Land Grant-Merced
Laws and Statutes

Appendix:

Selection of New Mexico General Governance Statutes Applicable to Political Subdivisions of the State

2020

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Preface

The Selection of New Mexico General Governance Statutes Applicable to Political Subdivisions of the State Appendix is a compilation of state laws relating to general governance for local units of government in New Mexico. The selection of statutes in this appendix are limited to those with the most applicability to land grants-mercedes. Therefore, not all statutes are presented in their entirety but rather only those parts of most relevance to land grants-mercedes, governed as political subdivisions of the State of New Mexico. The book covers laws and statutes in place as of July 2020. This book is provided by the New Mexico Land Grant Council for free distribution to active land grants-mercedes, government agencies and interested parties as a public service

Chapter 6 - Public Finances: Article 6 - Local Government Finances

6-6-1. Definitions.

"Local public body" means every political subdivision of the state that expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; incorporated cities, towns or villages; drainage, conservancy, irrigation or other districts; charitable institutions for which an appropriation is made by the legislature; and every office or officer of any of the above. "Local public body" does not include a mutual domestic water consumers association, a land grant, an incorporated municipality or a special district with an annual revenue, exclusive of capital outlay funds, federal or private grants or capital outlay funds disbursed directly by an administrating agency, of less than fifty thousand dollars ($50,000), nor county, municipal, consolidated, union or rural school districts and their officers or irrigation districts organized under Sections 73-10-1 through 73-10-47 NMSA 1978.

6-6-2. Local government division; powers and duties.

The local government division of the department of finance and administration has the power and duty in relation to local public bodies to:

A. require each local public body to furnish and file with the division, on or before June 1 of each year, a proposed budget for the next fiscal year;

B. examine each proposed budget and, on or before July 1 of each year, approve and certify to each local public body an operating budget for use pending approval of a final budget;

C. hold public hearings on proposed budgets;

D. make corrections, revisions and amendments to the proposed budgets as may be necessary to meet the requirements of law;

E. certify a final budget for each local public body to the appropriate governing body prior to the first Monday in September of each year. The budgets, when approved, are binding upon all tax officials of the state;

F. require periodic financial reports, at least quarterly, of local public bodies. The reports shall contain the pertinent details regarding applications for federal money or federal grants-in-aid or regarding federal money or federal grants-in-aid received, including details of programs, matching funds, personnel requirements, salary provisions and program numbers, as indicated in the catalog of federal domestic assistance, of the federal funds applied for and of those received;

G. notify the secretary of finance and administration if a municipality or county has failed to submit two consecutive financial reports required by Subsection F of this section;

H. upon the approval of the secretary of finance and administration, authorize the transfer of funds from one budget item to another when the transfer is requested and a need exists meriting the transfer and the transfer is not prohibited by law. In case of a need necessitating the expenditure for an item not provided for in the budget, upon approval of the secretary of finance and administration, the budget may be revised to authorize the expenditures;

I. with written approval of the secretary of finance and administration, increase the total budget of any local public body in the event the local public body undertakes an activity, service, project or construction program that was not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover the increase in the budget or the local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover the increase in the budget; provided, however, that the attorney general shall review legal questions identified by the secretary arising in connection with such budget increase requests;

J. supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted and that there will not be illegal expenditures;

K. prescribe the form for all budgets, books, records and accounts for local public bodies; and

L. with the approval of the secretary of finance and administration, make rules relating to budgets, records, reports, handling and disbursement of public funds or in any manner relating to the financial affairs of the local public bodies.

ANNOTATIONS

Local government division may suspend public hearing on proposed budget at any time for good cause. 1961 Op. Att'y Gen. No. 61-77.

Budget line transfer authorized where clerical error results in budget line deficit. — Where a clerical error results in a budget line deficit, an authorized budget line transfer may be accomplished by the director (secretary) of the department of finance and administration with or without request of the local authorities. 1969 Op. Att'y Gen. No. 69-09.

Division has authority to correct, revise and amend local budgets. — The local government division of the department of finance and administration has the authority under this section to correct, revise and amend the budget of a subdivision of a state and to

certify a final budget prior to the first Monday in September of each year. 1969 Op. Att'y Gen. No. 69-09.

Division may not substitute its judgment for that of local officials. — Subsection D of this section, giving the local government division the power to make corrections, revisions and amendments to proposed budgets, does not give that division a bludgeon to be held over the governing board of a local body to force them to exercise their discretion in accordance with the views of the officials in control of the department of finance and administration. The amount of money deemed necessary to repair a court house should be left to the exercise of sound discretion by the board of county commissioners. A line item within a budget for repair of the court house is not such an expenditure as is necessary to meet the requirements of law within the meaning of Subsection D of this section, insofar as fixing the amount necessary is concerned. The local government division cannot arbitrarily force the board of county commissioners to establish a line item in a budget at a sum which, in the judgment of the board of county commissioners, is excessive to meet the needs of that item. As a consequence thereto, the local government division does not have the power to order suspension of all disbursements by a county merely because the county has not provided a sum of money for a line item which the local government division feels is necessary. 1961 Op. Att'y Gen. No. 61-77.

6-6-3. Local public bodies; duties.

Every local public body shall:

A. keep all the books, records and accounts in their respective offices in the form prescribed by the local government division;

B. make all reports as may be required by the local government division; and

C. conform to the rules and regulations adopted by the local government division.

6-6-4. Local government division; research and survey; report to governor and legislature.

The local government division shall have the power, authority and responsibility to engage in research, conduct surveys and examine the operation and activities, including but not limited to the purchasing practices, of local public bodies, submitting to the governor and the legislature and local public bodies measures to secure greater administrative efficiency and economy, to minimize the duplication of activities, and to effect a better organization and consolidation of functions among local public bodies.

6-6-5. Record of approved budget.

Upon receipt of any budget approved by the local government division, the local public body shall cause such budget to be made a part of the minutes of such body.

6-6-6. Approved budgets; claims or warrants in excess of budget; liability.

When any budget for a local public body has been approved and received by a local public body, it is binding upon all officials and governing authorities, and no governing authority or official shall allow or approve claims in excess thereof, and no official shall pay any check or warrant in excess thereof, and the allowances or claims or checks or warrants so allowed or paid shall be a liability against the officials so allowing or paying those claims or checks or warrants, and recovery for the excess amounts so allowed or paid may be had against the bondsmen of those officials.

Chapter 6 - Public Finances: Article 10 - Public Money

6-10-1. Fiscal year designated.

A. The fiscal year for the state and for the counties, cities, towns, villages and school districts thereof begins on July 1 and ends on June 30. The year beginning on July 1, 1925 shall be known as the fourteenth fiscal year.

B. Beginning July 1, 1994, the fiscal year shall be cited by citing the calendar year in which the fiscal year ends. The fiscal year beginning July 1, 1994 shall be fiscal year 1995.

6-10-1.1. Definitions.

As used in Chapter 6, Article 10 NMSA 1978:

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

B. "deposit" includes share, share certificate and share draft;

C. "eligible governing body" means a local governing body, the governing authority of a tribe or any other governmental or quasi-governmental body created or authorized to be created pursuant to New Mexico statutes;

D. "finance officer" means the chief financial officer of an eligible governing body or a participating government;

E. "local governing body" means a political subdivision of the state, including a school district or a post-secondary educational institution;

F. "participating government" means an eligible governing body or the state treasurer on behalf of the general fund that has invested money in the local government investment pool;

G. "secretary" means the secretary of finance and administration;

H. "treasury" means the master depository or cash concentration account held at the state's fiscal agent bank and administered by the office of the state treasurer, unless the context otherwise clearly indicates; and

I. "tribe" means a federally recognized Indian nation, tribe or pueblo or a subdivision or agency of a federally recognized Indian nation, tribe or pueblo, located wholly or partially in New Mexico.

6-10-1.2. Payment methods authorized; fee.

A. A state agency or local governing body may accept payment by credit card or electronic means of any amount due under any law or program administered by the agency or local governing body. The state board of finance shall adopt rules on the terms and conditions of a state agency accepting payments by credit card or electronic transfer. The local governing body shall adopt procedures, subject to the approval of the department, on the terms and conditions of accepting payments by credit card or electronic transfer.

B. A state agency or local governing body may charge a uniform convenience fee to cover the approximate costs imposed by a financial institution that are directly related to processing a credit card or electronic transfer transaction. The fee shall be charged to the person using a credit card or electronic transfer. Amounts collected pursuant to this subsection are appropriated to the state agency or local governing body to defray the cost of processing the transaction.

6-10-2. Public money; cash books; daily balance; public record.

It is the duty of every public official or agency of this state that receives or disburses public money to maintain a cash record in which is entered daily, in detail, all items of receipts and disbursements of public money. The cash record shall be balanced daily so as to show the balance of public money on hand at the close of each day's business. Except as may be otherwise provided by law, the cash record is a public record and is open to public inspection.

6-10-10. Deposit and investment of funds.

H. A local public body, with the advice and consent of the body charged with the supervision and control of the local public body's respective funds, may invest all sinking funds or money remaining unexpended from the proceeds of any issue of bonds or other negotiable securities of the investor that is entrusted to the local public body's care and custody and all money not immediately necessary for the public uses of the investor and not otherwise invested or deposited in banks, savings and loan associations or credit unions in contracts with banks, savings and loan associations or credit unions for the present purchase and resale at a specified time in the future of specific securities at specified prices at a price differential representing the interest income to be earned by the investor. The contract shall be fully secured by obligations of the United States or the securities of its agencies, instrumentalities or United States government sponsored enterprises having a market value of at least one hundred two percent of the contract. The collateral required for investment in the contracts provided for in this subsection shall be shown on the books of the financial institution as being the property of the investor and the designation shall be contemporaneous with the investment. As used in this subsection, "local public body" includes all political subdivisions of the state and agencies, instrumentalities and institutions thereof; provided that home rule municipalities that prior to July 1, 1994 had enacted ordinances authorizing the investment of repurchase agreements may continue investment in repurchase agreements pursuant to those ordinances.

6-10-10.1. Local government investment pool created; distribution of earnings; report of investments.

A. There is created in the state treasury the "local government investment pool". The fund shall consist of all deposits from participating governments, including revenues dedicated to repaying bonds, that are placed in the custody of the state treasurer for investment purposes pursuant to this section. The state treasurer shall maintain one or more separate accounts for each participating government having deposits in the local government investment pool and may divide the fund into two or more subfunds, as the state treasurer deems appropriate, for short-term and medium-term investment purposes, including one or more subfunds for bond proceeds deposited by participating governments.

B. If an eligible governing body is unable to receive payment on public money at the rate of interest as set forth in Section 6-10-36 NMSA 1978 from financial institutions within the geographic boundaries of the eligible governing body, or if the eligible governing body is not bound by the terms of Section 6-10-36 NMSA 1978, the finance officer having control of the money of that eligible governing body not required for current expenditure may, with the consent of the board of finance of the eligible governing body if consent is required by the laws or rules of the eligible governing body, remit some or all of the money to the state treasurer for deposit for the purpose of investment as allowed by this section.

C. Before funds are invested or reinvested pursuant to this section, a finance officer shall notify and make the funds available for investment to banks, savings and loan associations and credit unions located within the geographical boundaries of the participating government or the eligible governing body, subject to the limitation on credit union accounts. To be eligible for deposit of the government funds, the financial institution shall pay to the participating government or eligible governing body the rate established by the state treasurer pursuant to a policy adopted by the state board of finance for the investments.

D. A finance officer shall specify the length of time a deposit shall be in the local government investment pool. The state treasurer through the use of the state fiscal agent shall separately track each deposit and shall make information regarding the deposit available to the public upon written request.

E. The state treasurer shall invest the local government investment pool as provided in Section 6-10-10 NMSA 1978 regarding the investment of state funds in investments with a maturity at the time of purchase that does not exceed three years. The state treasurer may elect to have the local government investment pool consolidated for investment purposes with the state funds under the control of the state treasurer; provided that accurate and detailed accounting records are maintained for the account of each participating government and that a proportionate amount of interest earned is credited to each of the separate accounts of a participating government. The fund shall be invested to achieve its objective, which is to realize the maximum return consistent with safe and prudent management.

F. At the end of each month, all net investment income or losses from investment of the local government investment pool shall be distributed by the state treasurer to the accounts of participating governments in amounts directly proportionate to the respective amounts deposited by them in the local government investment pool and the length of time the amounts in each account were invested.

G. The state treasurer shall charge participating governments reasonable audit, administrative and investment expenses and shall deduct those expenses directly from the net investment income for the investment and administrative services provided pursuant to this subsection. The amount of the charges, the manner of the use by the state treasurer and the nature of bond-related services to be offered shall be established in rules adopted and promulgated by the state treasurer subject to approval by the state board of finance.

H. Subject to appropriation by the legislature, amounts deducted from the accounts of participating governments for charges permitted pursuant to this section shall be expended by the state treasurer in fiscal year 2008 and in subsequent fiscal years for the administration and management of the local government investment pool, services provided to participating governments related to investment of their money in that fund and other services authorized by this section. Balances remaining at the end of a fiscal year from the amounts deducted pursuant to this section shall revert to the general fund. Balances in the state treasurer's operating account resulting from deductions taken pursuant to this section in excess of the amount required to provide administration, management and related services required by this subsection or other services authorized by this section shall be offset by reductions in the charges made by the state treasurer to the accounts of participating governments in subsequent deductions from participating governments' accounts.

I. Each fiscal year, the state treasurer shall cause to have the short-term investment portion of the local government investment pool rated by a nationally recognized statistical rating organization. If the rating received by the short-term investment portion of the fund is lower than "AA", the state treasurer shall immediately submit a plan to the state board of finance detailing the steps that will be taken to obtain an "AA" or higher rating.

J. The state treasurer may offer to provide to participating governments services related to requirements of the federal income tax laws applicable to the investment of bond proceeds.

K. A tribe or quasi-governmental body created pursuant to New Mexico statute may become a participating government only if the governing authority of the tribe or quasi-governmental body has adopted a resolution authorizing the tribe or quasi-governmental body to remit money to the state treasurer for investment in the local government investment pool.

L. Deposits by the state treasurer on behalf of the general fund and bond proceeds investment pools shall, in aggregate, be no more than thirty-five percent of the total amount in the local government investment pool at any time.

M. The educational retirement board, the public employees retirement association and the state investment council may remit money to the state treasurer for investment in the local government investment pool.

6-10-16. Security for deposits of public money.

A. Deposits of public money shall be secured by:

(1) securities of the United States, its agencies or instrumentalities;

(2) securities of the state of New Mexico, its agencies, instrumentalities, counties, municipalities or other subdivisions;

(3) securities, including student loans, that are guaranteed by the United States or the state of New Mexico;

(4) revenue bonds that are underwritten by a member of the financial industry regulatory authority, known as FINRA, and are rated "BAA" or above by a nationally recognized bond rating service; or

(5) letters of credit issued by a federal home loan bank.

B. No security is required for the deposit of public money that is insured by the federal deposit insurance corporation or the national credit union administration.

C. All securities shall be accepted as security at market value. The restrictions of Subsection A of this section apply to all securities subject to this subsection.

6-10-24. Deposit of public funds in federally insured banks, savings and loan associations and credit unions; conditions.

A. The state treasurer, the several county and municipal treasurers, the treasurers of any public or educational institution in this state and the treasurers of all irrigation districts and conservancy districts may deposit public funds in any bank of the state of New Mexico insured by the federal deposit insurance corporation up to the amount of the insurance or in any savings and loan association whose deposits are insured by the federal savings and loan insurance corporation up to the amount of the insurance, or in any credit union whose deposits are insured by the national credit union administration up to the amount of the insurance, without requiring the bank, savings and loan association or credit union to qualify as a public depository by giving security as required by the laws of New Mexico relating to public money; provided, however, that a deposit made in any credit union shall not exceed that amount insured by an agency of the United States.

B. The several county and municipal treasurers and the treasurers of all irrigation districts and conservancy districts shall not make any deposits outside their respective political subdivisions.

C. All other boards of control handling public funds in any manner whatever may deposit the public funds in any banks in New Mexico insured by the federal deposit insurance corporation up to the amount of the insurance or in any savings and loan association whose deposits are insured by the federal savings and loan insurance corporation up to the amount of the insurance or in any credit union whose deposits are insured by the national credit union administration up to the amount of such insurance, without requiring the bank, savings and loan association or credit union to qualify as a public depository by giving security as required by the laws of New Mexico relating to public money; provided, however, that a deposit made in any credit union shall not exceed that amount insured by an agency of the United States.

6-10-30. Interest rates set by state board of finance.

The state board of finance at any time, but at least once each fiscal year, shall fix the rate of interest to be paid upon all time deposits of public money made by all public officials authorized to make deposits of public money.

6-10-31. Interest on time deposits.

Any board of finance may, whenever in its opinion such a course is advisable and the public money under its control, or any part thereof, will not be needed immediately for public purposes, place such funds on time deposit with a bank, savings and loan association or credit union whose deposits are insured by an agency of the United States, taking the certificate of deposit or other evidence of indebtedness of the bank, savings and loan association or credit union receiving the deposit; provided, however, that all such deposits shall be secured as provided by law. No county or municipal board of finance shall make any deposits outside of its county.

6-10-33. Interest limited to maximum permitted by federal law or regulation.

No deposit of public funds shall bear interest where any bank, savings and loan association or credit union is precluded from paying interest on the deposit by federal law or the regulations of any agency or instrumentality of the United States, and no deposit of public funds shall bear a greater interest rate than banks, savings and loan associations or credit unions are authorized to pay under such federal laws or regulations.

6-10-34. Withdrawal of time deposits subject to federal law or regulation.

Notwithstanding any other provision of law, no time deposit of public funds in a member of the federal reserve system, as that term is or may be defined by law or regulation of the board of governors of the federal reserve system, or in a bank or savings and loan association which is a member of the federal home loan bank or the federal savings and loan insurance corporation or in a credit union which is chartered or insured by the national credit union administration may be withdrawn before maturity, except under the conditions as the member bank or savings and loan association or credit union is authorized to repay

the deposit before maturity under federal law or regulation, and no time deposit of public funds in a nonmember of the federal reserve system, federal home loan bank system or federal savings and loan insurance corporation, as the term "time deposit" is or may be defined by federal law or regulation of the federal deposit insurance corporation, shall be withdrawn before maturity, except under the conditions as a bank not a member of the federal reserve system, but insured by the federal deposit insurance corporation, is authorized to repay the deposit before maturity under federal law or regulation of the federal deposit insurance corporation.

6-10-36. Public money deposits of certain governmental units; distribution; interest.

A. All public money, except that in the custody of the state treasurer, institutions of higher education, technical and vocational institutes, incorporated municipalities and counties that have adopted home rule charters as authorized by the constitution of New Mexico and local school boards that have been designated as boards of finance, shall be deposited in qualified depositories in accordance with the terms of this section or invested as otherwise provided by law.

B. Deposits of funds of a governmental unit may be made in noninterest-bearing checking accounts in one or more banks or savings and loan associations designated as checking depositories located within the geographical boundaries of the governmental unit. In addition, deposits of funds may be in noninterest-bearing accounts in one or more credit unions designated as checking depositories located within the geographical boundaries of the governmental unit to the extent the deposits are insured by an agency of the United States. If there is no checking depository within the geographical boundaries of the governmental unit, one or more banks, savings and loan associations or credit unions within the county in which the principal office of the governmental unit is located may be so designated, but credit union deposits shall be insured by an agency of the United States.

C. Public money placed in interest-bearing deposits in banks and savings and loan associations shall be equitably distributed among all banks and savings and loan associations having their main or staffed branch offices within the geographical boundaries of the governmental unit that have qualified as public depositories by reason of insurance of the account by an agency of the United States or by depositing collateral security or by giving bond as provided by law and that desire a deposit of public money pursuant to this section. The deposits shall be in the proportion that each bank's or savings and loan association's deposits bears to the total deposits of all banks and savings and loan associations that have their main office or staffed branch office within the geographical boundaries of the governmental unit and that desire a deposit of public money pursuant to this section. The deposits of the main office of a savings and loan association and its staffed branch offices within the geographical boundaries of a governmental unit is the total deposits of the association multiplied by the percentage that deposits of the main office and the staffed branch offices located within the geographical boundaries of the governmental unit are of the total deposits of the association, net of any public fund deposits. The deposits of each staffed branch office or aggregate of staffed branch offices of a savings and loan

association located outside the geographical boundaries of the governmental unit in which the main office is located is the total deposits of the association multiplied by the percentage that deposits of the branch or the aggregate of branches located outside the geographical boundaries of the governmental unit in which the main office is located are of the total deposits of the association, net of any public fund deposits. The director of the financial institutions division of the regulation and licensing department shall promulgate a formula for determining the deposits of banks' main offices and branches for the purposes of distribution of public money as provided for by this section.

D. Public money may be placed at the discretion of the designated board of finance or treasurer in interest-bearing deposits in credit unions having their main or staffed branch offices within the geographical boundaries of the governmental unit to the extent the deposits are insured by an agency of the United States.

E. The rate of interest for all public money deposited in interest-bearing accounts in banks, savings and loan associations and credit unions shall be set by the state board of finance, but in no case shall the rate of interest be less than one hundred percent of the asked price on United States treasury bills of the same maturity on the day of deposit. Any bank or savings and loan association that fails to pay the minimum rate of interest at the time of deposit provided for in this subsection for any respective deposit forfeits its right to an equitable share of that deposit under this section.

If the deposit is part or all of the proceeds of a bond issue and the interest rate prescribed in this subsection materially exceeds the rate of interest of the bonds, the interest rate prescribed by this subsection shall be reduced on that deposit to an amount not materially exceeding the interest rate of the bonds if the bond issue would lose its tax-exempt status pursuant to the provisions of the Internal Revenue Code of 1986, as amended.

F. Public money in excess of that for which banks, savings and loan associations and credit unions within the geographical boundaries of the governmental unit have qualified may be deposited in qualified depositories in other areas within the state under the same requirements for payment of interest as if the money were deposited within the geographical boundaries of the governmental unit or may be invested as provided by law.

G. The department of finance and administration may monitor the deposits of public money by governmental units to assure full compliance with the provisions of this section.

ANNOTATIONS

Deposits in credit unions. — Sections 6-10-36(D) and 6-10-44 NMSA 1978 do not give the county treasurer and the county board of finance co-equal powers with respect to deposits in federally insured credit unions. These sections do not alter the relative authority of the county treasurer and the county board of finance as stated in 6-10-8 NMSA 1978. Sections 6-10-36(D) and 6-10-44.1 NMSA 1978 were intended to permit deposits in credit unions by treasurers and boards of finance of various public bodies, not just counties, leaving to other statutory provisions the question of the relative responsibilities of the two

in making an investment decision. *Board of Cnty. Comm'rs v. Padilla*, 1990-NMCA-125, 111 N.M. 278, 804 P.2d 1097.

Certificates of deposit are deposits for purposes of this section. 1987 Op. Att'y Gen. No. 87-50.

6-10-39. [Official bonds; payment of premiums; form.]

If any state, county, city or town officer or treasurer of any board in control required to give bond by the laws of this state, shall furnish such bond with an authorized surety company as surety thereon, the premium on such bond shall be paid by the state, in the case of state officers, and by the county, city or town in the case of county, city or town officers, and by the board in control in the case of their treasurers. Such bonds shall be in substantially the following form:

BOND

AMOUNT $ .....

Know all men by these presents, that we ....., of ..., as principal, and ....., as surety, are held and firmly bound unto the state of New Mexico, in the penal sum of ... dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the said ..... was on the ... day of ..... duly elected (or appointed) to the office of treasurer of .....:

NOW, THEREFORE, if the above bounden ..... shall, from the ..... day of ... well and faithfully perform all his duties as such treasurer during his term of office, and until his successor is elected or appointed, and qualified, and shall exercise all possible diligence and care in the collection of all money which it is his duty by law to collect and shall render true accounts of his office and his doings therein as required by law and pay over all moneys that may come into his hands by virtue of his said office, to the officers and persons authorized by law to receive the same and carefully keep and preserve all books and papers and other property appertaining to his office and deliver same to his successor in office when duly qualified, then this obligation to be void, otherwise to remain in full force and effect, provided however that the surety shall have the right to terminate its suretyship under this obligation by serving notice of its election so to do upon the ... thirty days prior to the date of such termination of suretyship, and thereafter the said surety shall be discharged from any liability hereunder for any default of the principal occurring after such termination of liability.

IN WITNESS WHEREOF, the said principal hath hereunto set his hand and seal and the said surety has caused this bond to be sealed with its corporate seal, attested by the signature of its attorney in fact, this ... day of ....., 19 ....

.....(Seal)
Principal
.....(Seal)
Surety

Approved

.....

Acknowledgments of principal and surety.

In event of the giving of bonds with personal sureties the bond shall be substantially in the foregoing form.

ANNOTATIONS

Bracketed material. — The bracketed material in the catchline was inserted by the compiler and is not part of the law.

Blanket position surety bond cannot be written to meet statutory bond requirements of several county officials of a particular county in lieu of individual surety bonds by each of said county officials. 1961 Op. Att'y Gen. No. 61-33.

6-10-40. Officials receiving consideration for placing loan or deposit; misusing funds; failure to deposit; penalty.

Any person holding the office of state treasurer or the office of treasurer of any county, city, town or board in control in this state or any public officer or employee having in his custody or under his control any public money, who directly or indirectly receives from any person or persons or body of persons, association or corporation for himself or otherwise than in behalf of the state, county, city, town or board in control, whose money is so in his custody or under his control, any reward, compensation or profit, either in money or other property or thing of value, in consideration of a loan to or a deposit with any such person or persons or body of persons, association or corporation, of any of the public money so in his custody or under his control, or in consideration of any other agreement or arrangement touching the use of the money or any part thereof or who shall use or permit the use of any of the money for any purpose not authorized by law or who shall willfully neglect or refuse to deposit the money in his custody as required by this act or shall willfully deposit the money in his custody in any bank, federally insured savings and loan association or federally insured credit union not qualified to receive it under the provisions of this act or in excess of the amount for which the bank, federally insured savings and loan association may have qualified shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment for not more than ten years or both.

6-10-43. Interest and sinking-fund balances.

If a balance remains in an interest or sinking fund of any county, municipality, school district or other political subdivision after the retirement and payment in full of the bonded indebtedness for which the interest and sinking fund was created, upon request of the governing body in charge of the expenditure of the funds, the secretary of finance and administration may approve the transfer of the balance to the fund requested by the county, municipality, school district or other political subdivision. Any balance transferred under this section shall be used for nonrecurring expenditures only.

