

This is an amendment to 2.81.4 NMAC, Sections 5, 6, 7, 8, 12, 13, 14, 15, 20, 25 and the part name has also been amended, effective 1-1-2010. 2 NMAC 81.4 has also been renumbered and reformatted to 2.81.4 NMAC, in conformance with current NMAC requirements, effective 1-1-2010.

PART 4 CONTRACTS [~~FOR PURCHASE OF PROFESSIONAL SERVICES~~]

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 [~~ATTORNEY GENERAL REVIEW: All professional services contracts in excess of two hundred thousand dollars shall be subject to approval by the attorney general.~~] [RESERVED]

[6/15/98; 2.81.4.8 NMAC - Rn & Repealed, 2 NMAC 81.4.8, 1-1-2010]

2.81.4.12 [SMALL PURCHASES:

~~A.~~ The board shall procure services, construction or items of tangible personal property having a value not exceeding \$5,000 in accordance with applicable small purchase regulations adopted by the secretary of the department of finance and administration (DFA).

~~B.~~ Notwithstanding the requirements of Subsection 12.1 [now Subsection A of 2.81.4.12 NMAC] of this section, the board may procure professional services having a value not exceeding \$20,000 excluding applicable state and local gross receipts taxes, in accordance with professional services procurement regulations promulgated by the secretary of the DFA.

~~C.~~ Notwithstanding the requirements of Subsection 12.1 [now Subsection A of 2.81.4.12 NMAC] of this section, the board may procure services, construction or items of tangible personal property having a value not exceeding \$10,000 in accordance with regulations promulgated by the secretary of the DFA.

~~D.~~ Notwithstanding the requirements of Subsection 12.1 [now Subsection A of 2.81.4.12 NMAC] of this section, the board may procure services, construction or items of tangible personal property having a value not exceeding \$500 by issuing a direct purchase order to a contractor based upon the best obtainable price.

~~E.~~ Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.] [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 [~~Subsections 13.2 and 13.3~~] 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 [~~Section 16 of this rule~~]
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 [~~(\$24,000.00)~~] \$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 [~~professions~~] 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 ~~[Section 13 of this rule]~~ 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 ~~[15.2.1 or 15.2.2 above.]~~ 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 ~~[15.1, 15.2 or 15.3 or this section]~~ 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]

2.81.4.20 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 ~~[Section 20.1]~~ 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]

2.81.4.25 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 [~~Section 25.2.2 above~~] 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]