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HOUSE BILL 128

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Luciano "Lucky" Varela

AN ACT

RELATING TO PROCUREMENT; EXEMPTING FROM THE PROCUREMENT CODE
PROCUREMENTS OTHERWISE EXEMPTED UNDER OTHER LAW; REQUIRING
ADDITIONAL PROCEDURES FOR SOLE SOURCE AND EMERGENCY
PROCUREMENT; RESTRICTING WHO MAY MAKE EMERGENCY PROCUREMENTS;
EXPANDING WHO MAY PROTEST A PROCUREMENT AWARD; INCREASING
PENALTIES FOR VIOLATING THE PROCUREMENT CODE.

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

SECTION 1. Section 13-1-98 NMSA 1978 (being Laws 1984,
Chapter 65, Section 71, as amended) is amended to read:

"13-1-98. EXEMPTIONS FROM THE PROCUREMENT CODE.--The
provisions of the Procurement Code shall not apply to:

A. procurement of items of tangible personal
property or services by a state agency or a local public body
from a state agency, a local public body or external

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1 procurement unit except as otherwise provided in Sections
2 13-1-135 through 13-1-137 NMSA 1978;

3 B. procurement of tangible personal property or
4 services for the governor's mansion and grounds;

5 C. printing and duplicating contracts involving
6 materials that are required to be filed in connection with
7 proceedings before administrative agencies or state or federal
8 courts;

9 D. purchases of publicly provided or publicly
10 regulated gas, electricity, water, sewer and refuse collection
11 services;

12 E. purchases of books and periodicals from the
13 publishers or copyright holders thereof;

14 F. travel or shipping by common carrier or by
15 private conveyance or to meals and lodging;

16 G. purchase of livestock at auction rings or to the
17 procurement of animals to be used for research and
18 experimentation or exhibit;

19 H. contracts with businesses for public school
20 transportation services;

21 I. procurement of tangible personal property or
22 services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978,
23 by the corrections industries division of the corrections
24 department pursuant to rules adopted by the corrections
25 industries commission, which shall be reviewed by the

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1 purchasing division of the general services department prior to
2 adoption;

3 J. minor purchases not exceeding five thousand
4 dollars (\$5,000) consisting of magazine subscriptions,
5 conference registration fees and other similar purchases where
6 prepayments are required;

7 K. municipalities having adopted home rule charters
8 and having enacted their own purchasing ordinances;

9 L. the issuance, sale and delivery of public
10 securities pursuant to the applicable authorizing statute, with
11 the exception of bond attorneys and general financial
12 consultants;

13 M. contracts entered into by a local public body
14 with a private independent contractor for the operation, or
15 provision and operation, of a jail pursuant to Sections
16 33-3-26 and 33-3-27 NMSA 1978;

17 N. contracts for maintenance of grounds and
18 facilities at highway rest stops and other employment
19 opportunities, excluding those intended for the direct care and
20 support of persons with handicaps, entered into by state
21 agencies with private, nonprofit, independent contractors who
22 provide services to persons with handicaps;

23 O. contracts and expenditures for services or items
24 of tangible personal property to be paid or compensated by
25 money or other property transferred to New Mexico law

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1 enforcement agencies by the United States department of justice
2 drug enforcement administration;

3 P. contracts for retirement and other benefits
4 pursuant to Sections 22-11-47 through 22-11-52 NMSA 1978;

5 Q. contracts with professional entertainers;

6 R. contracts and expenditures for litigation
7 expenses in connection with proceedings before administrative
8 agencies or state or federal courts, including experts,
9 mediators, court reporters, process servers and witness fees,
10 but not including attorney contracts;

11 S. contracts for service relating to the design,
12 engineering, financing, construction and acquisition of public
13 improvements undertaken in improvement districts pursuant to
14 Subsection L of Section 3-33-14.1 NMSA 1978 and in county
15 improvement districts pursuant to Subsection L of Section
16 4-55A-12.1 NMSA 1978;

17 T. works of art for museums or for display in
18 public buildings or places;

19 U. contracts entered into by a local public body
20 with a person, firm, organization, corporation or association
21 or a state educational institution named in Article 12, Section
22 11 of the constitution of New Mexico for the operation and
23 maintenance of a hospital pursuant to Chapter 3, Article 44
24 NMSA 1978, lease or operation of a county hospital pursuant to
25 the Hospital Funding Act or operation and maintenance of a

