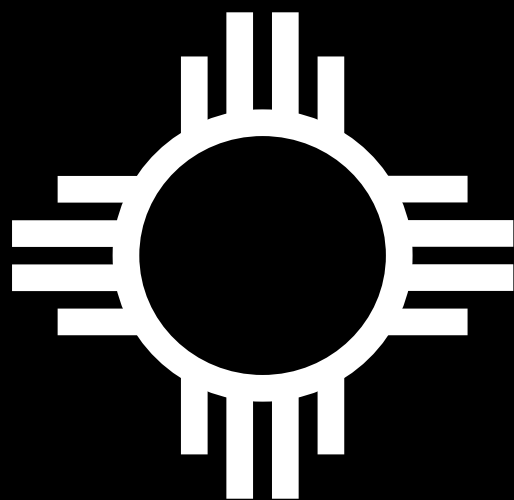


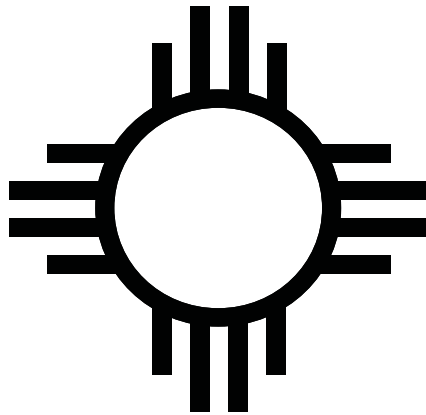
**NEW
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REGISTER**



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Issue Number 16
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The official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico

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2013

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New Mexico Register

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August 30, 2013

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Notices of Rulemaking and Proposed Rules

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

ENERGY CONSERVATION AND
MANAGEMENT DIVISION

NOTICE OF PUBLIC HEARING AND RULEMAKING OF THE NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

The New Mexico Energy, Minerals and Natural Resources Department (EMNRD), Energy Conservation and Management Division will hold a public hearing on proposed rule changes to the Sustainable Building Tax Credit Program at 9:15 a.m. on Tuesday, September 17, 2013 in Porter Hall, Wendell Chino Building, 1220 South Saint Francis Drive, Santa Fe, New Mexico.

EMNRD is proposing changes to the following rules: 3.4.16 NMAC, Sustainable Building Tax Credit for Residential Buildings, Corporate Income Taxes; 3.4.17 NMAC, Sustainable Building Tax Credit for Commercial Buildings, Corporate Income Taxes; 3.3.29 NMAC, Sustainable Building Tax Credit for Residential Buildings, Personal Income Taxes; and 3.3.30 NMAC, Sustainable Building Tax Credit for Commercial Buildings, Personal Income Taxes. Proposed changes to 3.4.16 NMAC include addition of definitions and the lowering of the annual cap for tax credits for residential buildings to reflect statutory changes. Proposed changes to 3.4.17 NMAC include the addition of multifamily dwellings to the definition of commercial building, streamlining of the tax credit application process and the lowering of the annual cap for tax credits for residential buildings to conform to statutory changes. Proposed changes to 3.3.29 NMAC include addition of definitions and the lowering of the annual cap for residential building to reflect statutory changes. Proposed changes to 3.3.20 NMAC include the addition of multifamily dwellings to the definition of commercial building, streamlining of the tax credit application process and the lowering of the annual cap for commercial buildings to conform to statutory changes.

Copies of the proposed rule changes are available from EMNRD, Energy Conservation and Management Division, 1220 S. Saint Francis Drive, Santa Fe, NM 87505; at www.cleanenergynm.org; or by contacting Ken Hughes at khughes@state.nm.us; telephone (505) 476-3320.

All interested persons may participate in the hearing, and will be given an opportunity to submit relevant evidence, data, views, and arguments, orally or in writing.

Those wishing to submit written statements in lieu of providing oral testimony at the hearing, may submit the written statements by September 10, 2013 by 5:00 p.m. by mail or e-mail. Please mail written comments to Ken Hughes, EMNRD, Energy Conservation and Management Division, 1220 South Saint Francis Drive, Santa Fe, New Mexico 87505 or submit them by e-mail to khughes@state.nm.us. EMNRD will accept no statements after the conclusion of the hearing.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact Ken Hughes at least one week prior to the hearing or as soon as possible.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on November 7, 2013 at 10:00 a.m. in Room 311 at the State Capitol, located at 490 Old Santa Fe Trail in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 13-06(R), proposed repeal of Air Quality Control Regulation 20.2.88 New Mexico Administrative Code (Emission Standards for New Motor Vehicles) ("20.2.88 NMAC").

The proponent of these regulatory amendments is the New Mexico Environment Department ("NMED").

The purpose of the public hearing is to consider and take possible action on a petition from NMED to repeal 20.2.88 NMAC. This regulation, sometimes called "Clean Cars," was first adopted in 2007 to apply the California motor vehicle emissions standards, or "California standards," within New Mexico beginning with model year 2011. The start date was later revised to 2016. At the time that the Board adopted the Clean Cars regulation, the California standards were more stringent than the federal motor vehicle emissions standards. However, since that time the federal

programs have been revised to achieve the same emissions reduction as the California standards. As a result, the administrative burdens of implementing the Clean Cars regulation now outweigh the potential benefits of having a State program.

The text of the regulation proposed for repeal may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico, on NMED's web site at www.nmenv.state.nm.us, or by contacting Lany Weaver at (505) 476-4322 or lany.weaver@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures – Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, §74-1-9, the Air Quality Control Act, NMSA 1978, §74-2-6, and any applicable procedural orders.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) include a copy of the direct testimony in narrative form of each technical witness;
- (4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
- (5) attach the text of any recommended modifications to the proposed regulatory change.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on October 18, 2013 and should reference the docket number, EIB 13-06(R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castañeda, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 2100-S
Santa Fe, NM 87505
Phone: (505) 827-2425, Fax (505) 827-2836

Any member of the general public may

testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact the J.C. Borrego of the NMED Human Resources Bureau by October 18, 2013 at P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502-5469, telephone 505-827-0424. TDY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on November 7, 2013 at 10:00 a.m. in Room 311 at the State Capitol, located at 490 Old Santa Fe Trail in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 13-07(R), proposed amendments to Air Quality Control Regulations 20.2.77 New Mexico Administrative Code (New Source Performance Standards) ("20.2.77 NMAC") and 20.2.82 New Mexico Administrative Code (Maximum Achievable Control Technology Standards for Source Categories of Hazardous Air Pollutants) ("20.2.82 NMAC").

The proponent of these regulatory amendments is the New Mexico Environment Department ("NMED").

The purpose of the public hearing is to consider and take possible action on a petition from NMED to amend 20.2.77 NMAC and 20.2.82 NMAC. The purpose of the proposed amendments is to incorporate by reference the new rules, corrections, revisions, and amendments to the federal New Source Performance Standards

("NSPS") and Maximum Achievable Control Technology Standards for Source Categories of Hazardous Air Pollutants ("MACT"), which were promulgated by the U.S. Environmental Protection Agency ("EPA") and published in the Federal Register from January 1, 2011 to August 29, 2013.

The proposed revised regulations, and the text of the federal standards to be incorporated by reference, may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico, on NMED's web site at www.nmenv.state.nm.us, or by contacting Lany Weaver at (505) 476-4322 or lany.weaver@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures – Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, §74-1-9, the Air Quality Control Act, NMSA 1978, §74-2-6, and any applicable procedural orders.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) include a copy of the direct testimony in narrative form of each technical witness;
- (4) list and attach each exhibit anticipated to be offered by that person at the hearing; and
- (5) attach the text of any recommended modifications to the proposed regulatory change.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on October 18, 2013 and should reference the docket number, EIB 13-07(R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castañeda, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 2100-S
Santa Fe, NM 87505
Phone: (505) 827-2425, Fax (505) 827-2836

Any member of the general public may

testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact the J.C. Borrego of the NMED Human Resources Bureau by October 18, 2013 at P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502-5469, telephone 505-827-0424. TDY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

NEW MEXICO HIGHER EDUCATION DEPARTMENT

NEW MEXICO HIGHER EDUCATION DEPARTMENT

The Higher Education Department ("Department") hereby gives notice that the Department will conduct a public hearing at 2048 Galisteo Street, Santa Fe, NM 87505-2100, on October 1, 2013, from 10:00 a.m. to 12:00 p.m. The purpose of the public hearing will be to obtain input on the following rule(s):

[Continued on page 583]

Rule Number	Rule Name	Proposed Action
5.7.4 NMAC	PRIMARY CARE PHYSICIAN STUDENT LOAN-FOR-SERVICE PROGRAM	Adopt new rule
5.7.5 NMAC	TEACHER LOAN REPAYMENT PROGRAM	Adopt new rule
5.7.9 NMAC	NEW MEXICO SCHOLARS PROGRAM	Rule amendment
5.7.31 NMAC	PUBLIC SERVICE LAW LOAN REPAYMENT PROGRAM	Rule amendment

Interested individuals may testify either at the public hearing or submit written comments regarding the proposed rulemaking to Mr. David Mathews, Office of General Counsel, Higher Education Department, 2048 Galisteo Street, Santa Fe, New Mexico 87505-2100 (david.mathews@state.nm.us) (505) 476-8402 (telefax (505) 476-8454).

Written comments must be received no later than 5:00 pm on October 1, 2013. However, the submission of written comments as soon as possible is encouraged.

The proposed rulemaking action may be accessed on the Department's website (<http://hed.state.nm.us/>) or obtained from David Mathews, Office of General Counsel, Higher Education Department, 2048 Galisteo Street, Santa Fe, New Mexico 87505-2100 (david.mathews@state.nm.us) (505) 476-8402(telefax (505) 476-8454). The proposed rule will be made available at least thirty (30) days prior to the hearings.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact the Higher Education Department as soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

**NEW MEXICO
COMMISSION OF PUBLIC
RECORDS
HISTORICAL RECORDS ADVISORY
BOARD**

Commission of Public Records
New Mexico State Records Center &
Archives
1205 Camino Carlos Rey
Santa Fe, New Mexico 87507

NOTICE OF REGULAR MEETING

The New Mexico Historical Records Advisory Board (NMHRAB) has scheduled a regular meeting for Friday, September 20, 2013 at 9:00 am. During the meeting, the NMHRAB will also hold a Rule Hearing to take public comment regarding the following proposed rulemaking action:

AMENDMENT

- 1.13.5 NMAC NEW MEXICO HISTORICAL RECORDS GRANT PROGRAM

A copy of the agenda and proposed rule amendment is available at the Office of the State Records Administrator, 1209 Camino Carlos Rey, Santa Fe, NM and on the SRCA website at: nmcpr.state.nm.us/index.htm.

The agenda is subject to change up to 72 hours prior to the meeting.

The meeting and rule hearing will be held at the NM State Records Center & Archives (SRCA), 1209 Camino Carlos Rey, Santa Fe, NM.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the meeting, please contact Ms. Meghan Bayer at 505-476-7936 of the State Records Center and Archives at least one week prior to the meeting. Public documents, including the agenda and minutes, can be provided in various accessible formats.

**End of Notices and Proposed
Rules Section**

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Adopted Rules

NEW MEXICO OFFICE OF THE STATE ENGINEER

SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91 is repealed effective 8-30-2013 and replaced by 19.25.2 NMAC, Hearing Unit Procedures, effective 8-30-2013.

19 NMAC 25.2, Hearing Procedures, filed 3-11-1998 is repealed and replaced by 19.25.2 NMAC, Hearing Unit Procedures, effective 8-30-2013.

NEW MEXICO OFFICE OF THE STATE ENGINEER

TITLE 19 N A T U R A L RESOURCES AND WILDLIFE CHAPTER 25 ADMINISTRATION AND USE OF WATER - GENERAL PROVISIONS PART 2 HEARINGS UNIT PROCEDURES

19.25.2.1 ISSUING AGENCY: Office of the State Engineer ("OSE").
[19.25.2.1 NMAC - Rp, 19 NMAC 25.2.1, 8-30-2013]

19.25.2.2 SCOPE: This rule governs the conduct and procedures of hearings before the state engineer conducted pursuant to NMSA 1978, Sections 72-2-16, 72-2-17, and 72-2-18. This rule shall not govern public rulemaking proceedings held pursuant to NMSA 1978, Section 72-2-8, expedited proceedings under NMSA 1978, Section 72-2-9.1, or appeals from a district water master to the state engineer in accordance with NMSA 1978, Section 72-3-3.
[19.25.2.2 NMAC - Rp, 19 NMAC 25.2.2, 8-30-2013]

19.25.2.3 STATUTORY AUTHORITY: NMSA 1978, Section 72-2-8 (authorizing state engineer to adopt regulations prescribing administrative procedures), Section 72-2-12 (authorizing state engineer to promulgate rules in connection with hearings and to appoint hearing examiners), Section 72-2-16 (granting state engineer authority to conduct hearings prior to appeal), Section 72-2-17 (establishing certain requirements for hearings) and Section 72-12-18 (granting state engineer authority to issue compliance orders).
[19.25.2.3 NMAC - Rp, 19 NMAC 25.2.3,

8-30-2013]

19.25.2.4 DURATION: Permanent.
[19.25.2.4 NMAC - Rp, 19 NMAC 25.2.4, 8-30-2013]

19.25.2.5 EFFECTIVE DATE: August 30, 2013, unless a later date is cited at the end of a section.
[19.25.2.5 NMAC - Rp, 19 NMAC 25.2.5, 8-30-2013]

19.25.2.6 OBJECTIVE: The objective of this rule is to establish procedures that govern hearings before the state engineer and the hearings unit and to ensure the expeditious and orderly handling of all administrative and enforcement matters consistent with the requirements of due process.
[19.25.2.6 NMAC - Rp, 19 NMAC 25.2.6, 8-30-2013]

19.25.2.7 DEFINITIONS: Unless otherwise defined below, terms used in this rule have the same meaning as set forth in NMSA 1978, Chapter 72. The use of a masculine pronoun to refer to individuals is for grammatical convenience and is intended to be gender neutral.

A. "Administrative litigation unit" or "ALU" means that division of the OSE designated to provide legal counsel to and legal representation of the water rights division ("WRD") in administrative hearings and to represent the state engineer in judicial proceedings.

B. "Aggrieved applicant" means an applicant whose unprotested application has been acted on by the WRD without hearing, and who disagrees with the action or decision and files a timely request for a hearing on the merits of the application.

C. "Applicant" means a person who has filed an application involving the beneficial use of water with the OSE.

D. "Alternative dispute resolution ("ADR") officer" means that person appointed or designated by the state engineer to facilitate settlement or alternative resolutions of disputed matters pending before the hearing unit.

E. "Compliance order" means a written administrative directive issued on the authority of the state engineer pursuant to NMSA 1978, Section 72-2-18 that states the specific nature of an alleged violation of a state engineer-issued permit, license or order, or any statute, regulation, or court order subject to administration by the state engineer; and that requires compliance by the respondent within a specified time period.

F. "Docket" means the

hearings unit's record containing the date of entry of a case, its numerical designation, and the calendar of those cases awaiting action through the hearing process.

G. "Ex parte communication" means a communication regarding substantive issues between a party to a matter pending before the hearings unit and the hearing examiner or state engineer, without all other parties being present or having received prior notice of such communication.

H. "Hearing" means a formal proceeding or hearing before the state engineer or his hearing examiner. This rule governs the following three types of hearings:

(1) **"compliance hearing"** that provides a person named in a compliance order an opportunity to respond to or contest the alleged violation of law or order;

(2) **"aggrieved application hearing"** that provides an aggrieved applicant an opportunity to be heard on the merits of the application; or

(3) **"protested application hearing"** that provides an applicant whose application has been protested and any protestant an opportunity to be heard on the merits of the application, including whether it will be detrimental to the objector's water right or otherwise result in impairment to existing water rights, be contrary to the conservation of water within the state, or detrimental to the public welfare of the state.

I. "Hearing examiner" means that person appointed or designated by the state engineer to conduct hearings with respect to matters properly before the state engineer. Hearing examiners report directly to the state engineer and are assigned to the hearings unit. For purposes of this rule, references to a hearing examiner shall apply to the state engineer when he presides at hearing.

J. "Hearings unit" means the division of the OSE comprising the hearing examiners, alternative dispute resolution officers and the hearings unit administrator.

K. "Hearings unit administrator" means that person designated by the state engineer to direct, provide and perform administrative duties in support of the hearing process and serve as the official custodian of the hearings unit files and official record of proceedings.

L. "Party" means an applicant, respondent, or protestant who has paid any required hearing fees and appears and participates in a hearing. The WRD shall be a party to every proceeding. A party other than an individual must be represented by an attorney licensed in the state of New Mexico.

M. "Person" means an individual, firm, corporation, or other entity, or a political subdivision of the state or its agencies, instrumentalities and institutions.

N. "Pro se party" means an individual who appears on his or her own behalf and participates in a hearing without legal representation by an attorney.

O. "Protestant" means a person who files a timely written protest to an application in the form and manner required by the WRD.

P. "Respondent" means a person named in a compliance order.

Q. "Water rights division" or "WRD" means the OSE division designated by the state engineer to process applications and administer water rights pursuant to the permits and licenses issued by and declarations filed with the state engineer and water rights as adjudicated by decree pursuant to NMSA 1978, Section 72-4-19.

[19.25.2.7 NMAC - Rp, 19 NMAC 25.2.7, 8-30-2013]

19.25.2.8 LIBERAL CONSTRUCTION: This rule shall be liberally construed to carry out its purpose. [19.25.2.8 NMAC - Rp, 19 NMAC 25.2.8, 8-30-2013]

19.25.2.9 DOCKETING AND STANDING:

A. WRD transmittals. WRD shall transmit timely for hearing by aggrieved applicants and any timely protests to an application to the ALU for filing with the hearings unit through a request to docket the matter for hearing.

B. Timeliness. An aggrievial by the applicant to initial action taken by the WRD on an application and any protest to an application must be timely filed.

(1) Aggrieved applications. An aggrieved applicant must file a request for a hearing within 30 days of the date of receipt, by certified mail, of WRD's action on an application. If no request for hearing is filed with the WRD within 30 days, the state engineer's findings, decision or action taken through the WRD shall be conclusive.

(2) Protests to applications. Protests to an application must be filed on or after the date of the first publication of notice of application and before the close of business on the tenth day after the last date of publication. Only persons filing a timely protest may participate at hearing with the applicant and ALU. Motions to intervene are disallowed and shall be rejected by the hearings unit.

C. Request to docket a hearing. The ALU will file a request to docket a proceeding within a reasonable amount of time of its receipt of a request for hearing transmitted by the WRD. The ALU

pleading shall:

(1) request that the hearings unit administrator issue a notice of scheduling conference that identifies a hearing examiner, and sets the date for the scheduling conference;

(2) state the grounds, if any, to extend or delay the hearing, including but not limited to, prior pending hearings, or ongoing settlement negotiations among parties to the hearing;

(3) include background documents to the hearings unit administrator such as a copy of the application, publication materials, written protests accepted by the WRD, and other relevant information that the ALU determines may be useful for docketing a proceeding; and

(4) provide a list of parties entitled to notice of the proceedings.

D. Compliance orders. A respondent named in a compliance order may request a hearing on the alleged violations, pursuant to the procedures set forth in 19.25.2.23 NMAC.

E. Special procedure for standing of protestant upon docketing. The standing of protestants may be challenged by the applicant, WRD, or the hearing examiner at any point once an application has been docketed by the hearings unit: Upon such challenge, the protestant shall be required:

(1) if alleging impairment to the protestant's water right, to provide evidence of a valid existing water right, including but not limited to, the protestant's OSE water right file number(s) or if there is no OSE file number, then a description of the affected water right(s) that specifies the place and purpose of use, amount of water placed to beneficial use, point of diversion and the water source (aquifer or stream) by name, and priority date; or

(2) if alleging conservation or public welfare issues, to provide evidence that the protestant will be substantially and specifically affected by the granting of the application.

[19.25.2.9 NMAC - N, 8-30-2013]

19.25.2.10 HEARING UNIT DOCKET AND FEES:

A. Docketing procedures. The hearings unit shall maintain a docket of matters to be heard and a hearing calendar. Upon receipt of a docketing request from the ALU, the hearings unit administrator shall assign a hearing examiner and a docket number. The hearings unit administrator or the hearing examiner shall issue a notice that:

(1) shall advise the parties of the docketing of the matter, the hearing number and caption, and procedural requirements concerning filing and service of documents with the hearings unit, including electronic service and posting of documents;

(2) shall set a deadline for the applicant and all protestants to pay any required hearing fee;

(3) may set a deadline for all protestants to identify in writing, by OSE file number or other description, all water rights under the protestant's ownership or control that may be adversely affected by the application, including a description of the affected water right(s) that specifies the place and purpose of use, amount of water placed to beneficial use, point of diversion and the water source (aquifer or stream) by name, and priority date, together with a statement explaining how the protestant will be substantially and specifically affected by the granting of the application;

(4) may set a date and time for a scheduling conference to be held, no earlier than 10 business days after the deadline for payment of fees and identification of affected water rights;

(5) may direct one or more parties to file and serve on all other parties a proposed date for scheduling conference and a proposed pre-hearing order that includes proposed procedural dates for discovery, motions and hearing, identifies all issues the party proposes to address at hearing, and sets forth the party's position on each known or anticipated issue; and

(6) may include a draft form of scheduling order and hearing instructions for parties.

B. Hearing fees. Pursuant to NMSA 1978, Section 72-2-6(J), the state engineer shall require a nonrefundable payment of twenty-five dollars (\$25.00) from an applicant and from each protestant.

C. Copying and other fees. The hearings unit may impose fees for copying papers, testimony, or records as are reasonable, in accordance with Section 72-2-6 and based on charges set by the state records center for similar types of copies. The hearing examiner shall order that costs associated with the issuance of any subpoena, as further described by this rule, be borne by the requesting party.

D. Failure to comply with fee or docketing requirements. If an applicant fails to make the payment as required, the hearing examiner shall deny the application and dismiss the docket. If a protestant fails to make the payment as required, the protest shall be dismissed by the hearing examiner. Failure to comply with any other docketing requirement may result in dismissal of an application or a party from the proceedings, the exclusion of information or issues at hearing, or other limitation as determined by the hearing examiner.

E. Inactive dockets. If a matter docketed for hearing has been inactive for six months, the hearing examiner may place the case on the hearings unit's inactive

docket, and the hearings unit administrator shall maintain a separate docket list for inactive cases. If a matter placed on the inactive docket has not had any activity for six months thereafter, the hearing examiner, after notice to the parties, may deny the application. In no event shall any matter remain on the inactive docket for more than 12 months without an order so specifying from the hearing examiner.

[19.25.2.10 NMAC - Rp, 19 NMAC 25.2.13, 8-30-2013]

19.25.2.11 REPRESENTATION OF PARTIES:

Parties may be represented by an attorney or may appear pro se, as described below, in hearings before the state engineer or designated hearing examiner. All communications by parties with the hearings unit shall be made through a party's attorney or a person appearing pro se, unless otherwise provided for by the hearing examiner.

A. Attorneys. An attorney representing a party shall enter his appearance in the record. Withdrawal or substitution of counsel shall be by notice to the parties and hearings unit, and all issues relating to withdrawal or substitution of counsel shall be resolved in a form and manner at the discretion of the hearing examiner.

B. Pro se appearance. An individual may appear as a pro se party. Parties appearing pro se shall be responsible for familiarizing themselves with this rule, the rules of civil procedure for the district courts of New Mexico, the rules of evidence governing non-jury trials for the district courts of New Mexico, the instructions for parties in administrative proceedings, and all other rules of the OSE.

C. Applicants, respondents and protestants other than a pro se party. A party that is not an individual shall be represented by an attorney.