6-10-44. Temporary investment of excess funds; federal bonds or treasury certificates eligible.

If at any time the state treasurer, or the treasurer of any county, incorporated municipality or board in control has on hand more money than can be divided equitably and ratably among qualified depositories, such treasurer may, with the approval of the proper board of finance, temporarily invest such excess funds in United States bonds or treasury certificates under such rules and regulations as may be prescribed by the state board of finance.

ANNOTATIONS

Authority to invest. — The words "with the approval of" establish an advice-and-consent relationship between the county treasurer and the board of finance with respect to investments in U.S. bonds or treasury certificates so that decisions concerning the investment of county funds in government securities are, in the first instance, a matter for the county treasurer. The county board of finance has no veto power, but does not have the power of choice itself. Board of Cnty. Comm'rs v. Padilla, 1990-NMCA-125, 111 N.M. 278, 804 P.2d 1097.

6-10-50. Loss of money deposited in qualified banks, savings and loan associations or credit unions; treasurers relieved of liability.

No treasurer is liable for the loss of public money deposited by him in any bank, savings and loan association or credit union qualified to receive it under the provisions of this article due to the failure of the depository to repay the money except in cases where the loss could have been avoided by the exercise of reasonable care on the part of the treasurer.

Nothing in this section shall be construed as relieving from liability any security given by any bank or savings and loan association under the provisions of this article.

6-10-51. To cover all moneys lawfully intrusted to treasurers.

All moneys, whether belonging to the state of New Mexico or to any county thereof, or to any city, town, village, municipal school district, union high school district,

independent rural school district, rural school district or to any other special or other district, board of [or] institution, when lawfully in the possession or custody or under the control of the state treasurer, or of any county, city, town or village treasurer, or of any person acting as treasurer of any board in control, shall be considered to be moneys of and belonging to the state of New Mexico, or of the county, city, town, village or board in control for which such treasurer or person so in possession lawfully acts.

6-10-52. [Failure to comply with specific requirements; penalty.]

Any person who shall willfully or knowingly fail to perform any act required, and as required by Section 2 [6-10-3 NMSA 1978] or Section 25 [6-10-42 NMSA 1978] hereof, or who shall commit any act in violation of either of said sections, shall be guilty of a felony and upon conviction shall be punished by a fine of not to exceed two thousand dollars ($2,000), or by imprisonment in the penitentiary for a term of not more than three years, or by both such fine and imprisonment.

6-10-53. [Bribery of public treasurers and employees; penalty.]

Any person or persons who shall directly or indirectly pay or give, or offer to pay or give, to any one holding the office of state treasurer or the office of treasurer of any county, city or town, or board in control, in this state, or to any person or persons under such officer's direction for the profit of any such officer or other person or persons, any reward or compensation either in money or other property or thing of value, in consideration of a loan to or deposit with any such person or persons, or body of persons, association or corporation, of any public monies in the custody or under the control of such state treasurer, or the treasurer of any county, city or town, or board in control, or in consideration of any other agreement or arrangement touching the use of such monies or any part thereof, for any purpose not authorized by law, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than five thousand dollars [($5,000)] or by imprisonment for not more than ten years or both.

6-10-55. Short title.

This act [6-10-55 to 6-10-57 NMSA 1978] may be cited as the "Warrant Cancellation Act".

6-10-56. Definitions.

As used in the Warrant Cancellation Act:

A. "fiscal officer" means:

(1) for the state, the state treasurer, or, for all warrants issued by the department of finance and administration, the secretary of that department, or, for all warrants issued by agencies and institutions other than the department of finance and administration, the legally authorized disbursing officer of the agency or institution;

(2) for a county, the county treasurer;

(3) for a municipality, the municipal treasurer;

(4) for a school district, the legally authorized disbursing officer for the local board of education; and

(5) for a special district, the legally authorized disbursing officer; and

B. "warrant" means any warrant or check issued by the state, its agencies, institutions and political subdivisions.

6-10-57. Cancellation of warrants.

A. Whenever any warrant issued by the state, county, municipality, school district or special district is unpaid for one year after it becomes payable, the fiscal officer shall cancel it.

B. The fiscal officer shall keep a register of all canceled warrants. The register shall show the number, date and amount of each warrant, the name of the person in whose favor it was drawn, the fund out of which it was payable and the date of cancellation.

C. The face amount of each warrant canceled shall revert and be credited to the fund against which the warrant was drawn.

D. Warrants canceled under Subsection A of this section are void and the indebtedness evidenced thereby is extinguished, which is hereby declared to be an express condition of every contract under which state warrants are issued except that:

(1) the department of finance and administration may issue a new warrant on a voucher issued by the commissioner of revenue [director of the revenue division of the taxation and revenue department] if a claim for refund was approved under Section 7-1-26 NMSA 1978, and if a warrant was issued and that warrant canceled under Subsection A of this section on or after January 1, 1970; and

(2) any fiscal officer may issue a new warrant for a canceled payroll warrant upon a voucher issued by the responsible employing authority certifying that the services for which the canceled payroll warrant had been issued were in fact rendered and that payment therefor had not been made, if:

(a) there is sufficient money in the fund from which the original payroll warrant was drawn to cover the new warrant; or

(b) if a suspense fund has been established in accordance with the provisions of Subsection E of this section and there is sufficient money in the suspense fund to cover the new warrant.

E. If any payroll warrant payable from an account which reverts at the end of a fiscal year to a general fund is canceled, the fiscal officer shall create a suspense fund in the amount of the total canceled payroll warrants and withhold that amount from reversion. Canceled payroll warrants shall be paid from the suspense fund.

F. Each warrant issued by the state, county, municipality or school district shall have printed on its face the words, "void after one year from date."

ANNOTATIONS

Subsection D means that indebtedness as evidenced by the warrant alone is extinguished, and not the indebtedness provable by an underlying contract. 1980 Op. Att'y Gen. No. 80-15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 804, 830; 72 Am. Jur. 2d States § 77.
20 C.J.S. Counties § 211; 64 C.J.S. Municipal Corporations § 1899; 79 C.J.S. Schools and School Districts § 351; 81A C.J.S. States § 242.

6-10-59. Loss or destruction of state or political subdivision warrant or order for money; issue of duplicate.

In case of the loss or destruction of any warrant, draft, check or order for the payment of money out of the treasury of the state, or of any political subdivision of the state, the officer who drew the original instrument, or his successors in office, shall issue a duplicate as provided in Section 6-10-60NMSA 1978.

ANNOTATIONS

Lost warrants must be issued in name of original payee. 1966 Op. Att'y Gen. No. 66-10.

6-10-60. Issuance of duplicate; affidavit; bond to save state or political subdivision harmless.

A. If the original warrant, draft, check or order has not cleared the treasury of the state or the fiscal agent of any political subdivision of the state and a stop payment has been filed with the treasury or with the fiscal agent by the officer before any duplicate is issued as provided in Section 6-10-59 NMSA 1978, the party applying for the duplicate shall file with the officer an affidavit which shall state that the original warrant, draft, check or order has been lost or destroyed or was never received.

B. If the original warrant, draft, check or order has been paid by the treasurer before any duplicate is issued as provided in Section 6-10-59 NMSA 1978, the party applying for the duplicate shall file with the officer a bond payable to the state or political subdivision, as the case may be in a penalty in the amount of the original warrant, draft, check or order

conditioned to save harmless the state or political subdivision from all loss in consequence of the loss of the original warrant, draft, check or order, and the issuing of the duplicate, if the loss to the state or political subdivision is a result of the fraud or negligence of the original payee or a holder in due course. If the bond is a personal surety bond, it shall be sufficient if:

(1) there is one surety for each bond for one hundred dollars ($100) and under, and there are two sureties for each bond over one hundred dollars ($100); no surety for any of these bonds may be proprietor as surety for his proprietorship or partner as surety for his partnership as principal; and

(2) each surety swears in writing that he owns real property in New Mexico having a net value equal to the amount of the bond, and that this net value is not exempt from execution and forced sale over and above all his just debts and liabilities.

6-10-62. Destruction of documentary evidence of extinguished debt; certificates of destruction; retention.

A. When a debt in the form of a bond, note, certificate of indebtedness or interest coupon, incurred by the state, a state agency or institution, or by a political subdivision of the state (hereinafter called the "debtor agency"), has been extinguished by the full payment thereof, the documentary evidence of the debt may be destroyed. When the payment has been made by a bank, savings and loan association or other third-party paying agent, the bank, savings and loan association or other third-party paying agent shall forward to the governing authority of the debtor agency a certificate of destruction on which shall be specified:

(1) the number and maturity date of the bond, note, certificate or coupon;

(2) the date paid; and

(3) any other information required by the debtor agency. The debtor agency shall retain all such certificates of destruction for six years.

B. If the debtor agency is the paying agent, the bond, note, certificate of indebtedness or interest coupon shall be retained for a period of two years following payment, at which time the documentary evidence of the debt may be destroyed and a certificate of destruction prepared containing the same information as that required in Subsection A of this section. The certificate of destruction shall be retained by the debtor agency for six years.

6-10-63. Electronic fund transfers.

Notwithstanding any other provision of law, any public money may be transferred by means of electronic funds transfer between any public body and a public or private entity. The state board of finance shall adopt rules and regulations to carry out the purpose of this section.

Chapter 10 - Public Officers and Employees: Article 1 – Qualifications

10-1-2. [Person convicted of crime; ineligibility for office; exception.]

That no person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in this state.

ANNOTATIONS

Felony convictions occurring during term of office. — A felony conviction that occurs during the term of an elective office disqualifies the elected official from continuing to hold that office effective upon entry of a judgment of conviction. *State ex rel. King v. Sloan*, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Restoration of citizenship rights. — A convicted felon who was elected to the position of county commissioner became eligible to hold that office when, prior to taking the oath of office, she applied for and received a certificate of restoration of full rights of citizenship from the governor. *Lopez v. Kase*, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Effect of appeal pending. — Person who committed felony by assaulting a federal officer was ineligible to run for governor where although a jury rendered a guilty verdict, the person was appealing the judgment. A judgment on a verdict of a guilty is a conviction, and the fact that an appeal is pending does not alter that interpretation. 1968 Op. Att'y Gen. No. 68-98.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 48 to 50.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.
Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155, 90 A.L.R.3d 900.

What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

Effect of conviction in federal court, or court of another state or country, on right to hold public office, 39 A.L.R.3d 303.

Misconduct: removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Pardon as restoring eligibility to public office, 58 A.L.R.3d 1191.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

67 C.J.S. Officers and Public Employees § 22.

10-1-10. [Nepotism prohibited; exceptions.]

It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided, that this act [10-1-10, 10-1-11 NMSA 1978] shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of $600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

ANNOTATIONS

Constitutionality. — This law is not unconstitutional by reason of the fact that the title merely states "An act relating to nepotism." 1938 Op. Att'y Gen. No. 38-2030.

Legislative intent. — The legislature intended by this section to apply the civil law rule for determining the degree of relationship and under this method of computation a cousin is not within the third degree, so that a public officer may employ his cousin as a deputy or assistant. 1947 Op. Att'y Gen. No. 47-5040.

Statute normally construed strictly. — Anti-nepotism statutes, being penal in nature, are normally strictly construed. However, no statute may be construed so as to defeat the obvious intent of the legislature. 1982 Op. Att'y Gen. No. 82-08.

Section inapplicable where person hired before relative's election. — This section would not apply to a person employed prior to his relative's election to the hiring authority. 1982 Op. Att'y Gen. No. 82-08.

Brothers are related within the second degree of consanguinity. 1982 Op. Att'y Gen. No. 82-08.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.

67 C.J.S. Officers and Public Employees § 23.

10-1-11. [Payment of nepotic employees; liability of employer and bondsmen; employment void.]

No person so unlawfully employed shall be paid or receive any compensation from public funds, and such employment shall be null and void, and the person or persons giving such employment, together with his or their bondsmen, shall be liable for any and all monies so unlawfully paid out.

Chapter 10 - Public Officers and Employees: Article 2 – Bonds

10-2-1. [Sureties on bonds; qualifications.]

No bond of any public officer of this state executed by any individual, or firm as surety, shall be accepted or approved unless the persons or firm executing the same shall be the owners of unencumbered real estate or personal property in this state to an amount equal to the amount for which they respectively qualify on such bonds.

ANNOTATIONS

Elements of public office. — Five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority. 1956 Op. Att'y Gen. No. 56-6396.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 487 to 566.

67 C.J.S. Officers and Public Employees § 47.

Chapter 10 - Public Officers and Employees: Article 3 – Vacancies in Local Offices.

10-3-1. Circumstances causing vacancy in local office.

Any office of a political subdivision of the state subject to election by the qualified electors within the political subdivision becomes vacant under any of the following circumstances:

A. by resignation or death of the party in office;

B. removal of the officer as provided by Sections 10-4-1 through 10-4-29 NMSA 1978;

C. failure of the officer to qualify as provided by law;

D. expiration of the term of office when no successor has been chosen as provided by law;

E. when the officer removes from the area from which the officer was elected to represent and, in case of an officer serving pursuant to an appointment, when the officer removes from the area the officer was appointed to represent;

F. absence from the political subdivision in which the officer serves for six consecutive months; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause;

G. by an officer accepting and undertaking an employment relationship with the political subdivision in which the officer serves in a position subject to election; or

H. by an officer taking the oath of office or undertaking to discharge the duties of another incompatible office.

ANNOTATIONS

Cross references. — For temporary abandonment for service in military forces, *see* 10-6-1NMSA 1978.

For permanent abandonment of office, what constitutes, *see* 10-6-3 NMSA 1978.

For incompatible office or service, definition, *see* 10-6-5 NMSA 1978.

For dismissal, demotion or suspension for conflict of interest, *see* 10-16-14 NMSA 1978.

Dual office holding. — The offices of mayor and district attorney of a city are not incompatible and may be held by the same person at the same time, and the fact that the mayor is also district attorney is not ground for ousting him from the mayorality. *State ex rel. Chapman v. Truder*, 1930-NMSC-049, 35 N.M. 49, 289 P. 594.

Effect on other section. — This section, creating a vacancy for "failure of the officer to qualify as provided by law" does not repeal by implication the last line of 10-3-3 NMSA 1978 providing that an appointive officer shall hold office until "his successor shall be duly elected and qualified according to law." *State ex rel. Rives v. Herring*, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

Effect where authority to hold over after expiration of term. — During the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment. *State ex rel. Rives v. Herring*, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

Effect of death of elected candidate before term begins. — The death of an elected candidate before term of office commences does not seat the minority candidate, but creates a vacancy to be filled as in case of vacancy for any other reason. 1918 Op. Att'y Gen. No. 18-2145.

Meaning of "qualify". — The word "qualify" does not refer to eligibility for the office but rather to the performance of the acts which the chosen person is required to perform before he can enter into office (usually the taking of an oath and the filing of a bond). 1963 Op. Att'y Gen. No. 63-86.

Residence in legal contemplation. — Residence in legal contemplation may be maintained in a locality despite actual physical absence, the mental intent of the person being an important factor in determining residence. 1964 Op. Att'y Gen. No. 64-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 138, 139.

Resignation from one office as affecting eligibility to another office during term of former office, 5 A.L.R. 117, 40 A.L.R. 945.

Right of officer to resign, 19 A.L.R. 39.

Incompatibility of offices or positions in military service and civil service, 26 A.L.R. 142, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Death or disability of one elected to office before qualifying as creating a vacancy, 74 A.L.R. 486.

Reconsideration of appointment to fill vacancy, 89 A.L.R. 141.

When resignation of public officer becomes effective, 95 A.L.R. 215.

Effect of election to, or acceptance of, one office by incumbent of another when both cannot be held by same person, 100 A.L.R. 1162.

Military service, induction or voluntary enlistment for, as creating vacancy in public office or employment, 151 A.L.R. 1462, 152 A.L.R. 1457, 153 A.L.R. 1429, 154 A.L.R. 1455, 155 A.L.R. 1456, 156 A.L.R. 1455, 157 A.L.R. 1454, 158 A.L.R. 1456, 35 A.L.R. Fed. 649.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for a fixed term and until successor is appointed or elected, is holding over, 164 A.L.R. 1248.

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.
Acceptance or assertion of right to pension or retirement as abandonment of public employment, 76 A.L.R.2d 1312.

Public officer's withdrawal of resignation made to be effective at future date, 82 A.L.R.2d 750.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.
67 C.J.S. Officers and Public Employees §§ 74 to 76.

Chapter 10 - Public Officers and Employees: Article 4 – Removal of Local Officers.

10-4-1. Local officers subject to removal.

Any officer of a political subdivision of the state elected by the people and any officer appointed to fill out the unexpired term of any such officer may be removed from office on any of the grounds mentioned in and according to the provisions of Sections 10-4-1 through 10-4-29 NMSA 1978.

ANNOTATIONS

Constitutionality. — This act (Sections 10-3-1, 10-4-1 to 10-4-29 NMSA 1978) does not violate N.M. Const., art. XX, § 2. *State ex rel. Harvey v. Medler*, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

Purpose of removal is not to determine whether a public officer has been a good person or a bad person in the past but only to determine whether, by reason of existing facts and circumstances, he should be removed from his present office. *State v. Santillanes*, 1982-NMSC-138, 99 N.M. 89, 654 P.2d 542.

Removal from office is a civil and not a criminal proceeding. *State ex rel. Mitchell v. Medler*, 1913-NMSC-025, 17 N.M. 644, 131 P. 976; *State ex rel. Mansker v. Leib*, 1915-NMSC-071, 20 N.M. 619, 151 P. 766; *State v. Santillanes*, 1982-NMSC-138, 99 N.M. 89, 654 P.2d 542.

Removal and suspension proceedings separate and distinct. — Proceedings for removal and that for suspension are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the latter is auxiliary to the former. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Officer not removable for misconduct during prior term. — The terms "office" and "in office" in this section and Section 10-4-2 NMSA 1978 mean during the current term for which the officer is elected or appointed and in which the offenses charged occurred. Therefore, it is not within the province of the court to punish a public officer by allowing his removal for misconduct which may have occurred during a previous term. *State v. Santillanes*, 1982-NMSC-138, 99 N.M. 89, 654 P.2d 542.

10-4-2. [Causes for removal of local officers.]

The following shall be causes for removal of any officer belonging to the class mentioned in the preceding section [10-4-1 NMSA 1978]:

A. conviction of any felony or of any misdemeanor involving moral turpitude;

B. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

C. knowingly demanding or receiving illegal fees as such officer;

D. failure to account for money coming into his hands as such officer;

E. gross incompetency or gross negligence in discharging the duties of the office;

F. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office.

ANNOTATIONS

Cross references. — For misapplication of funds received from United States forest reserves, ground for removal, *see*6-11-4 NMSA 1978.

Officer not removable for misconduct during prior term. — The terms "office" and "in office" in this section and Section 10-4-1 NMSA 1978 mean during the current term for which the officer is elected or appointed and in which the offenses charged occurred. Therefore, it is not within the province of the court to punish a public officer by allowing his removal for misconduct which may have occurred during a previous term. *State v. Santillanes*, 1982-NMSC-138, 99 N.M. 89, 654 P.2d 542.

Generally, as to neglect of duty. — Dismissal of a public officer for neglect of duty cannot be for honest errors in judgment or mistakes in administration. The dismissal must be for failure or neglect to do a positive duty. 1960 Op. Att'y Gen. No. 60-132.

Cupidity or pathological sloth. — The neglect must constitute "cupidity or pathological sloth." The mere failure to perform an act, with nothing more, does not constitute a neglect of duty. 1960 Op. Att'y Gen. No. 60-132.

Failure to attend meetings as neglect of duty. — The consistent, continual failure of an elected school board member to attend board meetings could be construed as a neglect of duty. The board is charged with the overall supervision of the schools of the district over which its has jurisdiction, and members thereof are certainly charged with a positive duty of such interest in the matters before the board to attend at least a part of its meetings. A complete failure on the part of a board member to take part in board affairs is a dereliction of a positive duty constituting neglect of office. 1960 Op. Att'y Gen. No. 60-132.

Meaning of "gross incompetency". — The plain meaning of the term "gross incompetency" is a glaringly noticeable or manifest lack of physical or mental ability. 1976 Op. Att'y Gen. No. 76-24.

Requirements of nonrelated job causing conflict of duties. — If an individual is unable to adequately and efficiently perform the duties of a public position because of the

requirements of other nonrelated jobs of either a public or private nature, such amounts to an inability to fill the position because of a conflict of duties, thus rendering such person subject to discharge. 1963 Op. Att'y Gen. No. 63-133.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 231 et seq.

Physical or mental disability as ground for removal, 28 A.L.R. 777.

Pendency of impeachment proceeding as affecting power of officer, 30 A.L.R. 1149.

Removal or dismissal of public officers or employees for bringing or defending an action affecting personal rights or liabilities, 74 A.L.R. 500.

Refusal of public officer to answer frankly questions asked him during an investigation as grounds for removal or discipline, 77 A.L.R. 616.

Removal of officer for collecting mileage when he had traveled at no expense to himself, 81 A.L.R. 493.

Implied power of appointing authorities to remove officer whose tenure is not prescribed by law, but who has been appointed for definite term, 91 A.L.R. 1097.

Power to remove public officer without notice and hearing, 99 A.L.R. 336.

Reversal of conviction of crime as affecting status of one removed from office because of the conviction, 106 A.L.R. 644.

Constitutional provision for removal of officer at pleasure of appointing power as applicable to office created by statute which prescribes definite term or a different method of removal, 112 A.L.R. 107.

Membership in or affiliation with religious, political, social, or criminal society or group as ground for removal of public officer, 116 A.L.R. 358.

Constitutionality and construction of statute which fixes or specifies term of office, but provides for removal without cause, 119 A.L.R. 1437.

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732.

Assertion of immunity as ground for removing public officer, 44 A.L.R.2d 789.

What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Removal of officer for misconduct during previous term, 42 A.L.R.3d 691.

Validity, construction and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

20 C.J.S. Counties § 105; 62 C.J.S. Municipal Corporations § 508.

10-4-3. [Grand jury accusation.]

An accusation in writing against any officer belonging to the class of officers mentioned in Section 10-4-1 NMSA 1978, charging any of the matters mentioned in this chapter as sufficient ground for removal, may be presented by the grand jury to the district court of the county in or for which the officer accused is elected.

10-4-4. [Form of accusation.]

The accusation must state the offense charged in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended.

ANNOTATIONS

Strict formality inapplicable. — Strict formality customarily required in the case of indictments or informations does not apply to accusation under this section. *State ex rel. Mansker v. Leib*, 20 N.M. 619, 151 P. 766 (1915).

10-4-5. [Presentment of grand jury accusation; service on defendant; return day.]

The accusation must be presented in open court, and the judge, after receiving the same, must forthwith cause it to be transmitted to the district attorney who must cause a copy thereof to be served upon the defendant and require by written notice that such defendant appear before the district court at a date to be named in the notice, which shall be not less than five nor more than ten days after service of a copy of such notice, and answer the accusation.

ANNOTATIONS

Cross references. — For procedure for suspension from office, *see* 10-4-20 NMSA 1978.

For process, *see* Rule 1-004 NMRA.

For service, *see* Rule 1-005 NMRA.

Citation or order to show cause necessary. — A citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has power to proceed to hear the matter of suspension. State ex rel. *Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

10-4-6. [Defendant's appearance or default.]

The defendant must appear at the time appointed in the notice and answer the accusation unless for sufficient cause the court has assigned another date for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

10-4-7. [Defendant's answer; grounds.]

The defendant may answer the accusation either by objecting to the sufficiency thereof, or any portion thereof, or by denying the truth of the same.

10-4-8. [Objection for insufficiency; form immaterial.]

If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it represents intelligibly the ground of the objection.

10-4-9. [Criminal procedure made applicable.]

All matters of procedure not otherwise provided for in this chapter shall be governed by the laws governing criminal procedure.

ANNOTATIONS

Removal action is civil proceeding. — An action for the removal of an officer from office under the provisions of this act is a civil and not a criminal proceeding. *State ex rel. Mitchell v. Medler*, 1913-NMSC-025, 17 N.M. 644, 131 P. 976.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Injunction as remedy against removal, 34 A.L.R.2d 554.

67 C.J.S. Officers and Public Employees § 176.

10-4-10. [Guilty plea; judgment; denial or refusal to plead; trial.]

If the defendant pleads guilty, the court must render judgment of conviction against him. If he denied the matters charged or refuses to answer the accusation, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

10-4-11. [Precedence in trial.]

As soon as the case is at issue, it must be immediately set down for trial and shall have precedence over all other cases on the docket.

ANNOTATIONS

Preemption not absolute. — These provisions are not absolutely peremptory, but secure to the public and the defendant a preference of right of trial over other cases. *State ex rel. Mitchell v. Medler*, 1913-NMSC-025, 17 N.M. 644, 131 P. 976.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 177.

10-4-12. [Jury trial required; procedure.]

The trial must be by jury and conducted in all respects in the same manner as a trial on an information or indictment for a misdemeanor.

ANNOTATIONS

Generally. — The provision of this section as to the conduct of the trial was designed to throw around the defendant the same safeguards with which the law clothes a defendant in a criminal action. *State ex rel. Mansker v. Leib*, 20 N.M. 619, 151 P. 766 (1915); *State ex rel. Mitchell v. Medler*, 1913-NMSC-025, 17 N.M. 644, 131 P. 976.

Citation or order to show cause necessary. — A citation or order to show cause is necessary before the court has the power to proceed to hear the matter. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 177.

10-4-13. [Verdict; form.]

The form of verdict of the jury in such cases shall be "guilty" or "not guilty".

10-4-14. [Judgment of removal; entry.]

Upon a conviction the court must pronounce judgment that the defendant be removed from office; and the judgment must be entered upon the minutes assigning therein the causes of removal.

10-4-15. [Attendance of witnesses.]

The district attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of an information or indictment.

10-4-16. [Appeal; suspension pending reversal; filling vacancy.]

From a judgment of removal, appeal may be taken to the supreme court in the same manner as from a judgment in a civil action, but until such judgment is reversed, the defendant is suspended from his office, and pending the appeal, the office must be filled as in case of vacancy.

ANNOTATIONS

Removal and suspension proceedings separate and distinct. — A proceeding for suspension and one for removal are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the former is auxiliary to the latter. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 517.

10-4-17. [Presentment of accusation by district attorney; vacation; no grand jury in county.]

The accusation provided for in this chapter may be presented by the district attorney to the judge in vacation or term time at any time when, under the provisions of law there will be no grand jury in the county where the same is presented, for a period of at least twenty days after the presentment of such accusation.

