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Transparency Report
State and Local Information Technology Contracting

Information Technology Industry Leads in Percentage of Out-of-State Contracts

Drawing on data that the Office of the State Auditor (OSA) collected in the Fiscal Year 2015 (FY15) audit process, this Transparency Report examines government procurement in the information technology industry (IT). Large IT contracts are of particular importance because the IT industry had the highest proportion of reported out-of-state contracting of any industry in FY15. More specifically, state and local governments reported contracts for large purchases of IT goods and services totaling about $48 million dollars statewide in FY15, of which over $40 million was done out of state. In other words, out of every dollar reported in large contracts for government IT goods and services, 84 cents went to a contract with a company that is not located in New Mexico.

While some goods and services can only be purchased from an out-of-state vendor, contracts being awarded outside of New Mexico could also be used in our State to help create and nurture a homegrown industry. Such an endeavor takes time and resources, but government contracting for IT goods and services is one of the few sources of demand that may support a burgeoning industry. Beyond serving the needs of New Mexico governmental agencies, our state could become the hub to which purchasers in other states turn to for their IT needs. This Transparency Report includes the following highlights:

- IT contracting represents "low hanging fruit" when it comes to creating economic drivers for New Mexico. Research indicates that for every $1 spent at an out-of-state business we lose 25 cents that would have stayed in the local economy if we had spent it locally.
- The large IT contracts leaving New Mexico were predominantly (65%) for the purposes of procuring enterprise management software and related goods and services.
- Over half (52%) of the large contracts with businesses outside of New Mexico for IT goods and services were awarded through non-competitive "sole source" purchases rather than public bidding, which accounted for over $20 million dollars of reported state and local governmental IT contracts in FY15.
- Over half (52%, and over $20 million in FY15) of the reported contracts awarded to businesses outside of New Mexico for IT goods and services go to Missouri, Illinois, California, Texas and Arkansas.
- Local businesses that won large contracts for general IT services, hardware, standard office software, web design, and enterprise management software can serve as the foundation upon which to expand the IT sector within New Mexico.
- Best practices include deliberate and transparent tracking of in-state purchases at the agency level, establishing goals for in-state purchases, working with local vendors to build capacity, and identifying institutional barriers to in-state vendor registration.

New Mexico Procurement Code
in a nutshell

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Local governments and state agencies enter into contracts to purchase a wide variety of goods and services each year and must ensure that each dollar is awarded fairly and transparently in accordance with the New Mexico Procurement Code. The Procurement Code (New Mexico Statutes Annotated Sections 13-1-28 to -199, and related regulations) governs the purchases of goods and services made in New Mexico. The Code also contains exceptions and exemptions, providing for different or less onerous compliance obligations. The attached "New Mexico Procurement Overview" explains these issues in more depth.

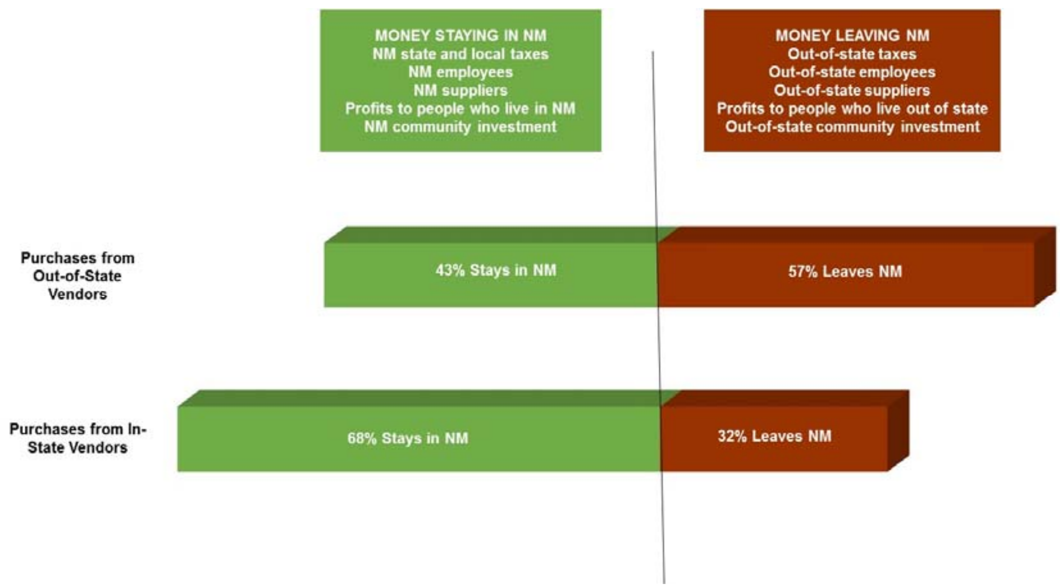
"Financial reporting plays a major role in fulfilling government's duty to be publicly accountable in a democratic society." – Governmental Accounting Standards Board, Concept Statement No. 1.