D. Ex parte communications prohibited. There shall be no ex parte communications with the hearing examiner or the state engineer in any pending proceeding on any substantive issue unless notice is given and an opportunity afforded all parties to participate or respond. Any continued ex parte communications after a single state engineer order to cease will result in dismissal of the offending party. Routine procedural questions may be addressed to the hearings unit administrator. [19.25.2.11 NMAC - Rp, 19 NMAC 25.2.19, 8-30-2013]

19.25.2.12 HEARINGS UNIT FILING REQUIREMENTS:

A. Filing of documents and number of copies. Written communications shall contain the name, address, and telephone number of the

communicator and an appropriate reference to hearings unit files by docket and OSE file number(s) pertaining to the subject of the communication. All motions and other pleadings shall be filed with the administrator of the hearings unit in triplicate, consisting of the original plus two copies. Motions requesting an order from the hearing examiner shall be accompanied by a proposed order and stamped, addressed by a proposed order and stamped, addressed envelopes for service by the hearings unit administrator of such order on all parties.

B. Rejection of documents. A document that does not reference the hearings unit's docket number and OSE file number in the caption of the document, or that is not in substantial compliance with this rule, may be rejected by the hearings unit administrator or hearing examiner. No motion or pleading requesting discovery shall be filed with the hearings unit prior to the matter being docketed by the hearings unit.

C. Date of filing. A pleading or document is considered filed on the date stamped by the hearings unit administrator, unless the pleading or document is subsequently rejected. Any pleading or document received after regular business hours will be stamped and considered filed on the next regular business day.

D. Facsimile and electronic filing. In the discretion of the hearings unit administrator, a pleading or document, not to exceed 10 pages, may be filed by facsimile transmission, subject to any additional filing requirements that may be required by the hearings unit administrator. Such facsimile transmissions must be received before 4 p.m., mountain standard or daylight time. When feasible, the hearing examiner may order pleadings and other documents to be filed electronically if electronic filing procedures by the hearings unit have been established.

E. Service. Except as otherwise provided by this rule or by order of the hearing examiner, a party shall serve upon all parties to the proceeding all pleadings and documents that are filed with the hearings unit. Service shall be made by delivering or mailing a copy to the party's counsel and to any individual party appearing pro se. Proof of service shall be made by a certificate of service, which shall include a list of all parties served. Upon agreement, service among parties may be by electronic means.

F. Notification of change of address or other information. Each party shall provide the hearings unit administrator and other parties with a current mailing address, telephone number, and facsimile information. A party shall be deemed to have received notice of all pleadings and notices mailed or sent by

facsimile to the address or facsimile number of record. If a party fails to provide a current mailing address, and pleadings or notices sent to the address of record are returned by a postal service as undeliverable, the hearing examiner shall dismiss that party.

G. Amendments and withdrawal. Requests to amend or withdraw a pleading shall be made by motion or application subject to response by the WRD or other parties, and if granted shall be subject to such conditions as the hearing examiner may deem appropriate. Amendments to any pleading shall not broaden the scope of the issues originally filed unless allowed by the hearing examiner, and shall be subject to such additional notice or other responses as ordered by the hearing examiner.

H. Computation of time. The time within which an act is to be done as provided in any rule or order, when expressed in days, shall be computed by excluding the day of the act or event from which the time begins to run and including the last, except that if the last day be Saturday, Sunday, or a legal holiday, the act may be done in the next succeeding business day.

I. Extensions of time. Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the hearing examiner for good cause, upon a motion made before the expiration of the period prescribed or previously extended. The filing of the motion does not toll the running of the time period prescribed.

[19.25.2.12 NMAC - N, 8-30-2013]

19.25.2.13 AUTHORITY AND DUTIES OF THE HEARING EXAMINER:

A. Powers of hearing examiner. In the absence of any limiting order, a hearing examiner appointed to hear any particular case shall have the power to regulate the proceedings before him and to perform all acts and take all measures necessary to conduct such hearing, including the following powers:

(1) to explain the events and requirements of the hearing process, including the use of electronic service, notice and posting on the OSE website;

(2) to establish a procedural schedule for the administrative proceedings and to modify procedural orders on his own motion or on motion of a party when necessary or appropriate;

(3) to schedule and conduct conferences and preliminary hearings when necessary or appropriate to: identify substantive issues for hearing, set a discovery schedule and hearing date, establish an official service list, address other preliminary matters, encourage settlement, and rule on

preliminary motions;

(4) to order parties to hold appropriate settlement conferences before or during any hearing, provided that the hearing examiner shall not take part in any settlement conference unless all parties agree to his participation;

(5) to dismiss parties or actions;

(6) to apply the procedures of this rule and to grant such waivers to those procedures as he deems necessary or appropriate;

(7) to issue subpoenas to produce materials and to require persons to appear;

(8) to provide for appropriate methods of discovery;

(9) to administer oaths and affirmations;

(10) to ensure that all relevant issues relating to impairment, conservation of water within the state and the public welfare of the state are considered during the evidentiary hearing and to request, receive and make part of the record all evidence (testimony and exhibits) determined necessary to decide the issues and rule upon all objections and motions;

(11) to regulate the conduct and course of the hearing consistent with due process, including the scheduling, recessing, reconvening, and adjournment thereof;

(12) to cause a complete record of the proceedings to be made in accordance with the requirement of NMSA 1978, Section 72-2-17(C);

(13) to make a report and recommendation to the state engineer based upon the record of the proceedings; and

(14) to take such other action as may be necessary and appropriate to the discharge of these duties, consistent with the statutory authority or other authorities under which the state engineer functions and with the rules and policies of the OSE.

B. Limitation of authority. The state engineer may limit the authority of the hearing examiner to the specific consideration of enumerated issues or the performance of certain acts, such as presiding as directed at hearing, pursuant to a limiting order.

C. Subpoenas. In accordance with NMSA 1978, Section 72-2-14, the hearing examiner has the authority to issue subpoenas and to require the production of evidence in any proceeding before the state engineer, including all hearings, conferences and discovery proceedings. If a subpoena is issued, the return of service shall be filed with the hearings unit promptly after service, and shall include a certificate or affidavit attesting to service.

D. Substitution of parties. Substitution of parties may be permitted upon motion and for good cause, at the hearing examiner's discretion.

[19.25.2.13 NMAC - Rp, 19 NMAC 25.2.10,

8-30-2013]

19.25.2.14 DISQUALIFICATION:

Any party may file a motion to disqualify a hearing examiner for lack of impartiality. A motion to disqualify a hearing examiner must be filed no later than 10 days after the initial scheduling conference and shall state with specificity the grounds for disqualification. A hearing examiner shall excuse himself in a proceeding in which the hearing examiner's impartiality might reasonably be questioned, including but not limited to instances of personal bias or prejudice concerning a party or a party's attorney or disputed evidentiary facts; or other bias or prejudice which would cause the hearing examiner to not render an impartial decision.

[19.25.2.14 NMAC - Rp, 19 NMAC 25.2.12, 8-30-2013]

19.25.2.15 SCHEDULING AND CONDUCT OF PRE-HEARING MATTERS:

The hearing examiner may establish conferences at regular times and places and at intervals sufficiently frequent for the orderly management of the proceedings. These may include scheduling conferences, status reviews, settlement conferences, motions hearings, pre-hearing conferences, and all other matters relevant to the achievement of a productive and efficient decision making process.

A. Procedural schedule.

The hearing examiner shall issue a procedural order that contains a statement of the issues to be heard and sets a procedural schedule. In the absence of a specific finding and order from the hearing examiner, all discovery and motions shall be completed within 150 days from the date of the initial scheduling conference, and the final hearing shall be held within 180 days from the date of the scheduling conference. The hearing examiner may periodically conduct status reviews of the progress of the proceedings, and may issue procedural orders modifying the procedural schedule as necessary or appropriate.

B. Pre-hearing and status conferences. The hearing examiner may conduct pre-hearing or other status conferences to simplify issues for hearing; rule on or otherwise consider outstanding motions or other pleadings; address stipulations, and admissions of fact and documents; address limitations on the number of witnesses or time allocated to particular witnesses or issues at hearing, order of witness presentation and scheduling of testimony and amount of time anticipated for direct and cross examinations; and any other relevant matters that may aid in the hearing process. The orders and rulings resulting from the pre-hearing conference shall control the subsequent course of the proceedings and final hearing, unless

otherwise ordered by the hearing examiner.

C. Alternative dispute resolution. The hearing examiner may order any or all parties to participate in an OSE-facilitated ADR process or to attend a settlement conference to assist in reaching a settlement at the earliest possible stage, resolve disputed facts or issues, expedite the hearing process, and conserve resources.

D. Motions hearings. The hearing examiner may rule on a motion, other than for summary judgment, based on the pleadings or may schedule a hearing on the motion, at the hearing examiner's discretion.

E. Summary judgment motions. Motions for summary judgment that are dispositive of any administrative or enforcement matter shall not be granted without a hearing. The hearing examiner shall submit a report and recommendation as to the dispositive motion to the state engineer for final decision in accordance with 19.25.2.28 and 29 NMAC.

F. Attendance at scheduled proceedings. All parties shall attend scheduled hearings, conferences or other proceedings fully prepared to discuss all matters noticed and to address any outstanding motions or pleadings. Without good cause shown, the failure of a party to attend or be prepared to discuss those matters set to be heard shall constitute a waiver of any objection to any agreement reached or to any order or ruling made as a result of the proceeding, and may be grounds for adverse action by the hearing examiner on the pleading of the party failing to appear.

G. Scheduling of site visits. The hearing examiner may schedule site visits, subject to notice to the parties and the opportunity for parties to attend.

[19.25.2.15 NMAC - Rp, 19 NMAC 25.2.14 & 15, 8-30-2013]

19.25.2.16 PROCEDURAL REQUIREMENTS AND DEADLINES:

A. Applicability of Rules of Civil Procedure. Conduct and procedure with respect to discovery and prehearing matters before the hearing unit shall be generally consistent with the New Mexico Rules of Civil Procedure for the District Courts, except as otherwise set forth in this rule or as otherwise permitted by the hearing examiner.

B. Specificity of motions. All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, state the relief sought, and state whether the motion is opposed or unopposed. An opposed motion shall state that consent of the other parties to the motion was sought and not obtained, or the reason such consent was not sought. An unopposed motion shall state that concurrence of all other parties was

obtained. The moving party shall submit a proposed order approved by all parties for the hearing examiner's consideration.

C. Deadline for response and reply to motions. Any party upon whom an opposed motion is served shall have 15 days to file a response. A non-moving party failing to file a timely response may be deemed to have waived any objection to the granting of the motion. The moving party may file a reply within 15 days after a response to a motion.

D. Prefiled testimony and exhibits. The hearing examiner may require advance filing of certain exhibits (subject to objections), including but not limited to copies of the application, notice, expert reports or written testimony, locational photographs or maps, and any other exhibits which may aid in an efficient hearing process. Where a proceeding involves complex and technical issues to be presented through multiple witnesses, the hearing examiner may require the filing of written testimony by witnesses in advance of the hearing. [19.25.2.16 NMAC - Rp, 19 NMAC 25.2.9, 8-30-2013]

19.25.2.17 DISCOVERY: No discovery shall be had on the state engineer, a hearing examiner, or ADR officer in proceedings before the hearings unit. The hearings unit favors prompt and complete disclosure and exchange of information and encourages informal arrangements among the parties for this exchange.

A. Types of discovery. Discovery shall include all depositions, written interrogatories, requests for production of documents, and requests for admissions. Parties shall have the right to take the testimony of any witnesses by deposition and may seek a subpoena for the attendance of witnesses and the production of documents or records. Parties shall make a good-faith effort to obtain public records through the relevant agency's open records process prior to requesting production of such documents from other parties.

B. Filing and service, and limitations. Discovery requests and responses, or objections thereto, and deposition transcripts, shall not be routinely filed with the hearings unit; provided however that the party making a discovery request shall file a certificate of service with the hearings unit. Interrogatories, requests for production or inspection of documents, requests for admissions and other written discovery requests shall be served upon the party to which such discovery is directed and all other parties requesting such service. Any given discovery request shall be limited to no more than a total of 50 interrogatories, requests for production of documents, and requests for admissions, including subparts, which shall be separately counted toward the

limit of 50. Parties desiring copies of the written discovery materials of other parties may request copies from either party, subject to the requesting party's agreement to pay the reasonable costs of reproduction.

C. Responses, objections and supplementation. Written answers or responses to discovery requests shall be served within 30 days of service of the discovery requests, unless otherwise directed by the hearing examiner or agreed to by the parties. Written answers or responses to discovery requests shall be verified by the person providing the answer or response. Objections shall identify the request objected to and shall state with particularity the factual and legal basis for the objections, and the response to the request shall be deferred until a determination has been made on such objections. A party who has responded to a request for discovery shall reasonably and promptly amend or supplement a previous response if he subsequently obtains information which would have been responsive if the information had been available at the time the response was served.

D. Motions to compel. Parties are expected to engage in discovery in good faith for the purpose of fair and efficient presentation of evidence at hearing, and they are expected to make every good faith effort to resolve discovery disputes informally. A party may move for an order compelling discovery only if the movant has made a good faith effort to resolve the dispute and was unable to do so. Any motion for an order compelling discovery shall document the good faith efforts taken by the movant to resolve the dispute, and shall include copies or complete restatements of the discovery requests or notices to which the movant seeks compelled responses, along with copies of any responses or objections to the subject discovery requests or notices, and any other pertinent materials.

E. Order for protection of parties, or witnesses. The hearing examiner may issue such orders for the protection of parties or witnesses from annoyances, embarrassment, or oppression as may be just and proper under the circumstances. If the hearing examiner determines that a party has not acted in good faith in propounding, undertaking, responding to, or otherwise participating in the discovery process, the order may include, but is not limited to, the exclusion of evidence, limitation of issues, or dismissal of a party.

[19.25.2.17 NMAC - Rp, 19 NMAC 25.2.9, 8-30-2013]

19.25.2.18 STIPULATIONS AND SETTLEMENTS: Parties to a proceeding shall make a reasonable effort to stipulate to facts to be relied upon in a hearing or on appeal. Stipulations of fact or of resolutions

of specific issues shall be in writing and signed or approved by all stipulating parties, and shall be filed with the hearings unit administrator, unless entered into within five days of any final hearing, whereupon the stipulation shall be presented at hearing. Objections to a stipulation shall be in writing, unless the stipulation is presented at hearing, whereupon any objections shall be presented at hearing. Settlements of all or a portion of the issues pending may be presented in writing before hearing or in writing or orally at hearing, and shall include the parties' procedural recommendation for disposition of the pending matter. The state engineer shall review and either accept, modify or reject any stipulation or settlement. If the state engineer modifies the stipulation or settlement, the parties shall have the opportunity to accept such modification or to void the stipulation. If the state engineer rejects any stipulation or settlement, the hearing shall proceed or be reconvened to take evidence on the merits of the pending matters, which may include the resolution of issues as presented in the stipulation or settlement.

[19.25.2.18 NMAC - N, 8-30-2013]

19.25.2.19 CONTINUANCE AND POSTPONEMENT:

A. Continuance of hearing. A scheduled hearing or conference may be continued with notice prior to the hearing or conference, or it may be recessed during the hearing or conference and reconvened at a later date. Grounds for continuance may include, but are not limited to: mandatory deference to the resolution of prior pending applications; limitations with regard to OSE resources available to investigate or evaluate the application and claims of the parties; and settlement of some or all issues among any or all parties.

B. Postponement of evidentiary hearing. A party may request postponement of the scheduled hearing, subject to determination by the hearing examiner. Grounds for postponement may include, but are not limited to, ongoing settlement negotiations, the unavailability of an expert witness, or the inability of a party to complete technical reports and exhibits. Repeated requests for postponement will not be viewed favorably unless good cause is presented.

[19.25.2.19 NMAC - Rp, 19 NMAC 25.2.25, 8-30-2013]

19.25.2.20 DISMISSAL OR WITHDRAWAL OF PARTY OR ACTION:

A. Dismissal of party or action for failure to participate. If the hearing examiner determines that the applicant has failed to meet his or her obligation to go forward with the application

by timely participation in the administrative hearings process, the hearing examiner shall deny a protested application or shall reinstate the action by the WRD on an aggrieved application, and shall dismiss the hearing. If the hearing examiner determines that a protestant has failed to meet his burden of timely participation in the administrative hearings process, the hearing examiner shall dismiss the protestant. In the event that all protestants are dismissed, the hearing examiner may remand the application to the WRD for further action.

B. Withdrawal of request for hearing from aggrieved WRD decision.

An aggrieved applicant may file a motion to withdraw the request for a hearing with the hearings unit and shall serve the motion on the ALU attorney of record. If granted, the hearing examiner shall reinstate the original decision or action of WRD. Upon motion by the applicant or the WRD, the hearing examiner may order that the application be withdrawn or remanded to WRD for other action, including but not limited to modification of the original WRD decision or action. The hearing examiner shall not grant the withdrawal of an aggrieved application once a hearing on the merits has concluded.

C. Withdrawal of protested application.

A protested application may be withdrawn by the applicant by pleading filed with the hearings unit and served on the ALU attorney of record and all protestants, prior to hearing. The hearing examiner may require that upon withdrawal of a protested application, the applicant shall not file the same or substantially similar application for a specified period of time. Once the hearings unit has concluded a hearing on the merits a protested application may not be withdrawn. [19.25.2.20 NMAC - Rp, 19 NMAC 25.2.32, 8-30-2013]

19.25.2.21 LOCATION OF HEARINGS:

All hearings shall be held in Santa Fe, New Mexico, unless otherwise ordered by the hearing examiner. Scheduling, status, and pre-hearing conferences and motions hearings shall be held in Santa Fe, New Mexico. At the discretion of the hearing examiner, any conference or hearing may be held telephonically.

[19.25.2.21 NMAC - Rp, 19 NMAC 25.2.16, 8-30-2013]

19.25.2.22 CONDUCT OF HEARINGS ON AGGRIEVED AND PROTESTED APPLICATIONS:

Evidentiary hearings on the merits of a pending matter are formal, recorded proceedings at which the testimony of witnesses is taken under oath and exhibits are presented for consideration of the hearing examiner for admission as evidence in the record. The course of the hearing

shall generally proceed as follows, unless otherwise directed by the hearing examiner:

A. Entry of appearances.

The parties shall enter their appearances at the beginning of the hearing and shall be made through counsel of record, or individually by any pro se party.

B. Preliminary matters.

The hearing examiner will address preliminary matters, including outstanding motions, the presentation and admission of exhibits deemed admitted pursuant to the scheduling order, stipulations, and other items not previously ruled on as deemed appropriate.

C. Opening statements.

At the discretion of the hearing examiner, the parties may present brief opening statements summarizing their positions concerning the issues in dispute, prior to the presentation of any witnesses.

D. Order of witnesses.

Unless otherwise directed by the hearing examiner, evidence will be presented in the order of applicant's direct case, including witnesses and exhibits, in support of its position; protestant(s)' responsive case, including witnesses and exhibits, in support of their position and in rebuttal to applicant's position and evidence; the WRD's presentation of its direct and rebuttal case, including direct witnesses and exhibits and rebuttal witnesses and exhibits; and applicant's rebuttal case. Surrebuttal shall only be allowed at the discretion of the hearing examiner.

E. Cross-examination.

The parties shall have a reasonable opportunity to cross-examine the witnesses of opposing parties. Cross-examination shall be limited to matters addressed on direct examination of the witness or matters contained in exhibits prepared by the witness, unless otherwise permitted by the hearing examiner. The hearing examiner may limit repetitious cross-examination.

F. Supplementation of testimony.

Testimony of a witness may, at the discretion of the hearing examiner and subject to cross examination and objection, be supplemented with graphics or computerized presentations, provided that the presenting party has given advance notice of its intent to do so, the projected images presented are disclosed as proposed exhibits pursuant to the scheduling order, and the proposed exhibit number or identifiers are clearly marked and visible on each graphic presentation.

G. Closing statements.

Closing statements may be allowed at the discretion of the hearing examiner.

H. Conduct of participants.

All parties, witnesses, counsel, staff, spectators and other persons shall conduct themselves in a respectful and orderly manner. Disruptions of any

kind at hearings shall not be permitted. Any disregard of the rulings of the hearing examiner on matters of order and procedure by any person may be noted on the record and the hearing examiner may take appropriate action pursuant to Chapter 72 of the New Mexico Statutes Annotated, the Rules of Civil Procedure for District Courts and the Rules of Professional Conduct. The hearing examiner may adjourn, recess, or continue any hearing if the behavior of any person interferes with the proper and orderly conduct of a hearing, and for any other cause or circumstance that may prevent the proper conduct of a hearing.

[19.25.2.22 NMAC - N, 8-30-2013]

19.25.2.23 COMPLIANCE ORDERS AND ENFORCEMENT HEARINGS:

A. Compliance order.

A compliance order shall consist of a written statement that identifies the subject water right or docket number and describes the following with specificity:

(1) acts or omissions with which the respondent is charged;

(2) citation of the statute, rule, order, or other authority that the respondent is alleged to have violated, or any other grounds for the compliance order;

(3) directive as to whether the alleged violation must cease immediately, or a specific time period in which a respondent must come into compliance.

B. Service.

The WRD shall cause the compliance order to be served upon the respondent by certified mail, return receipt requested.

C. Evidence of compliance.

The respondent shall have 10 days to contact the water master by telephone, email, or in writing to demonstrate that the alleged violation has ceased or that the respondent has come into compliance. Upon confirmation of compliance from the water master, WRD shall request dismissal of the docket.

D. Request for hearing.

If the respondent desires a hearing or otherwise contests a compliance order, the respondent shall submit a written request for hearing to the state engineer within 30 days of receipt of a compliance order.

E. Failure to request hearing.

If a written request for hearing is not submitted by the respondent within 30 days after receipt of a compliance order, the order shall be final, enforceable and non-appealable.

F. Procedures for compliance hearings.

The hearings unit shall establish regular hearing dates in Santa Fe for compliance orders. Requested hearings shall be held no less than 15 and no more than 60 days from the date the request is filed. The conduct of hearings

on compliance orders shall be established in accordance with the general procedures and requirements set forth in this rule. The hearing examiner shall issue a written decision within five business days after the scheduled hearing date.

G. Waiver of appearance at hearing. The respondent may waive the right to appear at hearing and make oral arguments or present testimony, and instead may submit the matter to the hearing examiner for decision on written submissions and documentary evidence. All such waivers shall be made in writing and shall be final and binding upon the respondent. Upon receipt of a written waiver, the hearing examiner shall render a decision within five business days on the basis of the submissions.

H. Failure to appear or participate at hearing. Failure to appear or participate at hearing shall constitute a waiver of the respondent's right to a hearing and to contest the merits of the compliance order. The hearing examiner may dismiss the request for hearing. Upon dismissal for failure to appear or participate, the compliance order shall be final, enforceable and non-appealable. The respondent may appeal the order of dismissal pursuant to NMSA 1978, Section 72-7-1. [19.25.2.23 NMAC - N, 8-30-2013]

19.25.2.24 EVIDENCE:

A. General. Each party is responsible for presenting evidence on the record. The New Mexico Rules of Evidence as applied in the district courts of the state shall generally apply. At the discretion of the hearing examiner, evidence not otherwise admissible under those rules of evidence may be admitted when necessary to ascertain relevant facts. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded upon the determination of the hearing examiner.

B. Oral and written testimony under oath. All testimony received by the hearing examiner in formal hearings shall be made under oath, except matters officially noticed or entered into by stipulation. All witnesses must be present at the hearing unless a witness' presence at hearing is waived by the hearing examiner upon notice to and without objection from the parties. Written testimony shall be introduced as an exhibit and shall be on pages containing line and page numbers, and shall identify the witness and party for whom the witness is testifying, and the hearing caption and docket number. Written testimony shall be accompanied by a statement by the witness attesting to or verifying the contents and substance of the written testimony. Where written testimony has been filed in advance of the hearing, such testimony shall be adopted by the witness at hearing, subject to any necessary

or appropriate corrections or amendments, and shall have the same force and effect as though it were stated orally by the witness and need not be repeated. The witness shall be subject to cross-examination on both oral and written testimony. Expert witnesses providing oral testimony shall also provide a detailed summary of their testimony in exhibit form, in the form of a written report or pre-filed testimony, in accordance with the scheduling order.

