

New Mexico Council for Purchasing from Persons with Disabilities

Adopted: June 8, 2016, Revised June 26, 2024

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

The following procedure modifies and amends all prior adverse impact 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.” NMSA 1978, § 13-1C-2. This procedure is established pursuant to NMAC 2.40.5.10 F (2).

II. ADVERSE IMPACT COMMITTEE OF THE COUNCIL FOR PURCHASING FROM PERSONS WITH DISABILITIES

The Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities is established and shall be appointed by the Council Chairperson, which will be comprised of three (3) members, with at least one member being a member of the Executive Committee. Committee members are not required to be members of the Council for Purchasing from People with Disabilities pursuant to Council Bylaws Article IV

III. SUITABILITY

The state agency or local 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 pursuant to NMAC 2.40.5.8.

Pursuant to NMAC 2.40.5.10(F) NMAC, an individual contract may be considered to be non-State use eligible when:

1. There are external requirements that proscribe the use of a specific provider;
2. It is unsuitable for some other reason, or;
3. 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 local public body that a particular contract 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.

IV. 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 local public body. In the event a state agency or local public body believes an adverse impact situation may exist, discussions between the state agency or local 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 local 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 Council for Purchasing from Persons with Disabilities. 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 local 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 local public body may submit documentation of discussions or meetings with State Use Act members to the Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities 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 local 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 local public body may submit documentation of discussions or meetings with State Use Act members or the Central Nonprofit Agency to the Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities 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 local 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 local 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 providers to the Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities as a part of the written statement of the significant adverse impact.

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 local 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 Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities 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 local public body that seeks to assert significant adverse impact may do so by submitting a written statement of the significant adverse impact to the Adverse Impact Committee of the Council for Purchasing from Persons with Disabilities 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 is made under penalty of perjury pursuant to NMSA 1978, Section 30-25-1, which makes such perjury a 4th degree felony.

3. The Adverse Impact Committee will acknowledge to the agency or public body receipt of the assertion within seven (7) days. The Adverse Impact Committee will commence review of the statement(s) and other documentation from either the agency or local public body, or Central Nonprofit Agency to clarify the concerns presented. The Adverse Impact Committee will consider and review the assertion with due haste within the requirements of the review. The Adverse Impact Committee may request additional information for review at their discretion. In the case of asserted adverse impact due to excessive cost, the Adverse Impact Committee will accept documentation of such assertion for analysis in a format of their choice as further detailed below.

The agency or local public body may submit quotes for identical services obtained from businesses that are not State Use Act providers in the following manner:

- A. The assertion will be accompanied by the service provider's documentation of their qualifications and capacity to successfully complete the contract.
 - B. The scope of work must be identical.
 - C. The contract term of the work must be identical.
 - D. The agency or local public body is prohibited from engaging in a Request for Proposals before the resolution of the matter is fully resolved by the Council in its favor and notice has been given.
 - E. The agency or local public body may be allowed to present a non-binding quote from an alternative provider for comparative purposes in their assertion.
 - F. The alternative provider is prohibited from subcontracting a significant portion of the work to another provider.
 - G. The cost breakdown must include separately disclosed amounts in these categories:
 - a. Direct and Indirect labor detailed by hours, hourly wage;
 - b. Mandatory and non-mandatory employee benefits;
 - c. Travel costs including mileage costs detailed by mileage rate and miles;
 - d. Insurance;
 - e. Administration/overhead costs;
 - f. Detail for supplies and materials cost components;
 - g. If an insignificant subcontract is quoted, it must be accompanied by work description, the hours and rate to arrive at the subcontract cost.
 - H. Should the submitted quote not be in conformance with the Committee requirements, the submittal will be returned by the Committee to the agency or public body for corrections.
4. 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.
5. The Adverse Impact Committee shall review the statement of adverse impact and the CNA's scope of work and quote, and prepare a recommendation to the Council as to whether there is a significant adverse impact. Should the Adverse Impact Committee conclude that there is substantial evidence of such a significant adverse impact, it shall issue a written recommendation of the adverse impact with a proposed action to the Council for a vote at the next scheduled Council meeting. The Council shall consider the recommendation of the Adverse Impact Committee and proposed course of action and shall vote to accept or deny the recommendation of the Adverse Impact Committee. The Council may also select an alternative course of action or return the recommendation to the Adverse Impact Committee for further review. Subsequent to the Council acceptance, the Council shall notify the agency or local public body..
6. In the case of a determination of significant adverse impact, the procurement shall proceed pursuant to the procurement code.

7 The Council shall periodically review all determinations of significant adverse impact to ensure compliance with the State Use Act.

APPROVED BY THE NEW MEXICO COUNCIL FOR PURCHASING FROM PERSONS WITH DISABILITIES THIS 26TH DAY OF June, 2024.

Kathleen Pinyan

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Chair