ANNOTATIONS

Cross references. — For grand jury accusation, *see* 10-4-3 NMSA 1978.

Jurisdiction of district attorney limited. — The jurisdiction of the district attorney to present the accusation provided for is limited by this section. *State v. Awalt*, 1916-NMSC-020, 21 N.M. 510, 156 P. 407.

10-4-18. [Duty of district attorney on receipt of evidence.]

Whenever sworn evidence is presented to the district attorney showing that any of the officers of the class provided for in this chapter are guilty of any of the matters herein mentioned as causes for removal, he must present the accusation to the court as provided in the next preceding section [10-4-17 NMSA 1978].

ANNOTATIONS

Generally. — It is the duty of the district attorney to bring matter of complaint to attention of court by statement of the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common knowledge to know what is intended, and support such statement by the affidavit or affidavits of those having knowledge of the facts upon which cause for removal is based. *State ex rel. Mansker v. Leib*, 1915-NMSC-071, 20 N.M. 619, 151 P. 766.

Filing accusation. — The district attorney cannot proceed in the matter of removal of county officials under this act (Sections 10-3-1, 10-4-1 to 10-4-29 NMSA 1978), unless sworn evidence has been presented to him, and unless he files an accusation supported by affidavit or affidavits, at a time when the grand jury of the county would not be in session within a period of twenty days, or at a time when the grand jury was not actually in session. *State v. Awalt*, 1916-NMSC-020, 21 N.M. 510, 156 P. 407.

10-4-19. [Presentment by district attorney; supporting affidavits; procedure.]

When the accusation is presented by the district attorney as provided in the preceding section [10-4-18 NMSA 1978], the same must be supported by sworn affidavit or affidavits, and the court must forthwith investigate the matter, and if a jury is in attendance at the time such accusation is presented, the court must order a citation to the defendant and thenceforth the case must proceed as provided in this chapter where the accusation is by a grand jury.

ANNOTATIONS

Cross references. — For presentment of grand jury accusation, *see* 10-4-5 NMSA 1978.

Amended verification prohibited. — Where the verification of an accusation for the removal of a public officer is held insufficient by the trial court within twenty days of the time for the grand jury to meet, or while it is in session, the matter should be presented, and it is error to permit amended verifications. *State v. Awalt*, 1916-NMSC-020, 21 N.M. 510, 156 P. 407.

Accusation distinguished from information. — Accusation to be presented to the court by the district attorney may be one based upon information of others and not a formal

charge upon information of the district attorney. *State ex rel. Mansker v. Leib*, 1915-NMSC-071, 20 N.M. 619, 151 P. 766.

Citation or order to show cause necessary. — Under the provisions of Section 10-4-5 NMSA 1978, a citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has the power to proceed to hear the matter of suspension. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 512.

10-4-20. [Procedure for suspension from office.]

If the accusation provided in this chapter, to be presented by the district attorney, is presented at a time when there is no jury in attendance or is presented to the court in vacation, the court, if it deems such action necessary, after ordering a citation to the defendant as provided in the next preceding section [10-4-19 NMSA 1978], may, on application of the district attorney, also order the defendant to appear at a time not less than five nor more than fifteen days after service of such order and at such place as may be mentioned in the order, to show cause why he should not be suspended from office until the matters and things alleged in the accusation have been judicially determined under the provisions of this chapter.

ANNOTATIONS

Cross references. — For presentment of accusation by district attorney, *see* 10-4-17 NMSA 1978.

Citation or order necessary. — A citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has power to proceed to hear the matter of suspension. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Proceedings for removal and suspension are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the latter is auxiliary to the former. *State ex rel. Delgado v. Leahy*, 1924-NMSC-077, 30 N.M. 221, 231 P. 197.

Jurisdiction of preliminary investigations. — District courts are without jurisdiction to entertain preliminary investigations except as provided in this section and Section 10-4-25 NMSA 1978, and jurisdiction assumed outside of these sections is properly restrained by a writ of prohibition. *State ex rel. Harvey v. Medler*, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

10-4-21. [Order of suspension.]

On the date provided in the order, if the defendant appears and offers proof, the court must hear the testimony presented by the district attorney and the defendant, and if in the judgment of the court there is reasonable ground to believe that the matters and things stated in the accusation will be established upon a trial, he may forthwith enter an order suspending the officer until after final hearing.

10-4-22. [Effect of suspension order.]

The order of suspension shall operate to relieve the officer from all the duties of the office until the matter is finally determined, and he must forthwith vacate the office and turn over all moneys, books, papers and property belonging thereto to the party appointed to serve until such suspension is removed.

10-4-23. [Denial of motion to suspend; dismissal of proceedings.]

If the court concludes that there is not sufficient ground for suspending the officer, it may enter an order denying the motion to suspend him and hold the matter in statu quo until final hearing, or the court may, in its discretion, dismiss the proceedings.

10-4-24. [Default of defendant; effect.]

If the defendant fails to appear and answer the order to show cause why he should not be suspended, the court may proceed in his absence as in this chapter provided.

10-4-25. [Continuance; preliminary investigation required; suspension pending final adjudication.]

Nothing in this chapter shall operate to deprive any defendant of the right to a continuance in any case in which such right would attach in any criminal case as provided by law, but before any case shall be continued, upon application of the defendant, beyond the term of court at which the accusation is presented, or if such accusation is presented in vacation beyond the first term of court after presentment thereof the court may, upon application of the district attorney, make a preliminary investigation as provided in this chapter and suspend the officer, pending a final adjudication of the matters alleged in the accusation.

ANNOTATIONS

Jurisdiction of district courts. — The act (Sections 10-3-1, 10-4-1 to 10-4-29 NMSA 1978) confers jurisdiction upon the district courts to make preliminary investigations and suspend an officer pending outcome of accusation, before continuance beyond the term of court. *State ex rel. Harvey v. Medler*, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 111.

10-4-26. [Reinstatement of suspended officer.]

If upon final trial the defendant is found not guilty, he must be reinstated and the party serving during the time of his suspension must immediately vacate the office and return to the defendant all moneys, books, papers and other property in his hands as such officer.

10-4-27. [Payment of salary after reinstatement; compensation of interim officer.]

If an officer has been suspended as provided in this chapter and reinstated after final trial, he shall receive pay for the entire time of his suspension, and the court may make an order to pay the officer serving during the time of such suspension, such reasonable compensation as his services warrant, which shall be paid out of a fund to be designated by the court.

History: Laws 1909, ch. 36, § 28; Code 1915, § 3981; C.S. 1929, § 96-132; 1941 Comp., § 10-329; 1953 Comp., § 5-3-29.

ANNOTATIONS

Cross references. — For suspension of officer, *see* 10-4-25 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 114.

10-4-28. [Officer appointed for suspension period; oath and bond; filling vacancy after final removal.]

When any officer is suspended as provided in this act [chapter], the judge of said court shall appoint some qualified person to discharge the duties of such officer during the period of his suspension, which person shall take the oath and give the bond required of incumbents of such office, and in case the final judgment be for the removal of such accused officer before the expiration of his term, his successor shall be appointed in the manner provided by law for filling vacancies in such office.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 74 to 79, 108.

10-4-29. [Exclusive method of removal.]

No officer belonging to the class mentioned in Section 10-4-1 NMSA 1978 can be removed from office in any manner except according to the provisions of this chapter.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Injunction as remedy against removal, 34 A.L.R.2d 554.

20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 506.

Chapter 10 - Public Officers and Employees: Article 5 – Suspension of Certain Officials.

10-5-1. Definition.

"Official of any local public body" means every officer, deputy or employee of:

A. every political subdivision of the state of New Mexico;

B. the agencies, instrumentalities and institutions of every political subdivision of this state; and

C. charitable institutions for which appropriations are made by the legislature.

10-5-2. Power of secretary to suspend certain officials; grounds for suspension; secretary to take charge of office.

The secretary of finance and administration may summarily suspend any official of any local public body in all cases where an audit conducted by the state auditor, or by personnel of his office, or by an independent auditor employed or approved by the state auditor reveals any of the following:

A. a fraudulent misappropriation or embezzlement of public money;

B. fiscal management of an office resulting in violation of law or willful violation of the fiscal regulations of the department of finance and administration for every local public body; or

C. willful failure to perform any duty imposed by any law which the secretary of finance and administration is charged with enforcing.

Upon such suspension, the secretary of finance and administration may take charge of the office of the persons [person] suspended.

10-5-3. Hearing; testimony.

Within five days after such suspension or within such reasonable time as the person suspended may request, the secretary of finance and administration shall conduct a hearing for the person suspended. At such hearing the person suspended may show cause why such suspension should not be continued. The state auditor, and the employees of his office or the auditors employed by the state auditor to conduct the audit upon which suspension was based, shall appear at the hearing and give testimony.

10-5-4. Oaths; subpoenas.

The secretary of finance and administration is authorized to administer oaths to persons who testify at such hearing. The secretary may compel the attendance of any person whose testimony may be required or needed at such hearing, and to compel the production of books, papers, documents, records and data necessary thereto. The official requesting the hearing shall have the right to make timely request to the secretary that subpoenas for necessary and material witnesses or for the production of documents and papers be issued, and the same shall be issued. The secretary and such employees of the department as may be designated by the secretary are authorized to issue subpoenas for persons whose testimony is required, and subpoenas so issued shall be served by persons authorized by law to make such service in civil actions, and if served by a sheriff or deputy, such service shall be made without cost.

10-5-6. Continuance of suspension after hearing; discontinuance of salary.

After such hearing, the secretary of finance and administration shall have discretion to continue such suspension for any of the causes above numbered, and if such suspension is continued no salary shall be received by such official during such suspension unless reinstated by the order of the district court as hereinafter provided.

10-5-7. Petition for reinstatement; order to show cause; result.

A. If after hearing before the secretary of finance and administration such suspension is continued, the person suspended shall have the right to appeal to the district court of the county where he was serving as an official within thirty days after entry of the order of suspension.

B. Upon appeal, the court shall set aside an order of suspension only if it is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with the law.

ANNOTATIONS

Cross references. — For procedures governing administrative appeals to the district court, *see*Rule 1-074 NMRA.

For scope of review of the district court, *see Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d 182 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 108, 111, 114, 116.

10-5-8. Control of office; bond of agent in charge; discretionary reinstatement; institution of removal proceedings.

Whenever the secretary of finance and administration assumes control of any office as hereinabove provided, the secretary may assign any employee of the department of finance and administration to perform the duties of the official suspended by the secretary.

The secretary of finance and administration may reinstate a suspended official of any local public body whenever the suspended official has made a proper showing satisfactory to the secretary that he is able and willing to conduct his office as provided by law, and that no loss will be suffered by the local public body.

In all cases where there shall be grounds for removal of such official, the secretary of finance and administration may cause removal proceedings to be instituted and prosecuted by the attorney general or district attorney, in the manner now provided by law for the institution and prosecution of such proceedings by the district attorney.

ANNOTATIONS

Cross references. — For definition of "official of any local public body", *see* 10-5-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 108, 111, 114.

10-5-9. Suspended official to deliver money and records to secretary; failure or refusal; criminal penalty.

A. Upon written order of suspension by the secretary of finance and administration, the official suspended shall immediately deliver to the secretary all money, records and other property of the office in his charge, for which the secretary shall give a receipt.

B. If upon order of the secretary a suspended official of any local public body refuses or fails to deliver to the secretary all money, records and other property of the local public body, the secretary may invoke the aid of the court to require delivery of money, records and other property of the local public body.

C. It shall be a petty misdemeanor for an official of any local public body to willfully fail or refuse to deliver all money, records and other property of the local public body to the secretary upon order in accordance with the provisions of this section. Upon conviction, the official shall be sentenced to not more than six months in the county jail and fined not more than five thousand dollars ($5,000) or both such imprisonment and fine in the discretion of the judge.

Chapter 10 - Public Officers and Employees: Article 6 – Abandonment of Public Office or Employment

10-6-1. [Effect of public officer or employee entering military service.]

Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall heretofore have entered or who hereafter shall enter military, naval, United States merchant marine, or other armed service of the United States of America, and who by reason of the duties imposed upon him in such service shall fail to devote his time to the performance in person of the duties of such office or employment shall, by entering or continuing in such service, be deemed to have waived and renounced the salary of, and to have abandoned such office or employment until, but only until, he shall have been relieved from active duty in such service and shall have resumed the personal performance of the duties of such public office or employment.

ANNOTATIONS

Purpose of statute. — Laws 1943, ch. 123 (Sections 10-6-1 to 10-6-6 NMSA 1978) had as its purpose the preservation to incumbents of their offices despite their failure to perform the duties thereof while in the armed services, and guarding against disruption of essential functions of government. *State ex rel. Sanchez v. Stapleton*, 1944-NMSC-056, 48 N.M. 463, 152 P.2d 877.

Challenge by public officer. — A public officer who enters military service cannot challenge provisions of act which temporarily diverts emoluments of the office during his inability to perform the duties of such office, in view of applicability of the removal and vacancy statutes which would normally foreclose him from retaining any right to either emoluments or salary pertaining to such office. *State ex rel. Sanchez v. Stapleton*, 1944-NMSC-056, 48 N.M. 463, 152 P.2d 877.

Challenge by person not legally appointed. — One who was not legally appointed to the post of deputy assessor cannot question constitutionality of act which provides for carrying on duties of public officer who entered military service. *State ex rel. Sanchez v. Stapleton*, 1944-NMSC-056, 48 N.M. 463, 152 P.2d 877.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Induction or voluntary enlistment in military service as creating a vacancy in, or as ground of removal from, public office or employment, 143 A.L.R. 1470, 147 A.L.R. 1427, 148 A.L.R. 1400, 150 A.L.R. 1447, 151 A.L.R. 1462, 152 A.L.R. 1459, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.
Constitutionality of statute providing for payments to public officers or employees who enter the military service of the United States, or to their dependents, 145 A.L.R. 1156.
20 C.J.S. Counties § 103; 62 C.J.S. Municipal Corporations § 502.

10-6-2. [Temporary appointments.]

The officer, agent, employee, board or other agency of the state of New Mexico, or of its departments, agencies, counties, municipalities or political subdivisions, who is by law authorized to fill ordinary vacancies in the public office or employment so temporarily abandoned as provided in Section 1 [10-6-1 NMSA 1978] hereof is hereby authorized, empowered and directed to appoint to the public office or employment, so abandoned as provided in Section 1 hereof, another person who shall receive the salary and perform the duties thereof until, but only until, the former incumbent shall have been relieved from active duty in the armed services and shall have resumed the personal discharge of the duties of such public office or employment.

10-6-3. [Permanent abandonment of office, what constitutes.]

Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment.

ANNOTATIONS

Factors constituting abandonment. — It is not only the acceptance of another public office for which a salary or compensation is authorized that will automatically constitute the abandonment of the incumbent's public office; in addition, it must be found that because of such other public office the incumbent fails for 30 successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office. 1964 Op. Att'y Gen. No. 64-73.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 100.

10-6-4. [Filling vacancy when office permanently abandoned.]

The officer, agent, employee, board or other agency of the state, or of its departments, agencies, counties, municipalities or political subdivisions, who is by law authorized to fill ordinary vacancies in the public office or employment so permanently abandoned, as provided in Section 3 [10-6-3 NMSA 1978] hereof, is hereby authorized, empowered and directed to appoint to such public office or employment some qualified person who shall thereafter receive the salary and perform the duties thereof until the expiration of the term

of the former incumbent or until his successor shall have been elected, appointed or otherwise chosen and qualified or until the former incumbent shall have been relieved from active duty in the armed services and shall have resumed the personal discharge of the duties of such public office or employment.

10-6-5. Definition of incompatible office; service and employment.

Any public office or service, other than service in the armed forces of the United States of America, and any private employment of the nature and extent designated in Section 10-6-3 NMSA 1978 is hereby declared to be incompatible with the tenure of public office or employment.

ANNOTATIONS

Physical incompatibility explained. — The test of physical incompatibility is a failure by an official for 30 consecutive days to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of his office. One cannot perform two full-time positions or one full-time position and one part-time position at the same time. Where the individual is serving in the capacity of municipal judge after his working hours as city clerk, there is no physical incompatibility of office. 1968 Op. Att'y Gen. No. 68-111.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Resignation of one office as affecting eligibility to another office during term of former office, 5 A.L.R. 117, 40 A.L.R. 945.

Incompatibility of offices or positions in military service and civil service, 26 A.L.R. 142, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632.

67 C.J.S. Officers and Public Employees §§ 27 to 33, 203.

10-6-6. [Penalties.]

It shall be unlawful for any person who has temporarily or permanently abandoned his public office or employment, as herein defined and described, to receive compensation from public money on account of services or periods of time in his or her public office or employment accruing after such temporary or permanent abandonment and, in the case of temporary abandonment as herein defined, before the resumption of such office or employment as described in Section 1 [10-6-1NMSA 1978] hereof. Any person receiving or paying compensation in violation of this section shall be punished by a fine of not less than two hundred fifty dollars ($250), nor more than one thousand dollars ($1,000), or by imprisonment for not more than one year, or by both such fine and imprisonment.

Chapter 10 - Public Officers and Employees: Article 8 – Per Diem and Mileage

10-8-1. Short title.

Sections 10-8-1 through 10-8-8 NMSA 1978 may be cited as the "Per Diem and Mileage Act".

10-8-2. Purpose of act.

The purpose of the Per Diem and Mileage Act is to establish standard rates for reimbursement for travel for public officers and employees coming under the Per Diem and Mileage Act. The act is designed to be referred to where applicable in statutes setting compensation of public officers and employees.

ANNOTATIONS

When allowance may not be drawn. — State highway commissioners, as unsalaried state officers, may not draw the statutory per diem allowance while engaged in official state business at their residence or personal business premises. 1977 Op. Att'y Gen. No. 77-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 225; 81A C.J.S. States §§ 61, 106 to 109.

10-8-3. Definitions.

As used in the Per Diem and Mileage Act:

A. "secretary" means the secretary of finance and administration;

B. "employee" means any person who is in the employ of any state agency, local public body or public post-secondary educational institution and whose salary is paid either completely or in part from public money, but does not include jurors or jury commissioners;

C. "governing board" means the board of regents of any institution designated in Article 12, Section 11 of the constitution of New Mexico or designated in Chapter 21, Article 14 NMSA 1978, or the board of any institution designated in Chapter 21, Articles 13, 16 and 17 NMSA 1978;

D. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions, except public post-secondary educational institutions;

E. "state agency" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions, except public post-secondary educational institutions;

F. "public post-secondary educational institution" means any institution designated in Article 12, Section 11 of the constitution of New Mexico and any institution designated in Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978; and

G. "public officer" or "public official" means every elected or appointed officer of the state, local public body or any public post-secondary educational institution. Public officer includes members of advisory boards appointed by any state agency, local public body or public post-secondary educational institution.

ANNOTATIONS

Payment to person not within definitions. — A person not within these definitions who performs a service for or on behalf of a school district can be paid under this act for his expenses. 1974 Op. Att'y Gen. No. 74-29.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 224, 225.

10-8-4. Per diem and mileage rates; in lieu of payment.

A. Notwithstanding any other specific law to the contrary and except as provided in Subsection I of this section, every nonsalaried public officer shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or up to ninety-five dollars ($95.00) per diem expenses:

(1) for each board or committee meeting attended; or

(2) for each day spent in discharge of official duties for travel within the state but away from the officer's home.

Nonsalaried public officers who travel to attend a board or committee meeting may elect to be reimbursed per diem under either Paragraph (1) or (2) of this subsection.

B. Every salaried public officer or employee who is traveling within the state but away from the officer's or employee's home and designated post of duty on official business shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or:

(1) up to eighty-five dollars ($85.00) per diem expenses for each day spent in the discharge of official duties for a salaried public officer or employee of a local public body or state agency. If the secretary finds that a per diem allowance of eighty-five dollars ($85.00) is inadequate for reimbursement of expenses in any municipality of this state, the secretary may authorize the reimbursement of per diem for travel to the municipality not to exceed one hundred thirty-five dollars ($135); or

(2) up to eighty-five dollars ($85.00) per diem expenses for each day spent in the discharge of official duties for a salaried public officer or employee of a public post-secondary educational institution. If the governing board finds that a per diem allowance of eighty-five dollars ($85.00) is inadequate for reimbursement of expenses in any municipality of this state, the governing board may authorize the reimbursement of per diem for travel to the municipality not to exceed one hundred thirty-five dollars ($135).

C. Every public officer or employee shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or:

(1) for public officers or employees of a state agency or local public body, up to one hundred fifteen dollars ($115) per diem expenses for each day of travel outside the state on official business. If the secretary finds that a per diem allowance of one hundred fifteen dollars ($115) is inadequate for out-of-state travel to a geographical area, the secretary may authorize per diem not to exceed two hundred fifteen dollars ($215) for out-of-state travel to that geographical area; provided that the secretary may authorize per diem for travel to a locality inside or outside the continental United States for a public officer or employee who is reimbursed solely from federal funds in accordance with the rate allowed by the federal government for travel to that locality. In lieu of per diem, a person trained in the field of accountancy and performing duties in that field of training as an employee while assigned for periods exceeding three weeks per assignment to travel out of state on official business may receive either reimbursement pursuant to the provisions of Subsection K of this section or actual expenses not to exceed two hundred fifteen dollars ($215) per day. Expenses shall be substantiated in accordance with rules promulgated by the department of finance and administration. The secretary may promulgate rules defining what constitutes out-of-state travel for purposes of the Per Diem and Mileage Act; or

(2) for public officers or employees of a public post-secondary educational institution, up to one hundred fifteen dollars ($115) per diem expenses for each day of travel outside the state on official business. If the governing board finds that a per diem allowance of one hundred fifteen dollars ($115) is inadequate for out-of-state travel to a geographical area, the governing board may authorize per diem not to exceed two hundred fifteen dollars ($215) for out-of-state travel to that geographical area; provided that the governing board may authorize per diem for travel to a locality inside or outside the continental United States for a public officer or employee who is reimbursed solely from federal funds in accordance with the rate allowed by the federal government for travel to that locality. Expenses shall be substantiated in accordance with rules promulgated by the governing board. The governing board may promulgate rules defining what constitutes out-of-state travel for purposes of the Per Diem and Mileage Act.

D. Every public officer or employee shall receive up to the internal revenue service standard mileage rate set January 1 of the previous year for each mile traveled in a privately owned vehicle or eighty-eight cents ($.88) a mile for each mile traveled in a privately owned airplane if the travel is necessary to the discharge of the officer's or employee's official duties and if the private conveyance is not a common carrier; provided, however, that only one person shall receive mileage for each mile traveled in a single privately owned

vehicle or airplane, except in the case of common carriers, in which case the person shall receive the cost of the ticket in lieu of the mileage allowance.

E. The per diem and mileage or per diem and cost of tickets for common carriers paid to salaried public officers or employees is in lieu of actual expenses for transportation, lodging and subsistence.

F. In addition to the in-state per diem set forth in this section, the department of finance and administration, by rule, may authorize a flat subsistence rate in the amount set by the legislature in the general appropriation act for commissioned officers of the New Mexico state police in accordance with rules promulgated by the department of finance and administration.

G. In lieu of the in-state per diem set in Subsection B of this section, the department of finance and administration may, by rule, authorize a flat monthly subsistence rate for certain employees of the department of transportation, provided that the payments made under this subsection shall not exceed the maximum amount that would be paid under Subsection B of this section.

H. Per diem received by nonsalaried public officers for travel on official business or in the discharge of their official duties, other than attending a board or committee meeting, and per diem received by public officers and employees for travel on official business shall be prorated in accordance with rules of the department of finance and administration or the governing board.

I. The provisions of Subsection A of this section do not apply to payment of per diem expense to a nonsalaried public official of a municipality for attendance at board or committee meetings held within the boundaries of the municipality.

J. In addition to any other penalties prescribed by law for false swearing on an official voucher, it shall be cause for removal or dismissal from office.

K. With prior written approval of the secretary or the secretary's designee or the local public body, a nonsalaried public officer of a state agency or local public body, a salaried public officer of a state agency or local public body or a salaried employee of a state agency or local public body is entitled to per diem expenses under this subsection and shall receive:

(1) reimbursement for actual expenses for lodging; and

(2) reimbursement for actual expenses for meals not to exceed thirty dollars ($30.00) per day for in-state travel and forty-five dollars ($45.00) per day for out-of-state travel.

L. With prior written approval of the governing board or its designee, a nonsalaried public officer of a public post-secondary educational institution, a salaried public officer

of a public post-secondary educational institution or a salaried employee of a public post-secondary educational institution is entitled to per diem expenses under this subsection and shall receive:

(1) reimbursement for actual expenses for lodging; and

(2) reimbursement for actual expenses for meals not to exceed thirty dollars ($30.00) per day for in-state travel and forty-five dollars ($45.00) per day for out-of-state travel.

ANNOTATIONS

Compiler's notes. — The General Appropriation Act, referred to in Subsection F, is the yearly act passed by the state legislature which funds all state agencies and personnel.

Cross references. — For payment of travel advances upon public vouchers, *see* 6-5-8 NMSA 1978.

Source of compensation. — Nothing in the Per Diem and Mileage Act specifies the source from which board members are to receive compensation for travel costs. *N.M. Bd. of Veterinary Med. v. Riegger*, 2006-NMCA-069, 139 N.M. 679, 137 P.3d 619, *aff'd in part, rev'd in part*, 2007-NMSC-044, 142 N.M. 248, 164 P.3d 947.

Per diem not part of wages. — Where an employee could not show that reimbursement for per diem expenses for out-of-town travel was in excess of his actual expenses and thus constituted a real economic gain to him, per diem payments were not included in his wages for purposes of calculating the amount of workers' compensation payable to the employee. *Antillon v. N.M. State Highway Dep't*, 1991-NMCA-093, 113 N.M. 2, 820 P.2d 436.

Enforcement of dropped restriction disallowed. — Where a 35-mile condition is retained only in a per diem clause of a bargaining agreement and it is clear that the parties intended that the 35-mile condition would not apply to a special living allowance provision, the highway department, once it agrees to drop a restriction during negotiations, cannot now be allowed to enforce it. *Local 2238 AFSCME v. N.M. State Highway Dep't*, 1979-NMSC-057, 93 N.M. 195, 598 P.2d 1155.

Intent of payment. — Payment under this section is intended to defray costs incurred in travel associated with the performance of public business rather than serve as a salary for services performed. 1977 Op. Att'y Gen. No. 77-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 224, 225.

10-8-5. Restrictions; rules.