C. Stipulation as to facts and issues. The parties may, by stipulation in writing filed with the hearings unit or entered in the record at hearing, agree upon facts or issues involved in the controversy, which stipulation shall be binding upon the parties entering into the stipulation and may be regarded and used by the hearing examiner as evidence at the hearing. The hearing examiner may require proof or evidence of the facts stipulated to, notwithstanding the stipulation of the parties.

D. Exhibits. Documentary factual or legal information may be received in evidence in the form of accurate copies or duplicates of the original. The original plus two copies of any document or exhibit shall be filed with the hearings unit pursuant to the requirements of the scheduling order. A copy of the document or exhibit, including any expert report that forms the basis of a witness' testimony or is anticipated to be sponsored by a witness, must be served by the submitting party upon the other parties to the proceeding prior to hearing, in accordance with the scheduling order. To the extent practicable all exhibits, including those to be introduced on cross-examination, shall be marked before the start of hearing. All exhibits shall be marked numerically in the order of introduction by the moving party. Documentary and other physical evidence may be authenticated or identified by any reasonable means that shows that the evidence is what the proponent claims it to be. Upon admission by the hearing examiner of an exhibit, it shall be entered into the record. A party shall make reasonable efforts to limit the amount of voluminous evidence when preparing and offering exhibits. Where an exhibit is an excerpt, summary or abstract of a larger document or set of materials, other parties shall be given reasonable opportunity in advance of the hearing to examine the underlying source of the exhibit and the excerpt, abstract, or summary.

E. Administrative notice. Requests to take administrative notice of OSE files are discouraged. In lieu of requesting that administrative notice be taken of documents, parties are encouraged to submit those documents or portions of documents in the form of exhibits in accordance with the scheduling order. The hearing examiner may take administrative notice of matters of which the district courts

of this state may take judicial notice. In addition, administrative notice may be taken of generally recognized technical or scientific facts, published reports of governmental and state agencies, site visits conducted by the hearing examiner with notice to parties, and studies and conclusions within the state engineer's specialized knowledge. In addition, the hearing examiner may take administrative notice on the record of the results of the hearings unit previous experience in similar situations and general information concerning a subject within the OSE's or hearings unit's expert knowledge. When a party requests that the hearing examiner take administrative notice of a fact, the noticed fact and its source shall be stated at the earliest possible time before or during the hearing and other parties, upon timely request, shall be provided an opportunity to show why notice should not be taken.

F. Additional evidence. At any stage of the proceeding the hearing examiner may require the production of further evidence upon any issue. Such evidence may, at the discretion of the hearing examiner, be in writing or presented orally. All parties will be given an opportunity to rebut or otherwise respond to such evidence submitted and cross-examine the witness under oath.

G. Objections. Any evidence offered in whatever form shall be subject to appropriate and timely objection. The evidence to be admitted at hearing shall be material and relevant to the issue. When objection is made to the admissibility of evidence, such evidence may be received subject to later ruling by the hearing examiner. The hearing examiner has discretion, with or without objection, to exclude inadmissible, incompetent, cumulative, or irrelevant evidence or order the presentation of such evidence discontinued. Parties objecting to the introduction of evidence shall briefly state the grounds of objection at the time such evidence is offered. Formal exceptions to rulings are not necessary and need not be taken.

H. Offers of proof. An offer of proof for the record may be made and shall consist of a statement of the substance of the evidence to which objection has been sustained. The hearing examiner may require offers of proof to be submitted in writing in question and answer form.

I. Rebuttal evidence. Rebuttal evidence is evidence that tends to explain, counteract, repel, or disprove evidence submitted by another party or by staff. Evidence that is merely cumulative or could have been more properly offered in the case in chief is not proper rebuttal evidence. The hearing examiner may permit or require rebuttal evidence to be submitted in prepared form in accordance with this rule prior to its introduction.

[19.25.2.24 NMAC - Rp, 19 NMAC 25.2.21 & 22, 8-30-2013]

19.25.2.25 BURDEN AND STANDARD OF PROOF: The burden of proof in a proceeding on a pending application is on the applicant to demonstrate that unappropriated waters are available for appropriation where a new appropriation is sought, and that the application will not impair or be detrimental to existing water rights, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state. In a compliance order hearing the burden of proof is on the WRD. The standard of proof for hearings unit proceedings shall be based on a preponderance of the evidence.

[19.25.2.25 NMAC - N, 8-30-2013]

19.25.2.26 RECORDING AND TRANSCRIPTION: All hearings shall be recorded or transcribed by the hearings unit. In accordance with NMSA 1978, Section 72-2-17(B)(5), the oral proceedings may be transcribed upon the request of any party. Parties requesting that proceedings be transcribed shall arrange for the appearance by a stenographer and shall pay the cost of the transcription directly to the preparer of the transcript. In the event that the proceedings are transcribed upon the hearing examiner's own request, the parties may obtain copies of the transcript upon payment of any applicable fees. Copies of recorded proceedings may be obtained by the parties upon payment of applicable fees charged by the hearings unit.

[19.25.2.26 NMAC - Rp, 19 NMAC 25.2.18, 8-30-2013]

19.25.2.27 PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS: At the conclusion of the hearing, the hearing examiner may request that the parties submit proposed findings of fact, conclusions of law, and recommendations that will become part of the administrative record. At the hearing examiner's discretion, proposed findings of fact, conclusions of law, and recommendations may be accompanied by supporting legal memoranda from the parties.

[19.25.2.27 NMAC - Rp, 19 NMAC 25.2.29, 8-30-2013]

19.25.2.28 HEARING EXAMINER'S REPORT AND RECOMMENDATIONS: After completion of an evidentiary or summary judgment hearing on the merits, the hearing examiner shall prepare and submit a report and recommendation to the state engineer for final decision.

[19.25.2.28 NMAC - Rp, 19 NMAC 25.2.30, 8-30-2013]

19.25.2.29 FINAL DECISION: Upon filing of the hearing examiner's report and recommendation, the state engineer shall issue a written final decision.

A. Record evidence. The state engineer shall base the final decision upon the record, including the hearing examiner's report and recommendation. Evidence upon which the state engineer may base the final decision includes the following:

(1) any records, investigation reports, stipulations, and other relevant documents in the state engineer's possession that is offered and made a part of the record of the proceeding;

(2) sworn testimony of witnesses and exhibits entered into the record by the hearing examiner; and

(3) any facts that have been administratively noticed.

B. Entry of decision. After submission and consideration of the hearing examiner's report and recommendation, the state engineer shall enter the final decision or shall order the hearing examiner to reopen the record of proceedings in order to take further evidence or testimony.

C. Notice of decision. The state engineer's decision shall be mailed to all parties, or to their counsel of record if legally represented, by certified mail, return receipt requested, within 10 days after entry of the decision.

D. Finality. A decision of the state engineer is final after 30 days, unless an appeal has been timely filed in accordance with NMSA 1978, Sections 72-2-16 and 72-7-1. The state engineer shall not seek enforcement of a compliance order until it is final, except where an emergency exists or the public health or safety necessitates.

[19.25.2.29 NMAC - Rp, 19 NMAC 25.2.31, 8-30-2013]

19.25.2.30 RECONSIDERATION: A party may file a written request for reconsideration with the state engineer within 10 days of receipt of a final decision, and shall serve such request on all parties to the proceeding. A request for reconsideration shall state the factual and or legal basis for reconsideration of the state engineer's decision, and shall contain appropriate citations to the record. The filing of a request for reconsideration does not operate to toll or otherwise delay the time for filing an appeal as set forth in NMSA 1978, Section 72-7-1. If the state engineer takes no action on a request for rehearing within 10 days of its filing, it shall be deemed denied. If the state engineer grants a request for reconsideration, the state engineer shall issue an order vacating the final decision.

[19.25.2.30 NMAC - N, 8-30-2013]

19.25.2.31 APPEAL FROM

FINAL DECISION: After hearing, appeal of the state engineer's decision may be taken by a party to a district court of the state, pursuant to NMSA 1978, Section 72-7-1, and other applicable laws of the state.

A. Time for filing notice of appeal. Any applicant or other party dissatisfied with the decision of the state engineer shall serve a notice of appeal within 30 days after receipt by certified mail of notice of the state engineer's decision, in accordance with the requirements of NMSA 1978, Section 72-7-1. The filing of a request for reconsideration by any party shall not operate to toll or otherwise delay the time for filing an appeal as set forth by statute.

B. Transmittal of record. Upon being served with a notice of appeal, the hearings unit administrator shall provide counsel for the state engineer a certified copy of the administrative hearing record for transmittal to and filing with the district court in accordance with NMSA 1978, Section 72-7-2.

[19.25.2.31 NMAC - N, 8-30-2013]

19.25.2.32 ADMINISTRATIVE RECORD: In accordance with NMSA 1978, Section 72-2-17(C), the administrative record shall include, at a minimum, all pleadings, motions, and intermediate rulings; evidence admitted at hearing; matters or items administratively noticed; questions and offers of proof, and objections and rulings thereon; any proposed findings submitted; the transcript or recordings of the administrative hearing; and any decision, opinion, or report by the state engineer or hearing examiner who conducted the hearing.

[19.25.2.32 NMAC - Rp, 19 NMAC 25.2.28, 8-30-2013]

19.25.2.33 DECISION OF DISTRICT COURT: The decision of the district court shall be binding on the state engineer upon the expiration of the deadline for appeal from the district court's decision if an appeal has not been taken in accordance with statutes and the procedural rules of the New Mexico supreme court. The state engineer shall take such action as is necessary or required in accordance with such decision, and shall include a copy of the decision from the court in the OSE files.

[19.25.2.33 NMAC - N, 8-30-2013]

HISTORY OF 19.25.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91.

History of Repealed Material:

SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91. Article 3, Hearings - Repealed effective 8-30-2013. 19 NMAC 25.2, Hearing Procedures, filed 3-11-98 - Repealed effective 8-30-2013.

NEW MEXICO GENERAL SERVICES DEPARTMENT

The General Services Department, State Purchasing Division repeals its rule entitled Procurement Code Regulations, 1.4.1 NMAC (filed 09-16-05) and replaces it with 1.4.1 NMAC entitled Procurement Code Regulations, effective 08-30-13.

The General Services Department, State Purchasing Division repeals its rule entitled Suspension or Debarment of Bidders, Offerors or Contractors, GSD 87-602 (filed 3-13-87) and replaces it with 1.4.7 NMAC entitled Suspension or Debarment of Bidders, Offerors or Contractors, effective 08-30-13.

NEW MEXICO GENERAL SERVICES DEPARTMENT

**TITLE 1 G E N E R A L GOVERNMENT ADMINISTRATION
CHAPTER 4 S T A T E PROCUREMENT
PART 1 P R O C U R E M E N T CODE REGULATIONS**

1.4.1.1 ISSUING AGENCY: General Services Department - State Purchasing Division. [1.4.1.1 NMAC - Rp, 1.4.1.1 NMAC, 08-30-13]

1.4.1.2 SCOPE: All executive branch state agencies.

A. Except as otherwise provided in the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, the code applies to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.

B. General. Except as otherwise provided in this section, this rule applies to every agency and to every transaction to which the Procurement Code applies except the following:

- (1) procurement of highway construction or reconstruction by the state highway and transportation department;
- (2) procurement by the judicial branch of state government;
- (3) procurement by the legislative

branch of state government;

(4) procurement by the boards of regents of state educational institutions named in Article 12 Section 11 of the constitution of New Mexico;

(5) procurement by the state fair commission of tangible personal property, services and construction under twenty thousand dollars (\$20,000);

(6) purchases from the instructional material fund;

(7) procurement by all local public bodies;

(8) procurement by regional education cooperatives;

(9) procurement by charter schools;

(10) procurement by each state health care institution that provides direct patient care and that is, or a part of which is, medicaid certified and participating in the New Mexico medicaid program; and

(11) procurement by the public school facilities authority.

[1.4.1.2 NMAC - Rp, 1.4.1.2 NMAC, 08-30-13]

1.4.1.3 S T A T U T O R Y

AUTHORITY: NMSA 1978, 9-17-5, Laws of 1983, Chapter 301, Section 5; and 13-1-95, Laws of 1984, Chapter 65, Section 68 (Repl. Pamp. 1997). Subject to the authority of the secretary of the general services department, Section 13-1-95 NMSA 1978 designates the state purchasing agent as both the administrator and chief executive of the state purchasing division. The cite further designates the state purchasing agent and purchasing division shall be responsible for the procurement of items of tangible personal property, services and construction for all state agencies except as otherwise provided in the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, and shall administer the code for those state agencies not excluded from the requirement of procurement through the state purchasing agent. Among the statutory duties and responsibilities afforded the state purchasing agent is to recommend procurement regulations to the secretary of the general services department.

[1.4.1.3 NMAC - Rp, 1.4.1.3 NMAC, 08-30-13]

1.4.1.4 D U R A T I O N :

Permanent. [1.4.1.4 NMAC - Rp, 1.4.1.4 NMAC, 08-30-13]

1.4.1.5 E F F E C T I V E D A T E:

August 30, 2013, unless a later date is cited at the end of a section. [1.4.1.5 NMAC - Rp, 1.4.1.5 NMAC, 08-30-13]

1.4.1.6 O B J E C T I V E: Section

13-1-29 C NMSA 1978 states that, the purposes of the Procurement Code are to provide for the fair and equal 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. The objective of this rule is to have the force and effect of law to implement, interpret or make statute specific as it applies to the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978 and the purposes stated therein.

[1.4.1.6 NMAC - Rp, 1.4.1.6 NMAC, 08-30-13]

1.4.1.7 D E F I N I T I O N S:

A. Most of the terms which appear in this rule are defined in the Procurement Code.

B. In these rules and regulations the following definitions apply.

(1) "Anti-poverty program businesses" means small businesses, cooperatives, community self-determination corporations or other such enterprises designed and operated to alleviate poverty conditions and aided by state or federal antipoverty programs or through private philanthropy.

(2) "Best obtainable price" means that price at which services or goods can be purchased which is most advantageous to the purchasing entity; best obtainable price can be found by obtaining quotes or other appropriate methods; where there is only one vendor available for such a purchase utilizing a direct purchase order in accordance with statute (such as an entity requiring dues, for example), the price would be the best obtainable price since it is the only possible price for that particular procurement.

(3) "Bidding time" means the period of time between the date the invitation to bid notice is published and the date and time set for receipt of bids.

(4) "Bidder" means one who submits a bid in response to an invitation for bid or submits a quote in response to a call for formal or informal quotes.

(5) "Central purchasing office" means that office within a state agency or a local public body responsible for the control of procurement of items of tangible personal property, services or construction. "Central purchasing office" includes the purchasing division of the general services department.

(6) "Chief information officer" means the administrative head of the department of information and technology.

(7) "Chief procurement officer" means that person within a state agency's or local public body's central purchasing office who is responsible for the control of procurement of items of tangible personal property, services or construction. "Chief procurement officer" includes the state

purchasing agent.

(8) "Competitive sealed bid" means the response from a bidder to an invitation to bid (ITB).

(9) "Competitive sealed proposal" means the response from an offeror to a request for proposals (RFP).

(10) "Contract" means any written, binding agreement for the procurement of items of tangible personal property, services or construction. A purchase order alone can be a binding contract.

(11) "Information systems resources" means computer voice and data communications hardware and software including imaging systems, terminals, radio and communications networks and facilities as well as information systems services and professional services contracts required for the implementation, operation, maintenance or support of an executive branch state agency computer or communication system.

(12) "Invitation for bid (IFB)" means all documents, including those attached or incorporated by reference, used for soliciting competitive sealed bids. Also sometimes referred to as an invitation to bid (ITB).

(13) "Offeror" means one who submits a proposal in response to a request for proposals.

(14) "Request for proposals (RFP)" means all documents, including those attached or incorporated by reference, used for soliciting competitive sealed proposals.

(15) "Sole source" means tangible personal property, services or construction for which there is only one source and that source is unique and no other similar items of tangible personal property, services or construction can meet the intended purpose of the procurement.

[1.4.1.7 NMAC - Rp, 1.4.1.7 NMAC, 08-30-13]

1.4.1.8 CENTRALIZATION OF PROCUREMENT ACTIVITY (1.4.1.8 - 1.4.1.13 NMAC):

A. State purchasing agent. All procurement for state agencies shall be performed by the state purchasing agent except the following:

- (1) professional services;
- (2) small purchases having a value not exceeding one thousand five hundred dollars (\$1,500);
- (3) emergency procurements; and
- (4) the types of procurement specified in Subsection B of 1.4.1.2 NMAC.

B. Central purchasing offices. All procurement for state agencies excluded from the requirement of procurement through the state purchasing agent shall be performed by a central purchasing office designated by statute, the governing authority of that state agency or as otherwise provided in the Procurement

Code.

C. **C O O P E R A T I V E** procurement. Nothing in this section should be interpreted as limiting the ability of state agencies to make procurements under existing contracts or enter into cooperative procurement agreements in accordance with 13-1-135 and 13-1-136 NMSA 1978.

[1.4.1.8 NMAC - Rp, 1.4.1.8 NMAC, 08-30-13]

1.4.1.9 INSPECTION OF PUBLIC RECORDS:

The inspection of public records is governed by the Inspection of Public Records Act, 14-2-1 through 14-2-12 NMSA 1978. To the extent that any provision of this rule conflicts with the Inspection of Public Records Act, as interpreted by the courts of this state, that act shall control. Furthermore, no obligation to keep data confidential which is contained in this rule is intended to create any liability that would not otherwise exist under state law.

[1.4.1.9 NMAC - Rp, 1.4.1.9 NMAC, 08-30-13]

1.4.1.10 D O L L A R

AMOUNTS: Whenever a dollar amount appears in this rule, such amount is exclusive of applicable gross receipts and local option taxes as the term is defined in Subsection Q of Section 7-9-3 NMSA 1978.

[1.4.1.10 NMAC - Rp, 1.4.1.10 NMAC, 08-30-13]

1.4.1.11 INDEMNIFICATION AND INSURANCE:

A. Tort liability. Except as provided for in the Tort Claims Act, 41-4-1 through 41-4-27 NMSA 1978, no contract governed by this rule shall contain any provision whereby a state agency agrees to indemnify or provide tort liability insurance for any contractor. The indemnification and insurance provisions of contracts provided for in the Tort Claims Act shall be approved in writing by GSD's risk management division before they become effective.

B. Other risks. No contract governed by this rule shall contain any provision whereby a state agency agrees to indemnify or provide a contractor with insurance for non-tort risks unless the provision has been approved in writing by GSD's risk management division.

C. Contract provisions void. Any indemnification or insurance provision in any contract executed in violation of this section shall be void and of no effect.

[1.4.1.11 NMAC - Rp, 1.4.1.11 NMAC, 08-30-13]

1.4.1.12 [RESERVED]

1.4.1.13 SEVERABILITY: If

any provision of this rule, or any application thereof, to any person or circumstance, is held invalid, such invalidity shall not affect any other provision or application of this rule which can be given effect without the invalid provision or application.

[1.4.1.13 NMAC - Rp, 1.4.1.13 NMAC, 08-30-13]

1.4.1.14 APPLICATION (COMPETITIVE SEALED BIDS;

1.4.1.14 -1.4.1.28 NMAC): The provisions of 1.4.1.14 through 1.4.1.28 NMAC apply to every procurement made by competitive sealed bids.

[1.4.1.14 NMAC - Rp, 1.4.1.14 NMAC, 08-30-13]

1.4.1.15 COMPETITIVE SEALED BIDS REQUIRED:

All procurement shall be achieved by competitive sealed bids except procurement achieved pursuant to the following methods:

- A. competitive sealed proposals;
- B. small purchases;
- C. sole source procurement;

- D. emergency procurement;
- E. procurement under existing contracts; and

- F. purchases from anti-poverty program businesses.

[1.4.1.15 NMAC - Rp, 1.4.1.15 NMAC, 08-30-13]

1.4.1.16 INVITATION FOR BIDS ("IFB"):

A. General. The invitation for bids ("IFB"), also sometimes referred to as the invitation to bid (ITB), is used to initiate a competitive sealed bid procurement. The IFB shall include the following:

- (1) the specifications for the services, construction or items of tangible personal property to be procured, except that professional services and a design and build project delivery system cannot be procured with an IFB pursuant to 13-1-111 NMSA 1978;

- (2) all contractual terms and conditions applicable to the procurement including any requirements for complying with applicable preferences provided in law;

- (3) the term of the contract and conditions of renewal or extension, if any;

- (4) instructions and information to bidders, including the location where bids are to be received and the date, time and place of the bid opening;

- (5) a notice that the IFB may be canceled and that any and all bids may be rejected in whole or in part when it is in the best interest of the state of New Mexico; and

- (6) a notice that reads substantially as follows: The Procurement Code, 13-1-28

through 13-1-199 NMSA 1978, imposes civil, misdemeanor and felony criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

B. Incorporation by reference. The IFB may incorporate documents by reference, provided that the IFB specifies where such documents can be obtained.

C. Evaluation criteria. The IFB shall set forth the evaluation criteria that will be used to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life-cycle costs that will affect the bid price shall be objectively measurable. No criteria may be used in bid evaluation that are not set forth in the IFB.

D. Bid form. The IFB shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions. A bidder may submit a reasonable facsimile of the bid form. Oral, telephonic and telegraphic bids except as provided in this subsection are invalid and shall not be considered. Telegraphic or bids sent via FAX to a third party and delivered in a sealed envelope to the location where bids are to be received by the date and time shown in the bid, will be accepted for consideration.

E. Bid samples and descriptive literature.

(1) "Descriptive literature" means information available in the ordinary course of business that shows the characteristics, construction, or operation of an item.

(2) "Bid sample" means a sample furnished by a bidder that shows the characteristics of an item offered in the bid.

(3) Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the item bid.

(4) Bid samples, when required, shall be furnished free of expense to the state and prior to the time set for the opening of bids. Samples not destroyed or mutilated in testing will be returned upon request by mail, express or freight, collect. Each sample must be labeled to clearly show the bid number and the bidder's name.

F. Bidding time. Bidding time is the period of time between the date of distribution of the IFB and the time and date set for receipt of bids. In each case bidding time shall be set to provide bidders a reasonable time to prepare their bids. In no case shall the bidding time be shorter than the time required for publication under 1.4.1.17 NMAC of this rule.

[1.4.1.16 NMAC - Rp, 1.4.1.16 NMAC, 08-

30-13]

1.4.1.17 PUBLIC NOTICE

INVITATION FOR BID: Publication. The IFB or notice thereof shall be published not less than ten calendar days prior to the date set for the opening of bids. The IFB or notice must be published once in at least three newspapers of general circulation in this state.

A. These requirements of publication are in addition to any other procedures that may be adopted by the state purchasing agent to notify prospective bidders that bids will be received, including but not limited to publication in trade journals, if available.

B. Bidder lists. The state purchasing agent shall send copies of the notice or IFB involving the expenditure of more than sixty thousand dollars (\$60,000) to those businesses which have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and which have paid any required fees. (13-1-104 NMSA 1978). Reference is also given to 1.4.1.48 NMAC of this rule.

C. Public availability. A copy of the IFB shall be made available for public inspection at the office of the state purchasing agent.

[1.4.1.17 NMAC - Rp, 1.4.1.17 NMAC, 08-30-13]

1.4.1.18 P R E - B I D

CONFERENCE: Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received the IFB. The conference should be held long enough after the IFB has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the IFB unless a change is made by written amendment as provided in this rule.

[1.4.1.18 NMAC - Rp, 1.4.1.18 NMAC, 08-30-13]

1.4.1.19 AMENDMENTS TO THE INVITATION FOR BIDS:

A. Form. An amendment to the IFB shall be identified as such and shall require that bidders acknowledge its receipt. The amendment shall refer to the portions of the IFB it amends.

B. Distribution. Amendments shall be sent to all prospective bidders known to have received the IFB.

C. Timeliness. Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will

not permit such preparation, the time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone or by other electronic means and confirmed in the amendment.

D. Use of amendments. Amendments should be used to:

(1) make any changes in the IFB such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;

(2) correct defects or ambiguities;

or
(3) furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders.

