

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 81 RETIREE HEALTH CARE FUNDS**  
**PART 4 CONTRACTS**

**2.81.4.1 ISSUING AGENCY:** NM Retiree Health Care Authority ("NMRHCA")  
[6/15/98; 2.81.4.1 NMAC - Rn, 2 NMAC 81.4.1, 1-1-2010]

**2.81.4.2 SCOPE:** This rule applies to all vendors or potential vendors of professional services or insurance services, the NMRHCA, its board, staff and consultants.  
[6/15/98; 2.81.4.2 NMAC - Rn, 2 NMAC 81.4.2, 1-1-2010]

**2.81.4.3 STATUTORY AUTHORITY:** This rule is promulgated pursuant to the Retiree Health Care Act, the New Mexico Retiree Health Care Act (the "Act"), Sections 10-7C-1 et seq. NMSA 1978.  
[6/15/98; 2.81.4.3 NMAC - Rn, 2 NMAC 81.4.3, 1-1-2010]

**2.81.4.4 DURATION:** Permanent.  
[6/15/98; 2.81.4.4 NMAC - Rn, 2 NMAC 81.4.4, 1-1-2010]

**2.81.4.5 EFFECTIVE DATE:** June 15, 1998 unless a later date is cited at the end of a section.  
[6/15/98; 2.81.4.5 NMAC - Rn & A, 2 NMAC 81.4.5, 1-1-2010]

**2.81.4.6 OBJECTIVE:** The objective of this rule is to establish requirements for procurement of professional services, consulting and insurance services, and tangible personal property for the authority. The objective is to set out policies whereby maximum competition is stimulated for provision of these services to the NMRHCA.  
[6/15/98; 2.81.4.6 NMAC - Rn & A, 2 NMAC 81.4.6, 1-1-2010]

**2.81.4.7 DEFINITIONS:**

**A. "Retiree health care authority"** or "NMRHCA" means the retiree health care authority established by Chapter 6 Laws of New Mexico, 1990 (Sections 10-7C-1 et seq. NMSA 1978).

**B. "Board"** means, the board of directors of the NMRHCA.

**C. "Group health insurance"** means coverage which includes but is not limited to: life insurance, accidental death and dismemberment, medical care and treatment, dental care, eye care and other coverages as determined to be necessary by the NMRHCA.

**D. "Professional services"** means the services of third party administrators, insurance consultants, banks, underwriters, brokers, agents, architects, archaeologists, artists, entertainers, auditors, engineers, clergymen, land surveyors, landscape architects, medical arts practitioners, scientists, managements and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, photographers, pilots, researchers, teachers, writers, interpreters and persons or businesses providing similar services.

**E. "Contract"** means any agreement for the procurement of professional services entered into by the NMRHCA.

**F. "Sole source"** means that there is only one source for a required professional service which is the object of a contract or amendment.

**G. "Best source"** means that a source for a required professional service is for a reason or combination of reasons significantly less costly, or better qualified, or more capable, or more advantageously situated or otherwise more suitable than any other source to provide the professional service which is the object of an amendment to a contract.

**H. "Emergency"** is when there exists a threat to public health, welfare, safety or property requiring procurement under emergency conditions. An emergency condition is a situation which creates a threat to public health, welfare or safety such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. Any emergency procurement shall be made with competition as is practicable under the circumstances. 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:

- (1) the functioning of government;

- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

**I. "Services"** means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. "Services" includes the furnishing of insurance but does not include construction or the services of employees of a state agency or a local public body.

**J. "Tangible personal property"** means tangible property other than real property having a physical existence, including but not limited to supplies, equipment, materials and printed materials.  
[6/15/98; 2.81.4.7 NMAC - Rn & A, 2 NMAC 81.4.7, 1-1-2010]

**2.81.4.8** [RESERVED]  
[6/15/98; 2.81.4.8 NMAC - Rn & Repealed, 2 NMAC 81.4.8, 1-1-2010]

**2.81.4.9 APPLICABILITY OF RULE:**

**A.** Every contract shall be approved by the board only after its general legal counsel has reviewed for and affirmed as in compliance with appropriate provisions of the procurement code and these rules.