A. The secretary may promulgate rules for state agencies and local public bodies for the purpose of carrying out the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. Public officials of public post-secondary educational institutions and employees of public post-secondary educational institutions shall be subject to the rules of their governing boards.

B. Public funds may be advanced to any public officer or employee before the travel occurs only with prior written approval of the secretary, the secretary's designee, the local public body or the governing board or its designee. This restriction shall not prohibit the use of authorized credit cards in connection with purchases necessary to the use of vehicles owned by the state, a local public body or a public post-secondary educational institution or for food, lodging or transportation as permitted by the department of finance and administration or the governing board. Public funds shall be paid out under the Per Diem and Mileage Act only upon vouchers duly presented with any required receipts attached thereto. For employees authorized to receive public funds in advance of travel, payment shall be received only upon vouchers submitted with attached authorization for each travel period. For public officers or employees using authorized credit cards, vouchers with required receipts for each month's travel expenses shall be submitted as a condition to receiving authorization to use the credit card for the next month's travel. Travel expenses may also be advanced if the travel is to be performed under provisions of federal or private contracts and the funds used are not derived from taxes or revenues paid to the state or any of its political subdivisions.

C. The secretary may reduce the rates set for the per diem and mileage for any class of public officials and for employees of state agencies, except public officials of public post-secondary educational institutions, at any time the secretary deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The secretary shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for all public officers and employees of the same classification. The secretary may, at the request of any state agency and for good cause shown, reduce the rates of per diem and mileage for that state agency. The governing body of any local public body may eliminate or may reduce the rates set for the per diem and mileage for all or any class of public officials and employees of the local public body at any time the local public body deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The local public body shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for all public officers and employees of the same classification. The secretary may, in extraordinary circumstances and with the prior approval of the state board of finance in public meeting, allow actual expenses rather than the per diem rates set in the Per Diem and Mileage Act.

D. The governing board or its designee may reduce the rates set for the per diem and mileage for public officials of public post-secondary educational institutions and for employees of public post-secondary educational institutions at any time the governing

board deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The governing board shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for public officers and employees of public post-secondary educational institutions. The governing board may reduce the rates of per diem and mileage for its public post-secondary educational institution and may, in extraordinary circumstances and in public meeting, allow actual expenses rather than the per diem rates set in the Per Diem and Mileage Act.

E. No reimbursement for out-of-state travel shall be paid to any elected public officer, including any member of the legislature, if after the last day to do so that officer has not filed a declaration of candidacy for reelection to the public officer's currently held office or has been defeated for reelection to the public officer's currently held office in a primary election or any general election.

F. Subsection E of this section does not apply to any elected public officer who is ineligible to serve another term after serving the public officer's term in office.

G. Subsection E of this section does not apply to legislators whose travel has been approved by a three-fourths' vote of the New Mexico legislative council at a regularly called meeting.

H. Any person who is not an employee, appointee or elected official of a county or municipality and who is reimbursed under the provisions of the Per Diem and Mileage Act in an amount that singly or in the aggregate exceeds one thousand five hundred dollars ($1,500) in any one year shall not be entitled to further reimbursement under the provisions of that act until the person furnishes in writing to the person's department head or, in the case of a department head or board or commission member, to the governor or, in the case of a member of the legislature, to the New Mexico legislative council an itemized statement on each separate instance of travel covered within the reimbursement, the place to which traveled and the executive, judicial or legislative purpose served by the travel.

ANNOTATIONS

Cross references. — For payment of travel expenses upon public vouchers, *see* 6-5-8 NMSA 1978.

Nonsalaried public officers. — Nonsalaried public officers, including state highway commissioners, may receive the statutory per diem allowance for each day on which public business involving the requisite travel is performed without regard to the number of hours actually expended while away from place of residence and personal business premises in the performance of public duties. 1977 Op. Att'y Gen. No. 77-20.

Reducing rates. — A state agency may reduce rates of per diem and mileage for that state agency to an amount less than that specified in the Per Diem and Mileage Act, subject to

the prior approval of the director (now secretary) of the department of finance and administration. 1977 Op. Att'y Gen. No. 77-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 224, 225.

10-8-6. Application of act.

A. The Per Diem and Mileage Act shall not apply to the members of the legislature unless the legislature by specific reference to the act makes it applicable to the members and such application does not thereby exceed the per diem and mileage rates fixed in the constitution of New Mexico.

B. The provisions of Subsection D of Section 10-8-4 NMSA 1978 pertaining to the mileage reimbursement rate for travel in a privately owned vehicle shall not apply to employees of a hospital facility under the control of the board of trustees of a special hospital district created pursuant to the provisions of the Special Hospital District Act [Chapter 4, Article 48A NMSA 1978], if the board of trustees has fixed a mileage reimbursement rate for those employees.

10-8-7. Penalty.

Any public officer or employee covered by the Per Diem and Mileage Act who knowingly authorizes or who knowingly accepts payment in excess of the amount allowed by the Per Diem and Mileage Act or in excess of the amount authorized by the secretary or the governing board pursuant to Section 10-8-5 NMSA 1978 is liable to the state in an amount that is twice the excess payment.

ANNOTATIONS

Cross references. — For definition of "employee" and "public officer", *see* 10-8-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 224, 225, 257.

10-8-8. Other reimbursements.

A. The secretary may authorize by regulation reimbursement for the following actual expenses incurred by public officers and employees of state agencies:

(1) moving expenses;

(2) professional fees or dues;

(3) tuition and fees for attending educational programs or classes approved by the secretary; and

(4) registration fees for attending seminars, educational programs or classes.

B. The governing body of any local public body may, by resolution, authorize the reimbursement of public officers and employees for any of the actual expenses set forth in Subsection A of this section. No resolution adopted pursuant to this subsection shall authorize the reimbursement for any expense not authorized by regulation of the secretary pursuant to Subsection A of this section.

C. The governing board may, by regulation, authorize the reimbursement of public officers of public post-secondary educational institutions and employees of public post-secondary educational institutions for any of the actual expenses set forth in Subsection A of this section.

D. No reimbursement shall be made for any expenses unless receipts for all such expenses are attached to the reimbursement voucher.

Chapter 10 - Public Officers and Employees: Article 15 – Open Meetings

10-15-1. Formation of public policy; procedures for open meetings; exceptions and procedures for closed meetings.

A. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

B. All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county, municipality, district or political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

C. If otherwise allowed by law or rule of the public body, a member of a public body may participate in a meeting of the public body by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the public body who speaks during the meeting.

D. Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

E. A public body may recess and reconvene a meeting to a day subsequent to that stated in the meeting notice if, prior to recessing, the public body specifies the date, time and place for continuation of the meeting and, immediately following the recessed meeting, posts notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting. Only matters appearing on the agenda of the original meeting may be discussed at the reconvened meeting.

F. Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda. Except in the case of an emergency or in the case of a public body that ordinarily meets more frequently than once per week, at least seventy-two hours prior to the meeting, the agenda shall be available to the public and posted on the public body's web site, if one is maintained. A public body that ordinarily meets more frequently than once per week shall post a draft agenda at least seventy-two hours prior to the meeting and a final agenda at least thirty-six hours prior to the meeting. Except for emergency matters, a public body shall take action only on items appearing on the agenda. For purposes of this subsection, "emergency" refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body. Within ten days of taking action on an emergency matter, the public body shall report to the attorney general's office the action taken and the circumstances creating the emergency; provided that the requirement to report to the attorney general is waived upon the declaration of a state or national emergency.

G. The board, commission or other policymaking body shall keep written minutes of all its meetings. The minutes shall include at a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policymaking body.

H. The provisions of Subsections A, B and G of this section do not apply to:

(1) meetings pertaining to issuance, suspension, renewal or revocation of a license, except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting;

(2) limited personnel matters; provided that for purposes of the Open Meetings Act, "limited personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this paragraph is not to be construed as to exempt final actions on personnel from being taken at open public

meetings, nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview;

(3) deliberations by a public body in connection with an administrative adjudicatory proceeding. For purposes of this paragraph, "administrative adjudicatory proceeding" means a proceeding brought by or against a person before a public body in which individual legal rights, duties or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing. Except as otherwise provided in this section, the actual administrative adjudicatory proceeding at which evidence is offered or rebutted and any final action taken as a result of the proceeding shall occur in an open meeting;

(4) the discussion of personally identifiable information about any individual student, unless the student or the student's parent or guardian requests otherwise;

(5) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policymaking body and a bargaining unit representing the employees of that policymaking body and collective bargaining sessions at which the policymaking body and the representatives of the collective bargaining unit are present;

(6) that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars ($2,500) that can be made only from one source is discussed and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting;

(7) meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant;

(8) meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body;

(9) those portions of meetings of committees or boards of public hospitals where strategic and long-range business plans or trade secrets are discussed; and

(10) that portion of a meeting of the gaming control board dealing with information made confidential pursuant to the provisions of the Gaming Control Act [Chapter 60, Article 2E NMSA 1978].

I. If any meeting is closed pursuant to the exclusions contained in Subsection H of this section:

(1) the closure, if made in an open meeting, shall be approved by a majority vote of a quorum of the policymaking body; the authority for the closure and the subject to

be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting; or

(2) if a closure is called for when the policymaking body is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed is given to the members and to the general public.

J. Following completion of any closed meeting, the minutes of the open meeting that was closed or the minutes of the next open meeting if the closed meeting was separately scheduled shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate closed meeting. This statement shall be approved by the public body under Subsection G of this section as part of the minutes.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Purpose of the Open Meetings Act is to open the meetings of governmental bodies to public scrutiny by allowing public attendance at such meetings, not to unduly burden the appropriate exercise of governmental decision-making and ability to act. *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, 96 N.M. 398, 631 P.2d 304.

The doctrine of res judicata applies to claimed violations of the Open Meetings Act. *Anaya v. City of Albuquerque*, 1996-NMCA-092, 122 N.M. 326, 924 P.2d 735, cert. denied, 122 N.M. 194, 922 P.2d 576.

Record of meeting. — Duly approved, written minutes of a policy making body can be sufficient to constitute an official transcript for review and duly approved and executed resolutions of a policy-making body can appropriately serve as a statement of the legal and factual basis for the body's decision. *Village of Angel Fire v. Wheeler*, 2003-NMCA-041, 133 N.M. 421, 63 P.3d 524, cert. denied, 133 N.M. 413, 63 P.3d 516.

Election of officers did not require a record of how voters voted. — Where defendants installed a new headgate on the association's acequia system without obtaining the approval of the association or the mayordomo; the mayordomo and a commissioner, on behalf of the association, obtained a temporary restraining order prohibiting defendants from continuing work on the ditch; defendants claimed that the association's meeting to elect officers violated the Open Meeting Act, Chapter 10, Article 15 NMSA 1978, because the minutes of the meeting did not record how each member voted as required by 10-15-1(G) NMSA 1978 and that consequently, the commissioner and the mayordomo were not

properly elected as officers and lacked standing to file the petition for injunction on behalf of the association; in the association's practice, each person meeting the voter requirements of 73-2-14 NMSA 1978 was accorded one vote; and the voters did not represent others, they represented their own interests in the ditch, the election of the commissioner and the mayordomo was not void because the purpose of recording the "yeas and nay's" of votes as required by 10-15-1(G) NMSA 1978 was not relevant where the recording of the votes would not serve the purpose of greater accountability. *Parkview Cmty. Ditch Ass'n v. Peper*, 2014-NMCA-049.

To "attend and listen," as used in Subsection A, means that persons desiring to attend shall have the opportunity to do so, that no one will be systematically excluded or arbitrarily refused admittance, and that the meeting will not be "closed" to the public. *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, 96 N.M. 398, 631 P.2d 304.

III. EXCEPTIONS.

Meetings with attorney. — Subsection H(7) does not apply only when a public body has already become involved in litigation or has been informed it will likely become involved. Also, it does not require that a decision regarding litigation be made in an open meeting. *Board of Cnty. Comm'rs v. Ogden*, 1994-NMCA-010, 117 N.M. 181, 870 P.2d 143, cert. denied, 117 N.M. 215, 870 P.2d 753.

Settlement agreements entered into between parties are outside the attorney-client privilege, and therefore Paragraph (7) of Subsection H of this section has no bearing on their disclosure. *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

Decisions to settle litigation may be made in a closed meeting. — A litigation committee, acting under the delegated authority of the New Mexico State Investment Council to settle legal matters, did not violate the Open Meetings Act (OMA) when it approved settlement agreements under the Fraud Against Taxpayers Act, 44-9-1 to 44-9-14 NMSA 1978, in private meetings, but because the litigation committee failed to comply with the notice provisions of the OMA, the litigation committee's approval of the settlement agreements was invalid. *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, cert. denied.

Communications regarding limited personnel matters. — In an underlying enforcement action under the New Mexico Inspection of Public Records Act, 14-2-1 to -12 NMSA 1978, where plaintiffs made a combined seven written requests of the Albuquerque public schools (APS) to inspect documents referencing complaints or allegations of misconduct regarding the former superintendent of APS, the district court did not err in ordering the non-party appellant to answer plaintiffs' deposition questions, because appellant failed to identify any privilege, either adopted by the New Mexico supreme court or recognized under the New Mexico constitution, on which to base her argument that communications regarding "limited personnel matters" that occur during a

closed public meeting are immune from discovery, and failed to meet her burden of establishing the essential elements necessary to prove the applicability of the attorney-client privilege, based on a claimed common interest, to her communications with APS attorneys. *Albuquerque Journal v. Board of Educ.*, 2019-NMCA-012, *cert. granted.*

County hospital physician's contract. — The Open Meetings Act was not applicable to a county hospital's contract with a physician since the board's bylaws gave authority to the CEO to enter into employment contracts with his subordinates, the contract was discussed at a closed-door meeting of the board conducted by the hospital's attorney, which was proper under the personnel exclusion of the Open Meetings Act. Also, since it did not appear that any "final actions" were taken by the board on the employment contracts, there was no action taken, and the Open Meetings Act did not apply. The contract did not have to be adopted by either the hospital's board or the county commission in order to be valid. *Treloar v. County of Chavez*, 2001-NMCA-074, 130 N.M. 794, 32 P.3d 803.

Quorum not required. — Where livestock board's executive director's largely unilateral action in negotiating with the Forest Service and executing a memorandum of understanding did not involve a meeting of a quorum of the Board members, the Open Meetings Act did not apply. *Paragon Found., Inc. v. N.M. Livestock Bd*., 2006-NMCA-004, 138 N.M. 761, 126 P.3d 577, cert. denied, 2006-NMCERT-001, 139 N.M.272, 131 P.3d 659.

IV. GENERAL REQUIREMENTS.

Reasonable public access required. — A governmental entity must allow reasonable public access for those who wish to attend and listen to its proceedings. *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, 96 N.M. 398, 631 P.2d 304.

Meeting with overflow crowd qualifies as open and public. — When the size of a crowd exceeds the capacity of the meeting place and every effort is made to allow those who cannot gain entrance to listen to the proceedings, the requirements of this article are satisfied and the meeting qualifies as both open and public. *Gutierrez v. City of Albuquerque*, 1981-NMSC-061, 96 N.M. 398, 631 P.2d 304.

Restrictions on public's right to speak at open meetings. — The Open Meetings Act does not require a county commission to allow the public to speak at its meetings. However, the commission in this case had an intentional practice and tradition of allowing public comment at its meetings, and it failed to identify a significant government interest justifying the prohibition of plaintiff's speech at a commission meeting. Therefore, the district courts order of summary judgment in favor of the commissioners was reversed. *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999).

V. NOTICE.

Notice reasonable. — Where notice of the meeting at which a board adopted regulations under the Environmental Improvement Act was mailed at least 10 days prior to the

scheduled date to 64 individuals, committees and organizations (including the appellant who had and exercised the opportunity to appear at two preliminary meetings at which evidence was taken regarding the proposed regulations), the notice of these preliminary meetings was published in nine newspapers, a news release was issued on April 16, 1974, giving the time and place of the April 19 meeting and stating that the board would take action on proposed regulations for solid waste and New Mexico's ambient air standard for sulfur dioxide, notice of the meeting, citing a U.P.I. release, appeared in two other papers on April 18, 1974, and April 17, 1974, respectively, and moreover, April 19 was the regular monthly meeting date for the board, it was held that all of these efforts by the board constituted reasonable notice to the public within the meaning of this subsection. *N.M. Mun. League, Inc. v. N.M. Envtl. Imp. Bd*., 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

VI. CORRECTION OF ERRORS.

Reinstatement of termination proceedings after initial ones defective. — Where the original termination proceedings against a teacher were reversed based upon a procedural defect (failure to comply with this article), the school board was entitled to reinstate terminational proceedings, correct the procedural defect, and rely upon the same alleged acts of misconduct that had been relied upon in the original proceedings. *Board of Educ. v. Sullivan*, 1987-NMSC-062, 106 N.M. 125, 740 P.2d 119.

Correction of procedural error. — A local school board's procedural error in, following private deliberations, issuing its written decision affirming a teacher's dismissal without convening an open meeting and without a public announcement of the vote, may be corrected by holding a prompt public meeting, affording the teacher an opportunity to be present, and publicly voting on and ratifying its decision. *Kleinberg v. Board of Educ*., 1988-NMCA-014, 107 N.M. 38, 751 P.2d 722.

Corrective action taken thirty months after procedural error was valid. — Where the New Mexico State Investment Council (NMSIC) ratified settlement agreements approved by a litigation committee, which violated the Open Meetings Act when acting under the delegated authority of the NMSIC, the NMSIC's ratification of the settlements in a properly-noticed public meeting, which included a public agenda, was open to the public, was publicly voted on by a quorum of the NMSIC, and the minutes of which were published online, was sufficient to remedy the litigation committee's improper action, because the legislature did not intend to unduly burden the appropriate exercise of governmental decision-making and ability to act. *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069.

Moot claim not vacated. — Although the drug-testing policy in issue was replaced, making the claim under this act moot on appeal, the city is not entitled to vacate the trial court's judgment on that claim. *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 76 F.3d 1142 (10th Cir. 1996).

Mutual domestic water association is a public body and must comply with the Open Meetings Act. 2006 Op. Att'y Gen. No. 06-02.

Intercommunity water supply association. — An association composed solely of two incorporated villages for purposes of securing an adequate and economic supply of water for the residents of the villages was a public body subject to the Open Meetings Act, particularly in light of the considerable public authority the association had over the creation, maintenance and distribution of the water to the two villages. 1991 Op. Att'y Gen. No. 91-07.

Denial to citizen of right to address board. — A local school board president has authority to deny citizens the right to address the local school board during a meeting of the board, if he is authorized to do so by rules promulgated by the board and he does not exercise that authority arbitrarily or capriciously. 1990 Op. Att'y Gen. No. 90-26.

All stages to be open. — All stages of the meetings must be open to the public because if the body were allowed to conduct a closed meeting in the determination of a matter, and then merely open the meeting to the public and announce its decision, the clear intent of the legislature would be defeated. 1959 Op. Att'y Gen. No. 59-105 (decided under prior law).

Decisions made by telephone, etc. — Final decisions made by telephone, mail or telegraph are not made at a meeting open to the public within the meaning of the act. A clear intention of the words "meeting open to the public" is to provide a situation where all of the attending members of the board or commission assembled together arrive at final decisions and determinations in such a manner as to allow the press and the general public to be present. Any other interpretation would defeat the legislative intent of the statute. 1959 Op. Att'y Gen. No. 59-105 (decided under prior law).

A county commission may not, consistently with this article, approve purchases by telephone. When it approves purchases, a county commission is conducting public business and taking official action. Therefore, to be valid, this action must be taken by the commissioners acting as a body at a meeting open to the public and according to the requirements of the Open Meetings Act. 1991 Op. Att'y Gen. No. 91-12.

Recording and broadcasting of meetings. — News reporters may record public meetings and may later broadcast those recordings, if the recording process does not effectively interfere with certain legitimate governmental interests such as the need to provide for order, decorum, etc. 1973 Op. Att'y Gen. No. 73-10 (decided under prior law).

Notice of meetings. — Notice must be posted in a timely manner prior to the anticipated meeting. 1990 Op. Att'y Gen. No. 90-29.

The reasonable notice standard contained in the Open Meetings Act involves an analysis of its substance and procedure, and no hard and fast rule can be applied to what constitutes "reasonable notice" under the Act. 1990 Op. Att'y Gen. No. 90-29.

Procedurally, it is acceptable to post notice in a prominent location like city hall or in the county courthouse. However, where notice has been posted in a prominent location but the public is denied access, such notice is defective and therefore not reasonable. 1990 Op. Att'y Gen. No. 90-29.

It is recommended that public policy-making bodies post notice at least 10 days prior to regular meetings, three days prior to special meetings and as practicable for emergency meetings. However, emergency meetings called with little or no notice must involve issues which, if not addressed immediately by a policy-making body, will threaten the health, safety or property of its citizens. 1990 Op. Att'y Gen. No. 90-29.

A violation of the Open Meeting Act's notice provisions must be considered to be substantial because the act's policy goals and intent cannot be achieved without sufficient notice. 1990 Op. Att'y Gen. No. 90-29.

Publication in New Mexico register. — A notice of proposed rulemaking in the New Mexico Register probably would not constitute reasonable notice under the Open Meetings Act, Sections 10-15-1 to 10-15-4 NMSA 1978, because the register is not widely circulated and is not readily available to the general public. 1993 Op. Att'y Gen. No. 93-02.

"Limited personnel matters" exception. — If a public policy-making body desires to meet in executive session to discuss an individual employee's dismissal, promotion, resignation, complaint or shortcomings, then such a meeting could properly be closed pursuant to the "limited personnel matters" exception set forth in Subsection H(2).Conversely, budgetary discussions and the like, while sometimes tangentially related to personnel matters, are not to be held behind closed doors. 1990 Op. Att'y Gen. No. 90-28.

Use of proxy votes is not permitted. — The Open Meetings Act does not allow a member of the New Mexico sentencing commission to use a designee to cast the member’s vote at a meeting. 2010 Op. Att'y Gen. No. 10-02.

Official acts. — An "official act" for purposes of the Open Meetings Act broadly encompasses any activity related to an agency’s official business, authority and responsibilities. 2010 Op. Att'y Gen. No. 10-02.

Sanctions for violations. — Sanctions for violating the Open Meetings Act include invalidation of agency action, award of attorney fees and costs to plaintiffs who prevail in a court action to enforce the Open Meetings Act, and criminal penalties. 2010 Op. Att'y Gen. No. 10-02.

No general right of public sector collective bargaining. — It would be incorrect to infer that by including a provision allowing closed meetings to discuss strategy preliminary to collective bargaining negotiations, Paragraph H(5) of this section, the legislature

recognized the general right of public sector collective bargaining. To the contrary, that provision was enacted only because the legislature specifically had authorized cities to bargain collectively with transit workers in 3-52-14 to 3-52-16 NMSA 1978. 1987 Op. Att'y Gen. No. 87-41.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Administrative Law § 101 et seq.

Emergency exception under state law making proceedings by public bodies open to the public, 33 A.L.R.5th 731.

Attorney-client exception under state law making proceedings by public bodies open to the public, 34 A.L.R.5th 591.

Pending or prospective litigation exception under state law making proceedings by public bodies open to the public, 35 A.L.R.5th 113.

Construction and application of exemptions, under 5 USCS § 552b(c), to open meeting requirement of Sunshine Act, 82 A.L.R. Fed. 465.

Exhaustion of administrative remedies as prerequisite to judicial action to compel disclosure under Freedom of Information Act (FOIA) (5 USC § 552), 112 A.L.R. Fed. 561.

73 C.J.S. Public Administrative Law and Procedure § 19.

10-15-1.1. Short title.

Chapter 10, Article 15 NMSA 1978 may be cited as the "Open Meetings Act".

10-15-2. State legislature; meetings.

A. Unless otherwise provided by joint house and senate rule, all meetings of any committee or policy-making body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings open to the public at all times. Reasonable notice of meetings shall be given to the public by publication or by the presiding officer of each house prior to the time the meeting is scheduled.

B. The provisions of Subsection A of this section do not apply to matters relating to personnel or matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party.

C. For the purposes of this section, "meeting" means a gathering of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body.

ANNOTATIONS

Open meetings not required. — The open meetings requirement as defined in this section does not apply to a caucus of the majority party of the house of representatives. 1976 Op. Att'y Gen. No. 76-21.

10-15-3. Invalid actions; standing.

A. No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of Section 10-15-1NMSA 1978.

B. All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the individual first provides written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred.

C. The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The court shall award costs and reasonable attorney fees to any person who is successful in bringing a court action to enforce the provisions of the Open Meetings Act. If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

D. No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

ANNOTATIONS

Memorandum of understanding entered into by regional forester of the forest service and the executive director of the livestock board was not a proper action under this section, and thus there was no Open Meetings Act violation. *Paragon Found., Inc. v. N.M.*

Livestock Bd., 2006-NMCA-004, 138 N.M. 761, 126 P.3d 577, cert. denied, 2006-NMCERT-001, 139 N.M.272, 131 P.3d 659.

Recall of school board members. — Violation of the Open Meetings Act provides a sufficient basis for a petition to recall school board members. *Dona Ana Cnty. Clerk v. Martinez*, 2005-NMSC-037, 138 N.M. 575, 124 P.3d 210.

Employment offer from two commissioners. — The action of two county commissioners orally extending an offer of a two-year employment was without statutory authority because it was not made at a duly constituted meeting of the board and, thus, it was not a valid act capable of binding the county. *Trujillo v. Gonzales*, 1987-NMSC-119, 106 N.M. 620, 747 P.2d 915.

Retroactive cure of invalid action. — When a public entity acts to cure an employment termination action that was taken in violation of the Open Meetings Act by taking a later action, the later action cannot be applied retroactively to make the prior action valid and effective as of the date it was taken. *Palenick v. City of Rio Rancho*, 2012-NMCA-018, 270 P.3d 1281, cert. granted, 2012-NMCERT-002.

Where a municipality terminated plaintiff as city manager in violation of the Open Meeting Act and in a meeting eleven months after the termination, the municipality passed a resolution ratifying and approving the prior action, the later attempt to ratify and approve the invalid action and make the termination retroactively effective as of the date of the prior action was not effective. *Palenick v. City of Rio Rancho*, 2012-NMCA-018, 270 P.3d 1281, cert. granted, 2012-NMCERT-002.