[1.4.1.19 NMAC - Rp, 1.4.1.19 NMAC, 08-30-13]

1.4.1.20 P R E - O P E N I N G MODIFICATION OR WITHDRAWAL OF BIDS:

A. Procedure. A bid may be modified or withdrawn by a bidder prior to the time set for bid opening by delivering written or telegraphic notice to the location designated in the IFB as the place where bids are to be received.

B. Disposition of bid security. If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

C. Records. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

[1.4.1.20 NMAC - Rp, 1.4.1.20 NMAC, 08-30-13]

1.4.1.21 L A T E B I D S, L A T E W I T H D R A W A L S A N D L A T E M O D I F I C A T I O N S:

A. Definition. Any bid or any withdrawal or modification of a bid received after the time and date for opening of bids at the place designated for opening is late.

B. General rule. No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of state personnel directly serving the procurement activity.

C. Records. All documents relating to late bids, late modifications, or late withdrawals shall be made a part of the appropriate procurement file.

[1.4.1.21 NMAC - Rp, 1.4.1.21 NMAC, 08-30-13]

1.4.1.22 B I D O P E N I N G:

A. Receipt. Upon its receipt, each bid and modification shall be

time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

B. No bids received. Except as provided in 1.4.1.68 through 1.4.1.72 NMAC of this rule, if no bids are received or if all bids received are rejected in accordance with the provisions of 1.4.1.68 through 1.4.1.72 NMAC of this rule, a new IFB shall be issued. If upon re-bidding with no change in specifications from the first IFB, the bids received are unacceptable, or if no bids are secured, the state purchasing agent may purchase (i.e., as opposed to procure) the items of tangible personal property, construction or services in the open market at the best obtainable price.

C. Opening and recording. Bids and modifications shall be opened publicly in the presence of one or more witnesses at the time and place designated in the IFB. The name of each bidder, the amount of each bid and each bid item, if appropriate, the names and addresses of the required witnesses, and such other relevant information as may be specified by the state purchasing agent shall be recorded. The record shall be open for public inspection. Each bid, except those portions for which a bidder has made a written request for confidentiality, shall also be open to public inspection. Any data, which a bidder believes should be kept confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Prices and makes and models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

[1.4.1.22 NMAC - Rp, 1.4.1.22 NMAC, 08-30-13]

1.4.1.23 MISTAKES IN BIDS:

A. Consideration for award. Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in 1.4.1.14 through 1.4.1.28 NMAC of this rule.

B. General principles. Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent authorized in 1.4.1.14 through 1.4.1.28 NMAC of this rule.

C. Mistakes discovered before opening. A bidder may correct mistakes discovered before bid opening by withdrawing or correcting the bid as provided in 1.4.1.20 NMAC of this rule.

D. Confirmation of bid. When the procurement officer knows or has reason to conclude that a mistake has been made in the low bid, the procurement officer should request the low bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the low bid or a bid unreasonably lower than the other bids submitted. If the low bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsection E of this section are met.

E. Mistakes discovered after opening. This subsection sets forth procedures to be applied in three situations in which mistakes in bids are discovered after the time and date set for bid opening.

(1) Technical irregularities. Technical irregularities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, when there is no effect on price, quality or quantity. The procurement officer may waive such irregularities or allow the low bidder to correct them if either is in the best interest of the state. Examples include the failure of the low bidder to:

(a) return the number of signed bids required by the IFB;

(b) sign the bid, but only if the unsigned bid is accompanied by other material indicating the low bidder's intent to be bound; or

(c) acknowledge receipt of an amendment to the IFB, but only if:

(i) it is clear from the bid that the low bidder received the amendment and intended to be bound by its terms; or

(ii) the amendment involved had no effect on price, quality or quantity.

(2) Mistakes where intended correct bid is evident. If the mistake and the intended correct bid are clearly evident on the face of a bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of a bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. It is emphasized that mistakes in unit prices cannot be corrected.

(3) Mistakes where intended correct bid is not evident. A low bidder alleging a material mistake of fact which makes the bid non-responsive may be permitted to withdraw the bid if:

(a) a mistake is clearly evident on the face of the bid document but the intended correct bid is not; or

(b) the low bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

(4) Written determination. When a

bid is corrected or withdrawn, or a correction or withdrawal is denied, the procurement officer shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

[1.4.1.23 NMAC - Rp, 1.4.1.23 NMAC, 08-30-13]

1.4.1.24 BID EVALUATION AND AWARD:

A. General. A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder. The IFB shall set forth the requirements and criteria that will be used to determine the lowest responsive bid. No bid shall be evaluated for any requirement or criterion that is not disclosed in the IFB. Contracts solicited by competitive sealed bids shall require that the bid amount exclude the applicable state gross receipts tax or local option tax but that the contracting agency shall be required to pay the tax including any increase in the tax becoming effective after the contract is entered into. The tax shall be shown as a separate amount on each billing or request for payment made under the contract.

B. Product acceptability. The IFB shall set forth all evaluation criteria to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any or all of the following prior to award:

(1) inspection or testing of a product for such characteristics as quality or workmanship;

(2) examination of such elements as appearance, finish, taste or feel; or

(3) other examinations to determine whether it conforms with other purchase description requirements.

C. Purpose of acceptability evaluation. An acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another's but only to determine that a bidder's offering is acceptable as set forth in the IFB. Any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive.

D. Brand-name or equal specification. Where a brand-name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition. When bidding an "or equal" the burden of persuasion is on the supplier or manufacturer who has not been specified to convince the procurement officer that their product is, in fact, equal to the one

specified. The procurement officer is given the responsibility and judgement for making a final determination on whether a proposed substitution is an "or equal".

E. Determination of lowest bidder. Following determination of product acceptability as set forth in Subsections B, C and D of this section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the state in accordance with the evaluation criteria set forth in the IFB. Only objectively measurable criteria that are set forth in the IFB shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, discounts, transportation costs and ownership or life-cycle formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall be reasonable estimates based upon information the state has available concerning future use.

(1) Prompt payment discounts. Prompt payment discounts shall not be considered in computing the low bid. Such discounts may be considered after award of the contract.

(2) Trade discounts. Trade discounts shall be considered in computing the low bid. Such discounts may be shown separately, but must be deducted by the bidder in calculating the unit price quoted.

(3) Quantity discounts. Quantity discounts shall be included in the price of an item. Such discounts may not be considered where set out separately unless the IFB so specifies.

(4) Transportation costs. Transportation costs shall be considered in computing the low bid. Such costs may be computed into the bid price or be listed as a separate item.

(5) Total or life-cycle costs. Award may be determined by total or life-cycle costing if so indicated in the IFB. Life-cycle cost evaluation may take into account operative, maintenance, and money costs, other costs of ownership and usage and resale or residual value, in addition to acquisition price, in determining the lowest bid cost over the period the item will be used.

(6) Energy efficiency. Award may be determined by an evaluation consisting of acquisition price plus the cost of energy consumed over a projected period of use.

F. Restrictions. Nothing in 1.4.1.24 NMAC of this rule shall be deemed to permit contract award to a bidder submitting a higher quality item than designated in the IFB unless the bidder is also the lowest bidder as determined under Subsection E of this section. Further, except as provided in this subsection, 1.4.1.24 NMAC of this rule does not permit negotiations with any bidder. If the lowest

responsive bid has otherwise qualified, and if there is no change in the original terms and conditions, the lowest responsible bidder may negotiate with the purchaser (i.e., this exception applies only to purchases and does not apply to procurements generally) for a lower total bid to avoid rejection of all bids for the reason that the lowest bid was up to 10 percent higher than budgeted project funds. Such negotiation shall not be allowed if the lowest bid was more than ten percent over budgeted project funds.

G. Documentation of award. Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

H. Publicizing awards. Written notice of award shall be sent to the successful bidder. Notice of award shall also be posted at the state purchasing agent's office.

[1.4.1.24 NMAC - Rn 1.4.1.24 NMAC, 08-30-13]

1.4.1.25 STATUTORY PREFERENCES: Statutory preferences to be applied in determining low bidder or low offeror. New Mexico law provides certain statutory preferences to resident businesses, resident veteran businesses, resident contractors and resident veteran contractors as well as for recycled content goods (13-1-21 and 13-1-22 NMSA 1978). These preferences must be applied in regard to invitations for bids and requests for proposals in accordance with statute in determining the lowest bidder or offeror.

[1.4.1.25 NMAC - Rp, 1.4.1.25 NMAC, 08-30-13]

1.4.1.26 IDENTICAL LOW BIDS:

A. Definition. Identical low bids are low responsive bids, from responsible bidders, which are identical in price after the application of the preferences referred to in 1.4.1.25 NMAC of this rule and which meet all the requirements and criteria set forth in the IFB.

B. Award. When two or more identical low bids are received, the state purchasing agent may:

(1) award pursuant to the multiple source award provisions of 13-1-153 and 13-1-154 NMSA 1978;

(2) award to a resident business or a resident veteran business or a resident contractor or a resident veteran contractor if the identical low bids are submitted by a resident business or a resident veteran business or a resident contractor or a resident veteran contractor and a nonresident business or nonresident contractor;

(3) award to a bidder offering

recycled content goods if the identical low bids are for recycled content goods and virgin goods;

(4) award by lottery to one of the identical low bidders; or

(5) reject all bids and re-solicit bids or proposals for the required services, construction or items of tangible personal property.

[1.4.1.26 NMAC - Rp, 1.4.1.26 NMAC, 08-30-13]

1.4.1.27 MULTI-STEP SEALED BIDS:

A. General. Multi-step bidding is a variant of the competitive sealed bidding method. This method may be utilized when the state purchasing agent or a central purchasing office makes a determination that it is impractical initially to prepare specifications to support an award based on price, or that specifications are inadequate or are too general to permit full and free competition without technical evaluation and discussion.

B. Phased process. Multi-step bidding is a phased process which combines elements of both the competitive sealed proposal method, seeking necessary information or unpriced technical offers in the initial phase; and regular competitive sealed bidding, inviting bidders who submitted technically acceptable offers in the initial phase, to submit competitive sealed price bids on the technical offers in the final phase. The contract shall be awarded to the lowest responsible bidder. If time is a factor, the state purchasing agent or a central purchasing office may require offerors to submit a separate sealed bid during the initial phase to be opened after the technical evaluation.

C. Public notice. Whenever multi-step sealed bids are used, public notice for the first phase shall be given in accordance with 1.4.1.17 NMAC of this rule. Public notice is not required for the second phase.

[1.4.1.27 NMAC - Rp, 1.4.1.27 NMAC, 08-30-13]

1.4.1.28 PAYMENTS FOR PURCHASES:

Contract clause. All contracts resulting from an invitation for bids shall contain a clause allowing for late payment charges against the state agency in the amount and under the conditions set forth in 13-1-158 NMSA 1978.

[1.4.1.28 NMAC - Rp, 1.4.1.28 NMAC, 08-30-13]

1.4.1.29 APPLICATION (COMPETITIVE SEALED PROPOSALS; 1.4.1.29-1.4.1.47 NMAC):

A. General. Except as provided in Subsections B and C of this section, the provisions of 1.4.1.29 through

1.4.1.47 NMAC of this rule apply to every procurement made by competitive sealed proposals.

B. Architects, engineers, landscape architects and surveyors. The provisions of 1.4.1.29 through 1.4.1.47 NMAC of this rule do not apply to the procurement of professional services of architects, engineers, landscape architects and surveyors for state public works projects or local public works projects. Except that when procuring such professional services for state public works projects or local public works projects state agencies and local public bodies shall comply with 13-1-120 through 13-1-124 NMSA 1978, competitive sealed qualifications-based proposals.

C. Procurement of professional services by state agencies with rulemaking authority. A state agency with rule making authority may adopt its own regulations for the procurement of professional services by competitive sealed proposals under the following conditions:

(1) the state agency must receive prior written authorization from the GSD secretary;

(2) the state agency's proposed regulations must provide that RFPs or notices thereof having a value exceeding sixty thousand dollars (\$60,000) will be provided to the state purchasing agent for distribution to prospective offerors who have registered with the state purchasing agent's office in accordance with the terms of Subsection B of 1.4.1.17 NMAC and Subsection A of 1.4.1.32 NMAC of this rule.

D. "Professional services" are defined in 13-1-76 NMSA 1978. The section of statute acknowledges the difficulty of any attempt made to recognize and list each and every service that could conceivably fall within the definition of "professional services". Instead, the statute provides in relevant part that "...other persons or businesses providing similar professional services to those listed may be designated as such by a determination issued by the state purchasing agent or a central purchasing office." In instances where "...other persons or businesses providing similar professional services...", as cited in 13-1-76, NMSA 1978, is not clearly defined, state agencies shall submit a written request to the state purchasing agent for issuance of a determination and a finding that the service is to be designated as a professional service. State agencies shall not make such a determination independent of the state purchasing agent.

[1.4.1.29 NMAC - Rp, 1.4.1.29 NMAC, 08-30-13]

1.4.1.30 GENERAL DISCUSSION:

A. Use of competitive sealed proposals. When a state agency

procures professional services that are not related to a design and build project delivery system in accordance with 13-1-119.1 NMSA 1978, or when the state purchasing agent or a designee makes a determination that the use of competitive sealed bids is either not practicable or not advantageous to the state, a procurement shall be effected by competitive sealed proposals. Note well: 13-1-111 NMSA 1978 only authorizes state agencies other than the state purchasing agent to procure professional services by means of competitive sealed proposals. 13-1-111 NMSA 1978 does not authorize state agencies to avoid centralized purchasing through the state purchasing agent by issuing RFPs for items of tangible personal property, or nonprofessional services.

B. Definitions. The words "practicable" and "advantageous" are to be given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" denotes a judgmental assessment of what is in the state's best interest. The use of competitive sealed bids may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the state's best interest.

C. Proposals offer flexibility. The key element in determining advantageousness is the need for flexibility. The competitive sealed proposal method differs from the competitive sealed bid method in two important ways:

(1) it permits discussions with competing offerors and changes in their proposals including price; and;

(2) it allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of a contract.

D. Determinations by category. The state purchasing agent may make determinations by category of services or items of tangible personal property that it is either not practicable or not advantageous to procure specified types of service or items of tangible personal property by competitive sealed bids in which case competitive sealed proposals shall be utilized. The state purchasing agent may modify or revoke such determinations at any time.

[1.4.1.30 NMAC - Rp, 1.4.1.30 NMAC, 08-30-13]

1.4.1.31 REQUEST FOR PROPOSALS ("RFP"):

A. Initiation. The request for proposals ("RFP") is used to initiate a competitive sealed proposal procurement. All state agencies shall follow published guidelines and procedures issued by the state purchasing agent from development stage through award of RFP-based procurements. At a minimum the RFP shall include the

following:

(1) the specifications for the services or items of tangible personal property to be procured;

(2) all contractual terms and conditions applicable to the procurement;

(3) instructions concerning the submission and response to questions;

(4) the term of the contract and conditions of renewal or extension, if any;

(5) instructions and information to offerors, including the location where proposals are to be received and the date, time and place where proposals are to be received and reviewed;

(6) all of the evaluation factors, and the relative weights to be given to the factors in evaluating proposals;

(7) a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions;

(8) a notice that the RFP may be canceled and that any and all proposals may be rejected in whole or in part when it is in the best interest of the state of New Mexico; and

(9) a statement of how proposed costs should be submitted;

(10) a notice that reads substantially as follows: The Procurement Code, 13-1-28 through 13-1-199 NMSA 1978, imposes civil, misdemeanor and felony criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

B. Incorporation by reference. The RFP may incorporate documents by reference, provided that the RFP specifies where such documents can be obtained.

C. Form of proposal. The manner in which proposals are to be submitted, including any forms for that purpose, should be designated in the RFP.

D. Proposal preparation time. 30 calendar days between the date of issue and the proposal due date is the recommended minimum proposal preparation time. A longer preparation time may be required for complex procurements or for procurements that require substantial offeror resources to prepare an acceptable proposal.

[1.4.1.31 NMAC - Rp, 1.4.1.31 NMAC, 08-30-13]

1.4.1.32 PUBLIC NOTICE REQUEST FOR PROPOSAL:

A. Procurements by the state purchasing agent. The state purchasing agent shall give public notice of the RFP in the same manner as provided in 1.4.1.17 NMAC of this rule. However, an RFP or

a notice shall be published not less than 20 days prior to the date set for receipt of proposals unless a shorter time frame is requested and approval granted by the state purchasing agent.

B. Procurements of all tangible personal property or services. The procurement manager shall deliver to the state purchasing agent or designee the following listed items no later than 15 calendar days prior to the proposed issue date:

(1) a one-page notice suitable for distribution that contains the procurement title, purpose statement, the issue date, the name of the agency conducting the procurement, the place where a copy of the RFP document may be obtained, the date and location of the pre-proposal conference, if one is held, the name, address and phone number of the procurement manager and the deadline for the submission of proposals;

(2) a completed state of New Mexico purchase document;

(3) a list containing the names and addresses of suggested sources, if any;

(4) a copy of the complete RFP document; for large or complex procurements, the draft RFP document shall be delivered to the state purchasing agent for review at least thirty days prior to the proposed issue date.

C. Procurements of professional services by other central purchasing offices. When procuring professional services, central purchasing offices other than the state purchasing agent shall provide the following notice:

(1) the RFP or a notice thereof shall be published not less than 10 calendar days prior to the date set for the receipt of proposals; it is recommended, however, that the time period between the published date and the date set for receipt of proposals be no less than 20 days; the RFP or notice shall be published at least once in a newspaper of general circulation in the area in which the central purchasing office is located; if there is no newspaper of general circulation in the area, such other notice may be given as is commercially reasonable; and

(2) a copy of the RFP and notice shall be delivered to the state purchasing agent not less than 15 calendar days prior to the date set for the issuance; the state purchasing agent shall distribute the RFP or notice to prospective offerors who have registered with the state purchasing agent's office in accordance with the terms of Subsection B of 1.4.1.17 NMAC of this rule and Subsection A of this section; and

(3) a copy of the RFP shall be made available for public inspection at the central purchasing office.

D. Additional notice. The requirements of Subsections A, B and C of this section are in addition to any other

procedures which may be adopted by the state purchasing agent or central purchasing offices to notify prospective offerors that proposals will be received, including but not limited to publication in professional journals, if available.

[1.4.1.32 NMAC - Rn 1.4.1.32 NMAC, 08-30-13]

1.4.1.33 PRE-PROPOSAL CONFERENCES:

Pre-proposal conferences may be conducted in accordance with 1.4.1.18 NMAC of this rule. Any such conference should be held prior to submission of initial proposals.

[1.4.1.33 NMAC - Rp, 1.4.1.33 NMAC, 08-30-13]

1.4.1.34 AMENDMENTS TO THE REQUEST FOR PROPOSALS:

A. Prior to submission of proposals. Prior to submission of proposals, amendments to the RFP may be made in accordance with 1.4.1.19 NMAC of this rule.

B. After submission of proposals. After submission of proposals, amendments to the RFP shall be distributed only to short-listed offerors. The short-listed offerors shall be permitted to submit new proposals or to amend those submitted. If in the opinion of the procurement officer or procurement manager, a contemplated amendment will significantly change the nature of the procurement, the RFP shall be canceled in accordance with 1.4.1.68 through 1.4.1.72 NMAC of this rule, and a new RFP issued.

[1.4.1.34 NMAC - Rp, 1.4.1.34 NMAC, 08-30-13]

1.4.1.35 MODIFICATION OR WITHDRAWAL OF PROPOSALS:

Proposals may be modified or withdrawn prior to the established due date in accordance with 1.4.1.20 NMAC of this rule. The established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or, if discussions have begun, it is the time and date by which best and final offers must be submitted by short-listed offerors.

[1.4.1.35 NMAC - Rp, 1.4.1.35 NMAC, 08-30-13]

1.4.1.36 LATE PROPOSALS, LATE WITHDRAWALS AND LATE MODIFICATIONS:

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. (See 1.4.1.35 NMAC of this rule for the definition of "established due date.") They may be considered only in accordance with 1.4.1.21 NMAC of this rule.

[1.4.1.36 NMAC - Rp, 1.4.1.36 NMAC, 08-30-13]

1.4.1.37 RECEIPT AND OPENING OF PROPOSALS:

A. Receipt. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. (See 1.4.1.35 of this rule for the definition of "established due date.")

B. Opening. Proposals shall not be opened publicly and shall not be open to public inspection until after award of a contract. An offeror may request in writing nondisclosure of confidential data. Such data shall accompany the proposal and shall be readily separable from the proposal in order to facilitate eventual public inspection of the nonconfidential portion of the proposal.

[1.4.1.37 NMAC - Rp, 1.4.1.37 NMAC, 08-30-13]

1.4.1.38 EVALUATION OF PROPOSALS:

A. Evaluation factors: The evaluation shall be based on the evaluation factors and the relative weights set forth in the RFP. Numerical rating systems are required for requests for proposals-based procurements.

B. Evaluation committee. The state agency management shall appoint an evaluation committee prior to the due date for receipt of proposals. The size of the committee should be manageable and include both user and technical support representatives.

C. Classified proposals. For the purpose of conducting discussions under 1.4.1.39 NMAC of this rule, proposals shall be initially classified as:

(1) responsive;

(2) potentially responsive, that is, reasonably susceptible of being made responsive; or

(3) non-responsive.

D. Disqualification. Non-responsive proposals are disqualified and eliminated from further consideration. A written determination in the form of a letter must be sent promptly to the disqualified offeror setting forth the grounds for the disqualification, and made a part of procurement file.

[1.4.1.38 NMAC - Rp, 1.4.1.38 NMAC, 08-30-13]

1.4.1.39 PROPOSAL DISCUSSIONS AND NEGOTIATIONS WITH INDIVIDUAL OFFERORS:

A. Discussions authorized. Discussions may be conducted with responsible offerors who submit acceptable or responsive, potentially acceptable or potentially responsive proposals.

B. Purposes of discussions. Discussions are held to clarify technical or other aspects of the proposals.

C. Conduct of discussions.

If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. Proposals may be accepted and evaluated without such discussion. This is not an opportunity for the offerors to amend the substance of their proposals.

D. Short list. All responsible offerors who submit acceptable proposals are eligible for the short list. If numerous acceptable proposals have been submitted, however, the procurement officer or procurement manager may rank the proposals and select the highest ranked proposals for the short list. Those responsible offerors who are selected for the short list are the "short-listed offerors" or "finalist offerors".

E. Competitive negotiations. Competitive negotiations may be held among the short-listed offerors to:

(1) promote understanding of a state agency's requirements and short-listed offerors' proposal; and

(2) facilitate arriving at a contract that will be most advantageous to a state agency taking into consideration the evaluation factors set forth in the RFP;

(3) except for circumstances and situations otherwise approved by the state purchasing agent, negotiations of the relevant terms and conditions as well as any other important factors in an RFP and proposed contract are negotiated prior to award of a contract, not after award.

F. Conduct of competitive negotiations. Short-listed offerors shall be accorded fair and equal treatment with respect to any negotiations and revisions of proposals. The procurement officer should establish procedures and schedules for conducting negotiations. If during discussions there is a need for any substantial clarification of or change in the RFP, the RFP shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the short-listed offeror.

[1.4.1.39 NMAC - Rp, 1.4.1.39 NMAC, 08-30-13]

1.4.1.40 DISCLOSURE:

The contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process and prior to award. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

[1.4.1.40 NMAC - Rp, 1.4.1.40 NMAC, 08-30-13]

1.4.1.41 BEST AND FINAL

OFFERS: Best and final offers in a request for proposals are strongly discouraged. An offeror's best offer should be included in that offeror's original proposal. No discussion or changes to that offer should be allowed prior to selection of the offeror as the successful offeror unless negotiations are undertaken pursuant to 1.4.1.39 NMAC of this rule. After such selection of a successful offeror or offerors (for a multiple award procurement) and before final award, an agency may negotiate with the selected successful offeror(s) for the best possible terms for the state but such negotiations shall not change the successful offeror's or offerors' (for a multiple award procurement) proposal(s) to the detriment of the state. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

[1.4.1.41 NMAC - Rp, 1.4.1.41 NMAC, 08-30-13]

1.4.1.42 MISTAKES IN PROPOSALS:

A. Modification or withdrawal of proposals. Proposals may be modified or withdrawn as provided in 1.4.1.35 NMAC of this rule.