**B.** All amendments to contracts shall be subject to review and approval as to form only by the board's general legal counsel as provided in these rules.  
[6/15/98; 2.81.4.9 NMAC - Rn, 2 NMAC 81.4.9, 1-1-2010]

**2.81.4.10 CONTRACTS - FORM:**

**A.** Contracts shall be in a form and contain such provisions as may be required by the board.

**B.** Each contract shall comply with the Conflict of Interest Act, particularly Sections 10-16-7, 10-16-8, 10-16-9 and 10-16-12 NMSA 1978 and when the disclosure required by Section 10-16-12 NMSA 1978 is necessary, that disclosure shall be filed with the secretary of state.  
[6/15/98; 2.81.4.10 NMAC - Rn, 2 NMAC 81.4.10, 1-1-2010]

**2.81.4.11 CONTRACTS - PROCEDURES:**

**A.** All prospective contractors shall submit to the board a signed completed original of a contract reviewed and approved by the board general legal counsel. The contract form shall be submitted to and approved by the board prior to initiating any action with prospective contractors for contractual services and prior to beginning performance of any services pursuant to the contract.

**B.** There shall be no liability whatsoever by the NMRHCA, and there shall be no services rendered unless those services have commenced after approval of a contract for services by the board.

**C.** Proposals shall be evaluated based on the requirements set forth in the invitation for proposals, which requirements shall include criteria for evaluating proposals such as experience, both quantitative and qualitative, prior provision of similar services, client references, price and any other considerations the NMRHCA deems relevant. No criteria may be used in proposal evaluations that are not set forth in the invitation for proposals. With regard to professional services contracts the NMRHCA may provide that price is a factor but that a contract need not be awarded to the vendor proposing the lowest price. The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the NMRHCA, taking into consideration the evaluation factors set forth in the request for proposals.

**D.** Contracts for professional services shall be solicited, negotiated and awarded through a competitive sealed proposal process in accordance with Sections 13-1-111 to 13-1-117 NMSA 1978, of the Procurement Code. Sole source purchases may be solicited, negotiated and awarded in accordance with Sections 13-1-126 NMSA 1978, of the Procurement Code. Sole source purchases may be solicited, negotiated and awarded in accordance with Section 13-1-126 NMSA 1978, of the Procurement Code, and 2.81.4.13 NMAC. Emergency purchases may be solicited, negotiated in accordance with Section 13-1-127 and 13-1-128 NMSA 1978, of the Procurement Code, and 2.81.4.16 NMAC.

[6/15/98; 2.81.4.11 NMAC - Rn, 2 NMAC 81.4.11, 1-1-2010]

**2.81.4.12** [RESERVED]  
[6/15/98; 2.81.4.12 NMAC - Rn & Repealed, 2 NMAC 81.4.12, 1-1-2010]

**2.81.4.13 SOLE SOURCE PROCUREMENT:**

**A.** Subject to the limitations of Subsections B and C of this section, a contract may be awarded without competitive sealed proposals regardless of the estimated cost when the board makes a written determination, after conducting a good-faith review of available sources, that there is only one source for the required professional service, in accordance with Section 13-1-126 NMSA 1978, of the Procurement Code. The written determination shall include a detailed, sufficient explanation of the reasons why the qualifications or unique capabilities of the proposed vendor require a sole source contract with the vendor.

**B.** A copy of the written determination shall be kept on file pursuant to 2.81.4.16 NMAC.

**C.** The board or its designee shall conduct negotiations as to price and terms in order to obtain the price most advantageous to the NMRHCA.