Waiver of breach of employment agreement based on a violation of the act. — Where defendant's city council terminated plaintiff's employment agreement; even though plaintiff believed that the city council had violated the Open Meetings Act and that plaintiff was still an employee of defendant, plaintiff demanded the severance benefits provided in the agreement; the correspondence between plaintiff and defendant concerning plaintiff's demand for severance benefits did not mention the circumstances surrounding plaintiff's termination; plaintiff did not object to defendant's letter informing plaintiff that plaintiff was no longer an employee of defendant; defendant paid plaintiff the severance package; the attorney general determined that plaintiff's termination violated the Open Meetings Act and that the violation invalidated plaintiff's termination; and plaintiff sued defendant for violation of the Open Meeting Act and for breach of contract, plaintiff's demand and acceptance of the severance package from defendant constituted a waiver of plaintiff's right to pursue claims against defendant for violation of the Open Meetings Act and for breach of contract. *Palenick v. City of Rio Rancho*, 2013-NMSC-029, *rev'g* 2012-NMCA-018, 270 P.3d 1281.

Breach of employment agreement based on a violation of the act. — Where a municipality terminated plaintiff as city manager in violation of the Open Meeting Act, plaintiff's acceptance of severance benefits did not constitute a waiver of plaintiff's right

to salary and benefits pursuant to plaintiff's employment agreement. *Palenick v. City of Rio Rancho*, 2012-NMCA-018, 270 P.3d 1281, cert. granted, 2012-NMCERT-002.

Attorney's fees. — Where a municipality terminated plaintiff as city manager in violation of the Open Meeting Act, plaintiff filed an action for enforcement of the act and for breach of contract to recover money due under plaintiff's employment agreement; and plaintiff's claim to enforce the act was dismissed for lack of jurisdiction, the court could not enforce the act in the breach of contract action by awarding attorney fees and costs under the act. *Palenick v. City of Rio Rancho*, 2012-NMCA-018, 270 P.3d 1281, cert. granted, 2012-NMCERT-002.

10-15-4. Penalty.

Any person violating any of the provisions of Section 10-15-1 or 10-15-2 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500) for each offense.

Chapter 10 - Public Officers and Employees: Article 16 – Governmental Conduct

10-16-1. Short title.

Chapter 10, Article 16 NMSA 1978 may be cited as the "Governmental Conduct Act".

10-16-2. Definitions.

As used in the Governmental Conduct Act:

A. "business" means a corporation, partnership, sole proprietorship, firm, organization or individual carrying on a business;

B. "confidential information" means information that by law or practice is not available to the public;

C. "contract" means an agreement or transaction having a value of more than one thousand dollars ($1,000) with a state or local government agency for:

(1) the rendition of services, including professional services;

(2) the furnishing of any material, supplies or equipment;

(3) the construction, alteration or repair of any public building or public work;

(4) the acquisition, sale or lease of any land or building;

(5) a licensing arrangement;

(6) a loan or loan guarantee; or

(7) the purchase of financial securities or instruments;

D. "employment" means rendering of services for compensation in the form of salary as an employee;

E. "family" means an individual's spouse, parents, children or siblings, by consanguinity or affinity;

F. "financial interest" means an interest held by an individual or the individual's family that is:

(1) an ownership interest in business or property; or

(2) any employment or prospective employment for which negotiations have already begun;

G. "local government agency" means a political subdivision of the state or an agency of a political subdivision of the state;

H. "official act" means an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority;

I. "public officer or employee" means any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators;

J. "standards" means the conduct required by the Governmental Conduct Act;

K. "state agency" means any branch, agency, instrumentality or institution of the state; and

L. "substantial interest" means an ownership interest that is greater than twenty percent.

10-16-3. Ethical principles of public service; certain official acts prohibited; penalty.

A. A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

C. Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

D. No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

10-16-3.1. Prohibited political activities.

A public officer or employee is prohibited from:

A. directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose;

B. threatening to deny a promotion or pay increase to an employee who does or does not vote for certain candidates, requiring an employee to contribute a percentage of the employee's pay to a political fund, influencing a subordinate employee to purchase a ticket to a political fundraising dinner or similar event, advising an employee to take part in political activity or similar activities; or

C. violating the officer's or employee's duty not to use property belonging to a state agency or local government agency, or allow its use, for other than authorized purposes.

10-16-4. Official act for personal financial interest prohibited; disqualification from official act; providing a penalty.

A. It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

10-16-4.1. Honoraria prohibited.

No legislator, public officer or employee may request or receive an honorarium for a speech or service rendered that relates to the performance of public duties. For the purposes of this section, "honorarium" means payment of money, or any other thing of value in excess of one hundred dollars ($100), but does not include reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service, or payment or compensation for services rendered in the normal course of a private business pursuit.

10-16-4.2. Disclosure of outside employment.

A public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency.

10-16-4.3. Prohibited employment.

It is unlawful for a state agency employee or local government agency employee who is participating directly or indirectly in the contracting process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.

10-16-6. Confidential information.

No legislator or public officer or employee shall use or disclose confidential information acquired by virtue of the legislator's or public officer's or employee's position with a state agency or local government agency for the legislator's, public officer's or employee's or another's private gain.

10-16-7. Contracts involving public officers or employees.

A. A state agency shall not enter into a contract with a public officer or employee of the state, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest unless the public officer or employee has disclosed through public notice the public officer's or employee's substantial interest and unless the contract is awarded pursuant to a competitive process; provided that this section does not apply to a contract of official employment with the state. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this section.

B. Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.

C. Subsection B of this section does not apply to a contract of official employment with a political subdivision. A person negotiating or executing a contract on behalf of a local government agency shall exercise due diligence to ensure compliance with the provisions of this section.

10-16-8. Contracts involving former public officers or employees; representation of clients after government service.

A. A state agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars ($1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of the state whose official act, while in state employment, directly resulted in the agency's making that contract or taking that action.

B. A former public officer or employee shall not represent a person in the person's dealings with the government on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.

C. A local government agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of that local government agency within the preceding year if the value of the contract or action is in excess of one thousand dollars ($1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of that political subdivision of the state whose official act, while in employment with that political subdivision of the state, directly resulted in the agency's making that contract or taking that action.

D. For a period of one year after leaving government service or employment, a former public officer or employee shall not represent for pay a person before the state agency or local government agency at which the former public officer or employee served or worked.

ANNOTATIONS

Subsection C [now Subsection D] not unconstitutional regulation of law practice. — The application of Subsection C [D] to former executive branch attorneys is not an attempt by the legislature to regulate the practice of law and the provision does not violate separation of powers. *Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

Construction with Rule 16-111 NMRA. — Subsection C [now Subsection D] and Rule 16-111NMRA, prohibiting an attorney in private practice from representing a client

in a matter in which the attorney participated personally and substantially while a public officer or employee, prohibit different types of conduct and are not in conflict. *Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

10-16-9. Contracts involving legislators; representation before state agencies.

A. A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978], except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

B. A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

ANNOTATIONS

Conflict of interest is not affected if bond proceeds involved. — Any potential conflict of interest is not affected if a contract or project is funded with local bond proceeds rather than state money. 1989 Op. Att'y Gen. No. 89-34.

10-16-11. Codes of conduct.

A. Each elected statewide executive branch public officer shall adopt a general code of conduct for employees subject to the officer's control. The New Mexico legislative council shall adopt a general code of conduct for all legislative branch employees. The general codes of conduct shall be based on the principles set forth in the Governmental Conduct Act.

B. Within thirty days after the general codes of conduct are adopted, they shall be given to and reviewed with all executive and legislative branch officers and employees. All new public officers and employees of the executive and legislative branches shall review the employees' general code of conduct prior to or at the time of being hired.

C. The head of every executive and legislative agency and institution of the state may draft a separate code of conduct for all public officers and employees in that agency or institution. The separate agency code of conduct shall prescribe standards, in addition to those set forth in the Governmental Conduct Act and the general codes of conduct for all

executive and legislative branch public officers and employees, that are peculiar and appropriate to the function and purpose for which the agency or institution was created or exists. The separate codes, upon approval of the responsible executive branch public officer for executive branch public officers and employees or the New Mexico legislative council for legislative branch employees, govern the conduct of the public officers and employees of that agency or institution and, except for those public officers and employees removable only by impeachment, shall, if violated, constitute cause for dismissal, demotion or suspension. The head of each executive and legislative branch agency shall adopt ongoing education programs to advise public officers and employees about the codes of conduct. All codes shall be filed with the state ethics commission and are open to public inspection.

D. Codes of conduct shall be reviewed at least once every four years. An amended code shall be filed as provided in Subsection C of this section.

E. All legislators shall attend a minimum of two hours of ethics continuing education and training developed and provided, in consultation with the director of the legislative council service, by the state ethics commission or a national state legislative organization of which the state is a member, approved by the director, biennially.

10-16-11.1. State agency or local government agency authority.

Nothing in the Governmental Conduct Act shall be construed to preclude a state agency or local government agency from adopting and publishing ordinances, rules or standards that are more stringent than those required by the Governmental Conduct Act.

10-16-13. Prohibited bidding.

No state agency or local government agency shall accept a bid or proposal from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based. A person accepting a bid or proposal on behalf of a state agency or local government agency shall exercise due diligence to ensure compliance with this section.

ANNOTATIONS

Section not violated. — If the state purchasing agent secures free technical assistance from a supplier in order to aid in preparing specifications, this act is not violated. 1967 Op. Att'y Gen. No. 67-118.

Scope of "person". — "Person" as used in this section includes any person, corporation, partnership or other legal entity. 1967 Op. Att'y Gen. No. 67-118.

10-16-13.1. Education and voluntary compliance.

A. The state ethics commission shall advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties. This includes advising all those persons at least annually of that act's ethical principles.

B. The state ethics commission shall seek first to ensure voluntary compliance with the provisions of the Governmental Conduct Act. A person who violates that act unintentionally or for good cause shall be given ten days' notice to correct the matter. Referrals for civil enforcement of that act shall be pursued only after efforts to secure voluntary compliance with that act have failed.

10-16-13.2. Certain business sales to the employees of state agencies and local government agencies prohibited.

A. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to an employee supervised by the public officer or employee. A public officer or employee shall not receive a commission or shall not profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to an employee supervised by the public officer or employee. The provisions of this subsection shall not apply if the supervised employee initiates the sale. It is not a violation of this subsection if a public officer or employee, in good faith, is not aware that the employee to whom the goods, services, construction or items of tangible personal property are being sold is under the supervision of the public officer or employee.

B. A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property, directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to a person over whom the public officer or employee has regulatory authority.

C. A public officer or employee shall not receive a commission or profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to a person over whom the public officer or employee has regulatory authority.

D. A public officer or employee shall not accept from a person over whom the public officer or employee has regulatory authority an offer of employment or an offer of a contract in which the public officer or employee provides goods, services, construction, items of tangible personal property or other things of value to the person over whom the public officer or employee has regulatory authority.

10-16-13.3. Prohibited contributions; financial service contractors.

A. A business that contracts with a state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects shall not knowingly contribute anything of value to a public officer or employee of that state agency or local government agency who has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state.

B. A public officer or employee of a state agency or local government agency that has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state, shall not knowingly accept a contribution of anything of value from a business that contracts with that state agency or local government agency to provide financial services involving the investment of public money or issuance of bonds for public projects.

C. For the purposes of this section:

(1) "anything of value" means any money, property, service, loan or promise, but does not include food and refreshments with a value of less than one hundred dollars ($100) consumed in a day; and

(2) "contribution" means a donation or transfer to a recipient for the personal use of the recipient, without commensurate consideration.

10-16-14. Enforcement procedures.

A. The state ethics commission may investigate suspected violations of the Governmental Conduct Act and forward its findings and evidence to the attorney general, district attorney or appropriate state agency or legislative body for enforcement. If a suspected violation involves the office of the state ethics commission, the attorney general may enforce that act. If a suspected violation involves the office of the attorney general, a district attorney may enforce that act.

B. Violation of the provisions of the Governmental Conduct Act by any legislator is grounds for discipline by the appropriate legislative body.

C. If the state ethics commission determines that there is sufficient cause to file a complaint to remove from office a public officer removable only by impeachment, the commission shall refer the matter to the house of representatives of the legislature. If within thirty days after the referral the house of representatives has neither formally declared that the charges contained in the complaint are not substantial nor instituted hearings on the complaint, the state ethics commission shall make public the nature of the charges but shall make clear that the merits of the charges have never been determined. Days during which the legislature is not in session shall not be included in determining the thirty-day period.

D. Violation of the provisions of the Governmental Conduct Act by any public officer or employee, other than those covered by Subsection C of this section, is grounds for discipline, including dismissal, demotion or suspension. Complaints against executive branch employees may be filed with the agency head and reviewed pursuant to the procedures provided in the Personnel Act. Complaints against legislative branch employees may be filed with and reviewed pursuant to procedures adopted by the New Mexico legislative council. Complaints against judicial branch employees may be filed and reviewed pursuant to the procedures provided in the judicial personnel rules. Complaints against employees subject to the State Ethics Commission Act may also be filed with the state ethics commission, which shall determine whether to forward a complaint to the appropriate state agency or investigate the complaint on its own.

E. Subject to the provisions of this section, the provisions of the Governmental Conduct Act may be enforced by the state ethics commission. Except as regards legislators, state employees or statewide elected officials, a district attorney in the county where a person who allegedly violated the provisions resides or where an alleged violation occurred may also enforce that act. Enforcement actions may include seeking civil injunctive or other appropriate orders.

10-16-17. Criminal penalties.

Unless specified otherwise in the Governmental Conduct Act, any person who knowingly and willfully violates any of the provisions of that act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than one year or both. Nothing in the Governmental Conduct Act shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.

10-16-18. Enforcement; civil penalties.

A. If the state ethics commission reasonably believes that a person committed, or is about to commit, a violation of the Governmental Conduct Act, the state ethics commission may refer the matter to the attorney general or a district attorney for enforcement.

B. The state ethics commission may institute a civil action in district court or refer a matter to the attorney general or a district attorney to institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred fifty dollars ($250) for each violation not to exceed five thousand dollars ($5,000).

Chapter 10 - Public Officers and Employees: Article 17 – Miscellaneous Provisions

10-17-5. [Delivery of lawbooks, records and documents to successors; exception.]

All public officers of this state who may have received lawbooks, as such officers, are hereby required to turn over the same to their successors, as also the records and all other documents relative to their respective offices: provided, that the members of the legislature shall not be included in this section.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees § 211.

10-17-12. [Willful neglect of duty; penalty.]

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful [willful] neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be deemed a misdemeanor, punishable by imprisonment in the county jail for not less than ten nor more than sixty days or by a fine of not less than $100, nor more than $500.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 255 to 263.

Chapter 12 – Miscellaneous Public Affairs Matters: Article 6 – Audit Act

12-6-1. Short title.

Sections 12-6-1 through 12-6-14 [12-6-15] NMSA 1978 may be cited as the "Audit Act."

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2019, ch. 3, § 1 enacted a new section of the Audit Act that was compiled as 12-6-15NMSA 1978, effective June 14, 2019.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States § 65.
81A C.J.S. States §§ 134, 229.

12-6-2. Definitions.

As used in the Audit Act:

A. "agency" means:

(1) any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate or metropolitan courts, district attorneys and charitable institutions for which appropriations are made by the legislature;

(2) any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; municipalities; drainage, conservancy, irrigation or other special districts; and school districts;

(3) any entity or instrumentality of the state specifically provided for by law, including the New Mexico finance authority, the New Mexico mortgage finance authority and the New Mexico lottery authority; and

(4) every office or officer of any entity listed in Paragraphs (1) through (3) of this subsection; and

B. "local public body" means a mutual domestic water consumers association, a land grant, an incorporated municipality or a special district.

ANNOTATIONS

Water and sanitation districts created pursuant to the Water and Sanitation District Act, 73-21-1NMSA 1978 et seq., acequias and community ditch associations subject to Section 73-2-1 NMSA 1978, et seq., and associations created pursuant to the Sanitary Projects Act, 3-29-1 NMSA 1978, et seq., are entities subject to audit under the Audit Act. 1990 Op. Att'y Gen. 90-30.

A conservancy district is an agency subject to audit by the state auditor. 1989 Op. Att'y Gen. No. 89-07.

12-6-3. Annual and special audits; financial examinations.

A. Except as otherwise provided in Subsection B of this section, the financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of the state auditor's office designated by the state auditor or independent auditors approved by the state auditor. The comprehensive annual financial report for the state shall be thoroughly examined and audited each year by the state auditor, personnel of the state auditor's office designated by the state auditor or independent auditors approved by the state auditor. The audits shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor.

B. The examination of the financial affairs of a local public body shall be determined according to its annual revenue each year. All examinations and compliance with agreed-upon procedures shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor. If a local public body has an annual revenue, calculated on a cash basis of accounting, exclusive of capital outlay funds, federal or private grants or capital outlay funds disbursed directly by an administrating agency, of:

(1) less than ten thousand dollars ($10,000) and does not directly expend at least fifty percent of, or the remainder of, a single capital outlay award, it is exempt from submitting and filing quarterly reports and final budgets for approval to the local government division of the department of finance and administration and from any financial reporting to the state auditor;

(2) at least ten thousand dollars ($10,000) but less than fifty thousand dollars ($50,000), it shall comply only with the applicable provisions of Section 6-6-3 NMSA 1978;

(3) less than fifty thousand dollars ($50,000) and directly expends at least fifty percent of, or the remainder of, a single capital outlay award, it shall submit to the state auditor a financial report consistent with agreed-upon procedures for financial reporting that are:

(a) focused solely on the capital outlay funds directly expended;

(b) economically feasible for the affected local public body; and

(c) determined by the state auditor after consultation with the affected local public body;

(4) at least fifty thousand dollars ($50,000) but not more than two hundred fifty thousand dollars ($250,000), it shall submit to the state auditor, at a minimum, a financial report that includes a schedule of cash basis comparison and that is consistent with agreed-upon procedures for financial reporting that are:

(a) narrowly tailored to the affected local public body;

(b) economically feasible for the affected local public body; and

(c) determined by the state auditor after consultation with the affected local public body;

(5) at least fifty thousand dollars ($50,000) but not more than two hundred fifty thousand dollars ($250,000) and expends any capital outlay funds, it shall submit to the state auditor, at a minimum, a financial report that includes a schedule of cash basis comparison and a test sample of expended capital outlay funds and that is consistent with agreed-upon procedures for financial reporting that are:

(a) narrowly tailored to the affected local public body;

(b) economically feasible for the affected local public body; and

(c) determined by the state auditor after consultation with the affected local public body;

(6) at least two hundred fifty thousand dollars ($250,000) but not more than five hundred thousand dollars ($500,000), it shall submit to the state auditor, at a minimum, a compilation of financial statements and a financial report consistent with agreed-upon procedures for financial reporting that are:

(a) economically feasible for the affected local public body; and

(b) determined by the state auditor after consultation with the affected local public body; or

(7) five hundred thousand dollars ($500,000) or more, it shall be thoroughly examined and audited as required by Subsection A of this section.

C. In addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part.

D. Annual financial and compliance audits of agencies under the oversight of the financial control division of the department of finance and administration shall be completed and submitted by an agency and independent auditor to the state auditor no later than sixty days after the state auditor receives notification from the financial control division to the effect that an agency's books and records are ready and available for audit. The local government division of the department of finance and administration shall inform the state auditor of the compliance or failure to comply by a local public body with the provisions of Section 6-6-3 NMSA 1978.

E. In order to comply with United States department of housing and urban development requirements, the financial affairs of a public housing authority that is determined to be a component unit in accordance with generally accepted accounting principles, other than a housing department of a local government or a regional housing authority, at the public housing authority's discretion, may be audited separately from the audit of its local primary government entity. If a separate audit is made, the public housing authority audit shall be included in the local primary government entity audit and need not be conducted by the same auditor who audits the financial affairs of the local primary government entity.

F. The state auditor shall notify the legislative finance committee and the public education department if:

(1) a school district, charter school or regional education cooperative has failed to submit a required audit report within ninety days of the due date specified by the state auditor; and

(2) the state auditor has investigated the matter and attempted to negotiate with the school district, charter school or regional education cooperative but the school district, charter school or regional education cooperative has not made satisfactory progress toward compliance with the Audit Act.

G. The state auditor shall notify the legislative finance committee and the secretary of finance and administration if:

(1) a state agency, state institution, municipality or county has failed to submit a required audit report within ninety days of the due date specified by the state auditor; and

(2) the state auditor has investigated the matter and attempted to negotiate with the state agency, state institution, municipality or county but the state agency, state institution, municipality or county has not made satisfactory progress toward compliance with the Audit Act.

ANNOTATIONS

Compiler's notes. — During calendar years 1992 and 1993 the District Court for the First Judicial District entered three orders in Vigil v. King, SF 92-1487(C), prescribing the procedure to be followed for selecting independent auditors for state agencies and local public bodies. In summary, the court orders provided:

If a state agency or local public body is notified that it has been designated for audit to be conducted by an independent auditor, the state agency or local public body shall select and submit the name of an independent auditor to the state auditor. The state auditor may, within five days after receipt of the state agency's or local public body's selection, disapprove of the choice of the agency or local public body. A disapproval must be in writing and set forth the reason(s) for disapproval. A disapproval is subject to judicial review;

If the state auditor finds that a state agency or local public body audit is not being conducted in accordance with generally accepted auditing standards or pursuant to the auditing contract between the parties, the state auditor may either complete the audit or contract with another independent auditor to complete the audit. If the state auditor contracts with another independent auditor, the contract amount is limited to the remaining amount owed on the original auditor contract;

The state auditor, pursuant to the Procurement Code, may, under conditions specified in the order, contract with independent auditors to assist the state auditor in conducting any special audit pursuant to 12-6-3 NMSA 1978. The state agency being audited is not a party to this contract. The total cost of the contract entered into by the state auditor cannot exceed 25% of the contract amount provided in the agreement between the state auditor and the agency to be audited.

No waiver of immunity under Tort Claims Act. — Because state auditor was acting within his scope of duty in commissioning a special audit and publishing the report, no waiver of immunity exists under the Tort Claims Act for claims of defamation. *Vigil v. State Auditor's Office*, 2005-NMCA-096, 138 N.M. 63, 116 P.3d 854, cert. denied, 2005-NMCERT-007, 138 N.M. 952, 117 P.3d 952.

Purely statutory duties of auditor may be transferred. — New Mexico Const., art. V, § 1, in designating the executive offices of state government, among which is the office of state auditor, is silent as to the duties appertaining to the office of state auditor. This being so, the legislature had power to transfer purely statutory duties of the office previously performed by the auditor to another officer of its own choosing. *Torres v. Grant*, 1957-NMSC-061, 63 N.M. 106, 314 P.2d 712.

State auditor may accept federal audit at his option. — The state auditor is fully authorized by Subsection A of this section to accept the annual federal audit of employment security commission (now employment security division) funds as an approved

independent audit. He is not, however, required to do so and may authorize an audit by personnel designated by him. 1970 Op. Att'y Gen. No. 70-33.

Section prevails over limitation on divulging information. — The legislature manifests a clear intent in this section that the state auditor have available to him all documents necessary to perform a thorough audit of every governmental entity in accordance with generally accepted auditing standards. The policy is expressed strongly enough so that this section must prevail over 3-38-8 NMSA 1978 (relating to divulging information) (repealed in 1981) to the extent of any repugnancy between the two provisions; therefore the state auditor is authorized to examine tax documents generated pursuant to 3-38-1 to 3-38-12 NMSA 1978 (now 3-38-1 to 3-38-6 NMSA 1978) insofar as such examination is required by generally accepted auditing standards. 1978 Op. Att'y Gen. No. 78-22.

Designation of agency to choose its own auditor. — The decision whether the state auditor's office will perform the audit or whether the agency may contract out rests within the state auditor's discretion. Once he has given his written approval to the agency's contract with an independent auditor and said contract has been enacted, however, he may not thereafter revoke the designation. 1987 Op. Att'y Gen. No. 87-54.

Auditor's revocation of designation of independent auditor. — If the state auditor revokes his designation of an agency to choose its own auditor, he may conduct the audit himself, through personnel of his office, or with the assistance of independent auditors under contract with his office. 1987 Op. Att'y Gen. No. 87-54.

Auditor's refusal of approval of independent auditor. — The state auditor may refuse to approve the choice of independent auditor by an agency for any of the reasons provided in SA Rule 87-2 (now 2.2.2.8 NMAC). He is limited to those reasons, because he has, by adopting that rule, committed himself to comply with it until it is changed; however, he is not required to disclose which reason or reasons formed the basis for his decision. 1987 Op. Att'y Gen. No. 87-54.

Directing agency to choose its own auditor. — In carrying out the requirement set forth in the Audit Act (12-6-1 to 12-6-14 NMSA 1978) to audit the financial affairs of each state agency on a yearly basis, the procedures employed by the State Auditor in creating a pool of independent auditors and then directing agencies to contract with auditors he designated from the pool violated the requirements of the Procurement Code (13-1-23 et seq. NMSA 1978). 1992 Op. Att'y Gen. No. 92-06 (but see compiler's notes) (decided under former law).

Sanitary Projects Act associations. — Associations created pursuant to the Sanitary Projects Act (3-29-1 NMSA 1978 et seq.) are subject to audit under this article. 1990 Op. Att'y Gen. No. 90-30.

Water and sanitation districts created by the Water and Sanitation District Act (73-21-1 NMSA 1978 et seq.) are subject to audit under this article. 1990 Op. Att'y Gen. No. 90-30.

Acequias under Sections 73-2-1 to 73-2-64 NMSA 1978 are subject to audit under this article. 1990 Op. Att'y Gen. No. 90-30.

State auditor and conservation district supervisors have statutory duty to audit district. — Both the state auditor and the soil and water conservation district supervisors have an express statutory duty to have district financial affairs audited: the primary responsibility for having the audits performed should be borne by the district supervisors, but the ultimate responsibility lies with the state auditor, who is responsible for ensuring that every agency's financial records are examined and audited. 1980 Op. Att'y Gen. No. 80-19.

Soil and Water Conservation Act creates exception to annual audit. — The apparent conflict between the annual auditing requirement in the Audit Act and the five-year audit exception in the Soil and Water Conservation District Act is easily resolved by applying the well-settled rule of statutory construction that, where there is no clear intention to the contrary, specific statutes prevail over general statutes, regardless of when enacted; consequently, the auditing requirements of the Soil and Water Conservation District Act, Section 73-20-41C(2) NMSA 1978 (now 73-20-41F(2)), apply since it is the more specific statute. 1980 Op. Att'y Gen. No. 80-19.

12-6-4. Auditing costs.