B. Mistakes discovered after receipt of proposals. This subsection sets forth procedures to be applied in several situations in which mistakes in proposals are discovered after receipt of proposals.

(1) Confirmation of proposal. When the procurement officer or procurement manager knows or has reason to conclude before award that a mistake has been made, the procurement officer or procurement manager should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsection C of this section are met.

(2) During negotiations. If best and final offers are requested in the RFP, between the period of selecting short-listed/finalist offerors and the date set for best and final offers, any short-listed or finalist offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

C. Technical irregularities. Technical irregularities are matters of form rather than substance evident from the proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other offerors; that is, when there is no effect on price, quality or quantity. If discussions are not held or if best and final offers upon which award will be made have been received, the procurement officer or procurement manager may waive such irregularities or allow an offeror to

correct them if either is in the best interest of the state. Examples include, but are not limited to, the failure of an offeror to:

(1) return the number of signed proposals required by the RFP;

(2) sign the proposal, but only if the unsigned proposal is accompanied by other material indicating the offeror's intent to be bound; or

(3) acknowledge receipt of an amendment to the RFP, but only if:

(a) it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or

(b) the amendment involved had no effect on price, quality or quantity.

D. Correction of mistakes. If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident to the evaluation committee members or the procurement officer or the procurement manager on the face of the proposal, in which event the proposal may not be withdrawn.

E. Withdrawal of proposals. If discussions are not held, or if the best and final offers upon which award will be made have been received, an offeror alleging a material mistake of fact which makes a proposal non-responsive may be permitted to withdraw the proposal if:

(1) the mistake is clearly evident to the evaluation committee members or the procurement officer or the procurement manager on the face of the proposal but the intended correct offer of the offeror is not; or

(2) the offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

F. Determination required. When a proposal is corrected or withdrawn, or correction or withdrawal is denied under Subsections C through E of this section, the procurement officer or procurement manager shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

[1.4.1.42 NMAC - Rp, 1.4.1.42 NMAC, 08-30-13]

1.4.1.43 AWARD : PROFESSIONAL SERVICES:

A. Procedure. An award shall be made to the responsible offeror whose proposal is most advantageous to a state agency, taking into consideration the evaluation factors set forth in the RFP. The procurement officer shall make a written determination showing the basis on which an award was found to be most advantageous to a state agency based on the factors set forth in the RFP. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

B. Publicizing awards. The procurement manager or procurement officer shall promptly provide all offerors who submitted responsive proposals written notice of the award. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

C. Publicizing awards. The procurement manager or procurement officer shall promptly provide all offerors who submitted responsive proposals written notice of the award which notice shall be sent via certified mail, return receipt requested, and shall include the expiration date and time of the protest period, if there was a change from the date and time published in the RFP.

[1.4.1.43 NMAC - Rp, 1.4.1.43 NMAC, 08-30-13]

1.4.1.44 AWARD: ALL TANGIBLE PERSONAL PROPERTY OR SERVICES: (INCLUDES SOFTWARE, HARDWARE, NON-PROFESSIONAL SERVICES, etc):

A. Procedure. The award shall be made by the state purchasing agent or designee to the responsible offeror whose proposal is most advantageous to the state agency, taking into consideration the evaluation factors set forth in the RFP. The procurement manager shall make a written determination in the form of an evaluation committee report showing the basis on which the recommended award was found to be most advantageous to the state agency based on the factors set forth in the RFP.

B. Publicizing awards. The procurement manager shall promptly provide all offerors who submitted responsive proposals written notice of the award. The written notice shall be sent via certified mail, return receipt requested, and shall include the expiration date and time of the protest period, if there was a change from the date and time published in the RFP.

[1.4.1.44 NMAC - Rp, 1.4.1.44 NMAC, 08-30-13]

1.4.1.45 PUBLIC INSPECTION:

A. General. After award, any written determinations made pursuant to these rules, the evaluation committee report and each proposal, except those portions for which the offeror has made a written request for confidentiality, shall be open to public inspection. Confidential data is normally restricted to confidential financial information concerning the offeror's organization and data that qualifies as a trade secret in accordance with the Uniform Trade Secrets Act, 57-3A-1 to 57-3A-7 NMSA 1978. The price of products offered or the cost of services proposed may not be designated as confidential information. Award in this

context means the final required state agency signature on the contract(s) resulting from the procurement.

B. Confidential data. If a request is received for disclosure of data, for which an offeror has made a written request for confidentiality, the state purchasing agent or central purchasing office shall examine the offeror's request and make a written determination that specifies which portions of the proposal should be disclosed. If it is determined that an offeror's requested confidential data should be disclosed, that offeror will receive reasonable notice in order to afford the offeror the opportunity to take legal action to prevent the disclosure. Unless the offeror takes legal action to prevent the disclosure, the data will be so disclosed. After award the proposal shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

[1.4.1.45 NMAC - Rp, 1.4.1.45 NMAC, 08-30-13]

1.4.1.46 PAYMENTS FOR PURCHASES: Contract clause. All contracts resulting from a request for proposals shall contain a clause allowing for late payment charges against the state agency in the amount and under the conditions set forth in 13-1-158 NMSA 1978.

[1.4.1.46 NMAC - Rp, 1.4.1.46 NMAC, 08-30-13]

1.4.1.47 DFA CONTRACT REVIEW: All contracts for professional services with state agencies shall be reviewed as to budget requirements by the department of finance and administration, if such review is required by DFA or subsequent DFA rules.

[1.4.1.47 NMAC - Rp, 1.4.1.47 NMAC, 08-30-13]

1.4.1.48 APPLICATION (SMALL PURCHASES; 1.4.1.48 - 1.4.1.52 NMAC): The provisions of 1.4.1.48 through 1.4.1.52 NMAC of this rule apply to the procurement of nonprofessional services, construction or items of tangible personal property having a value not exceeding sixty thousand dollars (\$60,000) and to the procurement of professional services having a value not exceeding sixty thousand dollars (\$60,000) the use of a statewide price agreement, an existing contract or the methods of procurement set forth in 1.4.1.50 through 1.4.1.52 NMAC of this rule provide alternatives to the competitive sealed bid and competitive sealed proposal methods of procurement. If an existing statewide price agreement, an existing contract or, the procurement methods set forth in 1.4.1.50 through 1.4.1.52 NMAC of this rule are not used, the competitive sealed bid or competitive sealed proposal methods shall apply.

[1.4.1.48 NMAC - Rp, 1.4.1.48 NMAC, 08-30-13]

1.4.1.49 DIVISION OF REQUIREMENTS: Procurement requirements shall not be artificially divided so as to constitute a small purchase under 1.4.1.48 through 1.4.1.52 NMAC of this rule.

[1.4.1.49 NMAC - Rp, 1.4.1.49 NMAC, 08-30-13]

1.4.1.50 SMALL PURCHASES OF \$20,000 OR LESS: A state agency may procure services, construction or items of tangible personal property having a value not exceeding twenty thousand dollars (\$20,000) by issuing a direct purchase order to a contractor based upon the best obtainable price and in accordance with any procedures or processes set forth by the state purchasing agent.

[1.4.1.50 NMAC - Rp, 1.4.1.50 NMAC, 08-30-13]

1.4.1.51 SMALL PURCHASES OF ITEMS OF TANGIBLE PERSONAL PROPERTY, CONSTRUCTION AND NONPROFESSIONAL SERVICES:

A. Quotation to be obtained. Insofar as it is practical for small purchases of nonprofessional services, construction or items of tangible personal property having a value exceeding twenty thousand dollars (\$20,000) but not exceeding sixty thousand dollars (\$60,000), and in accordance with any procedures or processes set forth by the state purchasing agent, no fewer than three businesses shall be solicited via written requests containing the specifications for the procurement to submit written quotations that are recorded and placed in the procurement file. If three written quotes cannot be obtained, the agency shall document the reasons and include the document in the procurement file. Such notations as "does not carry" or "did not return my phone call" do not qualify as a valid quotation. If the lowest quotation is not acceptable, the central purchasing office must issue a written determination as to the reasons for such a decision. These reasons must not be arbitrary or capricious. The written determination becomes a part of the procurement file.

B. Disclosure. Prior to award, the contents of any response to a quotation shall not be disclosed to any other business from which the same request for quotation is also being solicited. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement.

C. Award. Award shall be made to the business offering the lowest acceptable quotation.

D. Records. The names of

the businesses submitting quotations and the date and the amount of each quotation shall be recorded and maintained as a public record.

[1.4.1.51 NMAC - Rp, 1.4.1.51 NMAC, 08-30-13]

1.4.1.52 SMALL PURCHASES OF PROFESSIONAL SERVICES:

A. Application. A central purchasing office may procure professional services having a value not to exceed sixty thousand dollars (\$60,000) except for the services of architects, engineers, landscape architects, or surveyors for state public works projects, as that term is defined in 13-1-91 NMSA 1978, in accordance with Subsections B, C, and D of this section and 2.40.2 through 2.40.17 NMAC.

B. Examination of offeror list. Before contacting any business, a central purchasing office is encouraged to examine the state purchasing agent's current list of potential offerors, if any. Central purchasing offices are encouraged to contact at least three businesses for written offers before selecting a contractor.

C. Negotiations. A central purchasing office shall negotiate a contract for the required services at a fair and reasonable price to the state agency.

D. Disclosure. If more than one business is contacted, the contents of the written or oral offer of one business shall not be disclosed to another business until award is made. Award in this context means the final required state agency signature on the contract(s) resulting from the procurement. [1.4.1.52 NMAC - Rp, 1.4.1.52 NMAC, 08-30-13]

1.4.1.53 APPLICATION (SOLE SOURCE PROCUREMENTS, 1.4.1.53 - 1.4.1.57 NMAC):

The provisions of 1.4.1.53 through 1.4.1.57 NMAC of this rule apply to all sole source procurements unless emergency conditions exist as defined in 1.4.1.59 NMAC of this rule.

[1.4.1.53 NMAC - Rp, 1.4.1.53 NMAC, 08-30-13]

1.4.1.54 SOLE SOURCE PROCUREMENT OF ITEMS OF TANGIBLE PERSONAL PROPERTY, CONSTRUCTION AND NONPROFESSIONAL SERVICES:

A. Conditions for use. A contract may be awarded without competitive sealed bids or competitive sealed proposals, regardless of the estimated cost, when the state purchasing agent or a central purchasing office, employing due diligence, determines, in writing, that:

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

item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and

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

B. Request by using agency. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by a written explanation as to why no other will be suitable or acceptable to meet the need. The written explanation shall be made upon a form provided by the state purchasing agent and available on-line.

C. Posting. Prior to the award of a sole source procurement contract, the state purchasing agent or central purchasing office shall:

(1) provide the information set forth in statute and listed upon the form made available by the state purchasing agent on the state purchasing agent's website to the department of information technology for posting on the sunshine portal; and

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

D. A local public body central purchasing office, prior to award of a sole source contract, shall post the information required by statute on the local public body website, if one exists.

E. Negotiations. The state purchasing agent or a central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity, in order to obtain the price most advantageous to the state.

F. Notice; protest. At least 30 days before a sole source contract is awarded, the state purchasing agent, a central purchasing office, or a designee of either shall post notice of the intent to award a sole source contract on its website. If a central purchasing office does not maintain a website, it may post the notice on the state purchasing agent's website. Any qualified potential contractor who was not awarded a sole source contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted:

- (1) in writing; and
- (2) within 15 calendar days of the notice of intent to award a contract being posted by the state purchasing agent or a central purchasing office.

G. Specifications. The state purchasing agent or a central purchasing office shall not circumvent the sole source request and posting and award process by narrowly drafting specifications so that only one predetermined source would satisfy those specifications.

[1.4.1.54 NMAC - Rp, 1.4.1.54 NMAC, 08-30-13]

1.4.1.55 [RESERVED]

1.4.1.56 [RESERVED]

1.4.1.57 RECORDS OF SOLE SOURCE PROCUREMENTS:

The state purchasing agent or central purchasing office shall maintain records of sole source procurements for a minimum of three years. The party responsible for the procurement must retain the records. Posting such procurements on the state purchasing agent's website does not remove the central purchasing office's responsibility to maintain these records if the central purchasing office was responsible for the procurement. The record of each such procurement shall be a public record and shall contain:

- A. the contractor's name and address;
- B. the amount and term of the contract;
- C. a listing of the services, construction, or items of tangible personal property procured under the contract; and
- D. the justification for the procurement method which shall include any written determinations and written approvals required by any provision of 1.4.1.53 through 1.4.1.57 NMAC of this rule.

[1.4.1.57 NMAC - Rp, 1.4.1.57 NMAC, 08-30-13]

1.4.1.58 APPLICATION (EMERGENCY PROCUREMENTS, 1.4.1.58 - 1.4.1.64 NMAC):

The provisions of 1.4.1.58 through 1.4.1.64 NMAC of this rule apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

[1.4.1.58 NMAC - Rp, 1.4.1.58 NMAC, 08-30-13]

1.4.1.59 DEFINITION OF EMERGENCY CONDITIONS:

An emergency condition is a situation which creates a threat to public health, welfare, safety or property such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- A. the functioning of government;
- B. the preservation or protection of property; or
- C. the health or safety of any person.

[1.4.1.59 NMAC - Rp, 1.4.1.59 NMAC, 08-30-13]

1.4.1.60 SCOPE OF EMERGENCY PROCUREMENTS:

Emergency procurements shall be limited to those services, construction, or items of tangible personal property necessary to meet the emergency. Such procurement shall not include the purchase or lease-purchase of heavy road equipment.

[1.4.1.60 NMAC - Rp, 1.4.1.60 NMAC, 08-30-13]

1.4.1.61 AUTHORITY TO MAKE EMERGENCY PROCUREMENTS:

The state purchasing agent or a central purchasing office, employing due diligence, may make emergency procurements when an emergency condition arises; provided that emergency procurements shall be made with such competition as is practicable under the circumstances.

[1.4.1.61 NMAC - Rp, 1.4.1.61 NMAC, 08-30-13]

1.4.1.62 PROCEDURE: The procedure used shall be selected to assure that the required services, construction, or items of tangible personal property are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

[1.4.1.62 NMAC - Rp, 1.4.1.62 NMAC, 08-30-13]

1.4.1.63 WRITEN DETERMINATION AND POSTING REQUIRED:

A written determination of the basis for the emergency procurement shall be made containing the information set forth in statute and listed on the form issued by the state purchasing agent and available on the state purchasing agent's website. Within three business days of awarding an emergency procurement, the awarding central purchasing office within a state agency shall:

(1) provide the information required by statute to the department of information technology for posting on the sunshine portal; and

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

[1.4.1.63 NMAC - Rp, 1.4.1.63 NMAC, 08-30-13]

1.4.1.64 RECORDS OF EMERGENCY PROCUREMENTS:

The state purchasing agent or central purchasing office shall maintain records of emergency procurements for a minimum of three years. The party responsible for the procurement must retain the records. Posting such procurements on the state purchasing agent's website does not remove the central purchasing office's responsibility to maintain these records if the central purchasing office was responsible for the procurement. The record of each such procurement shall be a public record and shall contain:

A. the contractor's name and address;

B. the amount and term of the contract;

C. a listing of the services, construction, or items of tangible personal property procured under the contract; and

D. the justification for the procurement method.

[1.4.1.64 NMAC - Rp, 1.4.1.64 NMAC, 08-30-13]

1.4.1.65 PROCUREMENT UNDER EXISTING CONTRACTS AUTHORIZED:

The state purchasing agent or a central purchasing office may contract for services, professional services, construction, or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

A. at a price equal to or less than the contractor's current federal supply contract (GSA), providing the contractor has indicated in writing a willingness to extend the contract's pricing, terms and conditions to the state agency and the purchase order adequately identifies the contract relied upon; or

B. with a business which has a current price agreement with the state purchasing agent or a central purchasing office for the item, services, or construction meeting the same standards and specifications as the items to be procured, if the following conditions are met:

(1) the total quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and

(2) the purchase order adequately identifies the price agreement relied upon;

C. other than Subsection A and B of this section and cooperative procurements as authorized by statute (and described in 13-1-135 NMSA 1978) or the state procurement card program (described in 6-5-9.1 NMSA 1978), no other procurement under existing contracts is authorized; no central purchasing office of a state agency or any other governmental entity may utilize a contract entered into by a different state agency or other governmental entity if not involved in the procurement itself (i.e., so-called "piggybacking" of contracts; the practice of "piggybacking" is not allowed under the Procurement Code); purchases under contracts developed through cooperative procurement authorized under 13-1-135 NMSA 1978 or contracts which qualify under 13-1-129 NMSA 1978 is permitted and does not constitute "piggybacking."

[1.4.1.65 NMAC - Rp, 1.4.1.65 NMAC, 08-30-13]

1.4.1.66 LIMITATION

ON SUBSECTION A OF 1.4.1.65 OF THIS RULE RELATING TO GSA CONTRACTS: It should be understood, the state is not authorized to utilize a GSA contract per se. It is imperative, therefore, that the contractor, not a dealer or distributor, who has a current GSA contract indicate in writing a willingness to extend the contract's pricing, terms and conditions to the state of New Mexico. Therefore, a state agency shall not procure services, construction or items of tangible personal property directly under a general services administration (GSA) contract. Rather, a state agency must procure pursuant to a state purchasing agent price agreement which reflects the prices, terms and conditions of the respective GSA contract. If no such state purchasing agent price agreement exists, a state agency may make a written request to the state purchasing agent for the issuance of one. The request must be accompanied by a current copy of the applicable GSA contract, a letter from the contractor expressing a willingness to extend the contract's pricing, terms and conditions to the state of New Mexico and a letter from the state agency indicating a commitment to utilize the price agreement. The state purchasing agent will ascertain whether it is current and whether the proposed price is equal to or less than the federal supply contract price. If everything is in order, the state purchasing agent will issue a price agreement or purchase order reflecting the prices, terms and conditions of the GSA contract. A state agency shall make no procurements from the GSA contractor until a state purchasing agent price agreement has been issued.

[1.4.1.66 NMAC - Rp, 1.4.1.66 NMAC, 08-30-13]

1.4.1.67 COPIES OF CONTRACTS AND PRICE AGREEMENTS:

A central purchasing office shall retain for public inspection and for the use of auditors a copy of each state purchasing agent contract or current price agreement relied upon to make purchases without seeking competitive bids.

[1.4.1.67 NMAC - Rp, 1.4.1.67 NMAC, 08-30-13]

1.4.1.68 APPLICATION (CANCELLATION OF SOLICITATIONS OR REJECTION OF BIDS OR PROPOSALS; 1.4.1.68 - 1.4.1.72 NMAC):

The provisions of 1.4.1.68 through 1.4.1.72 NMAC of this rule shall govern the cancellation of any solicitations whether issued by the state purchasing agent under competitive sealed bids, competitive sealed proposals, small purchases, or any other source selection method, and rejection of bids or proposals in whole or in part.

[1.4.1.68 NMAC - Rp, 1.4.1.68 NMAC, 08-30-13]

1.4.1.69 POLICY: Any solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part when it is in the best interest of the state of New Mexico.
[1.4.1.69 NMAC - Rp, 1.4.1.69 NMAC, 08-30-13]

1.4.1.70 CANCELLATION OF SOLICITATIONS OR REJECTION OF ALL BIDS OR PROPOSALS:

A. Prior to opening.
(1) As used in this section, "opening" means the date set for opening of bids or receipt of proposals.

(2) Prior to opening, a solicitation may be canceled in whole or in part when the state purchasing agent or central purchasing office makes a written determination that such action is in the state's best interest for reasons including but not limited to:

(a) the services, construction, or items of tangible personal property are no longer required;

(b) the using agency no longer can reasonably expect to fund the procurement; or

(c) proposed amendments to the solicitation would significantly change the nature of the procurement.

(3) When a solicitation is canceled prior to opening, notice shall be sent to all businesses solicited. The notice shall:

(a) identify the solicitation;

(b) briefly explain the reason for cancellation; and

(c) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurements of similar services, construction, or items of tangible personal property.

B. After opening.

(1) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the state purchasing agent or central purchasing office makes a written determination that such action is in the state's best interest for reasons including but not limited to:

(a) all of the bids and proposals are nonresponsive;

(b) the services, construction, or items of tangible personal property are no longer required;

(c) ambiguous or otherwise inadequate specifications were part of the solicitation;

(d) the solicitation did not provide for consideration of all factors of significance to the using agency;

(e) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(f) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or

(g) there is reason to believe that

the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.

(2) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Paragraph (3) of Subsection A of this section.

[1.4.1.70 NMAC - Rp, 1.4.1.70 NMAC, 08-30-13]

1.4.1.71 REJECTION OF INDIVIDUAL BIDS OR PROPOSALS:

A. Reasons for rejection.

(1) Bids. As used in this section, "bid" includes both competitive sealed bids and small purchase quotations. Reasons for rejecting a bid shall include but are not limited to:

(a) the business that submitted the bid is nonresponsive as determined under 1.4.1.73 NMAC of this rule;

(b) the bid is not responsive; or

(c) the service, construction, or item of tangible personal property offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications, or permissible alternates, or other acceptability criteria set forth in the IFB.

(2) Proposals. As used in this section, "proposal" includes both competitive sealed proposals and small purchase offers. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction and a using agency's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(a) the business that submitted the proposal is nonresponsive as determined under 1.4.1.75 through 1.4.1.79 NMAC of this rule;

(b) the proposal is not responsive; or

(c) the proposed price is clearly unreasonable; or

(d) the proposal failed to adequately address one or more material mandatory requirements as set forth in the request for proposals.

B. Written determination required. A written determination which contains the reasons for the rejection of an individual bid or proposal shall be prepared by the state purchasing agent or central purchasing office and made a part of the procurement file.

[1.4.1.71 NMAC - Rp, 1.4.1.71 NMAC, 08-30-13]

1.4.1.72 "ALL OR NONE" BIDS: When the term "all or none" is used.

A. By the purchaser in a solicitation. A solicitation may require bidders to submit bids or offers on all items listed in the solicitation, or may identify certain groups of items in which all items must be bid. If the solicitation is properly so limited, a bidder's failure to bid all items identified as "all or none" items may render the bid nonresponsive.

B. By the bidder or offeror, and not the purchaser. If the bidder restricts acceptance of the bid, or a portion thereof, by such a statement as "all or none", the bidder has "qualified" the offer which may render the bid as nonresponsive.

C. In instances as stated in both Subsections A and B of this section such a bid or offer may be accepted only if the state purchasing agent or a central purchasing office issues a determination setting forth the basis for accepting the bid or offer as being in the best interest of the state. Also in both, instances, the bid or offer is only eligible for award if it is the overall low bid for the item or items so restricted.

[1.4.1.72 NMAC - Rp, 1.4.1.72 NMAC, 08-30-13]

1.4.1.73 APPLICATION (RECEIPT; INSPECTION; ACCEPTANCE OR REJECTION OF DELIVERIES; 1.4.1.73 - 1.4.1.74 NMAC): The using agency is responsible for inspecting and accepting or rejecting deliveries.

A. The using agency shall determine whether the quantity is as specified in the purchase order or contract.

B. The using agency shall determine whether the quality conforms to the specifications referred to or included in the purchase order or contract.

C. If inspection reveals that the delivery does not meet or conform to the quantity or quality specified in the purchase order or contract, the using agency shall notify the vendor that the delivery has been rejected and shall order the vendor to promptly make a satisfactory replacement or supplementary delivery.

D. In case the vendor fails to comply, the using agency shall promptly file a purchasing complaint with the state purchasing agent.

E. Also, in case the vendor fails to comply, the using agency shall have no obligation to pay for the nonconforming items of tangible personal property.

F. If the delivery does conform to the quantity and quality specified in the purchase order or contract, the using agency shall certify that delivery has been completed and is satisfactory.

[1.4.1.73 NMAC - Rp, 1.4.1.73 NMAC, 08-30-13]

1.4.1.74

S U M M A R Y :

Notwithstanding the requirements of 1.4.1.73 NMAC, if, after delivery and acceptance of goods, the goods or a portion thereof are later found to be non-conforming to the specifications referred to or included in the purchase order or contract, such acceptance does not waive any rights or remedies which are otherwise granted to the buyer in accordance with other applicable sections of laws of New Mexico.