Analysis

State and local government agencies play a vital role in building our state's economy. When governments contract with New Mexico businesses, money flows directly into the local economy, helping to build tax revenue, creating jobs, and further strengthening the New Mexico economy. When those dollars leave New Mexico, the local economy may receive fewer or none of those benefits. In addition, intangible benefits may arise from a vendor being personally invested in the community it is serving.

As the diagram below shows, not every dollar from an in-state purchase stays in New Mexico, and not every dollar from an out-of-state purchase leaves New Mexico. Instead, most businesses will spend the money they receive both in and out of state. However, research indicates that for every $100 spent at a local business approximately $68 stays in the community; in contrast only $43 stays in the community from an out-of-state purchase.

Economic Impact of Out-of-State Contracting (Top) vs. In-State Contracting (Bottom)



Through the procurement process, state and local government agencies use public money to purchase goods and services ranging from paper clips for the office, to repairs for leaky pipes, to the construction of new buildings. The "New Mexico Procurement Overview" appears at the end of this Report, and discusses the processes that government agencies use to buy goods and services.

In order to better understand in-state procurement, the OSA required all audited agencies to report all contracts entered into during FY15 over $60,000, regardless of how they were procured. The initial compiled data covers over $2 billion dollars in awarded contracts and over 3,000 reported procurements. More details on methodology appear later in this Report.

Overview of Large Contracts for IT Goods and Services

State and local governments reported contracts for a total of about $48 million dollars in IT goods and services, of which over $40 million were awarded to out-of-state vendors. In other words, 84 cents of every dollar contracted for government IT goods and services went to a company that is not located in New Mexico. At the agency level, the OSA found that in many cases, 100 percent of an agency's contracts for IT goods and services were awarded to businesses outside of New Mexico. For example, one of the state's biggest purchasers and economic driver institutions, the University of New Mexico Hospital and its behavioral health affiliate, reported spending all of its large-contract IT dollars (100%) outside of New Mexico for hospital and medical IT products and services.

Types of IT Services Leaving the State

Agencies reported large IT contract awards for a range of goods and services in FY15, including, but not limited to, hardware like computers and monitors, enterprise management software used to conduct agency business, web design, troubleshooting, repairs, and maintenance. A majority of these contracts (60%) were for enterprise management software. Enterprise management software products are designed to integrate various functions within the same agency, and often come with their own licensing, upgrades, troubleshooting and servicing needs. Thus, once an agency purchases such software, it is far more likely to require further goods and services that only the same vendor can provide. Once this type of contract is awarded to an out-of-state vendor, the volume of out-of-state business as a whole is likely to increase by more than just that one contract's dollar value.

Large IT Contracts Going Out of State, by Type of Goods or Services, FY15

Type of IT Goods, Services or Professional Services	Total Value of Awarded IT Contracts	Total Value of Contracts Awarded to Out-of-State Vendors	% of Value of Contracts Awarded to Out-of-State Vendors
Enterprise Management Software	$29,889,259	$27,737,936	93%
Hardware	$5,381,106	$5,276,460	98%
IT Services	$4,168,890	$779,687	19%
Standard Office Software	$2,507,606	$508,871	20%
Higher Education Software	$2,098,007	$2,098,007	100%
Medical Software	$2,790,112	$2,790,112	100%
Web Design	$411,870	$321,870	78%
Digital Signage	$279,804	$279,804	100%
Construction Mgmt. Software	$219,870	$219,870	100%
Accounting Software	$108,135	$108,135	100%
Surveillance Software and Hardware	$76,826	$76,826	100%
Workforce Mgmt. Software	$73,133	$73,133	100%
Education Data Mgmt. Software	$55,200	$55,200	100%
Nanosatellite Technology	$43,195	$43,195	100%
Total	**$48,103,013**	**$40,369,106**	**84%**

Types of Procurement Resulting in Out-of-State Contracts

In FY15, 52% of the reported large contracts awarded outside of New Mexico for IT goods and services were procured through non-competitive "sole source" purchases, which accounted for over $23 million dollars of large New Mexico IT contracts awarded in FY15. This means that for nearly half of the total value of large IT contracts, state and local governments selected out-of-state businesses based on the premise that only *one source* could meet the requirements of the agency for that purchase. Sole sourcing also means that there is little public notice, or public engagement on the contract. If the determination is made without 100% accuracy, it is possible potential local providers never even knew about the opportunity.

The OSA did not require agencies to disclose contracts of less than $60,000, which fall within the small purchase exception. This suggests that there may be a significant number of small IT contracts awarded to in-state vendors that were not in the OSA data set. It also suggests that New Mexico may have small vendors who could be fostered to grow into larger companies that could meet more of the government's IT needs.