[6/15/98; 2.81.4.13 NMAC - Rn & A, 2 NMAC 81.4.13, 1-1-2010]

#### **2.81.4.14 MULTI-TERM CONTRACTS; SPECIFIED PERIOD:**

**A.** A multi-term contract for services (including the furnishing of insurance) except for professional services, in an amount under twenty-five thousand dollars \$25,000.00, or more if authorized under Section 13-1-150 NMSA 1978, may be entered into for any period of time deemed to be in the best interests of the NMRHCA, not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting.

**B.** If the amount of the contract is twenty-five thousand dollars (\$25,000.00) or more, a multi-term contract for services (including the furnishing of insurance) shall not exceed eight years including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

**C.** A contract for professional services (not including the furnishing of insurance) may not exceed a term of four years including all extensions and renewals, except that a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement, and other similar services (excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities) may be for the life of the securities or as long as the securities remain outstanding.

[6/15/98; 2.81.4.14 NMAC - Rn & A, 2 NMAC 81.4.14, 1-1-2010]

#### **2.81.4.15 AMENDMENTS TO CONTRACTS:**

**A.** Amendments to contracts originally entered into pursuant to this rule, may be made pursuant to rules adopted by the secretary of DFA.

**B.** For amendments to contracts originally entered into as sole source procurement pursuant to 2.81.4.13 NMAC.

(1) A written determination which includes a detailed, sufficient explanation of the reason, qualifications or unique capabilities that make the vendor a sole source shall be required for all amendments which:

(a) significantly change the scope of work in the original contract; or

(b) when aggregated with any prior amendments, more than double the amount of the original contract.

(2) All other amendments, may be made pursuant to rules adopted by the secretary of DFA.

(3) Amendments which only extend the term of the original contract shall not require the determination provided for in Paragraphs (1) or (2) of Subsection B of this section.

**C.** For amendments to contracts originally entered into pursuant to a competitive proposal process, as provided for in Sections 13-1-111 through 13-1-117 of the Procurement Code, a written determination that includes a reasonable explanation of the reasons, qualifications or capabilities that make the vendor the best source for the contract services shall be required for all amendments, except for amendments which only extend the term of the contract.

**D.** For multi-term contracts, renewals shall be made pursuant to the terms of the contract, and amendments involving a change in the scope of services shall be made pursuant to the provisions of Subsections A, B or C of this section as appropriate.

**E.** No amendment to a professional services contract shall be approved which would renew or extend the term of a contract, including the original contract, beyond four years, except as allowed under Subsection C of 2.81.4.14 NMAC.

**F.** Contract amendments containing term periods with retroactive dates, or back-date contract amendments under which work has already begun, will not be approved by the board, except for good cause or in

extraordinary cases such as the imminent loss of available contractual funds. Requests for retroactive contract approval must be explained in detail in writing and be approved in writing by the executive director of the NMRHCA.

[6/15/98; 2.81.4.15 NMAC - Rn & A, 2 NMAC 81.4.15, 1-1-2010]

**2.81.4.16 EMERGENCY AND SOLE SOURCE PROCUREMENT; CONTENT AND RETENTION OF RECORD:**

Notwithstanding other provisions of this rule, an emergency purchase or sole source purchase of professional services may be made. A copy of records of any emergency procurement or sole source purchase of professional services, including the written determination of the basis for the emergency or sole source procurement which meets the requirements of Sections 13-1-128 NMSA 1978, and which cites the language in Sections 13-1-126 and 13-1-127 NMSA 1978, which is being relied on by the board as justification for the emergency or sole source purchase, shall be retained for a minimum of three years.

[6/15/98; 2.81.4.16 NMAC - Rn, 2 NMAC 81.4.16, 1-1-2010]

**2.81.4.17 RIGHT TO PROTEST:** Any offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the executive director of the NMRHCA. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrence giving rise to the protest.