The reasonable cost of all audits shall be borne by the agency audited, except that:

A. a public housing authority other than a regional housing authority shall not bear the cost of an audit conducted solely at the request of its local primary government entity; and

B. the administrative office of the courts shall bear the cost of auditing the magistrate courts. A metropolitan court shall be treated as a single agency for the purpose of audit and shall be audited as a unit, and the cost of the audit shall be paid from the appropriation to the metropolitan court. The district courts of all counties within a judicial district shall be treated as a single agency for the purpose of audit and shall be audited as a unit, and the cost of the audit shall be paid from the appropriation to each judicial district. The court clerk trust account and the state treasurer account of each county's district court shall be included within the scope of the judicial district audit.

ANNOTATIONS

Compiler's notes. — During calendar years 1992 and 1993 the District Court for the First Judicial District entered three orders in Vigil v. King, SF 92-1487(C), prescribing the procedure to be followed for selecting independent auditors for state agencies and local public bodies. In summary, the court orders provide:

If a state agency or local public body is notified that it has been designated for audit to be conducted by an independent auditor, the state agency or local public body shall select and

submit the name of an independent auditor to the state auditor. The state auditor may, within five days after receipt of the state agency's or local public body's selection, disapprove of the choice of the agency or local public body. A disapproval must be in writing and set forth the reason(s) for disapproval. A disapproval is subject to judicial review;

If the state auditor finds that a state agency or local public body audit is not being conducted in accordance with generally accepted auditing standards or pursuant to the auditing contract between the parties, the state auditor may either complete the audit or contract with another independent auditor to complete the audit. If the state auditor contracts with another independent auditor, the contract amount is limited to the remaining amount owed on the original auditor contract;

The state auditor, pursuant to the Procurement Code, may, under conditions specified in the order, contract with independent auditors to assist the state auditor in conducting any special audit pursuant to 12-6-3 NMSA 1978. The state agency being audited is not a party to this contract. The total cost of the contract entered into by the state auditor cannot exceed 25% of the contract amount provided in the agreement between the state auditor and the agency to be audited.

The state auditor's practice of assigning contract auditor's to assist the state auditor in conducting agency audits illegally circumvents the legislature's decision to place the selection of such contract auditors and contract negotiations with the agencies themselves. 1992 Op. Att'y Gen. No. 92-06.

12-6-5. Reports of audits.

A. The state auditor shall cause a complete written report to be made of each annual or special audit and examination made. Each report shall set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination. Each report of a state agency shall include a list of individual deposit accounts and investment accounts held by each state agency audited. A copy of the report shall be sent to the agency audited or examined; five days later, or earlier if the agency waives the five-day period, the report shall become a public record, at which time copies shall be sent to:

(1) the secretary of finance and administration; and

(2) the legislative finance committee.

B. The state auditor shall send a copy of reports of state agencies to the department of finance and administration.

C. Within thirty days after receipt of the report, the agency audited may notify the state auditor of any errors in the report. If the state auditor is satisfied from data or documents at hand, or by an additional investigation, that the report is erroneous, the state auditor shall

correct the report and furnish copies of the corrected report to all parties receiving the original report.

ANNOTATIONS

No waiver of immunity under Tort Claims Act. — Because state auditor was acting within his scope of duty in commissioning a special audit and publishing the report, no waiver of immunity exists under the Tort Claims Act for claims of defamation. *Vigil v. State Auditor's Office*, 2005-NMCA-096, 138 N.M. 63, 116 P.3d 854, cert. denied, 2005-NMCERT-007, 138 N.M. 952, 117 P.3d 952.

12-6-6. Criminal violations.

Immediately upon discovery of any violation of a criminal statute in connection with financial affairs, the state auditor shall report the violation to the proper prosecuting officer and furnish the officer with all data and information in his possession relative to the violation. An agency or independent auditor shall report a violation immediately to the state auditor.

12-6-7. Shortages in accounts; sureties.

A. The state auditor shall notify the appropriate surety on the official bond whenever an audit discloses a shortage in the accounts of any agency. Failure to notify the surety, however, does not release the surety from any obligation under the bond.

B. Sureties upon official bonds of agencies are not released from liability on official bonds until the state auditor has certified to them that the accounts of the agency have been examined and found to be correct and a clearance of liability is given them.

C. When necessary, the state auditor may institute legal proceedings against sureties upon official bonds of officers and employees. In such proceedings, the officer or employee may set up as a defense that errors have been committed by the state auditor in making charges against him, or that he has been refused proper and legal credit by the state auditor, but the burden of proof is upon the officer or employee to show such facts.

12-6-8. Repayment of funds.

If restitution has not been made in thirty days from the receipt by an agency of a report of an audit reflecting a shortage of funds for which the agency is accountable under law, suit to enforce repayment or refund to the agency may be brought by the state auditor.

12-6-9. Public depositories.

The state auditor may:

A. require depositories of public money to furnish reconciliation sheets for the purpose of checking the deposits of public funds;

B. inspect the books and records of any depository concerning public funds; and

C. examine employees of a depository under oath concerning the correctness of the reconciliation or any entry upon the books or records of the depository relating to public funds.

12-6-10. Annual inventory.

A. The governing authority of each agency shall, at the end of each fiscal year, conduct a physical inventory of movable chattels and equipment costing more than five thousand dollars ($5,000) and under the control of the governing authority. This inventory shall include all movable chattels and equipment procured through the capital program fund under Section 15-3B-16 NMSA 1978, which are assigned to the agency designated by the director of the facilities management division of the general services department as the user agency. The inventory shall list the chattels and equipment and the date and cost of acquisition. No agency shall be required to list any item costing five thousand dollars ($5,000) or less. Upon completion, the inventory shall be certified by the governing authority as to correctness. Each agency shall maintain one copy in its files. At the time of the annual audit, the state auditor shall ascertain the correctness of the inventory by generally accepted auditing procedures.

B. The official or governing authority of each agency is chargeable on the official's or authority's official bond for the chattels and equipment shown in the inventory.

C. The general services department shall establish standards, including a uniform classification system of inventory items, and promulgate rules concerning the system of inventory accounting for chattels and equipment required to be inventoried, and the governing authority of each agency shall install the system. A museum collection list or catalogue record and a library accession record or shelf list shall constitute the inventories of museum collections and library collections maintained by state agencies and local public bodies.

D. No surety upon the official bond of any officer or employee of any agency shall be released from liability until a complete accounting has been had. All official bonds shall provide coverage of, or be written in a manner to include, inventories.

12-6-11. Oaths; subpoenas.

A. Oaths may be administered by the state auditor when necessary for an audit or examination.

B. When necessary for an audit or examination, the state auditor may apply to the district court of Santa Fe county for issuance of a subpoena to compel the attendance of

witnesses and the production of books and records. Process under this section shall be served by any sheriff or deputy or by any member of the New Mexico state police without cost. Witnesses not then employed by an agency who are subpoenaed to appear shall receive the same compensation as that provided for witnesses subpoenaed before the district court, paid by the state auditor.

C. Any person subpoenaed under this section who fails to appear, refuses to testify or fails to produce the required books or records is guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000).

12-6-12. Regulations.

The state auditor shall promulgate reasonable regulations necessary to carry out the duties of his office, including regulations required for conducting audits in accordance with generally accepted auditing standards. The regulations become effective upon filing in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

12-6-13. Audit fund; payment for audits; expenses of auditor.

A. There is created in the state treasury the "audit fund" into which the state auditor shall deposit all fees and costs received from agencies audited by him.

B. Payments for salaries and expenses of the state auditor shall be made from the audit fund, and the fund shall not revert at the end of any fiscal year.

ANNOTATIONS

Audit fund was not intended for deposit and appropriation of federal funds. 1980 Op. Att'y Gen. No. 80-40.

Provision of General Appropriation Act of 1980 ineffective in controlling federal funds. — Insofar as the language in the General Appropriation Act of 1980, Laws 1980, ch. 155, attempted to control the expenditure of federal funds received by the state auditor, it can be of no effect. 1980 Op. Att'y Gen. No. 80-40.

12-6-14. Contract audits.

A. The state auditor shall notify each agency designated for audit by an independent auditor, and the agency shall enter into a contract with an independent auditor of its choice in accordance with procedures prescribed by rules of the state auditor; provided, however, that a state-chartered charter school subject to oversight by the public education department or an agency subject to oversight by the higher education department shall receive approval from its oversight agency prior to submitting a recommendation for an independent auditor of its choice. The state auditor may select the auditor for an agency that has not submitted a recommendation within sixty days of notification by the state auditor to contract for the

year being audited, and the agency being audited shall pay the cost of the audit. Each contract for auditing entered into between an agency and an independent auditor shall be approved in writing by the state auditor. Payment of public funds may not be made to an independent auditor unless a contract is entered into and approved as provided in this section.

B. The state auditor or personnel of the state auditor's office designated by the state auditor shall examine all reports of audits of agencies made pursuant to contract. Based upon demonstration of work in progress, the state auditor may authorize progress payments to the independent auditor by the agency being audited under contract. Final payment for services rendered by an independent auditor shall not be made until a determination and written finding that the audit has been made in a competent manner in accordance with the provisions of the contract and applicable rules by the state auditor.

ANNOTATIONS

Compiler's notes. — During calendar years 1992 and 1993 the District Court for the First Judicial District entered three orders in *Vigil v. King*, SF 92-1487(C), prescribing the procedure to be followed for selecting independent auditors for state agencies and local public bodies. In summary, the court orders provide:

If a state agency or local public body is notified that it has been designated for audit to be conducted by an independent auditor, the state agency or local public body shall select and submit the name of an independent auditor to the state auditor. The state auditor may, within five days after receipt of the state agency's or local public body's selection, disapprove of the choice of the agency or local public body. A disapproval must be in writing and set forth the reason(s) for disapproval. A disapproval is subject to judicial review;

If the state auditor finds that a state agency or local public body audit is not being conducted in accordance with generally accepted auditing standards or pursuant to the auditing contract between the parties, the state auditor may either complete the audit or contract with another independent auditor to complete the audit. If the state auditor contracts with another independent auditor, the contract amount is limited to the remaining amount owed on the original auditor contract;

The state auditor, pursuant to the Procurement Code, may, under conditions specified in the order, contract with independent auditors to assist the state auditor in conducting any special audit pursuant to 12-6-3 NMSA 1978. The state agency being audited is not a party to this contract. The total cost of the contract entered into by the state auditor cannot exceed 25% of the contract amount provided in the agreement between the state auditor and the agency to be audited.

Use of contract auditors for agency audits. — The state auditor does not have the authority to contract with independent auditors to assist him in doing agency audits. The state auditor may designate an agency for audit by an independent auditor, but the

designated agency is then authorized to contract with an independent auditor of its choice. Accordingly, the state auditor's practice of assigning contract auditors "to assist" him in conducting agency audits illegally circumvented the legislature's decision to place the selection of such contract auditors and the contract negotiations with the agencies themselves. 1992 Op. Att'y Gen. No. 92-06 (but see compiler's notes) (decided under prior law).

Selection of independent auditor. — It is a violation of the Procurement Code (13-1-23 NMSA 1978 et seq. [now 13-1-28 NMSA 1978 et seq.]) for the state auditor to direct an agency to enter into a contract with an independent auditor selected by him and paid for by the agency. 1992 Op. Att'y Gen. No. 92-06 (but see compiler's notes) (decided under prior law).

Chapter 13 – Public Purchases and Property: Article 1 – Procurement

13-1-21. Application of preferences.

A. For the purposes of this section:

(1) "business" means a commercial enterprise carried on for the purpose of selling goods or services, including growing, producing, processing or distributing agricultural products;

(2) "formal bid process" means a competitive bid process;

(3) "formal request for proposals process" means a competitive proposal process, including a competitive qualifications-based proposal process;

(4) "public body" means a department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of the state or a political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts, local school boards and all municipalities, including home-rule municipalities;

(5) "recycled content goods" means supplies and materials composed twenty-five percent or more of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications;

(6) "resident business" means a business that has a valid resident business certificate issued by the taxation and revenue department pursuant to Section 13-1-22 NMSA 1978 but does not include a resident veteran business; and

(7) "resident veteran business" means a business that has a valid resident veteran business certificate issued by the taxation and revenue department pursuant to Section 13-1-22NMSA 1978.

B. Except as provided in Subsection C of this section, when a public body makes a purchase using a formal bid process, the public body shall deem a bid submitted by a:

(1) resident business to be five percent lower than the bid actually submitted; or

(2) resident veteran business with annual gross revenues of up to three million dollars ($3,000,000) in the preceding tax year to be ten percent lower than the bid actually submitted.

C. When a public body makes a purchase using a formal bid process and the bids are received for both recycled content goods and nonrecycled content goods, the public body shall deem:

(1) bids submitted for recycled content goods from any business, except a resident veteran business, to be five percent lower than the bids actually submitted; or

(2) bids submitted for recycled content goods from a resident veteran business with annual gross revenues of up to three million dollars ($3,000,000) in the preceding tax year to be ten percent lower than the bids actually submitted.

D. When a public body makes a purchase using a formal request for proposals process, not including contracts awarded on a point-based system, the public body shall award an additional:

(1) five percent of the total weight of all the factors used in evaluating the proposals to a resident business; and

(2) ten percent of the total weight of all the factors used in evaluating the proposals to a resident veteran business that has annual gross revenues of up to three million dollars ($3,000,000) in the preceding tax year.

E. When a public body makes a purchase using a formal request for proposals process, and the contract is awarded based on a point-based system, the public body shall award additional points equivalent to:

(1) five percent of the total possible points to a resident business; or

(2) ten percent of the total possible points to a resident veteran business that has annual gross revenues of up to three million dollars ($3,000,000) in the preceding tax year.

F. When a joint bid or joint proposal is submitted by a combination of resident veteran, resident or nonresident businesses, the preference provided pursuant to Subsection B, C, D or E of this section shall be calculated in proportion to the percentage of the contract, based on the dollar amount of the goods or services provided under the contract, that will be performed by each business as specified in the joint bid or proposal.

G. A resident veteran business shall not benefit from the preference pursuant to this section for more than ten consecutive years. A person that is an owner of a business that is a resident veteran business shall not benefit from the preference pursuant to this section for more than ten consecutive years. A person shall not benefit from the provisions of this section based on more than one business concurrently.

H. A public body shall not award a business both a resident business preference and a resident veteran business preference.

I. The procedures provided in Sections 13-1-172 through 13-1-183 NMSA 1978 or in an applicable purchasing ordinance apply to a protest to a public body concerning the awarding of a contract in violation of this section.

J. This section shall not apply when the expenditure includes federal funds for a specific purchase.

ANNOTATIONS

Policy. — The underlying policy of this section is to give a preference to those persons and companies who contribute to the economy of the state of New Mexico by maintaining plants and other facilities within the state and giving employment to residents of the state. 1969 Op. Att'y Gen. No. 69-42.

Multiple preference policy. — A bidder who offers materials grown, processed or manufactured in this state may not claim both the manufacturer's 5% preference and the resident dealer's 5% preference against an out-of-state supplier, giving the in-state supplier a 10% preference. 1968 Op. Att'y Gen. No. 68-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 52, 54, 67, 69.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Validity, construction, and effect of requirement under state statute or local ordinance giving local or locally qualified contractors a percentage preference in determining lowest bid, 89 A.L.R.4th 587.

72 Supp. C.J.S. Public Contracts §§ 7 to 9, 16.

13-1-22. Resident business, resident veteran business, resident contractor and resident veteran contractor certification.

A. To receive a resident business or resident veteran business preference pursuant to Section 13-1-21 NMSA 1978 or a resident contractor or resident veteran contractor preference pursuant to Section 13-4-2 NMSA 1978, a business or contractor shall submit with its bid or proposal a copy of a valid resident business certificate, valid resident veteran business certificate, valid resident contractor certificate or valid resident veteran contractor certificate issued by the taxation and revenue department.

B. An application for a resident business certificate shall include an affidavit from a certified public accountant setting forth that the business is licensed to do business in this state and that:

(1) the business has paid property taxes or rent on real property in the state and paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit;

(2) if the business is a new business, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the business is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the business either leased real property for ten years or purchased real property greater than one hundred thousand dollars ($100,000) in value in the state; or

(4) if the business is a previously certified business or was eligible for certification, the business has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same commercial enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

C. An application for a resident veteran business certificate shall include the affidavit required by Subsection B of this section, an affidavit from a certified public accountant providing the previous year's annual revenues of the resident veteran business and:

(1) verification by the federal department of veterans affairs as being either a veteran-owned small business or a service-disabled veteran-owned small business; or

(2) verification of veteran status as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the department of veterans affairs and proof that a veteran or veterans own a majority of the business.

D. An application for a resident contractor certificate shall include an affidavit from a certified public accountant setting forth that the contractor is currently licensed as a contractor in this state and that:

(1) the contractor has:

(a) registered with the state at least one vehicle; and

(b) in each of the five years immediately preceding the submission of the affidavit: 1) paid property taxes or rent on real property in the state and paid at least one other tax administered by the state; and 2) paid unemployment insurance on at least three full-time employees who are residents of the state; provided that if a contractor is a legacy

contractor, the requirement of at least three full-time employees who are residents of the state is waived;

(2) if the contractor is a new contractor, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the five years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the contractor is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the contractor either leased real property for ten years or purchased real property greater than one hundred thousand dollars ($100,000) in value in the state; or

(4) if the contractor is a previously certified contractor or was eligible for certification, the contractor has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

E. An application for a resident veteran contractor certificate shall include the affidavit required by Subsection D of this section, an affidavit from a certified public accountant providing the previous year's annual revenues for the resident veteran contractor and:

(1) verification by the federal department of veterans affairs as being either a veteran-owned small business or a service-disabled veteran-owned small business; or

(2) verification of veteran status as indicated by the United States department of defense DD form 214 of release or discharge from active duty with an honorable discharge or of service-disabled veteran status by the department of veterans affairs and proof that a veteran or veterans own a majority of the business.

F. The taxation and revenue department shall prescribe the form and content of an application for certification and required affidavit. The taxation and revenue department shall examine the application and affidavit and, if necessary, may seek additional information to ensure that the business or contractor is eligible to receive the certificate pursuant to the provisions of this section. If the taxation and revenue department determines that an applicant is eligible, the department shall issue a certificate pursuant to the provisions of this section. If the taxation and revenue department determines that the applicant is not eligible, the department shall issue notification within thirty days. If no notification is provided by the department, the certificate is deemed approved. A certificate is valid for three years from the date of its issuance; provided that if there is a change of ownership of more than fifty percent, a resident business, resident veteran business, resident contractor or resident veteran contractor shall reapply for a certificate.

G. A business or contractor whose application for a certificate is denied has fifteen days from the date of the taxation and revenue department's decision to file an objection with the taxation and revenue department. The person filing the objection shall submit evidence to support the objection. The taxation and revenue department shall review the evidence and issue a decision within fifteen days of the filing of the objection.

H. If, following a hearing and an opportunity to be heard, the administrative hearings office finds that a business or contractor provided false information to the taxation and revenue department in order to obtain a certificate or that a business or contractor used a certificate to obtain a resident business, resident veteran business, resident contractor or resident veteran contractor preference for a bid or proposal and the resident business, resident veteran business, resident contractor or resident veteran contractor did not perform the percentage of the contract specified in the bid or proposal, the business or contractor:

(1) is not eligible to receive a certificate or a preference pursuant to Section 13-1-21 or 13-4-2 NMSA 1978 for a period of five years from the date on which the taxation and revenue department became aware of the submission of the false information or the failure to perform the contract as specified in the bid or proposal; and

(2) is subject to an administrative penalty of up to fifty thousand dollars ($50,000) for each violation.

I. In a decision issued pursuant to Subsection G or H of this section, the taxation and revenue department or administrative hearings office shall state the reasons for the action taken and inform an aggrieved business or contractor of the right to judicial review of the determination pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

J. The taxation and revenue department may assess a reasonable fee for the issuance of a certificate not to exceed the actual cost of administering the taxation and revenue department's duties pursuant to this section.

K. The state auditor may audit or review the issuance or validity of certificates.

L. For purposes of this section:

(1) "new business" means a person that did not exist as a business in any form and that has been in existence for less than three years;

(2) "new contractor" means a person that did not exist as a business in any form and that has been in existence for less than five years;

(3) "legacy contractor" means a construction business that has been licensed in this state for ten consecutive years; and

(4) "relocated business" means a business that moved eighty percent of its total domestic personnel from another state to New Mexico in the past five years.

13-1-22. Resident business and resident contractor certification. (Effective July 1, 2022.)

A. To receive a resident business preference pursuant to Section 13-1-21 NMSA 1978 or a resident contractor preference pursuant to Section 13-4-2 NMSA 1978, a business or contractor shall submit with its bid or proposal a copy of a valid resident business certificate or valid resident contractor certificate issued by the taxation and revenue department.

B. An application for a resident business certificate shall include an affidavit from a certified public accountant setting forth that the business is licensed to do business in this state and that:

(1) the business has paid property taxes or rent on real property in the state and paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit;

(2) if the business is a new business, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the three years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the business is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the business either leased real property for ten years or purchased real property greater than one hundred thousand dollars ($100,000) in value in the state; or

(4) if the business is a previously certified business or was eligible for certification, the business has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same commercial enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

C. An application for a resident contractor certificate shall include an affidavit from a certified public accountant setting forth that the contractor is currently licensed as a contractor in this state and that:

(1) the contractor has:

(a) registered with the state at least one vehicle; and

(b) in each of the five years immediately preceding the submission of the affidavit: 1) paid property taxes or rent on real property in the state and paid at least one

other tax administered by the state; and 2) paid unemployment insurance on at least three full-time employees who are residents of the state; provided that if a contractor is a legacy contractor, the requirement of at least three full-time employees who are residents of the state is waived;

(2) if the contractor is a new contractor, the owner or majority of owners has paid property taxes or rent on real property in the state and has paid at least one other tax administered by the state in each of the five years immediately preceding the submission of the affidavit and has not applied for a resident business or resident contractor certificate pursuant to this section during that time period;

(3) if the contractor is a relocated business, at least eighty percent of the total personnel of the business in the year immediately preceding the submission of the affidavit were residents of the state and that, prior to the submission of the affidavit, the contractor either leased real property for ten years or purchased real property greater than one hundred thousand dollars ($100,000) in value in the state; or

(4) if the contractor is a previously certified contractor or was eligible for certification, the contractor has changed its name, has reorganized into one or more different legal entities, was purchased by another legal entity but operates in the state as substantially the same enterprise or has merged with a different legal entity but operates in the state as substantially the same commercial enterprise.

D. The taxation and revenue department shall prescribe the form and content of the application and required affidavit. The taxation and revenue department shall examine the application and affidavit and, if necessary, may seek additional information to ensure that the business or contractor is eligible to receive the certificate pursuant to the provisions of this section. If the taxation and revenue department determines that an applicant is eligible, the department shall issue a certificate pursuant to the provisions of this section. If the taxation and revenue department determines that the applicant is not eligible, the department shall issue notification within thirty days. If no notification is provided by the department, the certificate is deemed approved. A certificate is valid for three years from the date of its issuance; provided that if there is a change of ownership of more than fifty percent, a resident business or resident contractor shall reapply for a certificate.

E. A business or contractor whose application for a certificate is denied has fifteen days from the date of the taxation and revenue department's decision to file an objection with the taxation and revenue department. The person filing the objection shall submit evidence to support the objection. The taxation and revenue department shall review the evidence and issue a decision within fifteen days of the filing of the objection.

F. If, following a hearing and an opportunity to be heard, the administrative hearings office finds that a business or contractor provided false information to the taxation and revenue department in order to obtain a certificate or that a business or contractor used a certificate to obtain a resident business or resident contractor preference for a bid or

proposal and the resident business or contractor did not perform the percentage of the contract specified in the bid or proposal, the business or contractor:

(1) is not eligible to receive a certificate or a preference pursuant to Section 13-1-21 or 13-4-2 NMSA 1978 for a period of five years from the date on which the taxation and revenue department became aware of the submission of the false information or the failure to perform the contract as specified in the bid or proposal; and

(2) is subject to an administrative penalty of up to fifty thousand dollars ($50,000) for each violation.

G. In a decision issued pursuant to Subsection E or F of this section, the taxation and revenue department or the administrative hearings office shall state the reasons for the action taken and inform an aggrieved business or contractor of the right to judicial review of the determination pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

H. The taxation and revenue department may assess a reasonable fee for the issuance of a certificate not to exceed the actual cost of administering the taxation and revenue department's duties pursuant to this section.

I. The state auditor may audit or review the issuance or validity of certificates.

J. For purposes of this section:

(1) "new business" means a person that did not exist as a business in any form and that has been in existence for less than three years;

(2) "new contractor" means a person that did not exist as a business in any form and that has been in existence for less than five years;

(3) "legacy contractor" means a construction business that has been licensed in this state for ten consecutive years; and

(4) "relocated business" means a business that moved eighty percent of its total domestic personnel from another state to New Mexico in the past five years.

13-1-28. Short title.

Sections 13-1-28 through 13-1-199 NMSA 1978 may be cited as the "Procurement Code".

13-1-29. Rules of construction; purposes.

A. The Procurement Code shall be liberally construed and applied to promote its purposes and policies.

B. All references in law to the Public Purchases Act [repealed] shall be construed to be references to the Procurement Code.

C. The purposes of the Procurement 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The Public Purchases Act, referred to in Subsection B, was compiled as 13-1-1 to 13-1-27 NMSA 1978, and was repealed by Laws 1984, ch. 65, § 175, effective November 1, 1984.

Purposes. — The Procurement Code protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Duty of fair and equitable treatment. — The duty of good faith and fair dealing in the bidding process required that the city abide by the strictures of the Procurement Code and the purchasing manual. Specifically, the criteria provided by the city were an implied contract that if any bids were accepted, the acceptance would be based on these criteria and no others. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Breach of implied contract to follow Procurement Code. — By unlawfully introducing, considering, and relying on a criterion not listed in the request, the city breached an informal contract that it would follow the Procurement Code and the purchasing manual in considering each bid. Thus, though no formal contract was ever concluded between the parties, the city's conduct was a breach of an implied contract for which damages will lie. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Licensed contractors only. — Reading the Procurement Code and the Construction Industries Licensing Act, Chapter 60, Article 13 NMSA 1978, together, it is clear that the legislature intended (1) that public contracts should be awarded only to licensed contractors and (2) that purchasing authorities should be relieved from the necessity of making an independent investigation into the qualifications and fiscal responsibility of a contractor who is not licensed at the time of bidding. Thus, the doctrine of substantial compliance does not apply to the requirement of 60-13-12B NMSA 1978 that a contractor have a valid license when submitting a bid on a public contract. *BC&L Pavement Servs. v. Higgins*, 2002-NMCA-087, 132 N.M. 490, 51 P.3d 533.