Large IT Contracts Awarded in FY15, by Type of Procurement

Type of Procurement	Total Value of Awarded Large IT Contracts	Total Value of Large IT Contracts to Out-of-State Vendors	% of Large IT Contracts to Out-of-State Vendors
Sole Source: A purchase for which there is only one source that meets the requirements; the service or good is unique; and other similar services or goods cannot meet the intended purpose of the contract.	$23,798,241	$20,813,196	87%
Competitive: Contracts that went through a full competitive procurement through an invitation to bid or request for proposals.	$19,854,280	$16,370,427	82%
Exempt: Contracts that were not subject to the Procurement Code because of the nature of the transaction or the agency.	$1,408,579	$450,196	32%
Emergency: Contracts arising from an immediate and serious need for services or goods that cannot be met through normal procurement methods and the lack of which would seriously threaten: the functioning of government; the preservation of protection of property; or the health or safety of any person.	$936,330	$936,330	100%
Statewide Pricing Agreement*: Contracts that result from the General Services Department's State Purchasing Division's competitive procurements on behalf of the State.	$724,572	$507,946	70%
Cooperative: This Report uses this as a broad term for multiple-agency procurements, including cooperative procurements, intergovernmental agreements, or procurements by one agency on behalf of other agencies.	$1,151,010	$1,061,010	92%
Federal Contract: Pursuant to Section 13-1-135, agencies may also purchase a good or service using the terms of a federal contract if the contract is submitted to and approved by the General Services Department.	$230,000	$230,000	100%
Grand Total	**$48,103,012**	**$40,369,105**	**84%**

* These types of procurements were not required to be reported, but some agencies volunteered this data. This data is incomplete because most agencies reported only what was required. Contracts procured under the exception for small purchases (under $60,000) were also not required to be reported.

Recipients of Out-of-State Contracts

About half of the value of large IT contracts awarded to firms outside of New Mexico in FY15 went to five states: Missouri, Illinois, California, Texas, and Arkansas. Over $20 million of contracts for IT goods and services were awarded to businesses in these five states alone.

Some examples of these large out-of-state contracts illustrate the areas in which New Mexico might target growth of its own IT sector. Missouri is home to the Cerner Corporation, a producer of medical software and IT products, which received over $6 million in contracts from University of New Mexico Hospital and its affiliates. The Cerner Corporation also received an economic incentive “megadeal” from the state of Missouri, valued at $1.6 billion. Texas is home to two vendors, Phoenix Business, Incorporated and Tyler Technologies, Incorporated, which each received enterprise management software contracts for over $1 million, from Bernalillo County and Cooperative Educational Services, respectively. Lastly, Aztec Municipal Schools, Carlsbad Municipal Schools, and Cibola General Hospitals awarded a total of about $3 million dollars in contracts to an Illinois-based company called CDW-G, a large multi-brand technology products and service provider. This also illustrates how government demand for IT goods and services could support a flourishing homegrown industry to which purchasers from other states may eventually turn for their IT purchasing needs. To the extent that a service or good is not available from a New Mexico vendor, the question becomes whether there is adequate demand for that good or service to encourage a local vendor to build capacity.

Large IT Contract Dollars Going Out of State, by State, FY15

State	Value of IT Contracts Awarded
Missouri	$6,221,470
Illinois	$4,283,073
California	$4,215,468
Texas	$4,000,660
Arkansas	$2,136,694
Georgia	$2,061,081
Arizona	$1,997,476
Kansas	$1,849,675
Pennsylvania	$1,405,182
Florida	$1,325,224
Other States	$10,873,102

The Role of Purchasing Agreements

The State created a number of mechanisms to leverage the purchasing power of the State. The idea behind these initiatives is that because of the cumulative size of its purchases, the State as a whole can negotiate a better deal than individual agencies. The Save Smart program and the statewide price agreement are based on this concept.

Similarly, New Mexico is a participant in the ValuePoint program of the National Association of State Procurement Officials (NASPO), an interstate purchasing cooperative formerly known as WSCA. Participating states propose a type of good or service needed and become the “lead state” on the competitive procurement process. Other states in the cooperative are charged with advertising the Request for Proposals locally, and may participate in the review and selection process. Once a vendor or vendors are selected, states can elect to participate in the established contract. Vendors can bid to provide the services to all or any combination of the states participating in the ValuePoint program. This enables smaller vendors to bid on ValuePoint opportunities, even if they are not able to service all participating states.

The ValuePoint website indicates that New Mexico is a participant in at least 27 IT-related contracts, all of which are with out-of-state companies. Twenty-five (93%) of these contracts are for “computer equipment, peripherals, and related services,” meaning hardware and services required for that hardware. Of those twenty-five, 28% went to businesses in California. The OSA is seeking to obtain data on the value of purchases made pursuant to these contracts and to determine what steps were taken to ensure that New Mexico vendors knew about these opportunities to bid.

Are Out-of-State Firms Providing Superior Services?

