

This rule was filed as 1 NMAC 5.3

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 4 STATE PROCUREMENT
PART 2 RESIDENT BUSINESS AND MANUFACTURER PREFERENCES

1.4.2.1 **ISSUING AGENCY:** General Services Department, State Purchasing Division
[01-15-98; Recompiled 11/30/01]

1.4.2.2 **SCOPE:** All executive branch state agencies

A. Applicability. Except as provided in Subsection 2.2 [now Subsection B of 1.4.2.2 NMAC], this rule applies to all competitive-sealed-bid procurements and all competitive-price-quote small purchases by state agencies and local public bodies.

B. Inapplicability. This rule does not apply in the following situations:

- (1) when a procurement method other than competitive sealed bids (or competitive price quotes for small purchases) is used; or
- (2) when a public works construction contract is being procured; or
- (3) when the expenditure of federal funds designated for a specific purchase is involved; or
- (4) for any bid price greater than five million dollars (\$5,000,000).

[01-15-98; Recompiled 11/30/01]

1.4.2.3 **STATUTORY AUTHORITY:** 1978 Comp., Section 13-1-21, enacted by Laws 1979, Chapter 72, Section 1, amended by Laws 1981, Chapter 104, Section 1; Laws 1988, Chapter 84, Section 1; Laws 1989, Chapter 310, Section 1; Laws 1995, Chapter 60, Section 1; Laws 1997, Chapter 1, Section 2; Laws 1997, Chapter 2, Section 2; Laws 1997, Chapter 3, Section 1.

[01-15-98; Recompiled 11/30/01]

1.4.2.4 **DURATION:** Permanent.

[01-15-98; Recompiled 11/30/01]

1.4.2.5 **EFFECTIVE DATE:** January 15, 1998 unless a later date is cited at the end of a section or paragraph.

[01-15-98; Recompiled 11/30/01]

1.4.2.6 **OBJECTIVE:** Section 13-1-22 NMSA 1978 is titled "resident business and manufacturer certification; application; information" and states in relevant part, "no resident business or resident manufacturer, as those terms are defined in Section 13-1-21 NMSA 1978, shall be given any preference in the awarding of contracts for furnishing materials or services to a state agency, unless the resident business or resident manufacturer shall have qualified with the state purchasing agent as a resident business or resident manufacturer, or both, by making application to the state purchasing agent and receiving from him a certification number." Therefore, the objective of this rule is to establish a process for a resident business or resident manufacturer to attain a certification number.

[01-15-98; Recompiled 11/30/01]

1.4.2.7 **DEFINITIONS:**

A. "Affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the qualifying business through ownership of voting securities representing a majority of the total voting power of the entity.

B. "Principal place of business" means the place in which a business:

- (1) earns the largest percentage of its revenues; and
- (2) owns the largest percentage of its capital assets; and
- (3) employs the largest percentage of its full-time equivalent employees. A business can have only one principal place of business.

C. "Resident business" means a New Mexico resident business or a New York state business enterprise.

D. "New Mexico resident business" means a business which, at the time a contract is awarded, is authorized to do and is doing business under the laws of this state and:

- (1) maintains its principal place of business in this state; or
- (2) has staffed an office in this state and has paid applicable state taxes for two years prior to the awarding of the contract and has five or more employees who are residents of this state; or
- (3) is an affiliate of a business which meets the requirements of Paragraph 7.4.1. or Paragraph 7.4.2 [now Paragraph (1) or (2) of Subsection D of 1.4.2.7 NMAC] above.

E. "New York state business enterprise" means a business enterprise, including sole proprietorship, partnership or corporation, that offers for sale or lease or other form of exchange, goods or commodities that are substantially manufactured, produced or assembled in New York state, or services, other than construction services, that are substantially performed within New York state.

F. "Resident manufacturer" means a person who offers materials grown, produced, processed or manufactured wholly in the state; provided, however, that a New York state business enterprise shall be deemed to be a resident manufacturer solely for the purpose of evaluating the New York state business enterprise's bid against the bid of a resident manufacturer that is not a New York state business enterprise.