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1 hospital pursuant to the Special Hospital District Act;

2 V. purchases of advertising in all media, including
3 radio, television, print and electronic;

4 W. purchases of promotional goods intended for
5 resale by the tourism department;

6 X. procurement of printing services for materials
7 produced and intended for resale by the cultural affairs
8 department;

9 Y. procurement by or through the public education
10 department from the federal department of education relating to
11 parent training and information centers designed to increase
12 parent participation, projects and initiatives designed to
13 improve outcomes for students with disabilities and other
14 projects and initiatives relating to the administration of
15 improvement strategy programs pursuant to the federal
16 Individuals with Disabilities Education Act; provided that the
17 exemption applies only to procurement of services not to exceed
18 two hundred thousand dollars (\$200,000);

19 Z. procurement of services from community
20 rehabilitation programs or qualified individuals pursuant to
21 the State Use Act;

22 AA. purchases of products or services for eligible
23 persons with disabilities pursuant to the federal
24 Rehabilitation Act of 1973;

25 BB. procurement, by either the department of health

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1 or Grant county or both, of tangible personal property,
2 services or construction that are exempt from the Procurement
3 Code pursuant to Section 9-7-6.5 NMSA 1978;

4 CC. contracts for investment advisory services,
5 investment management services or other investment-related
6 services entered into by the educational retirement board, the
7 state investment officer or the retirement board created
8 pursuant to the Public Employees Retirement Act;

9 DD. the purchase for resale by the state fair
10 commission of feed and other items necessary for the upkeep of
11 livestock; ~~and~~

12 EE. contracts entered into by the crime victims
13 reparation commission to distribute federal grants to assist
14 victims of crime, including grants from the federal Victims of
15 Crime Act of 1984 and the federal Violence Against Women Act;
16 and

17 FF. procurements exempt from the Procurement Code
18 as otherwise provided by law."

19 SECTION 2. Section 13-1-126 NMSA 1978 (being Laws 1984,
20 Chapter 65, Section 99, as amended) is amended to read:

21 "13-1-126. SOLE SOURCE PROCUREMENT.--

22 A. A contract may be awarded without competitive
23 sealed bids or competitive sealed proposals regardless of the
24 estimated cost when the state purchasing agent or a central
25 purchasing office ~~[makes a determination, after conducting a~~

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1 ~~good-faith review of available sources and consulting the using~~
2 ~~agency]~~ determines in writing that:

3 (1) there is only one source for the required
4 service, construction or item of tangible personal property;

5 (2) the service, construction or item of
6 tangible personal property is unique and this uniqueness is
7 substantially related to the intended purpose of the contract;
8 and

9 (3) other similar services, construction or
10 items of tangible personal property cannot meet the intended
11 purpose of the contract.

12 B. The state purchasing agent or a central
13 purchasing office shall use due diligence in determining the
14 basis for the sole source procurement, including reviewing
15 available sources and consulting the using agency, and shall
16 include its written determination in the procurement file.

17 C. The state purchasing agent or a central
18 purchasing office shall conduct negotiations, as appropriate,
19 as to price, delivery and quantity in order to obtain the price
20 most advantageous to the state agency or a local public body.

21 D. A contract for the purchase of research
22 consultant services by institutions of higher learning
23 constitutes a sole source procurement.

24 E. The state purchasing agent or a central
25 purchasing office shall not circumvent this section by narrowly

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1 drafting specifications so that only one predetermined source
2 would satisfy those specifications."

3 SECTION 3. Section 13-1-127 NMSA 1978 (being Laws 1984,
4 Chapter 65, Section 100, as amended) is amended to read:

5 "13-1-127. EMERGENCY PROCUREMENTS.--

6 A. The state purchasing agent or a central
7 purchasing office [~~or a designee of either~~] may make [~~or~~
8 ~~authorize others to make~~] emergency procurements when there
9 exists a threat to public health, welfare, safety or property
10 requiring procurement under emergency conditions; provided that
11 emergency procurements shall be made with competition as is
12 practicable under the circumstances. [~~A written determination~~
13 ~~of the basis for the emergency procurement and for the~~
14 ~~selection of the particular contractor or vendor shall be~~
15 ~~included in the procurement file. Emergency procurements shall~~
16 ~~not include the purchase or lease purchase of heavy road~~
17 ~~equipment.~~]