13-1-30. Application of the code.

A. Except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. That code also applies to concession contracts at the New Mexico state fair in excess of twenty thousand dollars ($20,000), whether those concession contracts generate revenue and earnings or expand funds.

B. When a procurement involves the expenditure of federal funds, the procurement shall be conducted in accordance with mandatory applicable federal law and regulations. When mandatory applicable federal law or regulations are inconsistent with the provisions of the Procurement Code, compliance with federal law or regulations shall be compliance with the Procurement Code.

ANNOTATIONS

Cooperative formed pursuant to the Joint Powers Agreements Act. — An agreement entered into by 30 school districts forming a cooperative pursuant to the Joint Powers Agreements Act, Section 11-1-1 NMSA 1978 et seq., for the purpose of procuring and delivering educational services, was required to comply with the provisions of the Procurement Code. *State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

Applicable to municipalities. — The Procurement Code applies to all nonfederal expenditures by state agencies and local public bodies for the procurement of items of tangible personal property, services, and construction. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Private non-profit corporations. — The standard to be applied when determining whether private non-profit corporations that lease hospitals from government entities meet the definition of "local public bodies" under this section and are, therefore, subject to the Procurement Code is whether under the totality of the circumstances the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity. *Memorial Med. Ctr. v. Tatsch Constr., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 1, 29, 33, 66.

72 C.J.S. Public Contracts §§ 2 to 4, 6 to 8.

13-1-30.1. Standardized classification codes; applicability.

Each state agency and local public body shall use the standardized classification codes developed by the state purchasing agent.

13-1-31. Definition; architectural services.

"Architectural services" means services related to the art and science of designing and building structures for human habitation or use and includes planning, providing preliminary studies, designs, specifications, working drawings and providing for general administration of construction contracts.

13-1-32. Definition; blind trust.

"Blind trust" means a trust managed by a person other than the employee-beneficiary in which the employee-beneficiary is not given notice of alterations in the property of the trust.

13-1-33. Definition; brand-name specification.

"Brand-name specification" means a specification limited to describing an item by manufacturer's name or catalogue number.

13-1-34. Definition; brand-name or equal specification.

"Brand-name or equal specification" means a specification describing one or more items by manufacturer's name or catalogue number to indicate the standard of quality, performance or other pertinent characteristics and providing for the substitution of equivalent items.

13-1-35. Definition; business.

"Business" means any corporation, partnership, individual, joint venture, association or any other private legal entity.

13-1-36. Definition; catalogue price.

"Catalogue price" means the price of items of tangible personal property in the most current catalogue, price list, schedule or other form that:

A. is regularly maintained by the manufacturer or vendor of an item; and

B. is either published or otherwise available for inspection by a customer.

13-1-37. Definition; central purchasing office.

"Central purchasing office" means that office within a state agency or a local public body responsible for the control of procurement of items of tangible personal property,

services or construction. "Central purchasing office" includes the purchasing division of the general services department.

13-1-38. Definition; change order.

"Change order" means a written order signed and issued by a procurement officer directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order with or without the consent of the contractor.

13-1-38.1. Definition; chief procurement officer.

"Chief procurement officer" means that person within a state agency's or local public body's central purchasing office who is responsible for the control of procurement of items of tangible personal property, services or construction. "Chief procurement officer" includes the state purchasing agent.

13-1-39. Definition; confidential information.

"Confidential information" means any information which is available to an employee because of the employee's status as an employee of a state agency or a local public body and which is not a matter of public knowledge or available to the public on request.

13-1-40. Definition; construction.

A. "Construction" means building, altering, repairing, installing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project;

(2) building, stadium or other structure;

(3) airport, subway or similar facility;

(4) park, trail, athletic field, golf course or similar facility;

(5) dam, reservoir, canal, ditch or similar facility;

(6) sewage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;

(7) sewage, water, gas or other pipeline;

(8) transmission line;

(9) radio, television or other tower;

(10) water, oil or other storage tank;

(11) shaft, tunnel or other mining appurtenance;

(12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditioners;

(13) air conditioning conduit, heating or other similar mechanical work; or

(14) similar work, structures or installations.

B. "Construction" shall also include:

(1) leveling or clearing land;

(2) excavating earth;

(3) drilling wells of any type, including seismographic shot holes or core drilling; and

(4) similar work, structures or installations.

13-1-40.1. Definition; construction management and construction manager.

A. "Construction management" means consulting services related to the process of management applied to a public works project for any duration from conception to completion of the project for the purpose of controlling time, cost and quality of the project.

B. "Construction manager" means a person who acts as an agent of the state agency or local public body for construction management, for whom the state agency or local public body shall assume all the risks and responsibilities.

13-1-41. Definition; contract.

"Contract" means any agreement for the procurement of items of tangible personal property, services or construction.

ANNOTATIONS

Cross references. — For definition of "procurement," *see* 13-1-74 NMSA 1978.
For definition of "tangible personal property," *see* 13-1-93 NMSA 1978.

Formation of contract. — A contract was not formed when the Human Services Department selected a bid pending General Service Department approval and legislative

appropriation, since the pending actions were not mere legal formalities, but conditions precedent to contract formation. *Wisznia v. Human Servs. Dep't*, 1998-NMSC-011, 125 N.M. 140, 958 P.2d 98.

13-1-42. Definition; contract modification.

"Contract modification" means any written alteration in the provisions of a contract accomplished by mutual action of the parties to the contract.

13-1-43. Definition; contractor.

"Contractor" means any business having a contract with a state agency or a local public body.

13-1-44. Definition; cooperative procurement.

"Cooperative procurement" means procurement conducted by or on behalf of more than one state agency or local public body, or by a state agency or local public body with an external procurement unit.

13-1-45. Definition; cost analysis.

"Cost analysis" means the evaluation of cost data and profit for the purpose of arriving at costs actually incurred by a contractor, estimates of costs to be incurred by a contractor and a profit to be allowed to a contractor.

13-1-46. Definition; cost data.

"Cost data" means factual information concerning the cost of labor, material, overhead and other cost elements which are expected to be incurred by a contractor or which have been actually incurred by a contractor in performing the contract.

13-1-47. Definition; cost reimbursement contract.

"Cost reimbursement contract" means a contract which provides for a fee other than a fee based on a percentage of cost and under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms.

13-1-49. Definition; data.

"Data" means recorded information regardless of form or characteristic.

13-1-50. Definition; definite quantity contract.

"Definite quantity contract" means a contract which requires the contractor to furnish a specified quantity of services, items of tangible personal property or construction at or within a specified time.

13-1-51. Definition; designee.

"Designee" means a representative of a person holding a superior position.

13-1-52. Definition; determination.

"Determination" means the written documentation of a decision of a procurement officer including findings of fact required to support a decision. A determination becomes part of the procurement file to which it pertains.

13-1-53. Definition; direct or indirect participation.

"Direct or indirect participation" means involvement through decision, approval, disapproval, recommendation, formulation of any part of a purchase request, influencing the content of any specification, investigation, auditing or the rendering of advice.

13-1-53.1. Definition; electronic.

"Electronic" includes electric, digital, magnetic, optical, electronic or similar medium.

13-1-54. Definition; employee.

"Employee" means an individual receiving a salary, wages or per diem and mileage from a state agency or a local public body whether elected or not and any noncompensated individual performing personal services as an elected or appointed official or otherwise for a state agency or a local public body.

13-1-55. Definition; engineering services.

"Engineering services" means any service or creative work, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, engineering studies and the review of construction for the purpose of assuring substantial compliance with drawings and specifications; any of which embrace such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, chemical, pneumatic or thermal nature, insofar as they involve safeguarding life, health or

property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. Such practice includes the performance of architectural work incidental to the practice of engineering. "Engineering services" does not include responsibility for the superintendence of construction, site conditions, operations, equipment, personnel or the maintenance of safety in the work place.

13-1-56. Definition; external procurement unit.

"External procurement unit" means any procurement organization not located in this state which, if in this state, would qualify as a state agency or a local public body. An agency of the United States government is an external procurement unit.

13-1-57. Definition; financial interest.

"Financial interest" means:

A. holding a position in a business as officer, director, trustee or partner or holding any position in management; or

B. ownership of more than five percent interest in a business.

13-1-58. Definition; firm fixed price contract.

"Firm fixed price contract" means a contract which has a fixed total price or fixed unit price.

13-1-59. Definition; gratuity.

"Gratuity" means a payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, received or promised, unless consideration of substantially equal or greater value is exchanged.

13-1-60. Definition; heavy road equipment.

"Heavy road equipment" means any motor-driven vehicle or apparatus capable of use for earth moving or mixing components which has an aggregate value or price of over one thousand dollars ($1,000).

13-1-61. Definition; highway reconstruction.

"Highway reconstruction" means the rebuilding, altering or repairing of any road, highway, bridge, parking area or related project. "Highway reconstruction" does not include routine maintenance.

13-1-62. Definition; immediate family.

"Immediate family" means a spouse, children, parents, brothers and sisters.

13-1-63. Definition; indefinite quantity contract.

"Indefinite quantity contract" means a contract which requires the contractor to furnish an indeterminate quantity of specified services, items of tangible personal property or construction during a prescribed period of time at a definite unit price or at a specified discount from list or catalogue prices.

13-1-64. Definition; invitation for bids.

"Invitation for bids" means all documents, including those attached or incorporated by reference, utilized for soliciting sealed bids.

13-1-65. Definition; surveying services.

"Surveying services" means any service or work, the substantial performance of which involves the application of the principles of mathematics and the related physical and applied sciences for:

A. the measuring and locating of lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings and on the beds or bodies of water for the purpose of defining location, areas and volume;

B. the monumenting of property boundaries and the platting and layout of lands and subdivisions thereof;

C. the application of photogrammetric methods used to derive topographic and other data;

D. the establishment of horizontal and vertical controls for surveys for design, topographic surveys including photogrammetric methods, construction surveys for engineering and architectural public works; and

E. the preparation and perpetuation of maps, records, plats, field notes and property descriptions.

ANNOTATIONS

Cross references. — For licensing of surveyors, *see* Chapter 61, Article 23 NMSA 1978.

13-1-66. Definition; landscape architectural services.

"Landscape architectural services" means services including but not limited to consultation, investigation, reconnaissance, research, design, preparation of drawings and specifications and administration of contracts where the dominant purposes of such services are:

A. the preservation or enhancement of land uses and natural features;

B. the location and construction of functional approaches for structures, pathways or walkways; or

C. the design of trails, plantings and landscape irrigation. Excluded from the provisions of this section are the services of architects, engineers and surveyors as defined in the Procurement Code.

ANNOTATIONS

Cross references. — For licensing of landscape architects, *see* Chapter 61, Article 24B NMSA 1978.

13-1-66.1. Definition; local public works project.

"Local public works project" means a project of a local public body that uses architectural or engineering services requiring professional services costing fifty thousand dollars ($50,000) or more or landscape architectural or surveying services requiring professional services costing ten thousand dollars ($10,000) or more, excluding applicable state and local gross receipts taxes.

13-1-67. Definition; local public body.

"Local public body" means every political subdivision of the state and the agencies, instrumentalities and institutions thereof, including two-year post-secondary educational institutions, school districts and local school boards and municipalities, except as exempted pursuant to the Procurement Code.

ANNOTATIONS

An intercommunity water supply association qualifies as a local public body for purposes of the Procurement Code given the availability of municipal funds to pay the association's expenses and the extent of the control over the management of the association by the member villages. 1991 Op. Att'y Gen. No. 91-07.

13-1-68. Definition; multi-term contract.

"Multi-term contract" means a contract having a term longer than one year.

13-1-69. Definition; multiple source award.

"Multiple source award" means an award of an indefinite quantity contract for one or more similar services, items of tangible personal property or construction to more than one bidder or offeror.

13-1-70. Definition; notice of invitation for bids.

"Notice of invitation for bids" means a document issued by a procurement officer which contains a brief description of the services, construction or items of tangible personal property to be procured, the location where copies of the invitation for bid may be obtained, the location where bids are to be received, the cost, if any, for copies of plans and specifications, the date and place of the bid opening and such other information as the procurement officer deems necessary.

13-1-70.1. Definition; person.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or other legal or commercial entity.

13-1-71. Definition; price agreement.

"Price agreement" means a definite quantity contract or indefinite quantity contract which requires the contractor to furnish items of tangible personal property, services or construction to a state agency or a local public body which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.

13-1-72. Definition; price analysis.

"Price analysis" means the evaluation of pricing data without analysis of the separate cost components and profit.

13-1-73. Definition; pricing data.

"Pricing data" means factual information concerning prices for items identical to or substantially similar to those being procured.

13-1-74. Definition; procurement.

"Procurement" means:

A. purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction; and

B. all procurement functions, including but not limited to preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration.

13-1-75. Definition; procurement officer.

"Procurement officer" means any person or a designee authorized by a state agency or a local public body to enter into or administer contracts and make written determinations with respect thereto.

13-1-76. Definition; professional services.

"Professional services" means the services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, construction managers and other persons or businesses providing similar professional services, which may be designated as such by a determination issued by the state purchasing agent or a central purchasing office.

ANNOTATIONS

Cross references. — For professional and occupational licenses, *see* Chapter 61 NMSA 1978.

13-1-77. Definition; purchase order.

"Purchase order" means the document issued by the state purchasing agent or a central purchasing office that directs a contractor to deliver items of tangible personal property, services or construction.

13-1-78. Definition; purchase request.

"Purchase request" means the document by which a using agency requests that a contract be obtained for a specified service, construction or item of tangible personal property and may include but is not limited to the technical description of the requested item, delivery schedule, transportation requirements, suggested sources of supply and supporting information.

13-1-79. Definition; qualified products list.

"Qualified products list" means a list of items of tangible personal property described by model or catalogue number which, prior to the solicitation of competitive sealed bids or competitive sealed proposals, are items the state purchasing agent or a central purchasing office has determined will meet the applicable specifications.

13-1-80. Definition; regulation.

"Regulation" means any rule, order or statement of policy, including amendments thereto and repeals thereof, issued by a state agency or a local public body to affect persons not members or employees of the issuer.

13-1-81. Definition; request for proposals.

"Request for proposals" means all documents, including those attached or incorporated by reference, used for soliciting proposals.

13-1-82. Definition; responsible bidder.

"Responsible bidder" means a bidder who submits a responsive bid and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.

13-1-83. Definition; responsible offeror.

"Responsible offeror" means an offeror who submits a responsive proposal and who has furnished, when required, information and data to prove that his financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services or items of tangible personal property described in the proposal.

13-1-84. Definition; responsive bid.

"Responsive bid" means a bid which conforms in all material respects to the requirements set forth in the invitation for bids. Material respects of a bid include but are not limited to price, quality, quantity or delivery requirements.

ANNOTATIONS

Responsible bid must be within bid request specifications. — A bid price not in conformity with the specifications of the bid request is not a responsible bid. *Shed Indus., Inc. v. King*, 1980-NMSC-086, 95 N.M. 62, 618 P.2d 1226.

Bid must incorporate public works minimum wage rates. — A bid is not a responsible bid when it fails to incorporate the state's public works minimum wage rates. *Shed Indus., Inc. v. King*, 1980-NMSC-086, 95 N.M. 62, 618 P.2d 1226.

13-1-85. Definition; responsive offer.

"Responsive offer" means an offer which conforms in all material respects to the requirements set forth in the request for proposals. Material respects of a request for a proposal include, but are not limited to, price, quality, quantity or delivery requirements.

13-1-86. Definition; secretary.

"Secretary" means the secretary of general services.

13-1-86.1. Duty to promulgate rules.

The secretary of general services shall promulgate rules necessary to implement the provisions of this 2016 act.

13-1-87. Definition; services.

"Services" means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. "Services" includes the furnishing of insurance but does not include construction or the services of employees of a state agency or a local public body.

13-1-88. Definition; small business.

"Small business" means a business, not a subsidiary or division of another business, having an average annual volume for the preceding three fiscal years which does not exceed one million five hundred thousand dollars ($1,500,000).

13-1-89. Definition; specification.

"Specification" means a description of the physical or functional characteristics or of the nature of items of tangible personal property, services or construction. "Specification" may include a description of any requirement for inspecting or testing, or for preparing items of tangible personal property, services or construction for delivery.

13-1-90. Definition; state agency.

"State agency" means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of this state. "State agency" includes the purchasing division of the general services department and the state purchasing agent but does not include local public bodies.

13-1-91. Definition; state public works project.

"State public works project" means a project of a state agency, not including projects of the state educational institutions, the supreme court building commission, the legislature or local public bodies, that uses architectural or engineering services requiring professional services costing fifty thousand dollars ($50,000) or more or landscape architectural or surveying services requiring professional services costing ten thousand dollars ($10,000) or more, excluding applicable state and local gross receipts taxes.

13-1-92. Definition; state purchasing agent.

"State purchasing agent" means the director of the purchasing division of the general services department.

13-1-93. Definition; tangible personal property.

"Tangible personal property" means tangible property other than real property having a physical existence, including but not limited to supplies, equipment, materials and printed materials.

13-1-94. Definition; using agency.

"Using agency" means any state agency or local public body requiring services, construction or items of tangible personal property.

13-1-95. Purchasing division; creation; director is state purchasing agent; appointment; duties.

A. The "purchasing division" is created within the general services department.

B. Subject to the authority of the secretary, the state purchasing agent shall be the administrator and director of the purchasing division. The state purchasing agent shall be appointed by the secretary with the approval of the governor.

C. The purchasing division and state purchasing agent shall be responsible for the procurement of services, construction and items of tangible personal property for all state agencies except as otherwise provided in the Procurement Code and shall administer the Procurement Code for those state agencies not excluded from the requirement of procurement through the state purchasing agent.

D. The state purchasing agent shall have the following additional authority and responsibility to:

(1) recommend procurement rules to the secretary;

(2) establish and maintain programs for the development and use of procurement specifications and for the inspection, testing and acceptance of services, construction and items of tangible personal property;

(3) cooperate with the state budget division of the department of finance and administration in the preparation of statistical data concerning the acquisition and usage of all services, construction and items of tangible personal property by state agencies;

(4) require state agencies to furnish reports concerning usage, needs and stocks on hand of items of tangible personal property and usage and needs for services or construction;

(5) prescribe, with consent of the secretary, forms to be used by state agencies to requisition and report the procurement of items of tangible personal property, services and construction;

(6) provide information to state agencies and local public bodies concerning the development of specifications, quality control methods and other procurement information;

(7) collect information concerning procurement matters, quality and quality control of commonly used services, construction and items of tangible personal property; and

(8) develop standardized classification codes for each expenditure by state agencies and local public bodies.

E. The state purchasing agent shall, upon the request of the central purchasing office of a local public body, procure a price agreement for the requested services, construction or items of tangible personal property. The state purchasing agent may procure a price agreement for services, construction or items of tangible personal property for a state agency or local public body that does not have a chief procurement officer.

13-1-95.2. Chief procurement officers; reporting requirement; training; certification.

A. On or before January 1 of each year beginning in 2014, and every time a chief procurement officer is hired, each state agency and local public body shall provide to the state purchasing agent the name of the state agency's or local public body's chief procurement officer and information identifying the state agency's or local public body's central purchasing office, if applicable.

B. The state purchasing agent shall maintain a list of the names of the chief procurement officers reported to the state purchasing agent by state agencies and local public bodies. The state purchasing agent shall make the list of chief procurement officers

available to the public through the web site of the purchasing division of the general services department and in any other appropriate form.

C. The state purchasing agent shall offer a certification training program for chief procurement officers each year.

D. On or before January 1, 2015, the state purchasing agent shall establish a certification program for chief procurement officers that includes initial certification and recertification every two years for all chief procurement officers. In order to be recertified, a chief procurement officer shall pass a recertification examination approved by the secretary of general services.

E. On and after July 1, 2015, only certified chief procurement officers may do the following, except that persons using procurement cards may continue to issue purchase orders and authorize small purchases:

(1) make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;

(2) issue purchase orders and authorize small purchases pursuant to the Procurement Code; and

(3) approve procurement pursuant to the Procurement Code.

13-1-97. Centralization of procurement authority.

A. All procurement for state agencies shall be performed by the state purchasing agent except as otherwise provided in the Procurement Code.

B. All procurement for state agencies excluded from the requirement of procurement through the office of the state purchasing agent shall be performed by a central purchasing office, the chief procurement officer or as otherwise provided in the Procurement Code.

C. All procurement for local public bodies shall be performed by a central purchasing office designated by the governing authority of the local public body except as otherwise provided in the Procurement Code. Local public bodies shall identify their designated central purchasing office to the state purchasing agent and shall report their chief procurement officers to the state purchasing agent.

ANNOTATIONS

When former act not violated. — If the state purchasing agent secured free technical assistance from a supplier in order to aid in preparing specifications, the former Public Purchases Act was not violated. 1967 Op. Att'y Gen. No. 67-118.

Delegation restricted. — Under the former Public Purchases Act, the local public body had no authority to delegate the performance of purchasing to someone other than the central purchasing office. 1969 Op. Att'y Gen. No. 69-135.

13-1-97.2. Competitive sealed bids and proposals; record maintenance.

A central purchasing office shall maintain, for a minimum of three years, all records relating to the award of a contract through a competitive sealed bid or competitive sealed proposal process.

13-1-98. Exemptions from the Procurement Code. (Effective July 1, 2020.)

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

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

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

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

E. purchases of books, periodicals and training materials in printed or electronic format from the publishers or copyright holders thereof;

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

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

H. contracts with businesses for public school transportation services;

I. procurement of tangible personal property or services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978, by the corrections industries division of the corrections department pursuant to rules adopted by the corrections industries commission, which shall be reviewed by the purchasing division of the general services department prior to adoption;

J. 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;

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

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

M. 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 33-3-27 NMSA 1978;

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

O. 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;

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

Q. contracts with professional entertainers;

R. contracts and expenditures for legal subscription and research services and litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts;

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

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

U. contracts entered into by a local public body with a person, firm, organization, corporation or association or a state educational institution named in Article 12, Section 11 of the constitution of New Mexico for the operation and maintenance of a hospital pursuant to Chapter 3, Article 44NMSA 1978, lease or operation of a county hospital pursuant to the Hospital Funding Act [Chapter 4, Article 48B NMSA 1978] or operation and

maintenance of a hospital pursuant to the Special Hospital District Act [Chapter 4, Article 48A NMSA 1978];

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

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

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

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

Z. procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act [13-1C-1 to 13-1C-7 NMSA 1978];

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

BB. procurement, by either the department of health or Grant county or both, of tangible personal property, services or construction that are exempt from the Procurement Code pursuant to Section 9-7-6.5 NMSA 1978;

CC. 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 [Chapter 10, Article 11 NMSA 1978];

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

EE. contracts entered into by the crime victims reparation commission to distribute federal grants to assist victims of crime, including grants from the federal Victims of Crime Act of 1984 and the federal Violence Against Women Act of 1994;

FF. procurement by or through the early childhood education and care department of early pre-kindergarten and pre-kindergarten services purchased pursuant to the Pre-Kindergarten Act [Chapter 32A, Article 23 NMSA 1978];

GG. procurement of services of commissioned advertising sales representatives for New Mexico magazine; and

HH. procurements exempt from the Procurement Code as otherwise provided by law.

ANNOTATIONS

Applicability. — When a local public body acquires property or services from a joint procurement agency of local public bodies, the acquisition is not subject to any provisions of the Procurement Code except those set forth in Sections 13-1-135, 13-1-136, and 13-1-137; on the other hand, Section 13-1-98A does not exempt the procurement of goods or services by the joint agency from an outsider. *State ex rel. Educ. Assessments Sys. v. Coop. Educ. Servs.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

Tariff permitting utility to recover costs of relocation required by a local ordinance did not violate the New Mexico Procurement Code by failing to provide for the seeking of bids by local governments because it fell within the specific statutory exception for purchases of utility facilities. *City of Albuquerque v. New Mexico Pub. Regulation Comm'n*, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297.

Emergency requirements not applicable to exempt transaction. — The emergency provisions of Section 13-1-127 NMSA 1978 did not apply to a contract for the purchase of water services by a school district from the water utility of a municipality which was within the exemptions contained in Subsections A and D of this section. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

Scope of exemption provision. — Only when centralized control was thought to be harmful or unproductive of savings were exemptions allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

When public notice and competitive bidding required. — A professional legal services contract in excess of $1,000 between a state agency and legislator may be awarded only after public notice and competitive bidding. 1979 Op. Att'y Gen. No. 79-23.

Contract for professional services of insurance agency exempt. — A contract whereby an insurance agency would provide technical or professional services to the central purchasing office of a local public body for a fee would have been exempt from the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-135.

13-1-99. Excluded from central purchasing through the state purchasing agent.

Excluded from the requirement of procurement through the state purchasing agent but not from the requirements of the Procurement Code are the following:

A. procurement of professional services;

B. small purchases having a value not exceeding one thousand five hundred dollars ($1,500);

C. emergency procurement;

D. procurement of highway construction or reconstruction by the department of transportation;

E. procurement by the judicial branch of state government;

F. procurement by the legislative branch of state government;

G. procurement by the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico;

H. procurement by the state fair commission of tangible personal property, services and construction under twenty thousand dollars ($20,000);

I. purchases from the instructional material fund;

J. procurement by all local public bodies;

K. procurement by regional education cooperatives;

L. procurement by charter schools;

M. 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; and

N. procurement by the public school facilities authority.

ANNOTATIONS

When exceptions allowed. — Only when centralized control would be harmful or unproductive of savings were exceptions allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Factual questions to be determined. — The question of the serving of public interest and the impracticability of obtaining bids is a factual question to be determined by the board of county commissioners and the state board of finance. The determinations of these boards are final unless such determination is arbitrary or capricious. 1956 Op. Att'y Gen. No. 56-6431.

13-1-100. Construction contracts; central purchasing office.

The award and execution of contracts for major construction, including but not limited to roads, bridges, airports, buildings and dams, shall be made by the governing authority of the using agency. The procurement officer responsible for the procurement shall give notice to prospective bidders pursuant to Section 13-1-104 NMSA 1978.

ANNOTATIONS

Cross references. — For public works contracts, *see* 13-4-1 NMSA 1978 et seq.

Electrical contract for state correctional facility. — Former Section 13-1-10 NMSA 1978 did not preclude the department of corrections from using the services of the state construction manager for the purpose of awarding an electrical contract for work at a state correctional facility. *State v. Integon Indem. Corp.*, 1987-NMSC-029, 105 N.M. 611, 735 P.2d 528.

