisal or valuation;
(2) lease or operating agreement;
(3) procurement record;
(4) FMV service logs, if applicable; and
(5) anti-donation compliance form in DFA format.

B. All documentation must be uploaded into CAPS when applicable.
C. Documentation must be retained for five to seven years after project close-out.
[2.91.4.12 NMAC - N, XX/XX/XXXX]

2.91.4.13 DFA APPROVAL WORKFLOW:

A. Public entities must submit anti-donation documentation before:
(1) executing a lease or operating agreement;
(2) allowing private use of a public asset; and
(3) approving design or construction that supports private benefit.

B. DFA may:

(1) request supplemental documentation;
(2) require changes to agreements; and
(3) condition approval on FMV adjustments.

C. DFA will issue a written determination of compliance or non-compliance.
[2.91.4.13 NMAC - N, XX/XX/XXXX]

2.91.4.14 PROHIBITED ACTIONS:

The following violate the Anti-Donation Clause:

A. Allowing private use of a public asset without FMV compensation;
B. Contracting or leasing with a private entity without procurement compliance;
C. Providing capital improvements to private property without statutory authorization;
D. Allowing a private operator to generate profit from a public asset without FMV lease payments; and
E. Providing free or discounted services funded with public capital outlay.

[2.91.4.14 NMAC - N, XX/XX/XXXX]

2.91.4.15 NONCOMPLIANCE AND ENFORCEMENT:

A. Noncompliance includes:

(1) failure to provide FMV documentation;
(2) missing or incomplete procurement records;
(3) unauthorized private use;
(4) execution of agreements without DFA approval;
(5) misrepresentation of ownership or control; and
(6) any action constituting an unconstitutional donation.

B. Consequences may include:

(1) suspension of grant agreement;
(2) freeze of funds;
(3) denial of reimbursement;
(4) mandatory corrective action under the Public Finance Accountability Act; and
(5) referral to the state auditor or attorney general; and
(6) reversion or transfer of the public asset to an eligible governmental entity.

C. DFA may require a fiscal agent if accounting controls are deficient.

[2.91.4.15 NMAC - N, XX/XX/XXXX]

2.91.4.16 CLEARANCE OF NONCOMPLIANCE:

A. Entities must resolve deficiencies through:

(1) revised agreements;
(2) FMV adjustments;
(3) procurement corrections; and
(4) updated documentation.

B. DFA will issue written clearance once all requirements are met.

[2.91.4.16 NMAC - N, XX/XX/XXXX]

2.91.4.17 SEVERABILITY:

If any section of this rule is held invalid, the remainder remains in effect.

[2.91.4.17 NMAC - N, XX/XX/XXXX]

HISTORY OF 2.91.4 NMAC: [RESERVED]