

# New Mexico Council for Purchasing from Persons with Disabilities

Adopted: July 13, 2016

## PROCEDURE for Determining and Responding to Significant Adverse Impact and Verification of Fair Market Price

The following procedure modifies and amends all prior procedures adopted by the New Mexico Council for Purchasing from Persons with Disabilities.

### I. PURPOSE

The purpose of this procedure is to facilitate the proper and efficient administration of the State Use Act. The purpose of the State Use Act is to “encourage and assist persons with disabilities to achieve maximum personal independence through useful and productive employment by ensuring an expanded and constant market for services delivered by persons with disabilities, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and entitlements.”

### II. SUITABILITY

The state agency or public body and the Central Nonprofit Agency are encouraged to work cooperatively to determine when there are State use eligible services that are suitable for provision by persons with disabilities. A service may not be considered to be State use eligible when there are external requirements that proscribe the use of a specific provider, when it is unsuitable for some other reason, or when there would be a significant adverse impact to a state agency or public body. When there is mutual agreement between the Central Nonprofit Agency and the state agency or public body that a particular service does not constitute a State use eligible service, the state agency or public body may proceed to have the service provided through the Procurement Code.

### III. SIGNIFICANT ADVERSE IMPACT

It is anticipated that most situations that would result in a determination of a significant adverse impact could be resolved by discussion between the Central Nonprofit Agency and the state agency or public body. In the event a state agency or public body believes an adverse impact situation may exist, discussions between the state agency or public body and the Central Nonprofit Agency are encouraged. However, despite sincere efforts to reach agreement, there may be times when there is no mutual agreement between the state agency or public body and the Central Nonprofit Agency as to the suitability of State use eligible services, or when seeking such agreement would be futile or needlessly time delaying. In such circumstances, it may be appropriate to seek a determination of significant adverse impact directly from the State purchasing Division. In such cases, the following procedure shall be used:

1. Significant Adverse impact may be established upon a showing of any one of the following:
  - a. Proceeding to contract under the State Use Act would result in a condition that would cause a violation of an applicable state or federal law, regulation, rule, or guidance.
  - b. Proceeding to contract under the State Use Act would result in a condition that would cause a breach of an applicable standard of care, would create an unacceptable level of risk or liability, or would result in a violation of an applicable code of conduct or rule of professional responsibility.
  - c. Proceeding to contract under the State Use Act would cause an agency or public body to cease working with a contractor with which it has had a prior business relationship, resulting in a material loss of subject matter expertise, specific skills, institutional memory, situational awareness, or long-term business continuity. The agency or public body may submit documentation of discussions or meetings with State Use Act members to the State Purchasing Division as a part of the written statement of the significant adverse impact.
  - d. Proceeding to contract under the State Use Act would cause an agency or public body to not be able to obtain the professional services of a contractor that possessed a unique and highly specialized ability in a technical, engineering, scientific, or legal field. The agency or public body may submit documentation of discussions or meetings with State Use Act members or the Central Nonprofit Agency to the State Purchasing Division as a part of the written statement of the significant adverse impact.
  - e. Proceeding to contract under the State Use Act would create a significant adverse impact due to an excessive cost to the agency or public body. Exclusive of the Central Nonprofit Agency fee, any cost that is more than 10 percent than what would be incurred should the agency or public body procure the services through the Procurement Code shall presumptively constitute substantial evidence of a significant adverse impact, such 10 percent hereby being verified as the Fair Market Price range. In the event of a determination of a significant adverse impact based on excessive cost, the report to the New Mexico Council for Purchasing from Persons with Disabilities shall include the initial determination of excessive cost, and a report of the final cost incurred by the agency or public body. The agency or public body may submit documentation of discussions or meetings with the Central Nonprofit agency or State Use Act members to the State Purchasing Division as a part of the written statement of the significant adverse impact. The agency or public body may also submit quotes for the same service obtained from businesses that are not State Use Act members.
  - f. Proceeding to contract under the State Use Act would create a significant adverse impact in the event of a natural, man-made, or other type of emergency or disaster, as defined and established pursuant to the New Mexico Procurement Code, that requires an agency or public body to take immediate action to preserve property or protect the health and safety of the public. In the event

of such an emergency, the State Purchasing Division may waive the procedures set forth herein, and immediately certify the agency or public body to proceed pursuant to the provisions of the procurement code that are applicable to such emergency or disaster situations.

g. Proceeding to contract under the State Use Act would create some other form of a significant adverse impact, provided that there is substantial evidence of an actual significant adverse impact upon an agency or public body.

2. An agency or public body that seeks to assert significant adverse impact may do so by submitting a written statement of the significant adverse impact to the State Purchasing Division for review. The written statement must include a description of the harm or damage that would arise if the contract proceeded through the State Use Act. The statement must include language that it is made under penalty of perjury pursuant to 28 U.S.C. Section 1746. The statement shall also be covered by NMSA 1978, Section 30-25-1, which makes such perjury a 4<sup>th</sup> degree felony.

3. The harm or damage that would arise as a result of the significant adverse impact must be actual, and must not be speculative, remote, or de minimis.

4. The State Purchasing Division shall review the statement of adverse impact and the CNA's scope of work and quote, and determine if there is a significant adverse impact. Should the State Purchasing Division conclude that there is substantial evidence of such a significant adverse impact, it shall issue a written determination of the adverse impact, notify the agency or public body, and notify the Central Nonprofit Agency.

5. In the case of a determination of significant adverse impact, the procurement shall proceed pursuant to the procurement code.

6. All determinations of significant adverse impact shall be reported to the New Mexico Council for Purchasing from Persons with Disabilities, which shall on a periodic basis review such determinations to ensure compliance with the State Use Act.

APPROVED BY THE NEW MEXICO COUNCIL FOR PURCHASING FROM PERSONS WITH DISABILITIES THIS 13TH DAY OF July, 2016.



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Larry Maxwell  
Chair