[1.4.1.74 NMAC - Rp, 1.4.1.74 NMAC, 08-30-13]

1.4.1.75 APPLICATION (RESPONSIBILITY OF BIDDERS AND OFFERORS; 1.4.1.75 - 1.4.1.79 NMAC):

A determination of responsibility or non-responsibility shall be governed by 1.4.1.75 through 1.4.1.79 NMAC.

[1.4.1.75 NMAC - Rp, 1.4.1.75 NMAC, 08-30-13]

1.4.1.76 STANDARDS OF RESPONSIBILITY:

A. Standards for bidders. Factors to be considered in determining whether the standard of responsibility has been met include whether a bidder has:

- (1) submitted a responsive bid;
- (2) adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services, construction, or items of tangible personal property described in the IFB;

(3) a satisfactory record of performance;

(4) a satisfactory record of integrity;

(5) qualified legally to contract with the state; and

(6) supplied all necessary information and data in connection with any inquiry concerning responsibility.

B. Standards for offerors. Factors to be considered in determining whether the standard of responsibility has been met include whether an offeror has:

(1) submitted a responsive proposal;

(2) adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services or items of tangible personal property described in the proposal;

(3) a satisfactory record of performance;

(4) a satisfactory record of integrity;

(5) qualified legally to contract with the state; and

(6) supplied all necessary information and data in connection with any inquiry concerning responsibility.

[1.4.1.76 NMAC -Rp, 1.4.1.76 NMAC, 08-30-13]

1.4.1.77 ABILITY TO MEET STANDARDS: A bidder or offeror may demonstrate the availability of adequate financial resources, production or service facilities, personnel and experience by submitting, upon request:

A. evidence that the bidder or offeror possesses the necessary items;

B. acceptable plans to subcontract for the necessary items; or

C. a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

[1.4.1.77 NMAC - Rp, 1.4.1.77 NMAC, 08-30-13]

1.4.1.78 INQUIRY BY PROCUREMENT OFFICER:

Before awarding a contract, the procurement officer or procurement manager must be satisfied that the bidder or offeror is responsible. Therefore, a bidder or offeror shall supply information and data requested by the procurement officer concerning the responsibility of the bidder or offeror. The unreasonable failure of a bidder or offeror to promptly supply information or data in connection with such an inquiry is grounds for a determination that the bidder or offeror is not responsible.

[1.4.1.78 NMAC - Rp, 1.4.1.78 NMAC, 08-30-13]

1.4.1.79 DETERMINATION REQUIRED:

If a bidder or offeror who otherwise would have been awarded a contract is found to be non-responsible, a written determination, setting forth the basis of the finding, shall be prepared by the state purchasing agent or central purchasing office. The written determination shall be made part of the procurement file, and a copy of the determination shall be sent to the non-responsible bidder or offeror.

[1.4.1.79 NMAC - Rp, 1.4.1.79 NMAC, 08-30-13]

1.4.1.80 APPLICABILITY (PROTESTS; 1.4.1.80 - 1.4.1.93 NMAC):

The provisions of 1.4.1.80 through 1.4.1.93 NMAC of this rule apply to all protests filed with the state purchasing agent and all central purchasing offices that have not adopted regulations for resolving protests. Central purchasing offices with rulemaking authority, other than the state purchasing agent, may adopt regulations for resolving protests filed within their jurisdictions.

[1.4.1.80 NMAC - Rp, 1.4.1.80 NMAC, 08-30-13]

1.4.1.81 RIGHT TO PROTEST:

Any bidder or offeror who is aggrieved in connection with a solicitation or award of a contract, including a sole

source procurement, may protest to the state purchasing agent or central purchasing office.

[1.4.1.81 NMAC - Rp, 1.4.1.81 NMAC, 08-30-13]

1.4.1.82 FILING OF PROTEST:

A. Protest must be written. Protests must be in writing and addressed to the state purchasing agent or central purchasing office, whichever has control and administration over the procurement.

B. Contents. The protest shall:

(1) include the name and address of the protestant;

(2) include the solicitation number;

(3) contain a statement of the grounds for protest;

(4) include supporting exhibits, evidence or documents to substantiate any claim unless not available within the filing time in which case the expected availability date shall be indicated; and

(5) specify the ruling requested from the state purchasing agent or central purchasing office.

C. Pleadings. No formal pleading is required to initiate a protest, but protests should be concise, logically arranged, and direct.

D. Time limit. Protests shall be submitted within 15 calendar days after knowledge of the facts or occurrences giving rise to the protest. Any person or business that has been sent written notice of any fact or occurrence is presumed to have knowledge of the fact or occurrence.

[1.4.1.82 NMAC - Rp, 1.4.1.82 NMAC, 08-30-13]

1.4.1.83 PROCUREMENTS AFTER PROTEST:

A. In the event of a timely protest, as defined in Subsection D of 1.4.1.82 NMAC of this rule, the state purchasing agent or central purchasing office shall not proceed further with the procurement unless the state purchasing agent or central purchasing office makes a written determination that the award of the contract is necessary to protect substantial interests of a state agency. Such written determination should set forth the basis for the determination. As used in 1.4.1.80 through 1.4.1.93 NMAC of this rule, the point in time in which a contract is awarded is that point at which a legally enforceable contract is created unless the context clearly requires a different meaning.

B. A procurement shall not be halted after a contract has been awarded merely because a protest has been filed. After a contract has been awarded, the state purchasing agent or central purchasing office may, in its sole discretion, halt a procurement

in exceptional circumstances or for good cause shown.

[1.4.1.83 NMAC - Rp, 1.4.1.83 NMAC, 08-30-13]

1.4.1.84 PROCEDURE:

A. Upon the filing of a timely protest, the state purchasing agent or central purchasing office shall give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied.

B. The protestant and every business that receives notice pursuant to Subsection A of this section will automatically be parties to any further proceedings before the state purchasing agent or central purchasing office. In addition, any other person or business may move to intervene at any time during the course of the proceedings. Intervention will be granted upon a showing of a substantial interest in the outcome of the proceedings. Interveners shall accept the status of the proceedings at the time of their intervention; in particular, they must abide by all prior rulings and accept all previously established time schedules. The state purchasing agent or central purchasing office, and all employees thereof, are not parties to the proceedings.

C. The state purchasing agent or central purchasing office may take any action reasonably necessary to resolve a protest. Such actions include, but are not limited to, the following:

(1) issue a final written determination summarily dismissing the protest;

(2) obtain information from the staff of the state purchasing agent or central purchasing office;

(3) require parties to produce for examination information or witnesses under their control;

(4) require parties to express their positions on any issues in the proceedings;

(5) require parties to submit legal briefs on any issues in the proceeding;

(6) establish procedural schedules;

(7) regulate the course of the proceedings and the conduct of any participants;

(8) receive, rule on, exclude or limit evidence;

(9) take official notice of any fact that is among the traditional matters of official or administrative notice;

(10) conduct hearings; and

(11) take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses.

[1.4.1.84 NMAC - Rp, 1.4.1.84 NMAC, 08-30-13]

1.4.1.85 DISCOVERY: Upon written request of any party, or upon its own motion, the state purchasing agent or central purchasing office may require parties to comply with discovery requests.

[1.4.1.85 NMAC - Rp, 1.4.1.85 NMAC, 08-30-13]

1.4.1.86 HEARINGS:

A. Hearings will be held only when the state purchasing agent or central purchasing office determines that substantial material factual issues are present that cannot be resolved satisfactorily through an examination of written documents in the record. Any party may request a hearing, but such requests shall be deemed denied unless specifically granted.

B. Hearings, when held, should be as informal as practicable under the circumstances, but the state purchasing agent or central purchasing office has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the state purchasing agent or central purchasing office required to adhere to formal rules of evidence or procedure.

[1.4.1.86 NMAC - Rp, 1.4.1.86 NMAC, 08-30-13]

1.4.1.87 RESOLUTION:

A. The state purchasing agent or central purchasing office shall promptly issue a written determination relating to the protest. The determination shall:

(1) state the reasons for the action taken; and

(2) inform the protestant of the right to judicial review of the determination pursuant to 13-1-183 NMSA 1978.

B. A copy of the written determination shall be sent immediately by certified mail, return receipt requested, to each of the parties.

[1.4.1.87 NMAC - Rp, 1.4.1.87 NMAC, 08-30-13]

1.4.1.88 RELIEF:

A. Prior to award. If, prior to award, the state purchasing agent or central purchasing office makes a written determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be canceled.

B. After award.

(1) No fraud or bad faith. If, after an award, the state purchasing agent or central purchasing office makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has not acted fraudulently or in bad faith:

(a) the contract may be ratified, affirmed or revised to comply with law, provided that a written determination is

made that doing so is in the best interest of the state; or

(b) the contract may be terminated, and the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

(2) Fraud or bad faith. If, after an award, the state purchasing agent or central purchasing office makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be canceled.

C. Relief not allowed. Except as provided in Subparagraph (b) of Paragraph (1) of Subsection B of this section, the state purchasing agent or central purchasing office shall not award money damages or attorneys' fees.

[1.4.1.88 NMAC - Rp, 1.4.1.88 NMAC, 08-30-13]

1.4.1.89 MOTION FOR RECONSIDERATION:

A. Motion. A motion for reconsideration of a written determination issued pursuant to 1.4.1.87 NMAC of this rule may be filed by any party or by any using agency involved in the procurement. The motion for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification of the determination is deemed warranted, specifying any errors of law made, or information not previously considered.

B. When to file. A motion for reconsideration shall be filed not later than seven calendar days after receipt of the written determination.

C. Response to motion. The state purchasing agent or central purchasing office shall promptly issue a written response to the motion for reconsideration. A copy of the written response shall be sent immediately by certified mail, return receipt requested, to each of the parties.

[1.4.1.89 NMAC - Rp, 1.4.1.89 NMAC, 08-30-13]

1.4.1.90 DESIGNEE:

A. Designation. At any point during a protest proceeding, the state purchasing agent or central purchasing office may appoint a designee as defined in 13-1-51 NMSA 1978 to preside over the proceeding. The designee will have all of the powers described in 1.4.1.80 through 1.4.1.93 NMAC of this rule except the power to issue a written determination under 1.4.1.87 NMAC of this rule. The designee only has authority to recommend a resolution to the state purchasing agent or central purchasing office under 1.4.1.87 NMAC of this rule.

B. Who may be designated. Any person, other than the procurement

officer, procurement manager or other person not directly involved in the procurement, may serve as a designee.

C. Recommended written determination. A designee shall present a recommended written resolution to the state purchasing agent or central purchasing office and mail a copy to each of the parties. No party may appeal from the recommended resolution of the designee.

D. Action by state purchasing agent or central purchasing office. The state purchasing agent or central purchasing office shall approve, disapprove or modify the recommended resolution of the designee in writing. Such approval, disapproval or modification shall be the written determination required by 1.4.1.87 NMAC of this rule. Any party may file a motion for reconsideration of the written determination pursuant to 1.4.1.89 NMAC of this rule.

[1.4.1.90 NMAC - Rp, 1.4.1.90 NMAC, 08-30-13]

1.4.1.91 F I N A L DETERMINATION:

A. No motion for reconsideration. In those proceedings in which no motion for reconsideration is filed, the written determination issued pursuant to 1.4.1.87 NMAC of this rule shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978.

B. Motion for reconsideration. In those proceedings in which a motion for reconsideration is filed, the written response to the motion issued pursuant to 1.4.1.89 NMAC of this rule shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978.

[1.4.1.91 NMAC - Rp, 1.4.1.91 NMAC, 08-30-13]

1.4.1.92 COPIES OF COMMUNICATIONS:

A. Copies to be provided to parties. Each party to a protest proceeding shall certify that it has provided every other party with copies of all documents or correspondence addressed or delivered to the state purchasing agent or central purchasing office.

B. Ex parte communications. No party shall submit to the state purchasing agent or central purchasing office, ex parte, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.

[1.4.1.92 NMAC - Rp, 1.4.1.92 NMAC, 08-30-13]

1.4.1.93 COUNTING DAYS:

In computing any period of time prescribed

in 1.4.1.80 through 1.4.1.93 NMAC of this rule, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

[1.4.1.93 NMAC - Rp, 1.4.1.93 NMAC, 08-30-13]

1.4.1.94 C H I E F PROCUREMENT REGISTRATION AND CERTIFICATION:

A. Registration. On or before January 1, 2014, and every time thereafter that a chief procurement officer is hired, each state agency and local public body shall provide to the state purchasing agent the name of the state agency's or local public body's chief procurement officer and information identifying the state agency's or local public body's central purchasing office, if applicable.

B. Information required. The information required from the state agency or local public body shall be submitted to the state purchasing agent through a database established by the state purchasing agent and made available on the state purchasing division's website. All required information must be submitted using this method.

C. Certification. On or before January 1, 2015, the state purchasing agent shall establish a certification program for chief procurement officers that includes initial certification and recertification every two years for all chief procurement officers. In order to be certified and recertified, a chief procurement officer shall obtain such education and training as deemed appropriate by the secretary of the general services department and pass a certification or recertification examination, as appropriate, approved by the secretary of the general services department. Separate certifications designed by the state purchasing agent and approved by the secretary of the general services department may be required before a chief procurement officer may conduct specialized procurement processes such as qualifications-based proposals, design-and-build projects, construction manager-at-risk projects, and other such procurements as determined by the state purchasing agent and approved by the secretary of the general services department. The secretary of the general services department reserves the right to add other elements to the required certification process as are deemed necessary or useful.

D. Chief procurement officer duties, responsibilities and obligations. On and after July 1, 2015, only certified chief procurement officers may:

(1) make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;

(2) issue purchase orders and authorize small purchases pursuant to the Procurement Code; and

(3) approve procurement pursuant to the Procurement Code;

(4) provided that, persons using procurement cards may continue to issue purchase orders and authorize small purchases.

[1.4.1.94 NMAC - N, 08-30-13]

1.4.1.95 STATE USE ACT:

A. Procurement of services. In regard to the procurement of services, before utilizing any other procurement method allowed under the Procurement Code, a state agency or local public body shall first offer the procurement to the central non-profit agency under contract with the state. The central non-profit agency has the right of first refusal for any procurement of services provided that the service is stated on a list provided and published by the central non-profit agency and provided that the provider can meet the time requirements of the state agency.

B. Central non-profit agency. The central non-profit agency shall:

(1) publish the list of services available through the central non-profit agency on a website available to all state agencies and local public bodies;

(2) ensure that all service providers on this list meet the eligibility requirements to offer services under 13-1C-1 et. seq. NMSA 1978; and

(3) ensure that the prices offered to state agencies and local public bodies reflect the fair market value of such services in accordance with 13-1C-5 NMSA 1978;

(4) provided that, under 13-1C-6 NMSA 1978, services provided pursuant to and facilities covered by 22-14-27 NMSA 1978 are excluded from procurement through the central non-profit agency.

C. Procurement of services pursuant to 13-1C-1 et. seq. NMSA 1978 are exempt from the Procurement Code.

[1.4.1.95 NMAC - N, 08-30-13]

History of 1.4.1 NMAC:

Pre-NMAC History:

Laws of 1984, Chapter 65, Section 1 enacted the Procurement Code to apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. To implement the Code, and in accordance with the statutory requirements applicable at the date and time, the subject and material found in this rule was first filed with the state records center and archives in 1984 as general services department (GSD) Procurement Code Regulations, GSD Rule

No. 84-611, filed 11-21-84; superseded by Procurement Code Regulations, GSD Rule No. 87-601, filed 12-16-87; superseded by Procurement Code Regulations, GSD Rule No. 89-601, filed 12-01-89; superseded by Procurement Code Regulations, GSD Rule No. 93-601, filed 09-21-93; superseded by 1 NMAC 5.2, filed 01-15-98.

History of Repealed Material:

1.4.1 NMAC, Procurement Code Regulations (filed 11/01/2001) repealed 09-30-05.

1.4.1 NMAC, Procurement Code Regulations (filed 09/16/2005) repealed 08-30-13.

Other History:

GSD Rule No. 93-601 (filed 09-21-93) was renumbered, reformatted and amended to 1 NMAC 5.2, Procurement Code Regulations, effective 01-15-98.

1 NMAC 5.2, Procurement Code Regulations (filed 01-02-98) was renumbered, reformatted, amended and replaced to 1.4.1 NMAC, Procurement Code Regulations, effective 11-15-01.

1.4.1 NMAC, Procurement Code Regulations (filed 11/01/2001) was replaced by 1.4.1 NMAC, Procurement Code Regulations, effective 09-30-05.

1.4.1 NMAC, Procurement Code Regulations (filed 09/16/2005) was replaced by 1.4.1 NMAC, Procurement Code Regulations, effective 08-30-13.

NEW MEXICO GENERAL SERVICES DEPARTMENT

TITLE 1 G E N E R A L GOVERNMENT ADMINISTRATION CHAPTER 4 S T A T E PROCUREMENT PART 7 S U S P E N S I O N OR DEBARMENT OF BIDDERS, OFFERORS OR CONTRACTORS

1.4.7.1 ISSUING AGENCY: General Services Department - State Purchasing Division.
[1.4.7.1 NMAC - N, 08-30-13]

1.4.7.2 SCOPE: Applicability. This regulation affects all user agencies procuring contracts, other than professional services, through the state purchasing agent, all contractors obtaining or attempting to obtain contracts through the state purchasing agent and all suspensions or debarments by the secretary of contractors from consideration for award of contracts.
[1.4.7.2 NMAC - Rp, GSD 87-602.2.0, 08-30-13]

1.4.7.3 STATUTORY AUTHORITY: This regulation is based on 13-1-177 through 13-1-180 NMSA 1978.
[1.4.7.3 NMAC - N, 08-30-13]

1.4.7.4 D U R A T I O N : Permanent.
[1.4.7.4 NMAC - N, 08-30-13]

1.4.7.5 EFFECTIVE DATE: August 30, 2013, unless a later date is cited at the end of a section.
[1.4.7.5 NMAC - N, 08-30-13]

1.4.7.6 O B J E C T I V E : Purpose. The purpose of this regulation is to protect the state from risks associated with awarding contracts to persons having exhibited an inability or unwillingness to perform faithfully contracts awarded to them by the state; and protect substantial state interests and the integrity of the state's procurement process by establishing a procedure whereby persons determined to have displayed improper conduct can be suspended or debarred from doing business with the state. It is not the purpose of the regulation to impose punishment upon persons for any acts or omissions. There shall be no suspension, debarment, or discrimination of any kind against any person because that person has complained or protested, formally or informally, the state's procurement processes or decisions.
[1.4.7.6 NMAC - Rp, GSD 87-602.1.0, 08-30-13]

1.4.7.7 DEFINITIONS:

A. "Contractor" means any bidder, offeror or construction contractor, excluding contractors for professional services, who have been awarded or are seeking award of one or more contracts through the state purchasing agent under the provisions of the Procurement Code. "Contractor" includes individuals, joint ventures, corporations and all other business entities.

B. "Debarment" means a final order of the secretary that denies a contractor the right to bid or offer to enter into a contract, other than a contract for professional services, with the state purchasing agent. The period of debarment specified in an order of debarment shall be for no less than three months and for no more than three years. A debarment period shall begin on the day the contractor receives notice of the final order of debarment and shall automatically expire no later than the end of the term specified in the order.

C. "Hearing" means an examination (proceeding) of the issue before the hearing officer, whether the issues are of law or fact. When the hearing officer determines that the contested issues are only of law, the examination need not include oral argument of the parties or their counsel or an evidentiary proceeding.

D. "Participants to a debarment or suspension proceeding" means the state purchasing agent, user agency (if

any) and contractor.

E. "Party" means the contractor who is the subject of a determination under Subsection A of 1.4.7.9 NMAC.

F. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or other legal or commercial entity. As used in this rule, the terms "person", "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the person, bidder, offeror or contractor.

G. "Procurement Code" means 13-1-28 through 13-1-199 NMSA 1978.

H. "Professional services" means the services of architects, archeologists, engineers, land surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, and researchers and persons and businesses providing similar services.

I. "Secretary" means the secretary of the general services department. The secretary is the governing authority of the state purchasing agent.

J. "State purchasing agent" means the director of the state purchasing division, general services department.

K. "Suspension" means a final order of the secretary that denies a contractor the right to bid or offer to enter into a contract, other than a contract for professional services, with the state purchasing agent. An order of suspension shall not exceed three months, provided that the suspension may be longer pursuant to Paragraph (3) of Subsection D of 1.4.7.9 NMAC. A period of suspension shall begin on the day the contractor receives notice of the final order of suspension and shall automatically expire no later than the end of the suspension specified in the order.

L. "Unsatisfactory performance" means a record of poor performance or default on one or more contracts for construction, services (other than professional services) or tangible personal property including, but not limited to, overshipments, undershipments, providing damaged or defective goods, making unauthorized substitutions, billing errors or service deficiencies. The term includes negligent or intentional failure, without good cause, to perform in accordance with the specifications or time limits provided in a contract, or a history of failure to perform or of poor performance in accordance with the terms of one or more contracts unless the failure to perform or the poor performance was caused by acts beyond the control of the contractor.

M. "User agency" means any state agency or agencies, including, but not limited to, departments, divisions, bureaus, boards, commissions and any other subdivision of the state of New Mexico that:

(1) received or were designated to receive any benefit, including, but not limited to, supplies, services or construction, pursuant to a contract which is the basis of any proposed suspension or debarment action; and

(2) initiated the grievance that led to issuance of a determination of probable cause under Subsection A of 1.4.7.9 NMAC or is determined to have had an integral role in the events which form the basis for the suspension or debarment action; such determination shall be made by the hearing officer or state purchasing agent; no agency of state government shall be a participant to a suspension or debarment proceeding unless designated as a participant pursuant to this section; only a user agency designated as a participant shall be entitled to notices required by this regulation.

[1.4.7.7 NMAC - Rp, GSD 87-602.5.0, 08-30-13]

1.4.7.8 POLICY: The policy of this regulation is to provide reasonable notice and require a fair hearing prior to any debarment of any contractor from consideration for award of contracts.

[1.4.7.8 NMAC - Rp, GSD 87-602.4.0, 08-30-13]

1.4.7.9 DEBARMENT OR SUSPENSION - PROCEDURES:

A. Initiation: The state purchasing agent or a central purchasing agent or a central purchasing office, after reasonable notice to the person involved, shall have authority to recommend to the governing authority of a state agency or a local public body the debarment of a person for cause from consideration for award of contracts, other than contracts for professional services. The debarment shall not be for a period of more than three years. The authority to debar shall be exercised by the governing authority of a state agency or a local public body in accordance with the following rules. The state purchasing agent and user agency and all employees thereof are not parties to the proceedings, but shall be participants as set forth in Subsection D of 1.4.7.7 NMAC.

B. Debarment procedures.

(1) Notice to the contractor: The state purchasing agent or his designee shall cause written notice of the proposed debarment to be sent by certified mail, return receipt requested, to the contractor. The notice shall contain the following statements:

(a) the action contemplated is for debarment;

(b) the maximum time period of

the debarment is three years (also give the recommended maximum time of debarment, if less than three years);

(c) the reasons for the action, which shall include a summary of the contractor's conduct to which the action relates and a listing of any contracts related to such conduct;

(d) the action is brought pursuant to the provisions contained in 13-1-177 through 13-1-180 NMSA 1978 and the regulations promulgated thereunder;

(e) sufficient facts exist, unless rebutted, to support the proposed debarment and that the GSD secretary shall proceed to debar unless contractor requests, in writing, a hearing within 15 consecutive calendar days from the day contractor receives the notice of the proposed action;

(f) the address where contractor's request for hearing shall be sent, and the name of the person to whom the request shall be sent; and

(g) the contractor may be represented throughout the proceeding by an attorney licensed to practice law in the state of New Mexico.

(2) Failure to request hearing on debarment: If the contractor fails to deliver a written request for a hearing to the person designated pursuant to Subparagraph (f) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC within the 15 days required in Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, a final determination shall be made, pursuant to the requirements of Subsection E of 1.4.7.9 NMAC.