[6/15/98; 2.81.4.17 NMAC - Rn, 2 NMAC 81.4.17, 1-1-2010]

**2.81.4.18 FILING OF PROTEST:**

- A.** Protests must be in writing and addressed to the executive director of the NMRHCA.
- B.** 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 NMRHCA.
- C.** No formal pleading is required to initiate a protest, but protests should be concise, logically arranged, and direct.
- D.** Protests shall be submitted within fifteen (15) 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.

[6/15/98; 2.81.4.18 NMAC - Rn, 2 NMAC 81.4.18, 1-1-2010]

**2.81.4.19 PROCUREMENT AFTER PROTEST:**

**A.** In the event of a timely protest, as defined in 2.81.4.17 NMAC and 2.81.4.18 NMAC, the executive director shall not proceed further with the procurement unless the executive director makes a written determination that the award of the contract is necessary to protect substantial interest of the authority. Such written determination should set forth the basis for the determination.

**B.** As used herein 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.

**C.** In no circumstance will a procurement be halted after a contract has been awarded merely because a protest has been filed.

[6/15/98; 2.81.4.19 NMAC - Rn, 2 NMAC 81.4.19, 1-1-2010]

**2.81.4.20 PROCEDURE:**

**A.** Upon the filing of a timely protest, the executive director shall give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders and 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 executive director or the board. 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. Intervenor shall accept the

status of the proceeding at the time of their intervention; in particular, they must abide by all prior rulings and accept all previously established time schedules.

**C.** The executive director and all employees and the general legal counsel of the NMRHCA are not parties to the proceedings.

[6/15/98; 2.81.4.20 NMAC - Rn & A, 2 NMAC 81.4.20, 1-1-2010]

**2.81.4.21 AUTHORITY TO RESOLVE PROTEST:** The executive director may take any action reasonably necessary to resolve a protest. Such actions include, but are not limited to, the following:

**A.** issue a final written determination summarily dismissing the protest;  
**B.** obtain information from the staff of the state purchasing agent or state central purchasing office and from the NMRHCA staff;

**C.** require parties to produce for examination information or witnesses under their control;

**D.** require parties to express their positions on any issue in the proceeding;

**E.** require parties to submit legal briefs on any issues in the proceeding;

**F.** establish procedural schedules;

**G.** regulate the course of the proceedings and the conduct of any participants;

**H.** receive, rule on, exclude or limit evidence;

**I.** take official notice of any fact that is among the traditional matters of official or administrative notice;

**J.** conduct hearings; and

**K.** take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses.

[6/15/98; 2.81.4.21 NMAC - Rn, 2 NMAC 81.4.21, 1-1-2010]

**2.81.4.22 DISCOVERY:** Upon written request of any party, or upon its own motion, the executive director or board may require parties to comply with discovery requests.

[6/15/98; 2.81.4.22 NMAC - Rn, 2 NMAC 81.4.22, 1-1-2010]

**2.81.4.23 HEARINGS:**

**A.** Hearings are disfavored and will be held only when the executive director or board determine that substantial material factual issues are present that cannot be resolved satisfactorily through an examination or written document 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 executive director or board has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the executive director or board required to adhere to formal rules of evidence or procedure.

[6/15/98; 2.81.4.23 NMAC - Rn, 2 NMAC 81.4.23, 1-1-2010]

**2.81.4.24 RESOLUTION:**

**A.** The executive director shall promptly (the goal is thirty (30) days after receipt of all information or the date of any hearing, whichever is later) 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 Section 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.

[6/15/98; 2.81.4.24 NMAC - Rn, 2 NMAC 81.4.24, 1-1-2010]

**2.81.4.25 RELIEF:**

**A.** If, prior to award, the executive director 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.** If, after an award, the executive director makes a 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:

(1) 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 NMRHCA; or

(2) 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.

C. If, after an award, the executive director or the board make 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.

D. Except as provided in Paragraph (2) of Subsection B of this section, the executive director of the board shall not award money damages or attorneys' fees.