G. "Recycled content goods" means supplies and materials composed in whole or in part of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications.

H. "Virgin content goods" means supplies and materials that are wholly composed of nonrecycled materials or do not meet minimum recycled content standards required by bid specifications.
[01-15-98; Recompiled 11/30/01]

1.4.2.8 **APPLICATION OF PREFERENCES:**

A. Bids from nonresident businesses and resident businesses. When bids are received only from nonresident businesses and resident businesses and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident business whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident bidder is made lower than the bid price of the nonresident business when multiplied by a factor of 0.95.

B. Bids from nonresident businesses and resident manufacturers. When bids are received only from nonresident businesses and resident manufacturers and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the nonresident business when multiplied by a factor of 0.95.

C. Bids from resident businesses and resident manufacturers. When bids are received only from resident businesses and resident manufacturers and the lowest responsible bid is from a resident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low resident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the resident business when multiplied by a factor of 0.95.

D. Bids from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a resident business. When bids are received from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a resident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low resident business bidder if the bid price of the resident manufacturer is made lower than the bid price of the resident business when multiplied by a factor of 0.95.

E. Bids from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a nonresident business. When bids are received from resident manufacturers, resident businesses and nonresident businesses and the lowest responsible bid is from a nonresident business, the contract shall be awarded to the resident manufacturer whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident manufacturer is evaluated as lower than the bid price of the nonresident business when multiplied by a factor of 0.95. If there is no resident manufacturer eligible for award under this provision, then the contract shall be awarded to the resident business whose bid is nearest to the bid price of the otherwise low nonresident business bidder if the bid price of the resident business is made lower than the bid price of the nonresident business when multiplied by a factor of 0.95.

(1) When bids are received for virgin content goods only or for recycled content goods only, Subsections 8.3 and 8.4 [now Subsections C and D of 1.4.2.8 NMAC] shall apply.

(2) When bids are received for both recycled content goods and virgin content goods and the lowest responsible bid is for virgin content goods, the contract shall be awarded to:

(a) a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .90 is made lower than the otherwise low virgin content goods bid price;

(b) a resident business offering a bid on recycled content goods of equal quality if:

(i) the bid price of no resident manufacturer following application of the preference allowed in 8.5.2.1 of this subsection [now Subparagraph (a) of Paragraph (2) of Subsection E of 1.4.1.8 NMAC] can be made sufficiently low; and

(ii) the lowest bid price of the resident business when multiplied by a factor of .90 is made lower than the otherwise low virgin content goods bid price; or

(c) a nonresident business or nonresident manufacturer offering recycled content goods of equal quality if:

(i) the bid price of no resident business or resident manufacturer following application of the preference allowed in 8.5.2.1 or 8.5.2.2 of this subsection [now Subparagraph (a) or (b) of Paragraph (2) of Subsection E of 1.4.2.8 NMAC] can be made sufficiently low; and

(ii) the lowest bid price of a nonresident offering recycled content goods when multiplied by a factor of .95 is made lower than the otherwise low virgin content bid price.

(3) When bids are received for both recycled content goods and virgin content goods, and the lowest responsible bid is for recycled content goods offered by a nonresident business or nonresident manufacturer, the contract shall be awarded to:

(a) a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price; or

(b) a resident business offering a bid on recycled content goods of equal quality if:

(i) the bid price of no resident manufacturer following application of the preference allowed in 8.5.3.1 of this subsection can be made sufficiently low; and

(ii) the lowest bid price of the resident business when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price offered by a nonresident business or manufacturer.

(4) When bids are received for both recycled content goods and virgin content goods, and the lowest responsible bid is for recycled content goods offered by a resident business, the contract shall be awarded to a resident manufacturer offering the lowest bid on recycled content goods of equal quality if the bid price of the resident manufacturer when multiplied by a factor of .95 is made lower than the otherwise low recycled content goods bid price.