(3) Hearing officer appointment: Where a timely request for hearing is received, the state purchasing agent may appoint a hearing officer to conduct the hearing and recommend a final decision to the state purchasing agent. If no hearing officer is appointed, the state purchasing agent shall act as the hearing officer. In such instance, the hearing officer's recommendation and the state purchasing agent's recommendation to the secretary shall be one and the same.

(4) Notice of hearing: When hearing is requested under Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, the hearing officer shall send written notice to the contractor of the time and the place of the hearing. The hearing shall be held within no sooner than five days and no later than 60 days after the contractor receives notice of the hearing unless continued by the hearing officer for good cause. Failure to hold a timely hearing shall result in dismissal of the contemplated action. The state purchasing officer may renew the proposed action against the contractor by following all procedures of 1.4.7.9 NMAC of these regulations if such refiling is otherwise timely.

(5) Debarment hearing procedures.

(a) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. However, in no event shall the hearing officer be required to adhere to formal rules of evidence or procedure. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the participants may be regarded and used as evidence at the hearing. The participants may stipulate the testimony that would be given by a witness as if the witness were present. The hearing officer may require evidence in addition to that offered by the participants.

(b) A hearing shall be recorded but need not be transcribed except at the request and expense of the party or participant requesting the transcription. In the event of multiple requests for transcriptions, cost of transcription shall be borne equally by those making the requests. In addition to the recording, a record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(c) Opening and closing statements may be made by the participants at the discretion of the hearing officer.

(d) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

(e) Hearing requirement. The hearing officer and the parties may require a final hearing before the hearing officer. The hearing officer may define the scope of such hearing and limit presentation to evidentiary, legal matter or summation of the case.

(f) The hearing officer shall make a final recommendation to the state purchasing agent within 30 days after the record is closed in the examination.

(g) A copy of the determination of debarment shall be mailed to the last known address on file with the state purchasing agent or central purchasing office, by first class mail, within three business days after issuance of the written determination or transmitted electronically within three business days after issuance of the written determination.

C. Authority of the hearing officer in a debarment procedure: the hearing officer may, among other things:

(1) conduct hearings and hold informal conferences in person or by telephone, to settle, simplify or establish the issues in a proceeding or to consider other matters that may aid in the expeditious disposition of the proceeding either by request of the participants or as required by the hearing officer;

(2) require participants to state their positions with respect to the various

issues in the proceeding, including requiring the submission of briefs on any issues in the proceedings;

(3) require participants to produce for examination those relevant witnesses and documents under their control and permit or prohibit discovery;

(4) rule on motions and other procedural matters;

(5) regulate the course of the proceedings, procedural schedules and the conduct of participants therein;

(6) receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or repetitious;

(7) fix time limits for submission of written documents;

(8) impose appropriate sanctions against any participant or person failing to obey a directive under these procedures, which sanctions may include, but not be limited to:

(a) refusing to allow the non-complying participant to support or oppose designated claims or defenses, or prohibiting that participant from introducing evidence when such evidence is the subject of or related to the non-compliance;

(b) excluding all testimony of an unresponsive or evasive witness; and

(c) expelling any participant or person from further participation in the hearing;

(9) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of official or administrative notice.

D. Suspension procedures.

(1) The state purchasing agent or a central purchasing office, after consultation with the using agency, may suspend a person from consideration for award of contracts if the state purchasing agent or central purchasing office, after reasonable investigation, finds that a person has engaged in conduct that constitutes cause for debarment pursuant to 13-1-178 NMSA 1978.

(2) The state purchasing agent or his designee shall cause written notice of the determination of suspension to be sent by certified mail, return receipt requested, to the contractor. The notice of suspension shall contain the following statements:

(a) the action is a suspension of the contractor;

(b) the maximum time period of the suspension is three months (also give the recommended maximum time of suspension if less than three months), provided that the suspension may be longer pursuant to Paragraph (3) of Subsection D of 1.4.7.9 NMAC in which case the notice of suspension will state this condition;

(c) the reasons for the action, which shall include a summary of the

contractor's conduct to which the action relates and a listing of any contracts related to such conduct;

(d) the action is brought pursuant to the provisions contained in 13-1-177 through 13-1-180 NMSA 1978 and the regulations promulgated thereunder; and

(e) the sufficient facts that exist to support the suspension, and that the GSD secretary has suspended the person.

(3) Suspension based upon a criminal offense. If a person has been charged with a criminal offense that would be a cause for debarment pursuant to 13-1-178 NMSA 1978, the suspension shall remain in effect until the criminal charge is resolved and the person is debarred or the reason for the suspension no longer exists.

E. Recommendation

of state purchasing agent and comment period. Final order. Appeal. The state purchasing agent shall prepare a written recommendation on whether to suspend or debar. The recommendation shall be sent to the secretary, contractor, and the user agency. When the contractor has submitted a timely response pursuant to Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, the contractor and the user agency shall have 10 days from the date of receiving the recommendation to file comments with the secretary. There shall be no administrative appeal from the recommendation to the secretary. The secretary shall issue a final order after expiration of the 10 day comment period. If the comment period does not apply, the secretary shall issue a final order after receipt of the recommendation. Both the state purchasing agent's recommendation and the secretary's final order shall recite the reasons for debarment and shall recite the evidence relied upon in making the determination for debarment. When the secretary's final order adopts all aspects of the state purchasing agent's recommendation, the final order may incorporate the recommendation by reference and attach it to the order. When suspension or debarment is recommended or ordered, the length of the suspension (not to exceed three months, unless suspension is made pursuant to 13-1-178 NMSA 1978 and Paragraph (3) of Section D of 1.4.7.9 of this regulation) or debarment (not to exceed three years) and the reasons for such action shall be set forth. The final order shall inform the debarred contractor of the contractor's right to judicial review pursuant to 13-1-179 and 13-1-183 NMSA 1978. The secretary's final order shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978. Notice of debarment or suspension shall be mailed by certified mail, return receipt requested, to contractor upon issuance of the secretary's final order. The state purchasing agent and user agency shall be given a copy

of the final order upon its issuance by the secretary.

F. Effect of suspension or debarment decision.

(1) A debarment or suspension shall take effect upon receipt of the final order by the contractor. The contractor shall remain suspended or debarred until a court of competent jurisdiction or the secretary orders otherwise, or until the debarment or suspension period, as specified in the final order, expires. The secretary may order the suspension or debarment reduced or ended only as provided in Subsection I of 1.4.7.9 NMAC.

(2) Any business entity which must hold a state license as a prerequisite for award of a contract (which is subject to the provisions of this regulation) shall also be suspended or debarred, as the case may be, if the holder of such license is a suspended or debarred contractor and the business entity holds no other license.

(3) Debarments and suspensions shall apply to all contracts subject to the authority of the state purchasing agent, regardless of the subject matter of future contracts.

G. Causes for debarment or suspension.

(1) The causes for debarment or suspension must occur within three years of the date final action on a procurement is taken. For purposes of this section, Subsection G of 1.4.7.9 NMAC, the date final action is taken on a procurement is the date the contract with the contractor is fully executed and contractor is authorized to proceed with his performance of the contract, in accordance with the terms of the contract.

(2) Those causes include, but are not limited to, the following:

(a) criminal conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(b) civil judgment against a bidder, offeror or contractor for a civil violation related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(c) conviction of a bidder, offeror or contractor under state or federal statutes related to embezzlement, theft, forgery, bribery, fraud, falsification or destruction of records, making false statements or receiving stolen property or for violation of federal or state tax laws;

(d) conviction of a bidder, offeror or contractor under state or federal antitrust statutes relating to the submission of offers;

(e) criminal conviction against a

bidder, offeror or contractor for any other offense related to honesty, integrity or business ethics;

(f) civil judgment against a bidder, offeror or contractor for a civil violation related to honesty, integrity or business ethics;

(g) civil judgment against a bidder, offeror or contractor pursuant to the Unfair Practices Act;

(h) violation by a bidder, offeror or contractor of contract provisions, as set forth in this paragraph, of a character that is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action, including:

(i) willful failure to perform in accordance with one or more contracts; or

(ii) a history of failure to perform or of unsatisfactory performance of one or more contracts; provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment; and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(i) any other cause that the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

(j) for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code.

H. Deferral of proceedings: The hearing officer may defer debarment proceedings pending final disposition of a related claim or dispute if he finds:

(1) that the cause of the action brought against the contractor is related to a good faith claim or dispute pending before a state agency, the state purchasing agent, or on judicial appeal; and

(2) a delay in the proceedings will not be prejudicial to the public interest.

I. Termination or modification of suspension or debarment.

(1) Any contractor suspended or debarred under this regulation may petition the state purchasing agent to shorten or terminate the suspension or debarment. The petition shall show good cause for the requested relief.

(2) A contractor's request for modification or termination of a suspension or debarment must be supported by good cause shown, including documentation providing reasons for such modification or termination, including, but not limited to:

(a) bona fide change in ownership and management of the business; or

(b) elimination or mitigation of

cause for which the suspension or debarment was imposed; or

(c) compliance with terms that were set forth in the suspension or debarment order.

(3) Procedure: The state purchasing agent shall admit or deny review of the petition. If review is allowed, the petition shall be reviewed pursuant to the procedures described in Subsection C of 1.4.7.9 NMAC.

(4) Upon termination of a suspension or debarment, a contractor suspended or debarred under this regulation shall automatically be reinstated with full contracting rights without further written notice by the secretary, hearing officer or state purchasing agent.

(5) Appeal: A petition for termination or modification of a final order of debarment shall not be treated as a motion for reconsideration and shall not stay the running of time in which a contractor has to appeal, under the provisions of 13-1-183 NMSA 1978, a final order issued pursuant to Subsection E of 1.4.7.9 NMAC. The secretary's final order on the petition for termination or modification of an order of debarment shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978, where there is a denial or partial denial of such petition.

J. Maintenance of list of suspended and debarred contractors: The state purchasing agent shall maintain and update a list of debarred and suspended contractors. The list shall reflect all modifications and terminations of debarments and suspensions. All purchasing agencies, political subdivisions of the state and the public shall be supplied with this list upon request. The state purchasing agent may charge a reasonable fee for the expense of copying and mailing such list. The state purchasing agent shall send updates of this list to all user agencies and political subdivisions of the state as the state purchasing agent deems necessary.

[1.4.7.9 NMAC - Rp, GSD 87-602.6.0, 08-30-13]

1.4.7.10 CONTINUATION OF CURRENT CONTRACTS – RESTRICTIONS ON SUBCONTRACTING:

A. Notwithstanding the debarment, suspension or proposed debarment of a person, a state agency or local public body may continue contracts or subcontracts in existence at the time that the person is debarred, suspended or proposed for debarment unless the governing authority of the state agency or local public body directs otherwise.

B. Unless the governing authority of a state agency or local public

body issues a written determination based on compelling reasons holding otherwise, a person that has been debarred or suspended or whose debarment has been proposed shall not, after the date that the person is debarred, suspended or proposed for debarment:

(1) incur financial obligations, including those for materials, services and facilities, unless the person is specifically authorized to do so under the terms and conditions of the person's contract; or

(2) extend the duration of the person's contract by adding new work, by exercising options or by taking other action.

C. Unless pursuant to a written authorization based on the compelling reasons of the governing authority of a state agency or local public body, the state purchasing agent or a central purchasing office shall not consent to enter into a subcontract subject to the Procurement Code with a person that has been debarred, suspended or proposed for debarment.

D. A person that has entered into a contract subject to the Procurement Code shall not subcontract with another person that has been debarred, suspended or proposed for debarment without the written authorization of the state purchasing agent or a central purchasing office. A person that wishes to subcontract with another person that has been debarred, suspended or proposed for debarment shall make a request to the applicable state agency or local public body that includes the following information:

(1) the name of the proposed subcontractor;

(2) information about the proposed subcontractor's debarment, suspension or proposed debarment;

(3) the requester's compelling reasons for seeking a subcontract with the proposed subcontractor; and

(4) a statement of how the person will protect the interests of the state agency or local public body considering the proposed subcontractor's debarment, suspension or proposed debarment.

[1.4.7.10 NMAC - N, 08-30-13]

HISTORY OF 1.4.7 NMAC:

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

GSD 87-602 Suspension or Debarment of Bidders, Offerors or Contractors, 03/13/1987.

History of Repealed Material:

GSD 87-602, Suspension or Debarment of Bidders, Offerors or Contractors, filed 03/13/1987 - Repealed effective 08-30-2013.

**NEW MEXICO
DEPARTMENT OF HEALTH**

The New Mexico Department of Health repeals its rule entitled Certified Nurse Midwives, 16.11.2 NMAC (filed 09/28/2009) and replaces it with 16.11.2 NMAC entitled Certified Nurse Midwives, effective 08/30/2013.

**NEW MEXICO
DEPARTMENT OF HEALTH**

**TITLE 16 OCCUPATIONAL
AND PROFESSIONAL LICENSING
CHAPTER 11 MIDWIVES
PART 2 CERTIFIED NURSE
MIDWIVES**

16.11.2.1 ISSUING AGENCY:
New Mexico Department of Health.
[16.11.2.1 NMAC - Rp, 16.11.2.1 NMAC, 8/30/13]

16.11.2.2 SCOPE: This rule applies to any person seeking to practice or currently practicing as a certified nurse-midwife in the state of New Mexico.
[16.11.2.2 NMAC - Rp, 16.11.2.2 NMAC, 8/30/13]

16.11.2.3 STATUTORY AUTHORITY: This rule is authorized by Sections 9-7-6 (E), 24-1-3 (R) and 24-1-4.1 NMSA 1978.
[16.11.2.3 NMAC - Rp, 16.11.2.3 NMAC, 8/30/13]

16.11.2.4 DURATION: Permanent.
[16.11.2.4 NMAC - Rp, 16.11.2.4 NMAC, 8/30/13]

16.11.2.5 EFFECTIVE DATE: 8/30/13, unless a later date is cited at the end of a section.
[16.11.2.5 NMAC - Rp, 16.11.2.5 NMAC, 8/30/13]

16.11.2.6 OBJECTIVE: This rule governs the licensure and practice of certified nurse-midwives (CNMs) in New Mexico.
[16.11.2.6 NMAC - Rp, 16.11.2.6 NMAC, 8/30/13]

16.11.2.7 DEFINITIONS:

A. "ACNM" means the American college of nurse-midwives.

B. "Addiction" is a neurobehavioral syndrome with genetic and environmental influences that results in psychological dependence on the use of substances for their psychic effects. It is characterized by behaviors that include one or more of the following: impaired control

over drug use; compulsive use; continued use despite harm; and craving. Physical dependence and tolerance are normal physiological consequences of extended opiate or opioid therapy for pain and should not by themselves be considered addiction.

C. "Board" means the certified nurse-midwifery advisory board established under these rules.

D. "Certified nurse-midwife (CNM)" means an individual educated in the two disciplines of nursing and midwifery, who is certified by the ACNM or its designee.

E. "Chronic pain" means pain that persists after reasonable efforts have been made to relieve the pain or its cause and that continues, either continuously or episodically, for longer than three consecutive months. For purposes of this rule, chronic pain does not include pain associated with a terminal condition or with a progressive disease that, in the normal course of progression, may reasonably be expected to result in a terminal condition.

F. "CNM license" means a document issued by the department identifying a legal privilege and authorization to practice within the scope of this rule.

G. "Contact hour" means 50-60 minutes of an organized learning experience or two hours of planned and supervised clinical practice relevant to CNM practice, approved by one of the following:

- (1) accreditation council for continuing medical education (ACCME);
- (2) ACNM;
- (3) American college of obstetricians and gynecologists (ACOG);
- (4) American academy of physician assistants (AAPA);
- (5) American academy of nurse practitioners (AANP);
- (6) nurse practitioners in women's health (NPWH); or
- (7) other clinician-level continuing education accrediting agencies approved by the department.

H. "Continuance" means the adjournment or postponement of a trial or other proceeding to a future date.

I. "Controlled substance" means any drug or therapeutic agent with a potential for abuse or addiction listed in Schedules I through V of the Controlled Substances Act, or rules adopted thereto, which is commonly understood to include narcotics.

J. "Dangerous drug" means a prescription drug other than a controlled substance which has been determined by law to be unsafe for self-administration and which are enumerated in the New Mexico Drug, Device and Cosmetic Act (NMSA 1978, Section 26-1).

K. "Department" means the department of health.

L. "Division" means the public health division.

M. "Pain" means an unpleasant sensory and emotional experience associated with inflammation or with actual or potential tissue damage, or described in terms of such inflammation and damage, which could include acute, persistent or chronic pain.

N. "Peer review" means the assessment and evaluation of CNM practice by other CNMs or other health care providers to measure compliance with established institutional or legal standards. In the peer review process, a CNM's practice undergoes scrutiny for the purpose of professional self-regulation. All participants in the peer review process have the opportunity to enhance professional knowledge and skills.

O. "Physical dependence" means a state of adaptation that is manifested by a drug-specific withdrawal syndrome that can be produced by abrupt cessation, rapid dose reduction, decreasing blood level of the drug, administration of an antagonist, or a combination of these.

P. "Prescription monitoring program (PMP)" means a centralized system within the New Mexico board of pharmacy to collect, monitor, and analyze electronically controlled substances, prescribing and dispensing data submitted by pharmacies and dispensing practitioners. The data are used to support efforts in education, research, enforcement and abuse prevention.

Q. "Primary care" means the provision of integrated, accessible health care services by clinicians who are accountable for addressing the large majority of presenting health care needs, developing sustained partnerships with clients, and practicing within the context of family and community.

R. "Quality assurance" means monitoring structural, procedural and outcome indicators as they relate to accepted standards.

S. "Quality improvement" means modifying the process for providing care in order to improve outcomes. Modifications are based upon the measurement of parameters such as evidence-based best practices, patient satisfaction, clinical outcomes, population-specific care, appropriate use of technology and resources, and access to care.

T. "Therapeutic purpose" means the use of pharmaceutical and non-pharmaceutical treatments and the spectrum of available modalities that conforms substantially to accepted guidelines.

U. "Tolerance" means a state of adaptation in which exposure to a drug induces changes that result in a

diminution of one or more of the drug's effects over time.

V. "Valid CNM-client relationship" means a relationship that assures safe prescribing of a dangerous drug by a CNM to an individual. Such a relationship includes:

(1) the CNM has sufficient information to assure that the dangerous drug is indicated and necessary for treatment of a condition;

(2) the CNM has sufficient information to assure that the dangerous drug is not contraindicated for the individual;

(3) the CNM provides the individual with appropriate information on the proper dosage, route, frequency and duration of the drug treatment;

(4) the CNM informs the individual of possible untoward effects and side effects of the treatment;

(5) the CNM provides for care in the event of an untoward effect or a side effect that requires care;

(6) the CNM provides for client education regarding the condition and its treatment to secure treatment compliance and preventive self-care;

(7) the CNM provides for appropriate follow-up care, including further testing, treatment and education, as appropriate; and

(8) the CNM documents, at minimum, the indication, drug and dosage in a health record for the individual.

[16.11.2.7 NMAC - Rp, 16.11.2.7 NMAC, 8/30/13]

16.11.2.8 DOCUMENTS INCORPORATED BY REFERENCE:

A. ACNM "core competencies for basic midwifery practice".

B. ACNM "standards for the practice of midwifery".

C. ACNM handbook: "homebirth practice".

[16.11.2.8 NMAC - Rp, 16.11.2.8 NMAC, 8/30/13]

16.11.2.9 LICENSURE:

A. Licensure requirements: A CNM licensed in New Mexico shall hold a license that meets the New Mexico board of nursing's requirement to practice as a registered nurse in New Mexico and shall hold current certification by ACNM or its designee. The department may deny licensure to a CNM whose midwifery or nursing license has been subject to disciplinary action in any jurisdiction. A CNM license is not transferable.

B. Initial licensure.

(1) An applicant for licensure to practice as a CNM in New Mexico shall submit to the department:

(a) a completed application;

(b) proof of holding a valid

license that meets the New Mexico board of nursing's requirement to practice as a registered nurse in New Mexico;

(c) proof of current certification by ACNM or its designee;

(d) the fee designated in Subsection E of this section.

(2) An initial CNM license may be issued at any time upon submission and verification of the materials required in Paragraph (1) of this subsection and shall expire on the expiration date of the license that satisfies the New Mexico board of nursing's requirement to practice as a registered nurse in New Mexico. A CNM license shall be valid for a maximum of two years.

C. Licensure renewal.

(1) A CNM's renewed license shall expire on the date of expiration of the license that satisfies the New Mexico board of nursing's requirements for practicing as a registered nurse in New Mexico.

(2) An applicant for licensure renewal shall submit to the department:

(a) a completed application postmarked or electronically submitted at least 20 calendar days before the expiration of her CNM license;

(b) proof of holding a valid license that meets the requirement of the New Mexico board of nursing to practice as a registered nurse in New Mexico for the period the renewed CNM license will cover;

(c) proof of current certification by American midwifery certification board (AMCB) or its designee;

(d) proof of having met the continuing quality assurance and continuing education requirements in Paragraphs (3) and (4) of this subsection; and

(e) the fee designated in Subsection E of this section; an additional fee shall be charged for applications received later than 20 calendar days before the expiration date.

(3) Continuing education: proof of a minimum of 30 contact hours completed during the two years preceding renewal is required for licensure renewal.

(a) 15 of the contact hours shall be pharmacology-related. As part of the pharmacology-related contact hours, a CNM who holds a CNM license on August 30, 2013, shall submit, with her next license renewal application, proof of completing a minimum of five contact hours on the following topics:

(i) the CNM rule as it applies to management of chronic pain,

(ii) the pharmacology and risks of controlled substances,

(iii) the problems of abuse and addiction, or

(iv) state and federal regulations for the prescription of controlled substances; with each subsequent license

renewal application, a CNM shall submit proof of completing a minimum of two contact hours on the above topics.

(b) The following options, subject to audit and approval by the department, may be accepted in place of continuing education contact hours:

(i) preparation and presentation of a nurse-midwifery topic that has received contact hour approval by any of the organizations listed in Subsection E of 16.11.2.7 NMAC, will count for twice the number of contact hours for which the presentation is approved; the same presentation cannot be credited more than once;

(ii) sole or primary authorship of one nurse-midwifery related article published in a department-approved professional medical or midwifery journal per licensure period may be accepted in place of 10 contact hours;

(iii) completion of a formal university or college course directly related to nurse-midwifery practice; each university or college unit shall be credited as 15 hours of continuing education; and

(iv) acting as primary preceptor for a nurse-midwifery or certified midwifery student; each 10 hours of precepting shall be credited as one continuing education hour; verification shall be provided by an accreditation commission for midwifery education (ACME) accredited nurse-midwifery education program. This option shall not be accepted in place of pharmacology-related contact hours.

(4) Quality management: documentation of participation during the preceding two years in a system of quality management meeting the approval of the department is required for licensure renewal. Quality management includes peer review, quality assurance and quality improvement as defined in 16.11.2.7 NMAC.

D. Reinstatement of a lapsed CNM license.

(1) The requirements for reinstatement of a CNM license that has lapsed within the four previous years are the same as those for licensure renewal, listed in Subparagraphs (a) through (e) of Paragraph (2) of Subsection C of this section, except that the application may be submitted at any time within the four years of the license's lapsing, and the fee designated in Subsection E of this section.

(2) An applicant for CNM licensure whose license has lapsed more than four years prior may apply for licensure reinstatement or may apply for a new CNM license.

E. Fees: the department shall charge applicants the following fees for licensure services:

(1) two hundred dollars (\$200) for initial licensure;

(2) one hundred dollars (\$100) for license renewal;

(3) fifty dollars (\$50.00) additional for renewing a license when the complete application is not postmarked or electronically submitted at least 20 calendar days before the current license's expiration date;

(4) fifty dollars (\$50.00) additional for reinstatement of a lapsed license;

(5) twenty dollars (20.00) for verifying licenses by FAX or letter;

(6) twenty dollars (\$20.00) for replacing a lost license card; and

(7) thirty dollars (\$30.00) for replacing a license certificate (8 ½" x 11" size).

