

This rule was filed as 7 NMAC 1.6.

**TITLE 7           HEALTH**  
**CHAPTER 1       HEALTH GENERAL PROVISIONS**  
**PART 6           PROTEST PROCEDURE UNDER THE PROCUREMENT CODE**

**7.1.6.1           ISSUING AGENCY:** NM Department of Health, Harolds Runnels Building, 1190 St. Francis Drive, P.O. Box 26110, Santa Fe, NM 87502-6110.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.2           SCOPE:** General Public  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.3           STATUTORY AUTHORITY:** The statutory authority for adopting these regulations is found in Section 9-7-6.F., NMSA 1978 of the Department of Health Act and Section 13-1-174, NMSA 1978 of the Procurement Code.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.4           DURATION:** Permanent  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.5           EFFECTIVE DATE:** January 1, 1997, unless a later date is cited at the end of a section or paragraph.  
[1/1/97; Recompiled 10/31/01]  
[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

**7.1.6.6           OBJECTIVE:** To implement the protest process mandated by the Procurement Code.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.7           DEFINITIONS:**

- A. "Central purchasing office" means an organizational unit within the department responsible for the control of procurement by competitive sealed proposals.
- B. "Contract" means any agreement for the procurement of professional services.
- C. "Department" means the New Mexico department of health.
- D. "Offeror" means a person or business which submits a proposal to provide professional services in response to a request for proposals.
- E. "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, researchers and persons or businesses providing similar services.
- F. "Procurement" means purchasing or otherwise acquiring professional services.
- G. "Secretary" means the secretary of the New Mexico department of health.

[8/12/85, 7/7/87, 1/1/97, 12/1/98; Recompiled 10/31/01]

**7.1.6.8           APPLICABILITY:**

- A. The provisions of this regulation apply to all protests filed with the central purchasing office of the department.
- B. All definitions as stated in 7 NMAC 1.5 [now 7.1.5 NMAC], "Procurement of Professional Services," shall apply to these regulations.
- C. When computing time under these regulations, the first day shall be excluded and the last day included unless the last day falls on Sunday, in which case, the time prescribed shall be extended to include the following Monday.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.9 RIGHT TO PROTEST:**

A. Who may file: Any offeror who is aggrieved in connection with a solicitation or award of a professional services contract initiated by the department may protest to the central purchasing office of the department.

B. What may be protested: Protestants may protest any procurement function in connection with a solicitation or award of a contract.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.10 FILING OF PROTEST:**

A. Protest must be written: Protests must be in writing and addressed to the contracts officer, administrative services division, department of health, 1190 St. Francis Drive, P.O. Box 26110, Santa Fe, New Mexico 87502-6110.

B. Contents: The protest shall:

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

(2) identify the contracting activity and the number of the solicitation, if any, and, if a contract has been awarded, the contract 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 available date shall be indicated; and

(5) specify the ruling requested from the central purchasing office or procuring unit of the department.

C. Pleadings: No formal briefs or other technical forms of pleadings or motion are required, but protests and other submissions should be concise, logically arranged, and direct.

D. Time limit: Protests shall be submitted within fifteen (15) calendar days after the facts or occurrences giving rise thereto.

E. Appointment of hearing officer: Upon the filing of a timely protest, the department shall designate a hearing officer. The hearing officer shall not have been directly involved in the protested procurement and, to the extent possible, be disinterested and impartial.

F. Additional information: If additional information is required by the hearing officer from the protestant, the department, or from interested parties, such information shall be submitted within the time period established by the hearing officer. Failure to timely comply may result in consideration and resolution of the protest without the untimely-filed information.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.11 PROCUREMENT AFTER PROTEST:** In the event of a timely protest, as defined in Paragraph 10.4 [now Subsection D of 7.1.6.10 NMAC] of this regulation, the central purchasing office or procuring unit of the department shall not proceed further with the procurement unless the central purchasing office or procuring unit of the department makes a written determination that the award of the contract is necessary to protect substantial interests of the department. Such written determination should set forth the basis for the determination.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.12 NOTICE OF PROTEST:** Notice to offerors: The hearing officer shall give notice of the protest to the contractor if award has been made or, if no award has been made, to all offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest or appeal is denied.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.13 FURNISHING OF INFORMATION ON PROTESTS:**

A. Information generally available: The hearing officer shall, upon written request, make available to any party information bearing on the substance of the protest which has been submitted by the parties, except to the extent that withholding of information is permitted or required by law.

