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SENATE BILL 330

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Phil A. Griego

FOR THE LEGISLATIVE FINANCE COMMITTEE

AN ACT

**RELATING TO GOVERNMENT CONTRACTING; ENACTING THE PERFORMANCE
CONTRACTING ACT; PROVIDING FOR CONTRACT MANAGEMENT AND
ACCOUNTABILITY.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. SHORT TITLE.--This act may be cited as the
"Performance Contracting Act".**

**Section 2. DEFINITIONS.--As used in the Performance
Contracting Act:**

**A. "department" means the department of finance and
administration;**

**B. "performance contract" means a contract for
professional services that focuses on the outputs, quality and
outcomes of service provision and that ties at least a portion
of the contractor's payment as well as any contract extension**

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1 or renewal to the achievement of those goals; and

2 C. "professional services" means the services of
3 architects, archaeologists, engineers, surveyors, landscape
4 architects, medical arts practitioners, scientists, management
5 and systems analysts, certified public accountants, registered
6 public accountants, lawyers, psychologists, planners,
7 information technology experts, researchers, construction
8 managers and other persons or businesses providing similar
9 professional services.

10 Section 3. DETERMINATION OF CONTRACT NEED. --

11 A. Prior to making the decision to contract for
12 professional services, an agency shall perform a cost-benefit
13 analysis that includes an objective evaluation of state and
14 private resources. The cost-benefit analysis shall assess the
15 need to contract, considering whether the agency has the
16 necessary skills and expertise to deliver the service; whether
17 the agency can provide the service at a competitive price; and
18 whether there are deadline requirements that the agency may not
19 be able to meet. The agency shall proceed with the contracting
20 process only if the results of the analysis show that the
21 benefits of the contract are likely to exceed the costs.

22 B. The agency's administrative services division,
23 general counsel and secretary, or their equivalent personnel in
24 noncabinet state agencies, shall substantively review the
25 decision to contract, the request for proposal process, final

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1 contract negotiations and contract form and legal sufficiency.

2 C. Before entering into a contract for professional
3 services, an agency shall certify to the department that the
4 agency has complied with the provisions of Subsections A and B
5 of this section. The cost-benefit analysis shall remain on
6 file with the contracting agency.

7 Section 4. PERFORMANCE CONTRACTING REQUIRED--
8 SPECIFICATIONS--TERMS AND CONDITIONS--DOCUMENTATION.--

9 A. Unless exempted by the provisions of the
10 Performance Contracting Act, pursuant to the schedule developed
11 by the department, every contract for professional services
12 entered into by an agency shall be a performance contract.

13 B. The following elements shall be included in a
14 performance contract:

15 (1) performance measures to be used by the
16 agency to evaluate the services provided to the agency and the
17 outcomes resulting from those services;

18 (2) an accountability section that requires
19 the contractor to report regularly on how performance levels
20 are meeting the performance measures and that allows the agency
21 to withhold payment until successful completion of all or part
22 of a contract; and

23 (3) monitoring requirements that outline the
24 agency's evaluation of the contractor's performance, including
25 progress reports, activity data, site visits, inspections or

1 outcomes.

2 C. The agency shall use department guidelines or
3 similar guidelines to identify and develop an effective system
4 for contract management, including:

5 (1) documentation to support the contract
6 solicitation and selection process;

7 (2) policies and procedures to ensure that
8 contractors do not provide services until a fully executed and
9 approved contract is in place;

10 (3) cost-effective methods to track contracts;

11 and

12 (4) filing of contracts and related
13 documentation.

14 D. If review is required by rule of the department
15 or the general services department pursuant to Section 13-1-118
16 NMSA 1978, the contracting agency shall submit the contract for
17 review no less than thirty days prior to the effective date.

18 Section 5. DEPARTMENT--ADDITIONAL DUTIES.--The department
19 shall:

20 A. assist agencies in performance contract
21 development and management, including providing training
22 courses;

23 B. develop policies and procedures for performance
24 accountability in contract management;

25 C. prepare guidelines for agencies to conduct and

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1 document a meaningful cost-benefit analysis. The guidelines
2 shall provide for different types of cost-benefit analyses
3 depending on the types of the professional services contracts
4 and the dollar amounts involved;

5 D. prepare guidelines for agencies on performance
6 contract specifications, terms and conditions that include
7 performance measures, accountability clauses, monitoring
8 provisions and auditing;

9 E. actively participate in the development of major
10 requests for proposals and performance contract awards of
11 agencies for competitive procurement over twenty thousand
12 dollars (\$20,000); and

13 F. selectively monitor contract procedures and
14 projects in agencies.

15 Section 6. APPLICABILITY. --

16 A. Except as provided in this section, and pursuant
17 to the schedule developed by the department, the Performance
18 Contracting Act applies to any department, institution, board,
19 bureau, commission, district or committee of the state and
20 every contract for professional services entered into by any of
21 the above; provided that the provisions do not apply to a
22 contract for professional services:

23 (1) for litigation expenses in connection with
24 proceedings before administrative agencies or state or federal
25 courts, including experts, mediators, court reporters, process

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1 servers and witness fees, but not including attorney contracts;

2 (2) for hospital- and health-care-related
3 service exempt from the provisions of the Procurement Code
4 pursuant to Section 13-1-98.1 NMSA 1978;

5 (3) in response to an emergency procurement
6 under Section 13-1-127 NMSA 1978; or

7 (4) exempted by rule of the department or
8 order of the secretary of finance and administration, but only
9 to the extent specified in the rule or order.

10 B. The department shall develop a state agency
11 schedule so that all agencies subject to the Performance
12 Contracting Act pursuant to Subsection A of this section,
13 including the legislative and judicial branches of government
14 and institutions of higher education, are implementing the
15 provisions of that act by the end of fiscal year 2009.

16 C. The Performance Contracting Act applies to
17 contracts entered into by agencies of the legislative branch of
18 state government, the judicial branch of state government and
19 public post-secondary educational institutions, but such
20 agencies and institutions:

21 (1) may develop their own policies, procedures
22 and guidelines similar to those required of the department in
23 Section 5 of the Performance Contracting Act;

24 (2) may provide for exemptions similar to
25 those allowed pursuant to Subsection A of this section; and

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1 (3) are not required to report or make
2 submissions to the department.

3 D. No provision of the Performance Contracting Act
4 shall be applied to any situation, decision, proposed contract
5 or contract if the application of that provision to the
6 situation, decision, proposed contract or contract would
7 directly or indirectly impair a legally protected right.

8 Section 7. EFFECTIVE DATE. --The effective date of the
9 provisions of this act is July 1, 2006.

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