In addition to the non-availability of New Mexico vendors, agencies cite the superiority of out-of-state vendors to justify out-of-state procurement. Measuring the relative effectiveness of in-state and out-of-state IT contractors was outside of the scope of this Report. However, agencies have received audit findings and experienced other high-profile problems related to several large out-of-state IT contracts in the past few years:

- uFACTS. In 2013, the Department of Workforce Solutions (DWS) launched a “new, fully-integrated Unemployment Insurance system” called uFACTS, which was intended to provide “improved integrity, reporting capabilities and maintenance.” The Department of Workforce Solutions FY15 audit included Finding 2014-002, a material weakness in unemployment insurance financial reporting and accounting arising from uFACTS. The finding stated: “Due to inaccurate automated system entries posted to the UI fund and the lack of an account reconciliation process, adjustments to accounts receivable totaled approximately $12M and adjustments to other liabilities totaled approximately $21M.” Furthermore, “[t]he Department has not established the necessary reports or queries from the system to report timely financial information required to prepare the Department's financial statements.” Problems with uFACTS were also cited in Finding 2015-001, a significant deficiency in federal grant reporting. Deloitte, the vendor of uFACTS, is headquartered in New Jersey and has offices worldwide, including a Santa Fe office with approximately 100 local employees. The New Mexico Sunshine Portal lists $46,172,817 in payments from DWS to Deloitte since 2010, largely to help replace or repair existing IT systems.

- SHARE. The Statewide Human Resource Accounting and Management Reporting System (SHARE) consolidated accounting, payroll and human resource systems within state government. At inception in 2004, 12 state agencies contributed toward the system, with the Department of Finance and Administration (DFA), the General Services Department (GSD), the Department of Information Technology (DoIT) and the State Personnel Office (SPO) leading the project. The problems with SHARE have been well documented. Issues with cash reconciliation forced the State to keep a $100 million reserve on the books while the State spent millions more investigating the problem. It is difficult to determine the exact amount that has been spent on SHARE. A 2008 Legislative Finance Committee (LFC) report documented $28 million in payments to multiple companies. The lead vendor at inception was Maximus, Inc., a publicly traded company headquartered in Virginia, which had been paid $22.8 million as of the 2008 LFC report. Peoplesoft, which is now a division of Oracle and is headquartered in California, had received $3.3 million. ACRO, a Missouri corporation, had received about $600,000. Deloitte has received millions of dollars in consulting services to address problems with the system. The New Mexico Sunshine Portal lists $2.2 million of DoIT payments to Deloitte for services related to SHARE since 2013.

- ASPEN. The Human Services Division (HSD) contracted with Cognosante, LLC, of Virginia for the Automated System Program and Eligibility Network (ASPEN). ASPEN determines eligibility, benefit delivery and case management in support of public assistance programs. In the FY15 HSD audit, ASPEN was discussed in Finding 15-001, a significant deficiency in how HSD applied the appropriate level of sanctions in child support cases, and Findings 15-002 and 15-003, significant deficiencies with respect to Temporary Aid to Needy Families eligibility and payments. In FY16, concerns about employee falsification of records in connection with emergency applications for the Supplemental Nutritional Aid Program led to a discussion of widespread shortcomings in ASPEN. The New Mexico Sunshine Portal lists $3,315,398 in payments from HSD to Cognosante since 2010.

Best Practices in Government Contracting for IT Goods and Services

Large IT contracts that are currently being awarded out of New Mexico could be used to help create and nurture a homegrown industry. Government contracting for IT goods and services is one of the few sources of demand that may be adequate to support a burgeoning industry. The following best practices aim to achieve a better proportion of in-state contracting for large IT projects:

- The data that OSA collected revealed that many state and local governmental agencies are not keeping track of whether their purchases are with in-state or out-of-state vendors. Tracking in-state purchases is a necessary first step.

- After understanding the dynamics that currently exist, agencies can improve in-state purchasing by establishing institution-wide local purchasing goals. This can also involve active outreach with local vendors. Agency goals may also translate into adding in-state benefits to procurement scoring criteria.

- By recognizing the patterns behind out-of-state spending, like the need for enterprise management system vendors, higher education institutions can work with local vendors to build their capacity.

- Centralizing local purchasing efforts has been successful in a number of localities. For example, cities like San Diego and Phoenix have established local small business enterprise programs, with which they work to solicit heavily from local vendors, sometimes directing a minimum percentage of contracts to local vendors. Similarly, the city of Cleveland opted to move local procurement to the forefront of its governmental goals by assigning local contracting its own department within the mayor's administration.

- The data that OSA collected suggests that the in-state vendor preference is under-utilized. The Taxation and Revenue Department should contact local businesses to understand any institutional barriers to taking advantage of this program.

- While leveraging the purchase power of the state is essential, it is also essential that local firms are aware of and have an opportunity to compete for statewide and ValuePoint contracting opportunities.