B. Confidentiality of information: If a party considers that information submitted contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the document, and the information requested to be kept confidential must be so identified wherever it appears. Upon such written request, material submitted by a party shall be made available except to the extent that the withholding of information is permitted or required by law.

C. Comments on information. Any party may file comments on the information, provided such comments are filed within ten (10) days of receipt of the information.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.14 CONFERENCE OR HEARING:**

A. When held: A conference or hearing on the merits of the protest may be held at the discretion of the hearing officer, with or without the request of the protestant, interested parties or the department. The hearing officer shall establish any necessary procedures for a conference or hearing. Requests for conferences or hearings should be made within ten (10) days of the filing of the protest.

B. Comments on conference or hearing: Any written comments to be submitted as a result of the conference or hearing must be received by the hearing officer within five (5) days of the date on which the conference or hearing was held, unless the hearing officer provides otherwise.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.15 RESOLUTION:**

A. Written recommendation: The hearing officer shall make a written recommendation on the merits of the protest within ten (10) days or as expeditiously as possible after the receipt of all information or the date of any conference or hearing held on the matter, whichever is later, and shall furnish a copy of the recommendation to the protestant, the department, and other interested parties. Such recommendation should include:

(1) a copy of the protest to interested parties if any;  
(2) a statement setting forth findings and conclusions in the matter, together with any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to the allegations of the protest. If the award was made after receipt of the protest, the statement shall include the determination required under Paragraph 11 [now 7.1.6.11 NMAC] of this regulation;

(3) a statement of the relief granted; and  
(4) notice to the protestant of the right to judicial review of the final determination, pursuant to Section 13-1-183 NMSA 1978.

B. Notice of Recommendation. A copy of the recommendation shall be transmitted to the protestant, the department, and other interested parties involved in the procurement.  
[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.16 RELIEF:**

A. Prior to award: If, prior to award, the hearing officer makes a recommendation and the department division director or his/her designee makes a determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be cancelled.

B. After Award:

(1) No fraud or bad faith. If, after an award, the hearing officer makes a recommendation and the department division director or his/her designee makes a determination that 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:

(2) the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interest of the department; or

(a) 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 or equivalent thereto prior to termination.

(b) Fraud or bad faith: If, after an award, the hearing officer makes a recommendation and department division director or his/ her designee whose organizational unit initiated the procurement makes a 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 cancelled.

C. Relief not allowed: Except as provided in Paragraph 16.2.2.1 [now Subparagraph (a) of Paragraph (2) of Subsection B of 7.1.6.16 NMAC], above, the hearing officer shall not award money damages or attorneys' fees.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**7.1.6.17 FINAL DETERMINATION:**

A. The hearing officer shall prepare a recommended written decision in the format required by Section 39-3-1.1 NMSA 1978. The recommended written decision shall be approved or disapproved by the department division director or designee within ten days or as expeditiously as possible after the issuance of the hearing officers written recommendation.

B. The decision by the department division director or designee is subject to review by the secretary at the secretary's discretion and is the final determination for purpose of judicial review.

C. The department shall issue a final decision that includes an order granting or denying relief. The final decision may incorporate the hearing officer's recommended decision or the department may render any other final decision supported by law. The final decision shall include a statement of the factual and legal basis for the order.

[8/12/85, 7/7/87, 1/1/97, 12/1/98; Recompiled 10/31/01]

**7.1.6.18 EX PARTE COMMUNICATION:** The hearing officer shall not receive, nor shall any person directly or indirectly involved in a protest submit to the hearing officer, ex parte, any evidence explanation, analysis, or advice, when written or oral, regarding any matter at issue in a protest.

[8/12/85, 7/7/87, 1/1/97; Recompiled 10/31/01]

**HISTORY OF 7.1.6 NMAC:**

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center: HED-85-5 (ASD), Regulations Governing the Protest Procedure Under the Procurement Code, 8/12/85.

HED-87-7 (ASD), Regulations Governing the Protest Procedure Under the Procurement Code, 7/7/87.

History of Repealed Material: [RESERVED]