

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 4 STATE PROCUREMENT
PART 3 RESIDENT CONTRACTOR PREFERENCE

1.4.3.1 ISSUING AGENCY: General Services Department - State Purchasing Division.
[1.4.3.1 NMAC - Rp, 1 NMAC 5.4.1, 11-15-01]

1.4.3.2 SCOPE: All executive Branch State Agencies.
A. General applicability. This rule applies to all public works construction procurements by state agencies and local public bodies.
B. Federal funds. This rule does not apply to federal aid construction projects or when federal funds designated for a specific contract are expended.
[1.4.3.2 NMAC - Rp, 1 NMAC 5.4.2, 11-15-01]

1.4.3.3 STATUTORY AUTHORITY: 1978 Comp., Section 13-4-2, enacted by Laws 1984, Chapter 66, Section 2, amended by Laws 1988, Chapter 84, Section 3; Laws 1989, Chapter 310, Section 2; Laws 1997, Chapter 2, Section 3; Laws 2001, Chapter 174, Section 1.
[1.4.3.3 NMAC - Rp, 1 NMAC 5.4.3, 11-15-01]

1.4.3.4 DURATION: Permanent.
[1.4.3.4 NMAC - Rp, 1 NMAC 5.4.4, 11-15-01]

1.4.3.5 EFFECTIVE DATE: 11-15-01 unless a later date is cited at the end of a Section.
[1.4.3.5 NMAC - Rp, 1 NMAC 5.4.5, 11-15-01]

1.4.3.6 OBJECTIVE: Section 13-4-1 NMSA 1978 is titled "Public Works Contracts" and states in relevant part that, "it is the duty of every office department, institution, board, commission or other governing body or officer thereof of this state or of any political subdivision thereof to award all contracts for the construction of public works or for the repair, reconstruction, including highway reconstruction, demolition or alteration thereof, to a resident contractor whenever practicable. The objective of this rule is to establish a process for a contractor to attain certification as a "resident contractor".
[1.4.3.6 NMAC - Rp, 1 NMAC 5.4.6, 11-15-01]

1.4.3.7 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 a telecommunications company through ownership of voting securities representing a majority of the total voting power of that entity.
B. "Individual citizen" means a citizen of New Mexico who is an actual human person, as opposed to a corporate person or other legal entity.
C. "Principal office" means the headquarters of a business or the place where the principal affairs of a business are transacted. A business can have only one principal office.
D. "Principal place of business" means the place in which a business:
 (1) earns the largest percentage of its revenues;
 (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.
E. "Resident Contractor" means a New Mexico resident contractor or a New York state business enterprise.
F. "New Mexico resident contractor" means a construction contractor which, at the time a public works construction contract is advertised for bids and at the time bids are opened, has all required licenses and meets the following requirements:
 (1) if the contractor is a corporation, it shall be incorporated in new Mexico, and maintain its principal office and place of business in New Mexico.
 (2) if the contractor is a partnership, general or limited, or other legal entity, it shall maintain its principal office and place of business in New Mexico.

(3) if the contractor is an individual, he shall maintain his principal office and place of business in New Mexico; or

(4) if the contractor is a public telecommunications company as defined by Section 63-9A-3 (M) NMSA 1978 or an affiliate of a telecommunications company and has paid unemployment compensation to the Employment Security Division of the Labor Department at the applicable experience rate for that employer pursuant to the New Mexico Unemployment Compensation Law on no fewer than ten employees who have performed services subject to contributions for the two-year period prior to issuance of notice to bid, the contractor will be considered to have fulfilled the requirements of paragraphs (1), (2), or (3) of this subSection. A successor to a previously qualified New Mexico contractor or resident contractor, where the creation of the successor resulted from a court order, is entitled to credit for qualifying contributions paid by the previously qualified new Mexico contractor or resident contractor.

G. "New York state business enterprise" means a business enterprise, including a 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. For purposes of construction services, a New York state business enterprise, including sole proprietorship, partnership or corporation, that has its principal place of business in New York state.

[1.4.3.7 NMAC - Rp, 1 NMAC 5.4.7 NMAC, 11-15-01]

1.4.3.8 APPLICATION OF PREFERENCES:

A. Bids from nonresident contractors and resident contractors. When bids are received only from nonresident contractors and resident contractors and the lowest responsible bid is from a nonresident contractor, the contract shall be awarded to the resident contractor whose bid is nearest to the bid price of the otherwise low nonresident contractor if the bid price of the resident contractor is made lower than the bid price of the nonresident contractor when multiplied by a factor of 0.95. Any contract executed in violation of this subSection shall be void and of no effect.

B. Resident business and resident manufacturer preferences inapplicable. The resident contractor preference is the only bidding preference that applies to the awarding of public works construction contracts. The resident business preference and the resident manufacturer preference shall not be considered in the awarding of such contracts under any circumstances.

[1.4.3.8 NMAC - Rp, 1 NMAC 5.4.8, 11-15-01]

1.4.3.9 PREQUALIFICATION:

A. Prequalification required. No contractor shall be treated as a resident contractor in the awarding of public works by a state agency or local public body unless the contractor has prequalified as a resident contractor by making application to the state purchasing agent and receiving from him a certification number.

B. Procedure. The prequalification procedure shall be as follows:

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

(2) a prospective resident contractor shall complete the application form and submit it to the state purchasing agent prior to the submission of a bid on which the contractor 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 contractor. 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 treatment as a resident contractor under Section 1.4.3.8 of this rule.

[1.4.3.9 NMAC - Rp, 1 NMAC 5.4.9, 11-15-01]

1.4.3.10 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 contractor. 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 contractor 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 contractor.

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 contractor.

(1) a revocation shall be effective immediately and shall apply to all subsequent contract awards. A revocation shall not affect any previously-awarded contracts, through, 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 contractor. If the holder fails to provide any requested information or proof, his certification number may be revoked.

[1.4.3.10 NMAC - Rp, 1 NMAC 5.4.10, 11-15-01]

1.4.3.11 PROTESTS:

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

B. Resident businesses and resident contractors. If a protest presents the issue of whether the holder of a certification number is actually a resident contractor, the central purchasing office responsible for the procurement shall refer the issue to the state purchasing agent for resolution in accordance with Procurement Code Rule 1.4.1 NMAC or succeeding rules.

C. If a protest governed by SubSection B of this Section presents additional issues, the central purchasing office responsible for the procurement shall remain responsible for resolution of the additional issues.

[1.4.3.11 NMAC - Rp, 1 NMAC 5.4.11, 11-15-01]

History of 1.4.3 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as GSD Rule 89-604, Resident Contractor Preference, filed 08-18-89 was replaced in its entirety by 1 NMAC 5.4, Resident Contractor Preference, filed 01-02-98.

History of Repealed Material: 1 NMAC 5.4, Resident Contractor Preference, filed 01-02-98 repealed effective 11-15-01.