F. Change of address: a CNM shall report a change of address or phone number to the department within 30 days.

[16.11.2.9 NMAC - Rp, 16.11.2.9 NMAC, 8/30/13]

16.11.2.10 PRACTICE OF THE CERTIFIED NURSE-MIDWIFE:

A. Scope of practice: Practice by CNMs encompasses independently providing a full range of primary health care services for women from adolescence to beyond menopause. These services include primary care, gynecologic and family planning services, pre-conception care, care during pregnancy, childbirth and the postpartum period, care of the normal newborn, and treatment of male partners for sexually transmitted infections. Midwives provide initial and ongoing comprehensive assessment, diagnosis and treatment. They conduct physical examinations; independently prescribe, distribute and administer dangerous drugs, devices and contraceptive methods, and controlled substances in Schedules II-V of the Controlled Substances Act (NMSA 1978, Section 30-31-1); admit, manage and discharge patients; order and interpret laboratory and diagnostic tests; and order the use of medical devices. Midwifery care also includes health promotion, disease prevention, and individualized wellness education and counseling. These services are provided in partnership with women and families in diverse settings such as ambulatory care clinics, private offices, community and public health systems, homes, hospitals and birth centers. A CNM practices within a health care system that provides for consultation, collaborative management or referral as indicated by the health status of the client. A CNM practices in accordance with the ACNM "standards for the practice of midwifery". A CNM who expands beyond the ACNM "core competencies" to incorporate new procedures that improve care for women and their families shall comply with the

guidelines set out in the ACNM "standards for the practice of midwifery", standard VIII. Practice guidelines for home births should be informed by the "ACNM home birth practice handbook".

B. Prescriptive authority.

(1) Dangerous drugs: A CNM who prescribes distributes or administers a dangerous drug or device shall do so in accordance with the New Mexico Drug, Device and Cosmetic Act (NMSA 1978, Section 26-1).

(2) Controlled substances.

(a) A CNM shall not prescribe nor distribute controlled substances in Schedule I of the Controlled Substances Act (NMSA 1978, Section 26-1).

(b) A CNM shall not prescribe, distribute or administer controlled substances in Schedules II-V of the Controlled Substances Act unless she is registered with the New Mexico board of pharmacy and the United States drug enforcement administration to prescribe, distribute and administer controlled substances.

(c) A CNM who prescribes, distributes or administers a controlled substance in Schedules II-V of the Controlled Substances Act shall do so in accordance with the Controlled Substances Act (NMSA 1978, Section 26-1).

(d) An individual employed as a CNM by the United States military, the United States veterans administration or the United States public health service and operating in the official capacity of that employment who is prescribing, distributing or administering controlled substances under that facility's United States drug enforcement administration registration is exempt from the Subparagraphs (a), (b) and (c) of Paragraph (2) of this subsection.

(3) Prescription pads: A CNM may prescribe by telephone, by written prescription or by e-mail. A CNM prescription shall have the CNM's name, office address and telephone number printed on it. In the event that a CNM is writing a prescription printed with the names of more than one CNM, the name of the CNM writing the individual prescription shall be indicated. The name and address of the client, the date of the prescription, the name and quantity of the drug prescribed, and directions for use shall be included on a prescription.

(4) Labeling: when distributing a drug, a CNM shall label it with the client's name, the date, instructions for use, and the CNM's name, address and telephone number.

(5) Except in emergencies, CNMs shall not prescribe controlled substances for themselves, members of their households or immediate family members.

C. Guidelines for management of chronic pain with controlled substances. The treatment

of chronic pain with various modalities, including controlled substances such as opiates and opioids, is a legitimate practice when done in the usual course of CNM practice. The goal when treating chronic pain is to reduce or eliminate pain and also to avoid development of or contribution to addiction, drug abuse and overdosing. Effective dosages should be prescribed, with both under- and over-prescribing to be avoided, using patient protection as a guiding principle. The CNM should provide control of the patient's pain for its duration, while effectively addressing other aspects of the patient's functioning, including physical, psychological, social and work-related factors. A CNM may treat patients with addiction, physical dependence or tolerance who have legitimate pain, however such patients require very close monitoring and precise documentation.

(1) If, in a CNM's professional opinion, a patient is seeking pain medication for reasons that are not medically justified, the CNM is not required to prescribe controlled substances for the patient.

(2) When prescribing, dispensing or administering controlled substances for management of chronic pain, a CNM shall:

(a) obtain a PMP report for the patient covering the preceding 12 months from the New Mexico board of pharmacy, or another state's report where applicable and available;

(b) complete a history and physical examination and include an evaluation of the patient's psychological and pain status, any previous history of significant pain, past history of alternate treatments for pain, potential for substance abuse, coexisting disease or medical conditions, and the presence of medical indications or contraindications related to controlled substances;

(c) be familiar with and employ screening tools, as well as the spectrum of available modalities for therapeutic purposes, in the evaluation and management of pain, and consider an integrative approach to pain management in collaboration with other care providers, including but not limited to acupuncturists, chiropractors, doctors of oriental medicine, exercise physiologists, massage therapists, pharmacists, physical therapists, psychiatrists or psychologists;

(d) develop a written individual treatment plan taking age, gender and culture into consideration, with stated objectives by which treatment can be evaluated, such as degree of pain relief, improved physical and psychological function, or other accepted measures, and including any need for further testing, consultation, referral or use of other treatment modalities as appropriate;

(e) discuss the risks and benefits of using controlled substances with the patient or legal guardian and document this discussion in the record;

(f) make a written agreement with the patient or legal guardian outlining patient responsibilities, including that the chronic pain patient will receive all chronic pain management prescriptions from one practitioner and one pharmacy whenever possible;

(g) maintain complete and accurate records of care provided and drugs prescribed, including the indications for use, the name of the drug, quantity, prescribed dosage and number of refills authorized;

(h) when indicated by the patient's condition, consult with health care professionals who are experienced in the area of the chronic pain, though not necessarily specialists in pain control, both early in the course of long-term treatment and at least every six months;

(i) when treating patients with drug addiction or physical dependence, use drug screening prior to and during the course of treatment to identify actual drugs being consumed and to compare with patients' self reports (this should be included in the written agreement, see Subparagraph (f) above);

(j) note the following possible indications of drug abuse by a patient and take appropriate steps to further investigate and to avoid contributing to drug abuse; such steps may include termination of treatment; some of this information may be available only through PMP reports;

(i) receiving controlled substances from multiple prescribers;

(ii) receiving controlled substances for more than 12 consecutive weeks;

(iii) receiving more than one controlled substance analgesic;

(iv) receiving a new prescription for any long-acting controlled substance analgesic formulation, including oral or transdermal dosage forms or methadone;

(v) overutilization, early refills;

(vi) appearing overly sedated or intoxicated upon presentation; or

(vii) an unfamiliar patient requesting a controlled substance by specific name, street name, color, or identifying marks.

D. Other rules: a CNM shall fulfill the requirements of all relevant department rules including:

(1) "Bureau of Vital Records and Health Statistics," 7.2.2 NMAC;

(2) "Control of Disease and Conditions of Public Health Significance," 7.4.3 NMAC;

(3) "Newborn Genetic Screening," 7.30.6 NMAC;

(4) "Prevention of Infant Blindness," 7.30.7 NMAC.

E. Limitation of physician liability: any consultative relationship

between a CNM and a physician shall not by itself provide the basis for finding a physician liable for any acts or omissions of the CNM.

[16.11.2.10 NMAC - Rp, 16.11.2.10 NMAC, 8/30/13]

16.11.2.11 LICENSE DENIAL, SUSPENSION OR REVOCATION; DISCIPLINARY ACTION:

The department may deny, revoke or suspend any license held or applied for or reprimand or place a license on probation on the grounds of incompetence, unprofessional conduct or other grounds listed in this section, pursuant to NMSA 1978, Section 24-1-3(R).

A. Grounds for action.

(1) Incompetence. A CNM who fails to possess and apply the knowledge, skill or care that is ordinarily possessed and exercised by CNMs or as defined by the ACNM "core competencies for basic midwifery practice" is considered incompetent. Charges of incompetence may be based upon a single act of incompetence or upon a course of conduct or series of acts or omissions which extend over a period of time and which, taken as a whole, demonstrate incompetence. Conduct of such a character that it could have resulted in harm to the client or to the public from the act or omission or series of acts or omissions constitutes incompetence, whether or not actual harm resulted.

(2) Unprofessional conduct. For purposes of this rule "unprofessional conduct" includes, but is not limited to, the following:

(a) verbally or physically abusing a client;

(b) engaging in sexual contact with or toward a client;

(c) abandonment of a client;

(d) engaging in the practice of midwifery when judgment or physical ability is impaired by alcohol or drugs or controlled substances;

(e) practice which is beyond the scope of licensure;

(f) dissemination of a client's health information or treatment plan to individuals not entitled to such information and where such information is protected by law from disclosure;

(g) falsifying or altering client records for the purpose of reflecting incorrect or incomplete information;

(h) obtaining or attempting to obtain any fee for client services for one's self or for another through fraud, misrepresentation, or deceit;

(i) aiding, abetting, assisting or hiring an individual to violate any duly promulgated rule of the department;

(j) failure to follow established procedure and documentation regarding controlled substances;

(k) failure to make or keep accurate, intelligible entries in records as required by the ACNM "standards for the practice of midwifery";

(l) obtaining or attempting to obtain a license to practice certified nurse midwifery for one's self or for another through fraud, deceit, misrepresentation or any other act of dishonesty in any phase of the licensure by examination or endorsement process, or relicensure process;

(m) practicing midwifery in New Mexico without a valid New Mexico license or permit, or aiding, abetting or assisting another to practice midwifery without a valid New Mexico license;

(n) delegation of midwifery assessment, evaluation, judgment or medication administration to non-licensed persons; or

(o) failure to provide information requested by the department pursuant to this rule within 10 business days of receiving the request.

(3) Failure to comply with the New Mexico Parental Responsibility Act, Section 40-5A-1 through 40-5A-13, NMSA 1978.

(4) Dereliction of any duty imposed by law.

(5) Conviction of a felony.

(6) Failure to report in writing to the division, a complaint or claim that has been made against the CNM's practice as a registered, certified or licensed health care provider in any jurisdiction, including as a registered nurse. Such notification shall include the credentialing jurisdiction and the location, time and content of the complaint or claim. It shall be made within 10 business days of the CNM becoming aware of the complaint or claim.

(7) Conduct resulting in the suspension or revocation of a registration, license or certification to perform as a health care provider.

(8) Failure to report a midwife or CNM who appears to have violated the rule for the practice of licensed or certified nurse midwifery. Anyone reporting an alleged violation of this rule shall be immune from liability unless the person acted in bad faith or with malicious purpose.

(9) Violation of any of the provisions of this rule.

B. Disciplinary proceedings:

disciplinary proceedings shall be conducted in accordance with the Uniform Licensing Act (ULA) NMSA 1978 Section 61-1-1 through 61-1-31. Disciplinary proceedings related to a CNM's treatment of a patient for chronic pain with a controlled substance shall be conducted in accordance with the Pain Relief Act, NMSA 1978, Section 24-2D-1 through 24-2D-6, in addition to this rule.

(1) Filing of a complaint.

(a) A written complaint must be filed with the division before a disciplinary proceeding can be initiated.

(i) A complaint is an allegation of (a) wrongful act(s) or omission(s).

(ii) A complaint may include knowledge of a judgment or settlement against a licensee.

(b) A written complaint may be filed by any person, including a member of the board.

(2) Investigation of a complaint.

(a) All complaints alleging a violation of the rules adopted by the department shall be investigated to determine whether a violation of applicable law or rule has occurred.

(b) The investigation may result in a notice of contemplated action (NCA) being issued by the department if a violation exists or a dismissal of the complaint because no actionable violation exists.

(3) Notice of contemplated action.

(a) The NCA shall be drafted by the department.

(b) The director of the division, or his designee shall sign all NCAs.

(c) The NCAs shall contain written information in accordance with the requirements of the ULA and shall be served on the licensee in accordance with the ULA.

(4) Request for a hearing, notice of hearing and request for continuance.

(a) Every licensee shall be afforded notice and an opportunity to be heard.

(b) Within 20 days of receiving the NCA, a licensee may request a hearing in writing by certified mail. The department shall notify the licensee of the time and place of hearing within 20 days of receipt of the request. The hearing shall be held no more than 60 nor less than 15 days from the date of service of the notice of hearing. However, if the ULA designates time requirements different from the above stated time requirements, the ULA time requirements shall prevail. The department shall notify the licensee of these prevailing time requirements when it sends the NCA.

(c) Once a hearing has been scheduled, if a request for a continuance is made it shall be presented to the department's hearing officer, in writing, at least 10 days prior to the scheduled hearing. The hearing officer may approve or deny the request.

(d) If a person fails to appear after requesting a hearing, the department may proceed to consider the matter and make a decision.

(e) If no request for a hearing is made within the time and manner stated in the NCA, the department may take the action contemplated in the NCA. Such action shall be final.

(5) Administrative hearing.

(a) All hearings shall be conducted

by a hearing officer designated by the secretary or authorized representative of the department. The hearing officer shall have authority to rule on all nondispositive motions.

(b) All hearings before the department shall be conducted in the same manner as a hearing in a court of law with the exception that the rules of evidence may be relaxed in the hearing pursuant to the ULA.

(i) Hearsay evidence is admissible if it is of a kind commonly relied upon by reasonable prudent people in the conduct of serious affairs.

(ii) Disciplinary action against a CNM license must not be based solely on hearsay evidence.

(c) The hearing officer may take testimony, examine witnesses and direct a continuance of any case.

(d) The hearing officer shall have the power to issue subpoenas to compel the attendance of witnesses or the production of books, documents or records pertinent to the matter of a case before the department.

(e) The hearing officer shall issue a report and recommended finding to the department secretary.

(f) Decision of the department: the secretary of the department shall render a final administrative determination after reviewing the report and recommended findings issued by the hearing officer. Copies of the written decision shall be mailed via certified mail to the licensee in accordance with the ULA, placed in the CNM's licensure file. A copy of the written decision shall be mailed to the authority(ies) that license(s) the CNM as a registered nurse if the decision is to uphold the disciplinary action.

C. Reinstatement of a suspended or revoked license.

(1) Individuals who request reinstatement of their license or who request that their probation be lifted or altered shall provide the department with substantial evidence to support their request. This evidence must be in the form of notarized written reports or sworn written testimony from individuals who have personal knowledge of the individual's activities and progress during the period of probation, suspension or revocation.

(2) Requests for reinstatement of a revoked license shall not be considered by the department prior to the expiration of one year from the date of the order of revocation. The date of the order of revocation or suspension is the controlling date, unless otherwise specified in the order.

(3) Requests for reinstatement of a suspended license shall be considered at such time as provided by the department in the order of suspension.

(4) Reinstatement of a suspended

license requires proof of meeting the renewal requirements as set forth in this rule, any remedial education, supervised practice or other condition specified in the order for suspension required by the department and payment of the reinstatement of current or lapsed license fee.

(5) Reinstatement of a revoked license requires proof of meeting the renewal requirements set forth in this rule and payment of the reinstatement of current or lapsed license fee.

[16.11.2.11 NMAC - Rp, 16.11.2.11 NMAC, 8/30/13]

16.11.2.12 ADVISORY BOARD:

The department shall appoint a CNM advisory board to make recommendations to the department regarding the regulation of CNMs.

A. The board may be comprised of:

(1) three New Mexico licensed CNMs, at least one of whom is actively practicing midwifery;

(2) one New Mexico licensed midwife who is actively practicing midwifery;

(3) two consumer members;

(4) one actively practicing board certified obstetrician-gynecologist physician; and

(5) one representative of the department.

B. Board members other than the department representative shall be appointed for staggered terms up to three years in length. Board members shall serve on a voluntary basis without compensation. They shall not serve for more than two consecutive terms. The department representative shall not be subject to term limits.

C. The board shall meet a minimum of two times a year when called by the director of the division.

D. The board members may submit requests for reimbursement of in-state travel and per diem for attending board meetings in accordance with department of finance administration rules.

E. Any member failing to attend two consecutive board meetings without good cause and an excused absence prior to the meetings shall be deemed to have resigned from the board.

[16.11.2.12 NMAC - Rp, 16.11.2.12 NMAC, 8/30/13]

16.11.2.13 SEVERABILITY:

If any part or application of these rules is determined to be illegal, the remainder of these rules shall not be affected.

[16.11.2.13 NMAC - Rp, 16.11.2.13 NMAC, 8/30/13]

HISTORY OF 16.11.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records-state records center and archives.

DPHW 67-24, Nurse Midwife Regulations For New Mexico, filed 12/12/67.

HSSD 76-2, Nurse Midwife Regulations For New Mexico, filed 1/20/76.

HED-80-6 (HSD), Regulations Governing the Practice of Certified Nurse Midwives, filed 10/17/80.

DOH 91-06 (PHD), Regulations Governing the Practice of Certified Nurse Midwives, filed 11/04/91.

History of Repealed Material:

16 NMAC 11.2, Certified Nurse Midwives (filed 10/18/96) repealed 10/15/09.

16.11.2 NMAC, Certified Nurse Midwives (filed 9/28/09) repealed 8/30/13.

Other History:

DOH 91-06 (PHD), Regulations Governing the Practice of Certified Nurse Midwives (filed 11/04/91) was renumbered into first version of the New Mexico Administrative Code as 16 NMAC 11.2, Certified Nurse Midwives, effective 10/31/96.

16 NMAC 11.2, Certified Nurse Midwives (filed 10/18/96) was replaced by 16.11.2

NMAC Certified Nurse Midwives, effective 10/15/09.

16.11.2 NMAC, Certified Nurse Midwives (filed 9/28/09) was replaced by 16.11.2 NMAC, Certified Nurse Midwives, effective 8/30/13.

**NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION**

This is an amendment to 8.200.520 NMAC, Section 13, effective September 1, 2013.

8.200.520.13 FEDERAL BENEFIT RATES

YEAR	Individual	Inst.	Indiv.	Couple	Inst.	Couple
	FBR	FBR	VTR	FBR	FBR	VTR
1/89 to 1/90	\$368	\$30	\$122.66	\$553	\$60	\$184.33
1/90 to 1/91	\$386	\$30	\$128.66	\$579	\$60	\$193.00
1/91 to 1/92	\$407	\$30	\$135.66	\$610	\$60	\$203.33
1/92 to 1/93	\$422	\$30	\$140.66	\$633	\$60	\$211.00
1/93 to 1/94	\$434	\$30	\$144.66	\$652	\$60	\$217.33
1/94 to 1/95	\$446	\$30	\$148.66	\$669	\$60	\$223.00
1/95 to 1/96	\$458	\$30	\$152.66	\$687	\$60	\$229.00
1/96 to 1/97	\$470	\$30	\$156.66	\$705	\$60	\$235.00
1/97 to 1/98	\$484	\$30	\$161.33	\$726	\$60	\$242.00
1/98 to 1/99	\$494	\$30	\$164.66	\$741	\$60	\$247.00
1/99 to 1/00	\$500	\$30	\$166.66	\$751	\$60	\$250.33
1/00 to 1/01	\$512	\$30	\$170.66	\$769	\$60	\$256.33
1/01 to 1/02	\$530	\$30	\$176.66	\$796	\$60	\$265.33
1/02 to 1/03	\$545	\$30	\$181.66	\$817	\$60	\$272.33
1/03 to 1/04	\$552	\$30	\$184.00	\$829	\$60	\$276.33
1/04 to 1/05	\$564	\$30	\$188	\$846	\$60	\$282.00
1/05 to 1/06	\$579	\$30	\$193	\$869	\$60	\$289.66
1/06 to 1/07	\$603	\$30	\$201	\$904	\$60	\$301.33
1/07 to 1/08	\$623	\$30	\$207.66	\$934	\$60	\$311.33
1/08 to 1/09	\$637	\$30	\$212.33	\$956	\$60	\$318.66
1/09 to 1/10	\$674	\$30	\$224.66	\$1,011	\$60	\$337
1/10 to 1/11	\$674	\$30	\$224.66	\$1,011	\$60	\$337
1/11 to 1/12	\$674	\$30	\$224.66	\$1,011	\$60	\$337
1/12 to 1/13	\$698	\$30	\$232.66	\$1,048	\$60	\$349.33
1/13 to 1/14	\$710	\$30	\$237	\$1,066	\$60	\$355

Ineligible child deeming allocation: \$350.00

Part B premium is [~~\$99.90~~] \$104.90 per month.

VTR (value of one third reduction) is used when an individual or couple lives in the household of another and receives food and shelter from the household or when the individual or couple is living in their own household but receiving support and maintenance from

others.

The SSI resource standard is \$2000 for an individual and \$3000 for a couple.

[1-1-95, 4-1-95, 3-30-96, 4-1-97, 4-30-98, 1-1-99; 8.200.520.13 NMAC - Rn, 8 NMAC 4.MAD.520.7 & A, 1-1-01; A, 1-01-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-15-10; A, 1-1-11; A, 4-1-11; A, 1-1-12; A, 1-1-13; A, 9-1-13]

End of Adopted Rules Section

Other Material Related to Administrative Law

**NEW MEXICO HUMAN
SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION**

New NMAC Names

By request of the Human Services Department, the State Records Administrator considered and approved the following new chapter names of the following chapters of Title 8, Social Services. The new chapters will take effect on October 1, 2013.

CHAPTER 291 M E D I C A I D
ELIGIBILITY - AFFORDABLE CARE

CHAPTER 292 M E D I C A I D
ELIGIBILITY - PARENT CARETAKER

CHAPTER 293 M E D I C A I D
ELIGIBILITY - PREGNANT WOMEN

CHAPTER 294 M E D I C A I D
ELIGIBILITY - PREGNANCY-RELATED
SERVICES

CHAPTER 295 M E D I C A I D
ELIGIBILITY - CHILDREN UNDER 19

CHAPTER 296 M E D I C A I D
ELIGIBILITY - OTHER ADULTS

CHAPTER 297 M E D I C A I D
ELIGIBILITY - LOSS OF PARENT
CARETAKER MEDICAID DUE TO
SPOUSAL SUPPORT

CHAPTER 298 M E D I C A I D
ELIGIBILITY - LOSS OF PARENT
CARETAKER MEDICAID DUE TO
EARNINGS FROM EMPLOYMENT

**End of Other Related Material
Section**

Submittal Deadlines and Publication Dates 2013

Volume XXIV	Submittal Deadline	Publication Date
Issue Number 16	August 16	August 30
Issue Number 17	September 3	September 16
Issue Number 18	September 17	September 30
Issue Number 19	October 1	October 15
Issue Number 20	October 16	October 31
Issue Number 21	November 1	November 14
Issue Number 22	November 15	November 27
Issue Number 23	December 2	December 13
Issue Number 24	December 16	December 30

Submittal Deadlines and Publication Dates 2014

Volume XXV	Submittal Deadline	Publication Date
Issue Number 1	January 2	January 15
Issue Number 2	January 16	January 31
Issue Number 3	February 3	February 14
Issue Number 4	February 17	February 28
Issue Number 5	March 3	March 14
Issue Number 6	March 17	March 31
Issue Number 7	April 1	April 15
Issue Number 8	April 16	April 30
Issue Number 9	May 1	May 15
Issue Number 10	May 16	May 30
Issue Number 11	June 2	June 13
Issue Number 12	June 16	June 30
Issue Number 13	July 1	July 15
Issue Number 14	July 16	July 31
Issue Number 15	August 1	August 15
Issue Number 16	August 18	August 29
Issue Number 17	September 2	September 15
Issue Number 18	September 16	September 30
Issue Number 19	October 1	October 15
Issue Number 20	October 16	October 30
Issue Number 21	October 31	November 13
Issue Number 22	November 14	November 26
Issue Number 23	December 1	December 15
Issue Number 24	December 16	December 30

The *New Mexico Register* is the official publication for all notices of rule making, proposed rules, adopted rules, emergency rules, and other material related to administrative law. The Commission of Public Records, Administrative Law Division publishes the *New Mexico Register* twice a month pursuant to Section 14-4-7.1 NMSA 1978.

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