[6/15/98; 2.81.4.25 NMAC - Rn & A, 2 NMAC 81.4.25, 1-1-2010]

#### **2.81.4.26 MOTION FOR RECONSIDERATION:**

A. A motion for reconsideration of a written determination issued pursuant to 2.81.4.24 NMAC may be filed by any party 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 ten (10) days after receipt of the written determination.

C. **Response to motion:** The executive director or the board shall promptly (the goal is ten (10) days after receipt of the motion) 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.

[6/15/98; 2.81.4.26 NMAC - Rn, 2 NMAC 81.4.26, 1-1-2010]

#### **2.81.4.27 DESIGNEE:**

A. At any point during a protest proceeding the executive director of the board may appoint a designee, to preside over the proceeding. The designee will have all of the powers described in this Rule except the power to issue a written determination under 2.81.4.24 NMAC. The designee only has authority to recommend a resolution to the executive director or the board under that section.

B. Any person other than the procurement officer directly involved in the procurement or any person having made a proposal in response to the RFP may serve as a designee to preside over the proceeding.

C. A designee shall present a recommended written resolution to the executive director or the board and mail a copy to each of the parties. No party may appeal from the recommended resolution of the designee.

D. The executive director or the board 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 2.81.4.24 NMAC. Any party may file a motion for reconsideration of the written determination pursuant to 2.81.4.26 NMAC.

[6/15/98; 2.81.4.27 NMAC - Rn, 2 NMAC 81.4.27, 1-1-2010]

#### **2.81.4.28 FINAL DETERMINATION:**

A. In those proceedings in which no motion for reconsideration is filed, the written determination issued pursuant to 2.81.4.24 NMAC shall be the final determination for purposes of the time limits for seeking judicial review under Section 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 2.81.4.24 NMAC shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

[6/15/98; 2.81.4.28 NMAC - Rn, 2 NMAC 81.4.28, 1-1-2010]

#### **2.81.4.29 COPIES OF COMMUNICATIONS:**

A. 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 executive director or the board.

B. No party shall submit to the executive director or the board, ex parte, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.

[6/15/98; 2.81.4.29 NMAC - Rn, 2 NMAC 81.4.29, 1-1-2010]

#### **2.81.4.30 CONTRACTS - AUDITS:**

**A.** The NMRHCA has the primary responsibility for contract compliance monitoring. The board or its consultant if any, shall audit contracts on a random basis to determine:

- (1) if the tasks called for in the scope of services have been performed;
- (2) if the contract was completed in time and within budget;
- (3) if the services were performed to the satisfaction of the NMRHCA.

**B.** For purposes of compliance with this provision, every contract shall require the contractor to maintain detailed time records which indicate the date, time and nature of services rendered.

[6/15/98; 2.81.4.30 NMAC - Rn, 2 NMAC 81.4.30, 1-1-2010]

**2.81.4.31 VOUCHER APPROVAL - PROFESSIONAL SERVICES:**

**A.** No voucher for payment of professional services will be approved by the board or its third party administrators, other than a payroll voucher or travel voucher, unless the contract and any amendments to the contract has been approved were required by these rules. All vouchers must contain the contract identification number.

**B.** The board or its third party administrators shall not approve any voucher for the payment of professional services unless the voucher certifies that the services have been rendered.

[6/15/98; 2.81.4.31 NMAC - Rn, 2 NMAC 81.4.31, 1-1-2010]

**HISTORY OF 2.81.4 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the state records center and archives under:

RHCA Rule 90-4, Contracts for Purchase of Professional Services, filed 7-10-90.

**History of Repealed Material:** [RESERVED]

**Other History:**

RHCA Rule 90-4, Contracts for Purchase of Professional Services (filed 7-10-90) was renumbered, reformatted and replaced by 2 NMAC 81.4, Contracts for Purchase of Professional Services, effective 6-15-98.

2 NMAC 81.4, Contracts for Purchase of Professional Services (filed 6-02-98) was renumbered, reformatted, amended and replaced by 2.81.4 NMAC, Contracts, effective 1-1-2010.