- Non-competitive procurement methods result in local businesses not even getting an opportunity to try for many government contracts. Ensuring that sole source and emergency procurements are used only when truly necessary would benefit local businesses trying to enter the government contracting market.

Learn More

For more information on the studies and programs involving local purchasing, go to:

Business Alliance for Local Living Economies, BALLE: https://bealocalist.org/leveraging-anchor-institution-purchasing-benefit-communities

Institute for Local Self-Reliance: https://ilsr.org/procurement-more-than-a-policy-change/

The Democracy Collaborative: http://democracycollaborative.org/

To learn more about economic incentive "megadeals," visit the Good Jobs First Subsidy Tracker: http://www.goodjobsfirst.org/subsidy-tracker

To learn more about procurement, read the Legislative Finance Committee's 2016 Report: https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Obtaining%20Value%20in%20State%20Procurement%20and%20Issues%20with%20Non-Competitive%20Methods.pdf

Methodology

Through the Audit Rule, NMAC 2.2.2.1 et seq., the Office of the State Auditor required all audited agencies to self-report all contracts with a value that exceeded $60,000 entered into during the FY15, regardless of how they were procured. This included contracts awarded in FY15 even if nothing was spent under those contracts. Conversely, the data does not include any expenditures made in FY15 made under contracts awarded in previous years. Specifically, all audited agencies were required to prepare a Schedule of Vendor Information for purchases exceeding $60,000 (excluding gross receipts tax) that included the following information:

- Type of Procurement
- Name and address of all vendors that responded to requests for bids or requests for proposals during the fiscal year
- Whether the vendor was an in-state vendor for purposes of the in-state vendor preference
- If the vendor was in-state, whether they chose the veterans' preference instead of the in-state preference
- A short description of the scope of work
- The name of the vendor that was awarded the contract
- The dollar amount of the resulting contract

The initial compiled data covers over $2 billion dollars in awarded contracts and over 3,000 procurements.

This is a one-year snapshot of just a portion of the contracts awarded by New Mexico state and local governments, as the data covers only those self-reported contracts for over $60,000 in one fiscal year (FY15). Therefore, any contracts entered into for IT goods and services, including professional services, totaling less than $60,000 were not required to be disclosed. The same data will be collected again for FY16, allowing for analysis of government contracting with year-over-year comparisons.

Self-reported data should always be interpreted with caution, as such data can be prone to subjectivity and under- or over-reporting on the part of those reporting it. The data that was submitted in the schedule of vendors was unaudited, and was often incomplete, unclear, or inaccurate. The OSA used its best efforts to obtain clarifications on data that was clearly incorrect. The OSA also modified the instructions and template used to collect contract data for FY16 to avoid similar shortcomings in the future.

The Audit Rule required agencies to identify whether vendors were eligible for the resident business preference, pursuant to Section 13-1-22, NMSA 1978. However, the OSA did not consider the answer to this question to be dispositive of whether the vendor was an in-state business because the data identified many businesses that were clearly in New Mexico but had not used the resident business preference. This Report describes vendors as in-state or out-of-state based on the primary address of the vendor, as the agency provided that address information to the OSA.

This Report refers to the IT industry and IT contract types. The OSA internally classified all contracts into a number of industry sectors, of which information technology was one. The OSA also internally classified all IT contracts within a number of major categories like enterprise management software and web design, relying on the scope of work descriptions that agencies provided.

As mentioned, based on other procurement studies that have been conducted in New Mexico, the OSA believes that agencies may have inadequately reported procurements made under exceptions to or exemptions from the Procurement Code. The OSA used its best efforts to obtain such information where possible and account for any gaps in the data in its analysis.

New Mexico is also a participant in the ValuePoint program of the National Association of State Procurement Officials (NASPO), a regional interstate cooperative purchasing program that facilitates public procurement solicitations and agreements among its participants. No agencies, including the General Services Department, identified any ValuePoint contracts in their data. This is another potential source of underreporting.

When agencies provided information on goods and services purchased through multiple agency procurements, the OSA had no way of determining whether the initial procurement was conducted through competitive or non-competitive means.