18 B. An emergency condition is a situation [~~which~~]
19 that creates a threat to public health, welfare or safety such
20 as may arise by reason of floods, fires, epidemics, riots, acts
21 of terrorism, equipment failures or similar events and includes
22 the planning and preparing for an emergency response. The
23 existence of the emergency condition creates an immediate and
24 serious need for services, construction or items of tangible
25 personal property that cannot be met through normal procurement

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1 methods and the lack of which would seriously threaten:

2 (1) the functioning of government;

3 (2) the preservation or protection of

4 property; or

5 (3) the health or safety of any person.

6 C. Emergency procurements shall not include the
7 purchase or lease purchase of heavy road equipment.

8 D. The state purchasing agent or a central
9 purchasing office shall use due diligence in determining the
10 basis for the emergency procurement and for the selection of
11 the particular contractor. The determination shall be in
12 writing and included in the procurement file.

13 [~~G.~~] E. Money expended for planning and preparing
14 for an emergency response shall be accounted for and reported
15 to the legislative finance committee and the department of
16 finance and administration within sixty days after the end of
17 each fiscal year."

18 SECTION 4. Section 13-1-128 NMSA 1978 (being Laws 1984,
19 Chapter 65, Section 101, as amended) is amended to read:

20 "13-1-128. SOLE SOURCE AND EMERGENCY PROCUREMENTS--
21 PUBLICATION OF AWARD TO AGENCY WEB SITE AND CONTRACT DATABASE--
22 CONTENT AND SUBMISSION OF RECORD.--

23 A. Prior to award of a sole source procurement
24 contract, the state purchasing agent shall:

25 (1) post the information described in

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1 Subsection E of this section on the state agency web site and
2 in the contract database pursuant to Section 13-1-97.1 NMSA
3 1978; and

4 (2) forward the same information to the
5 legislative finance committee.

6 B. Prior to the award of a sole source procurement
7 contract, the local public body central purchasing office shall
8 post the information described in Subsection E of this section
9 on the local public body web site, if one exists.

10 C. Within seventy-two hours of awarding an
11 emergency procurement contract, the state purchasing agent
12 shall:

13 (1) post the information described in
14 Subsection E of this section on the state agency web site and
15 in the contract database pursuant to Section 13-1-97.1 NMSA
16 1978; and

17 (2) forward the same information to the
18 legislative finance committee.

19 D. Within seventy-two hours of awarding an
20 emergency procurement contract, the local public body central
21 purchasing office shall post the information described in
22 Subsection E of this section on the local public body web site,
23 if one exists.

24 E. All central purchasing offices shall maintain,
25 for a minimum of three years, records of sole source and

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1 emergency procurements. The record of each such procurement
2 shall be public record and shall contain:

- 3 ~~[A.]~~ (1) the contractor's name and address;
- 4 ~~[B.]~~ (2) the amount and term of the contract;
- 5 ~~[C.]~~ (3) a listing of the services,
6 construction or items of tangible personal property procured
7 under the contract; ~~[and]~~

8 (4) whether the contract was a sole source or
9 emergency procurement; and

10 ~~[D.]~~ (5) the justification for the procurement
11 method."

12 SECTION 5. Section 13-1-172 NMSA 1978 (being Laws 1984,
13 Chapter 65, Section 145, as amended) is amended to read:

14 "13-1-172. RIGHT TO PROTEST.--Any bidder or offeror who
15 is aggrieved in connection with a solicitation or award of a
16 contract, or anyone aggrieved in connection with the award of a
17 sole source or emergency procurement contract, may protest to
18 the state purchasing agent or a central purchasing office. The
19 protest shall be submitted in writing within fifteen calendar
20 days after knowledge of the facts or occurrences giving rise to
21 the protest."

22 SECTION 6. Section 13-1-199 NMSA 1978 (being Laws 1984,
23 Chapter 65, Section 172) is amended to read:

24 "13-1-199. ~~[MISDEMEANOR]~~ PENALTIES.--Any business or
25 person ~~[which]~~ that violates the Procurement Code is guilty of:

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