[01-15-98; Recomplied 11/30/01]

1.4.2.9 **PREQUALIFICATION:**

A. Resident business. No business shall be given any preference in the awarding of contracts by a state agency or local public body unless the business has prequalified a resident business by making application to the state purchasing agent and receiving from him a certification number. The procedure for application and certification shall be as follows:

(1) the state purchasing agent shall prepare an application form for certification as a resident business requiring such information and proof as he deems necessary to prequalify the applicant under the terms of this rule;

(2) a prospective resident business shall complete the application form and submit it to the state purchasing agent prior to the awarding of any contract in which the business desires to be given a preference;

(3) the state purchasing agent shall examine the application and if necessary may seek additional information or proof so as to be assured that the applicant is indeed entitled to certification as a resident business. If the state purchasing agent is so assured, he shall issue the applicant a distinctive certification number which is valid until revoked and which, when used on bids and other purchasing documents for state agencies or local public bodies, entitles the holder of the number to the resident business preference.

B. Resident manufacturers. Since a resident manufacturer is a person who offers materials grown, produced, processed or manufactured wholly in this state, the state purchasing agent will not prequalify any person as a resident manufacturer. Rather, a person must establish that each item bid on which he desires to be given a preference is for materials grown, produced, processed or manufactured wholly in this state.

[01-15-98; Recompiled 11/30/01]

1.4.2.10 REVOCATION OF CERTIFICATION NUMBERS:

A. General. All certification numbers are subject to revocation in accordance with this rule. A certification number does not establish conclusively that the holder of the number is a resident business. Rather, a certification number merely establishes that the state purchasing agent believed, as of the date of issuance, the holder was entitled to treatment as a resident business by state agencies and local public bodies. Whenever a certification number is challenged, the holder of the number has the burden of persuasion on the issue of whether the holder is actually a resident business.

B. Revocation. A certification number shall be revoked by the state purchasing agent upon making a determination that the holder of the number no longer qualifies as a resident business.

(1) A revocation shall be effective immediately and shall apply to all subsequent contract awards. A revocation shall not affect any previously awarded contracts, though, in the absence of fraud or bad faith.

(2) At any time, the state purchasing agent may request information or proof from the holder of a certification number as to whether the holder continues to qualify as a resident business. If the holder fails to provide any requested information or proof, this certification number may be revoked.

[01-15-98; Recompiled 11/30/01]

1.4.2.11 PROTESTS:

A. Right to protest. A bidder who is aggrieved in the award of a contract to another bidder, who is relying on a resident business or manufacturer preference, may protest to the central purchasing office responsible for the procurement in accordance with Section 13-1-172 NMSA 1978.

B. Resident businesses. If a protest presents the issue of whether the holder of a certification number is actually a resident business, the central purchasing office responsible for the procurement shall refer the issue to the state purchasing agent for resolution in accordance with 1 NMAC 5.2 [now 1.4.1 NMAC] or succeeding regulations. If a protest governed by Subsection 11.2 [now this subsection - Subsection B of 1.4.2.11 NMAC]] presents additional issues, the central purchasing office responsible for the procurement shall remain responsible for resolution of the additional issues.

C. Resident manufacturers. If a protest presents the issue of whether a person is entitled to a resident manufacturer preference on a particular bid, the central purchasing office responsible for the procurement shall resolve the protest.

[01-15-98; Recompiled 11/30/01]

History of 1.4.2 NMAC:

Pre-NMAC History:

Section 13-1-21 NMSA 1978, enacted by Laws 1979, Chapter 72, Section 1, and amended in subsequent years thereafter, applies to all procurement of items of tangible personal property and construction effected by state agencies and local public bodies. The section provides bidders preference to New Mexico businesses and New York state business enterprises who have qualified with the office of the state purchasing agent when competing against nonresident businesses for contracts let by state agencies and local public bodies. To implement the relevant section of laws of New Mexico, the subject and material found in this rule was filed with the state records center and archives on August 18, 1989 as general services department (GSD) Rule 89-603, and titled "Resident Business and Manufacturer Preferences." GSD Rule 89-603 was superseded by 1 NMAC 5.3 (now 1.4.2 NMAC), effective 1-15-1998.

History of Repealed Material: [Reserved]

GSD Rule 89-603 - superseded 1-15-1998