The data used in this study is available at the OSA website:
http://www.saonm.org/government_accountability_office

Procurement in New Mexico
An Overview

Overview of Public Purchasing before the New Mexico Procurement Code (1887 – 1984)

As early as 1887, Territorial New Mexico enacted statutes relating to public procurement at the county level. Section 4-47-1 NMSA 1978, now repealed, applied to any board of county commissioners. When contracting for public works paid out of county funds exceeding $300, the statute required a county to advertise the work for at least 20 days in a newspaper in the county where the work was to be done, to post notices in a least 10 conspicuous places for bids for the work, and to "let" (i.e., award) the contract to the "lowest responsible bidder." The winning bidder was required to post bonds for double the amount of the work for the "faithful" performance of the contract.[1]

Specific state statutes governed procurement for individual public works projects at the State level, such as for the State Capitol, the Territorial Penitentiary of New Mexico in Santa Fe and the New Mexico Insane Asylum in Las Vegas. For example, the state statute governing the building of the Territorial Penitentiary contained a residential business purchasing provision.[2]

In 1939, the New Mexico Legislature enacted a broader public purchases statute applicable to public "purchasers," including all New Mexico school boards, all boards of county commissioners, all State departments except the State Highway Department, bureaus and boards, all municipalities, and all boards of State institutions.[3] It included a 5% resident preference for the purchase of goods and required three bona fide written bids for the purchase of materials or labor or both if the expenditure involved more than $200 but less than $500. It also prohibited the purchaser from having a financial interest, directly or indirectly, in the vendor.

The Public Purchases Act ("PPA"), enacted in 1967, applied to state agencies and local public bodies.[4] It repealed the untitled 1939 procurement law.[5] Its competitive bid process applied only to the procurement of "materials and services;" but exempted contracts for "technical and professional services," which a rule or regulation of the "central purchasing agent" would define.[6] The PPA introduced terms that carried over into the subsequent New Mexico Procurement Code such as "central purchasing office," "state purchasing agent," "responsible bid" and "responsible bidder." The non-executive branches of government (judicial, legislative, state educational institutions, the State Fair and the Inter-Tribal Indian Ceremonial Association) were excluded from the requirement of purchasing through the state purchasing agent. It also clarified the concept of "emergency purchases" and continued the five percent (5%) resident supplier preference.

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[1] See Laws of 1887, Chapter 8, Section 3, as amended; repealed by Laws of 1984, Chapter 65, Section 175 when the New Mexico Procurement Code was enacted.
[2] See Laws of 1889, Chapter 76, Section 31; repealed by Laws of 1967, Chapter 250, Section 20 when the Public Purchases Act was enacted.
[3] See Laws of 1939, Chapter 233, Sections 1-8; compiled at Section 6-5-1 through 6-5-11, 6-7-1 through 6-7-7, 6-7-9 through 6-7-14 and 42-1-12 through 42-1-15 NMSA 1953.
[4] See Laws of 1967, Chapter 250, Sections 1-20; repealed by Laws of 1984, Chapter 65, Section 174 when the New Mexico Procurement Code became law; compiled at Section 6-5-17, et seq., NMSA 1953
[5] See Laws of 1967, Chapter 250, Section 20.
[6] See Laws of 1967, Chapter 250, Section 18.B.

Overview of Public Purchasing under the New Mexico Procurement Code (1984 – Present)

In 1984, the New Mexico Legislature enacted the current New Mexico Procurement Code ("Code"), Sections 13-1-28, et seq., NMSA 1978.[7] It applies to all contracts solicited or entered into by state agencies and local public bodies after November 1, 1984.[8] The purposes of the Code "are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity."[9] The New Mexico Supreme Court has stated that the Code "protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts."[10]

The American Bar Association's ("ABA") Sections of Public Contract Law and State and Local Government Law jointly developed the ABA Model Procurement Code ("MPC"), adopted by the ABA House of Delegates in 1979. The MPC aimed to help standardize state procurement statutes by creating transparent, competitive and reliable processes by which billions of dollars in public funds are expended through contracts with private sector businesses. It is a model code as distinguished from a uniform code developed by the National Conference of Commissioners on Uniform State Laws. Between 1997 and 2000, the MPC was studied further with recommended revisions and updates reflected in the 2000 MPC.[11]

In 1984, New Mexico became the eleventh state to adopt the 1979 MPC following Kentucky, Arkansas, Louisiana, Utah, Maryland, South Carolina, Colorado, Indiana, Virginia and Montana.[12] New Mexico's Code is a distillation of the final draft of the 1979 MPC and provisions of previous New Mexico procurement statutes.[13]

The Code covers the purchases of goods, which are those tangible items of personal property required for agency operations, such as pens, paper, computers, and office equipment and furniture.[14] The Code also covers the purchase of "services," such as those for construction or transportation, means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product with certain exceptions.[15] Unlike previous versions of New Mexico procurement law, the Code also covers the purchase of "professional services" that are typically performed by a person or similar business holding a professional license, such as engineering, architecture, or legal services.[16]

The Code requires formal solicitations of sealed bids or proposals for procurements expected to be greater than $60,000 (or $50,000 for agencies under the New Mexico Department of Finance and Administration ("DFA") oversight), excluding applicable state and local gross receipts tax. In contrast, procurements less than $60,000 are handled by the individual agency in need and are based on three valid quotes for values over $20,000 and not exceeding $60,000, or from the vendor offering the best price at or below $20,000. When a state agency needs a good or service, it issues a formal solicitation, to which vendors/bidders/offerors will respond. In the case of invitations to bid, contracts are awarded to the "lowest responsible bidder."[17] Requests for proposals, in contrast, are administered through a longer, more complex process involving weighted evaluation factors in addition to cost, and professional services contracts are

[7] Laws 1984, Chapter 65.
[8] See Laws 1984, Chapter 65, Section 176.
[9] Section 13-1-29.C. NMSA 1978.
[10] *Planning and Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P. 2d 628 (S. Ct. 1994).
[11] The 2000 Model Procurement Code for State and Local Governments, American Bar Association, 2000.
[12] Second Supplement Annotations to the Model Procurement Code, American Bar Association, 1990.
[13] See Laws 1984, Chapter 65, Section 175.
[14] See Section 13-1-93, NMSA 1978.
[15] See Section 13-1-87, NMSA 1978.
[16] See Section 13-1-76, NMSA 1978.
[17] See Section 13-1-108, NMSA 1978.

ultimately awarded based on the best value of what is "most advantageous" to the procuring agency.[18] While the competitive process takes considerable time and effort, its eventual aim is achieving best value through increased competition, leading to more value added and increased efficiency in governmental public purchasing. The Code's exemptions and exclusions, described in more detail below, allow non-competitive procurements.

The object of the procurement and the cost of the procurement affect not only how procurement is conducted but also who is responsible for the oversight, review, and approval of such purchases. For example, before a state agency enters a contract, DFA determines whether it is a contract for professional services. If it is a contract for professional services, the DFA Contracts Review Bureau reviews and approves it. If it is a contract for goods or non-professional services, the New Mexico General Service Department's State Purchasing Division ("SPD") oversees the purchase.[19]

The legislative and judicial branches of government, state educational institutions and local governments are *not* required to seek approval from these state agencies; instead, their chief procurement officers are responsible for oversight, review and approval of contracts.[20]

Despite this basic structure, the rules and regulations regarding public purchase of goods, services and professional services are not centralized or standardized in New Mexico. Exemptions to the Code result in all purchases of certain agencies and entities, or all of certain types of purchases, being completely excluded from Code regulation. Exceptions to the Code may also provide for different or less onerous compliance obligations and oversight. There are many exemptions from and exceptions to the Code, but the three elements of compliance they affect are: (1) following the Code; (2) being subject to SPD oversight; and (3) requiring the competitive sealed or proposal process to make the desired purchase.

Sole Source Procurement (NMSA 1978, § 13-1-126, 126.1 and 128)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	Yes	No

The Code defines a sole source procurement as a purchase wherein "(1) there is only one source for the required service, construction or item of tangible personal property; (2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and (3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract." Such contracts may be awarded without competitive bids or proposals regardless of the estimated cost when SPD and/or DFA determines in writing that these criteria are met.

Emergency Procurement (NMSA 1978, § 13-1-127 and 128)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	Yes	No

The state purchasing agent may make emergency procurements under certain conditions, defined as situations that create "a threat to public health, welfare or safety such as may arise by reason of floods, fires, epidemics, riots, acts of terrorism, equipment failures or similar events and includes the planning and preparing for an emergency response." The statute further states, "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 of protection of property; or (3) the health or safety of any

[18] See Section 13-1-117, NMSA 1978.
[19] See Section 13-1-117, NMSA 1978.
[20] See Section 13-1-95.2, NMSA 1978.

person." As is the case with sole source contracts, emergency procurements must be recorded in writing by the state purchasing agent.

Small Purchases (NMSA 1978, § 13-1-125)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	No	No

Purchases of professional services less than $60,000 (or $50,000 if the Agency is subject to DFA oversight) and purchases of goods for less than $5,000 are exempt from the competitive bidding process.

Statewide Price Agreements

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	Yes	For initial procurement only

SPD competitively procures certain goods and services on behalf of the State through the negotiation of statewide price agreements. State agencies are then required to purchase these goods or services from vendors with statewide price agreements, unless they provide a justification to exclude themselves from such purchases.

Cooperative Procurement (NMSA 1978, § 13-1-135, et seq.)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	Maybe	Maybe

Formally, this term refers to two or more agencies participating in, sponsoring or administering an agreement for procurement. This OSA uses "cooperative procurement" as a broad term for multiple-agency procurements, including formal cooperative procurements, intergovernmental agreements under NMSA 1978, §13-1-98, or procurements performed by one agency on behalf of other agencies. While agencies may make purchases using the terms of a contract already entered into by another agency, a process referred to as "piggybacking," this practice was strongly discouraged in a 2013 memo issued by the General Services Department, which states that doing so "…would be to frustrate the purposes of the Procurement Code (fairness to vendors and transparency of purchasing)." Unless otherwise specified, OSA reports also include within cooperative procurement any purchases through agencies like Cooperative Educational Services. Cooperative Educational Services is a purchasing cooperative created by a joint powers agreement comprised of New Mexico's 89 school districts plus many other public education institutions, including charter schools, and two and four-year post-secondary institutions. This state agency solicits competitive bids and proposals on a state and national level and awards contracts on behalf of all the agencies that comprise the cooperative. Those schools and other education institutions then make purchases based on the contracts into which Cooperative Educational Services entered.

Federal Contracts (NMSA 1978, § 13-1-135)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
No	Yes	For initial procurement only

Agencies may purchase a good or service using the terms of a federal contract. The federal agency is called an "external procurement unit," whose contracts other agencies may participate in, but the contract must be submitted to and approved by SPD.

Exempt Agencies

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
No	No	No

Some agencies are entirely exempt from the requirements of the Code based on the statutes that govern the agency. These include:

- New Mexico Exposition Authority Act, NMSA 1978, § 6-25A-5.W
- University Research Park and Economic Development Act, NMSA 1978, § 21-28-7.A
- New Mexico Beef Council Act, NMSA 1978, § 77-2A-9
- Cumbres & Toltec Scenic Railroad Commission, NMSA 1978, § 16-5-6 NMSA 1978
- New Mexico Health Insurance Exchange Act, NMSA 1978, § 59A-23F-3.M

Exempt Purchases (NMSA 1978, § 13-1-98, 98.1 & 98.2)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
No	No	No

Statutory exemptions to the Code state that the provisions of the Code do not apply to a wide range of purchases, including:

- Purchases between a state agency or a local public body and another state agency, local public body or external procurement unit, except for cooperative procurements
- Purchases for the governor's mansion and grounds
- Travel or shipping by common carrier or by private conveyance or to meals and lodging
- Contracts with businesses for public school transportation services
- Purchases not exceeding ten thousand dollars ($10,000) consisting of magazine subscriptions, web-based or electronic subscriptions, conference registration fees and other similar purchases where prepayments are required
- Contracts entered into by a local public body with a private independent contractor for the operation, or provision and operation, of a jail pursuant to Sections 33-3-26 and -27 NMSA 1978
- Contracts and expenditures for services or items of tangible personal property to be paid or compensated by money or other property transferred to New Mexico law enforcement agencies by the United States department of justice drug enforcement administration
- Contracts for retirement and other benefits pursuant to Sections 22-11-47 through -52 NMSA 1978
- Contracts with professional entertainers
- Purchases of advertising in all media, including radio, television, print and electronic
- Purchases of promotional goods intended for resale by the tourism department
- Contracts for investment advisory services, investment management services or other investment-related services entered into by the educational retirement board, the state investment officer or the retirement board created pursuant to the Public Employees Retirement Act

Home Rule (NMSA 1978, § 13-1-98.K.)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
No	No	Depends on local ordinance

Eleven entities throughout the state are exempt from the Code as a result of “home rule,” a system of self-government allowed for by the State Constitution. These include Alamogordo, Albuquerque, Clovis, Gallup, Grants, Hobbs, Las Cruces, Las Vegas, Rio Rancho, Santa Fe, and Los Alamos (combined with Los Alamos County). In home rule jurisdictions, a local charter is established, transferring authority and responsibility of local government from the state legislature to the local community, unless otherwise forbidden by state law. Entities that operate under home rule have procurement rules and regulations that govern instead of state law and thus exempt those entities from the Code unless the local rules refer to the Code. For example, the City of Albuquerque conducts its public purchasing operations according to its Public Purchasing Ordinance (’74 Code, § 5-7-2) (Ord. 6- 1991; Am. Ord. 30-1998), which pursuant to Article I of the City Charter and Article X, section 6 of the New Mexico Constitution, “shall serve to exempt the city from all provisions of the New Mexico Procurement Code, as provided in Section 13-1-98K NMSA1978.”

Exclusion from Purchasing through Central Purchasing (NMSA 1978, § 13-1-99)

Subject to Procurement Code	SPD/DFA Oversight	Competitive Bid or Proposal
Yes	No	Maybe

A number of transactions and agencies are excluded from the requirement of procurement through the state purchasing agent but not from the requirements of the Code. These include:

- the procurement of professional services (which must be approved by DFA after the competitive sealed proposal process is undertaken by a state agency);
- small purchases having a value not exceeding one thousand five hundred dollars ($1,500);
- procurement of highway construction or reconstruction by the Department of Transportation;
- procurement by the judicial or legislative branches of state government;
- procurement by the boards of regents of state educational institutions;
- procurement by the State Fair commission of tangible personal property, services and construction under ten thousand dollars ($10,000);
- purchases from the instructional material fund;
- procurement by all local public bodies;
- procurement by the Public School Facilities Authority, regional education cooperatives or charter schools; and
- procurement by each state health care institution that provides direct patient care and that is, or a part of which is, Medicaid certified and participating in the New Mexico Medicaid program.

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