Legislative intent. — The legislature intended that public construction projects come within the safeguards of the former State Purchasing Act, and be awarded whenever practicable to New Mexico contractors. 1962 Op. Att'y Gen. No. 62-80.

13-1-100.1. Construction contracts; construction management services.

A. A construction management services contract may be entered into for any construction or state or local public works project when a state agency or local public body makes a determination that it is in the public's interest to utilize construction management services. Construction management services shall not duplicate and are in addition to the normal scope of separate architect or engineer contracts, the need for which may arise due to the complexity or unusual requirements of a project as requested by a state agency or local public body.

B. To insure fair, uniform, clear and effective procedures that will strive for the delivery of a quality project, on time and within budget, the secretary, in conjunction with the appropriate and affected professional associations and contractors, shall promulgate regulations, which shall be adopted by the governing bodies of all using agencies and shall be followed by all using agencies when procuring construction management services as authorized in Subsection A of this section.

C. A state agency shall make the decision on a construction management services contract for a state public works project, and a local public body shall make that decision

for a local public works project. A state agency shall not make the decision on a construction management services contract for a local public works project.

13-1-102. Competitive sealed bids required.

All procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-103 through 13-1-110 NMSA 1978, except procurement achieved pursuant to the following sections of the Procurement Code:

A. Sections 13-1-111 through 13-1-122 NMSA 1978, competitive sealed proposals;

B. Section 13-1-125 NMSA 1978, small purchases;

C. Section 13-1-126 NMSA 1978, sole source procurement;

D. Section 13-1-127 NMSA 1978, emergency procurements;

E. Section 13-1-129 NMSA 1978, existing contracts;

F. Section 13-1-130 NMSA 1978, purchases from antipoverty program businesses; and

G. the Educational Facility Construction Manager At Risk Act [13-1-124.1 NMSA 1978].

ANNOTATIONS

Cross references. — For Bateman Act, *see* 6-6-11, 6-6-13 to 6-6-18 NMSA 1978.
For exemptions from Bateman Act, *see* 6-6-12 NMSA 1978.

When lowest bid not best bid. — The school board, if it has accurate figures at its disposal showing the lowest bid not to be the best bid because of such matters as operating expense, may award the contract to a higher bidder. 1954 Op. Att'y Gen. No. 54-5959.

Effect on lease purchase. — A lease purchase of personalty by a school district is exempted from the Bateman Act [6-6-11, 6-6-13 to 6-6-18 NMSA 1978], but was subject to the former Public Purchases Act in respect to bidding requirements. 1964 Op. Att'y Gen. No. 64-141.

Purchase of group insurance. — The purchase of group insurance for employees of state agencies was required to be made in compliance with the former Public Purchases Act including the requirement for bids. 1969 Op. Att'y Gen. No. 69-117.

Contract renewal. — A renewal of a contract which was for a definite term is a new and separate contract; it was therefore required to meet the requirements of the former Public Purchases Act. 1966 Op. Att'y Gen. No. 66-40.

Trade-in or exchange. — If there is to be a trade-in or exchange of used articles as part payment on a purchase price, the bid procedure to be followed is that for the total expenditure and not what may be the bid of the seller when the bid is the difference between the sale price and the trade-in allowance. 1969 Op. Att'y Gen. No. 69-142.

Effect on insurance contracts. — Material changes in an insurance contract with a school district, which would increase the rates and/or benefits, could not be made without following the bid procedures set forth in the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-43.

Union statement not required. — It would not be legal to require a union statement in the acceptance of an invitation to bid for printing because to do so would possibly shut out bidders who qualify. 1968 Op. Att'y Gen. No. 68-34.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 29 to 61.

Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee, 2 A.L.R.4th 991.

Standing of disappointed bidder on public contract to seek damages under 42 USCS § 1983 for public authorities' alleged violation of bidding procedures, 86 A.L.R. Fed. 904.

20 C.J.S. Counties §§ 165 to 168; 63 C.J.S. Municipal Corporations §§ 917 to 933; 72 Supp. C.J.S. Public Contracts § 9; 78 C.J.S. Schools and School Districts § 409 et seq.; 81A C.J.S. States § 116.

13-1-103. Invitation for bids.

A. An invitation for bids shall be issued and shall include the specifications for the services, construction or items of tangible personal property to be procured, all contractual terms and conditions applicable to the procurement, the location where bids are to be received, the date, time and place of the bid opening and the requirements for complying with any applicable in-state preference provisions as provided by law.

B. If the procurement is to be by sealed bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of the bid opening.

C. If the procurement is to be by sealed bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with the requirements of Section 13-1-95.1 NMSA 1978.

ANNOTATIONS

The 2011 (1st. S.S.) amendment, effective October 5, 2011, required that invitations for bids include a statement of the requirements for complying with the applicable resident preference; and in Subsection A, after "place of the bid opening", added the remainder of the sentence.

The 2006 amendment, effective March 2, 2006, added Subsection B to provide that if the procurement is a bid without electronic submission, the invitation for bids shall include the location where bids are to be received and the date, time and place of bid opening and added Subsection C to provide that if the procurement is to be by bid with part or all of the bid to be submitted electronically, the invitation for bids shall comply with 13-1-95.1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 53.

72 Supp. C.J.S. Public Contracts § 11.

13-1-104. Competitive sealed bids; public notice.

A. An invitation for bids or a notice thereof shall be published not less than ten calendar days prior to the date set forth for the opening of bids. In the case of purchases made by the state purchasing agent, the invitation or notice shall be published at least once in at least three newspapers of general circulation in this state; in addition, an invitation or notice may be published electronically on the state purchasing agent's web site that is maintained for that purpose. In the case of purchases made by other central purchasing offices, the invitation or notice shall be published at least once in a newspaper of general circulation in the area in which the central purchasing office is located. These requirements of publication are in addition to any other procedures that may be adopted by central purchasing offices to notify prospective bidders that bids will be received, including publication in a trade journal, if available. If there is no newspaper of general circulation in the area in which the central purchasing office is located, such other notice may be given as is commercially reasonable.

B. Central purchasing offices shall send copies of the notice or invitation for bids involving the expenditure of more than twenty thousand dollars ($20,000) to those businesses that have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and that have paid any required fees. A central purchasing office may set different registration fees for different categories of services, construction or items of tangible personal property, but such fees shall be related to the actual, direct cost of furnishing copies of the notice or invitation for bids to the prospective bidders. The fees shall be used exclusively for the purpose of furnishing copies of the notice or invitation for bids of proposed procurements to prospective bidders.

C. A central purchasing office may satisfy the requirement of sending copies of a notice or invitation for bids by distributing the documents to prospective bidders through electronic media. Central purchasing offices shall not require that prospective bidders receive a notice or invitation for bids through electronic media.

D. As used in this section, "prospective bidders" includes persons considering submission of a bid as a general contractor for the construction contract and persons who may submit bids to a general contractor for work to be subcontracted pursuant to the construction contract. Central purchasing offices shall make copies of invitations for bids for construction contracts available to prospective bidders. A central purchasing office may require prospective bidders who have requested documents for bid on a construction contract to pay a deposit for a copy of the documents for bid. The deposit shall equal the full cost of reproduction and delivery of the documents for bid. The deposit, less delivery charges, shall be refunded if the documents for bid are returned in usable condition within the time limits specified in the documents for bid, which time limits shall be no less than ten calendar days from the date of the bid opening. All forfeited deposits shall be credited to the funds of the applicable central purchasing office.

ANNOTATIONS

Cross references. — For publication of public notices, *see* 14-11-1 NMSA 1978 et seq.

13-1-105. Competitive sealed bids; receipt and acceptance of bids.

A. Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in the Procurement Code. In addition to the requirement for the prime contractor and subcontractors to be registered as provided in Section 13-4-13.1 NMSA 1978, bids shall be evaluated based on the requirements set forth in the invitation for bids, which requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life-cycle costs that will affect the bid price shall be objectively measurable, which shall be defined by rule. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids. A bid submitted by a prime contractor that was not registered as required by Section 13-4-13.1NMSA 1978 shall not be considered for award. A bid submitted by a registered prime contractor that includes any subcontractor that is not registered in accordance with that section may be considered for award following substitution of a registered subcontractor for any unregistered subcontractor in accordance with Section 13-4-36 NMSA 1978.

B. If the lowest responsible bid has otherwise qualified, and if there is no change in the original terms and conditions, the lowest bidder may negotiate with the purchaser for a lower total bid in order to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds. Such negotiation shall not be allowed if the lowest bid was more than ten percent over budgeted project funds.

ANNOTATIONS

Evaluation of bids. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 64 to 65.

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts, 49 A.L.R.5th 747.

72 Supp. C.J.S. Public Contracts § 15.

13-1-106. Competitive sealed bids; correction or withdrawal of bids.

A. A bid containing a mistake discovered before bid opening may be modified or withdrawn by a bidder prior to the time set for bid opening by delivering written or telegraphic notice to the location designated in the invitation for bids as the place where bids are to be received. After bid opening, no modifications in bid prices or other provisions of bids shall be permitted. A low bidder alleging a material mistake of fact which makes his bid nonresponsive may be permitted to withdraw its bid if:

(1) the mistake is clearly evident on the face of the bid document; or

(2) the bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

B. Any decision by a procurement officer to permit or deny the withdrawal of a bid on the basis of a mistake contained therein shall be supported by a determination setting forth the grounds for the decision.

ANNOTATIONS

Section not applicable to executed contracts. — While this section can prevent modification of bid prices after bid opening, it does not address contracts or contract modification or reformation. Because this section relates to bids and not contracts, it is not applicable and it does not preclude contract reformation based upon mutual mistake discovered after contract formation. *Ballard v. Chavez*, 1994-NMSC-007, 117 N.M. 1, 868 P.2d 646.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 80.

Mistake: right of bidder for state or municipal contract to rescind bid on ground that bid was based on his own mistake or that of his employee, 2 A.L.R.4th 991.

72 Supp. C.J.S. Public Contracts § 14.

13-1-107. Competitive sealed bids; bid opening.

Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and each bid item, if appropriate, and such other relevant information as may be specified by the state purchasing agent or a central purchasing office, together with the name of each bidder, shall be recorded, and the record and each bid shall be open to public inspection.

13-1-108. Competitive sealed bids; award.

A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder. Contracts solicited by competitive sealed bids shall require that the bid amount exclude the applicable state gross receipts tax or applicable local option tax but that the contracting agency shall be required to pay the applicable tax including any increase in the applicable tax becoming effective after the date the contract is entered into. The applicable gross receipts tax or applicable local option tax shall be shown as a separate amount on each billing or request for payment made under the contract.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Low bidder's monetary relief against state or local agency for nonaward of contract, 65 A.L.R.4th 93.

13-1-109. Competitive sealed bids; multi-step sealed bidding.

When the state purchasing agent or a central purchasing office makes a determination that it is impractical to initially prepare specifications to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids.

13-1-110. Competitive sealed bids; identical bids.

When competitive sealed bids are used and two or more of the bids submitted are identical in price and are the low bid, the state purchasing agent or a central purchasing office may:

A. award pursuant to the multiple source award provisions of Sections 126 and 127 [13-1-153, 13-1-154 NMSA 1978] of the Procurement Code;

B. award to a resident business if the identical low bids are submitted by a resident business and a nonresident business;

C. award to a resident manufacturer if the identical low bids are submitted by a resident manufacturer and a resident business;

D. award by lottery to one of the identical low bidders; or

E. reject all bids and resolicit bids or proposals for the required services, construction or items of tangible personal property.

13-1-111. Competitive sealed proposals; conditions for use.

A. Except as provided in Subsection G of Section 13-1-119.1 NMSA 1978, when a state agency or a local public body is procuring professional services or a design and build project delivery system, or when the state purchasing agent, a central purchasing office or a designee of either officer [office] makes a written determination that the use of competitive sealed bidding for items of tangible personal property or services is either not practicable or not advantageous to the state agency or a local public body, a procurement shall be effected by competitive sealed proposals.

B. Competitive sealed proposals may also be used for contracts for construction and facility maintenance, service and repairs.

C. Competitive sealed proposals may also be used for construction manager at risk contracts if a three-step selection procedure is used pursuant to the Educational Facility Construction Manager At Risk Act [13-1-124.1 to 13-1-124.5 NMSA 1978].

D. Competitive qualifications-based proposals shall be used for procurement of professional services of architects, engineers, landscape architects, construction managers and surveyors who submit proposals pursuant to Sections 13-1-120 through 13-1-124 NMSA 1978.

E. Competitive sealed proposals shall also be used for contracts for the design and installation of measures the primary purpose of which is to conserve natural resources, including guaranteed utility savings contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [Chapter 6, Article 23 NMSA 1978].

ANNOTATIONS

Bracketed material. — The bracketed word "office" was inserted by the compiler to correct an apparent error and is not part of the law.

13-1-112. Competitive sealed proposals; request for proposals.

A. Competitive sealed proposals, including competitive sealed qualifications-based proposals, shall be solicited through a request for proposals that shall be issued and shall include:

(1) the specifications for the services or items of tangible personal property to be procured;

(2) all contractual terms and conditions applicable to the procurement;

(3) the form for disclosure of campaign contributions given by prospective contractors to applicable public officials pursuant to Section 13-1-191.1 NMSA 1978;

(4) the location where proposals are to be received and the date, time and place where proposals are to be received and reviewed; and

(5) the requirements for complying with any applicable in-state preference provisions as provided by law.

B. A request for proposals may, pursuant to Section 13-1-95.1 NMSA 1978, require that all or a portion of a responsive proposal be submitted electronically.

C. In the case of requests for competitive qualifications-based proposals, price shall be determined by formal negotiations related to scope of work.

ANNOTATIONS

Request is not an offer. — A request for bids is not an offer; the bidders are making offers when they submit bids. No contract for the procurement occurs until acceptance by the party that solicited bids. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Effect of request for proposals. — By requesting proposals, the city entered into an implied or informal contract that it would fairly consider each bid in accordance with all applicable statutes. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

13-1-113. Competitive sealed proposals; public notice.

Public notice of the request for proposals shall be given in the same manner as provided in Section 77 [13-1-104 NMSA 1978] of the Procurement Code.

13-1-114. Competitive sealed proposals; evaluation factors.

The request for proposals shall state the relative weight to be given to the factors in evaluating proposals.

ANNOTATIONS

Evaluation of proposals. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

13-1-115. Competitive sealed proposals; negotiations.

Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted after submissions of proposals and prior to award for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award. This section shall not apply to architects, engineers, landscape architects and surveyors who submit proposals pursuant to Sections 13-1-120 through 13-1-124 NMSA 1978.

13-1-116. Competitive sealed proposals; disclosure; record.

The contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.

13-1-117. Competitive sealed proposals; award.

The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the state agency or a local public body, taking into consideration the evaluation factors set forth in the request for proposals.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts §§ 40, 42.

72 Supp. C.J.S. Public Contracts §§ 6 to 9.

13-1-117.1. Procurement of professional services; local public bodies; legislative branch; selection and award.

A. Each agency within the legislative branch of government operating under the provisions of the Procurement Code and each local public body shall adopt regulations regarding its selection and award of professional services contracts.

B. The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the local public body or legislative agency respectively, taking into consideration the evaluation factors set forth in the request for proposals.

13-1-117.2. Procurement of professional services; local public bodies; professional technical advisory assistance.

A. Any local public body which does not have on staff a licensed professional engineer, surveyor, architect or landscape architect shall have appointed to it or have the appointment waived by the appropriate New Mexico professional society listed in Subsection D of this section, an individual to serve as a professional technical advisor. The professional technical advisor shall be a senior member of an architectural, engineering, surveying or landscape architectural business with experience appropriate to the type of local public works project proposed and shall be a resident licensed architect, professional engineer, surveyor or landscape architect in the state who possesses at least ten years of experience in responsible charge as defined in the Architectural Act [Chapter 61, Article 15 NMSA 1978], the Engineering and Surveying Practice Act [Chapter 61, Article 23 NMSA 1978] or the Landscape Architects Act [Chapter 61, Article 24B NMSA 1978], respectively.

B. The professional technical advisor to a local public body shall serve as an agent of the local public body and shall be indemnified and held harmless. He may be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] for per diem and mileage in connection with his service as a professional technical advisor and shall receive no other compensation, perquisite or allowance.

C. The duties and responsibilities of the professional technical advisor shall include but may not be limited to the following activities:

(1) advise the local public body in the development of requests for proposals for engineering, surveying, architectural or landscape architectural services procured by the local public body;

(2) advise the local public body in giving public notice of requests for proposals;

(3) advise in the evaluation and selection of professional businesses to perform services for the local public body, based upon demonstrated competence and qualification for the type of professional services required; and

(4) assist in contract negotiations.

D. Professional technical advisors shall be obtained through the professional technical advisory board, a consortium of the consulting engineers council of New Mexico and the professional engineers in private practice division of the New Mexico society of professional engineers; the New Mexico professional surveyors; the New Mexico society of architects; or the New Mexico chapter of the American society of landscape architects.

E. No individual or firm whose principal, officer, director or employee serves as a professional technical advisor to a local public body shall be permitted to submit a proposal to the local public body during the period in which the individual, principal, officer, director or employee serves as a professional technical advisor to the local public body; however, nothing in this section shall prohibit an individual or firm from submitting a proposal to any municipality in which the individual or a principal, officer, director or employee is not serving as a professional technical advisor.

13-1-117.3. Contracts for the design and installation of measures for the conservation of natural resources.

A state agency or a local public body may solicit competitive sealed proposals for a contract that provides for both the design and installation of measures the primary purpose of which is to conserve natural resources, including guaranteed utility savings contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [Chapter 6, Article 23 NMSA 1978].

13-1-118. Competitive sealed proposals; professional services contracts; contract review.

All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the general services department if required by the regulations of the department. This section does not apply to contracts entered into by the legislative branch of state government, the judicial branch of state government or the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico.

ANNOTATIONS

Cross references. — For adoption of rules and regulations by secretary of finance and administration, *see* 9-6-5 NMSA 1978.

For adoption of rules and regulations by secretary of general services department, *see* 9-17-5NMSA 1978.

Temporary provisions. — Laws 2019, ch. 153, § 6 provided:

A. On the effective date of this act, all personnel, functions, appropriations, money, records, furniture, equipment and other property of, or attributable to, the contracts review bureau of the administrative services division of the department of finance and administration are transferred to the purchasing division of the general services department.

B. On the effective date of this act, all contractual obligations of the contracts review bureau of the administrative services division of the department of finance and administration become binding on the purchasing division of the general services department.

C. On and after the effective date of this act, rules of the department of finance and administration pertaining to the approval of professional services contracts shall be deemed to be the rules of the general services department until amended or repealed by the general services department, and all references in those rules to the department of finance and administration shall be deemed to be references to the general services department.

13-1-119. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; additional requirements.

In addition to compliance with the requirements of Sections 13-1-112 through 13-1-114 and 13-1-116 through 13-1-118 NMSA 1978, a state agency or local public body, when procuring the services of architects, landscape architects, engineers or surveyors for state public works projects or local public works projects, shall comply with Sections 13-1-120 through 13-1-124 NMSA 1978.

13-1-119.1. Public works project delivery system; design and build projects authorized.

A. Except for road and highway construction or reconstruction projects, a design and build project delivery system may be authorized when the state purchasing agent or a central purchasing office makes a determination in writing that it is appropriate and in the best interest of the state or local public body to use the system on a specific project. The determination shall be issued only after the state purchasing agent or a central purchasing office has taken into consideration the following criteria, which shall be used as the minimum basis in determining when to use the design and build process:

(1) the extent to which the project requirements have been or can be adequately defined;

(2) time constraints for delivery of the project;

(3) the capability and experience of potential teams with the design and build process;

(4) the suitability of the project for use of the design and build process as concerns time, schedule, costs and quality; and

(5) the capability of the using agency to manage the project, including experienced personnel or outside consultants, and to oversee the project with persons who are familiar with the design and build process.

B. When a determination has been made by the state purchasing agent or a central purchasing office that it is appropriate to use a design and build project delivery system, the design and build team shall include, as needed, a New Mexico registered engineer or architect and a contractor properly licensed in New Mexico for the type of work required.

C. Except as provided in Subsections F and G of this section, for each proposed state or local public works design and build project, a two-phase procedure for awarding design and build contracts shall be adopted and shall include at a minimum the following:

(1) during phase one, and prior to solicitation, documents shall be prepared for a request for qualifications by a registered engineer or architect, either in-house or selected in accordance with Sections 13-1-120 through 13-1-124 NMSA 1978, and shall include minimum qualifications, a scope of work statement and schedule, documents defining the project requirements, the composition of the selection committee and a description of the phase-two requirements and subsequent management needed to bring the project to completion. Design and build qualifications of responding firms shall be evaluated, and a maximum of five firms shall be short-listed in accordance with technical and qualifications-based criteria; and

(2) during phase two, the short-listed firms shall be invited to submit detailed specific technical concepts or solutions, costs and scheduling. Unsuccessful firms may be paid a stipend to cover proposal expenses. After evaluation of these submissions, selection shall be made and the contract awarded to the highest-ranked firm.

D. Except as provided in Subsections F and G of this section, to ensure fair, uniform, clear and effective procedures that will strive for the delivery of a quality project on time and within budget, the secretary, in conjunction with the appropriate and affected professional associations and contractors, shall promulgate rules applicable to all using agencies, which shall be followed by all using agencies when procuring a design and build project delivery system.

E. A state agency shall make the decision on a design and build project delivery system for a state public works project, and a local public body shall make that decision for a local public works project. A state agency shall not make the decision on a design and build project delivery system for a local public works project.

F. The requirements of Subsections C and D of this section do not apply to a design and build project delivery system and the services procured for the project if:

(1) the maximum allowable construction cost of the project is four hundred thousand dollars ($400,000) or less; and

(2) the only requirement for architects, engineers, landscape architects or surveyors is limited to either site improvements or adaption for a pre-engineered building or system.

G. The procurement of a design and build project delivery system qualifying for exemptions pursuant to Subsection F of this section, including the services of any architect, engineer, landscape architect, construction manager or surveyor needed for the project, shall be accomplished by competitive sealed bids pursuant to Sections 13-1-102 through 13-1-110 NMSA 1978.

13-1-119.2. Design and build procurement for certain transportation projects.

Notwithstanding any prohibition on road and highway construction or reconstruction projects in Section 13-1-119.1 NMSA 1978, the department of transportation may use a design and build project delivery system pursuant to Section 13-1-119.1 NMSA 1978 for projects with a maximum allowable construction cost of more than fifty million dollars ($50,000,000) funded in whole or in part by federal-aid highway funds.

13-1-120. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection process.

A. For each proposed state public works project, local public works project or construction management contract, the architect, engineer, landscape architect, construction management and surveyor selection committee, state highway and transportation department selection committee or local selection committee, as appropriate, shall evaluate statements of qualifications and performance data submitted by at least three businesses in regard to the particular project and may conduct interviews with and may require public presentation by all businesses applying for selection regarding their qualifications, their approach to the project and their ability to furnish the required services.

B. The appropriate selection committee shall select, ranked in the order of their qualifications, no less than three businesses deemed to be the most highly qualified to perform the required services, after considering the following criteria together with any criteria, except price, established by the using agency authorizing the project:

(1) specialized design and technical competence of the business, including a joint venture or association, regarding the type of services required;

(2) capacity and capability of the business, including any consultants, their representatives, qualifications and locations, to perform the work, including any specialized services, within the time limitations;

(3) past record of performance on contracts with government agencies or private industry with respect to such factors as control of costs, quality of work and ability to meet schedules;

(4) proximity to or familiarity with the area in which the project is located;

(5) the amount of design work that will be produced by a New Mexico business within this state;

(6) the volume of work previously done for the entity requesting proposals which is not seventy-five percent complete with respect to basic professional design services, with the objective of effecting an equitable distribution of contracts among qualified businesses and of assuring that the interest of the public in having available a substantial number of qualified businesses is protected; provided, however, that the principle of selection of the most highly qualified businesses is not violated; and

(7) notwithstanding any other provisions of this subsection, price may be considered in connection with construction management contracts, unless the services are those of an architect, engineer, landscape architect or surveyor.

C. Notwithstanding the requirements of Subsections A and B of this section, if fewer than three businesses have submitted a statement of qualifications for a particular project, the appropriate committee may:

(1) rank in order of qualifications and submit to the secretary or local governing authority of the public body for award those businesses which have submitted a statement of qualifications; or

(2) recommend termination of the selection process pursuant to Section 13-1-131 NMSA 1978 and sending out of new notices of the resolicitation of the proposed procurement pursuant to Section 13-1-104 NMSA 1978. Any proposal received in response to the terminated solicitation is not public information and shall not be made available to competing offerors.

D. The names of all businesses submitting proposals and the names of all businesses, if any, selected for interview shall be public information. After an award has been made, the appropriate selection committee's final ranking and evaluation scores for all proposals shall become public information. Businesses which have not been selected for contract award shall be so notified in writing within fifteen days after an award is made.

13-1-121. Competitive sealed qualifications-based proposals; architects; engineers; landscape architects; surveyors; selection committee; state public works projects.

A. For each state public works project, an "architect, engineer, landscape architect and surveyor selection committee" shall be formed with four members as follows:

(1) one member of the agency for which the project is being designed;

(2) the director of the facilities management division of the general services department, or the director's designee, who shall be chair;

(3) one member designated by the joint practice committee; and

(4) one member designated by the secretary.

B. Once an architect, engineer, landscape architect and surveyor selection committee is formed, no member shall be substituted or permitted to serve through a proxy for the duration of the selection process for a state public works project.

C. The staff architect or the staff architect's designee of the facilities management division shall serve as staff to the architect, engineer, landscape architect and surveyor selection committee.

D. The members of the architect, engineer, landscape architect and surveyor selection committee shall be reimbursed by the facilities management division for per diem and mileage in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

E. Notwithstanding the provisions of this section, an architect, engineer, landscape architect and surveyor selection committee shall not be formed for department of transportation highway projects. The department of transportation shall create its own selection committee by rule, after notice and hearing, for department of transportation highway projects.

13-1-122. Competitive sealed qualifications-based proposals; award of architect, engineering, landscape architect and surveying contracts.

The secretary or his designee, or the secretary of the highway and transportation department or his designee or a designee of a local public body shall negotiate a contract with the highest qualified business for the architectural, landscape architectural, engineering or surveying services at compensation determined in writing to be fair and reasonable. In making this decision, the secretary or his designee or the designee of a local public body shall take into account the estimated value of the services to be rendered and the scope, complexity and professional nature of the services. Should the secretary or his designee or the designee of a local public body be unable to negotiate a satisfactory contract with the business considered to be the most qualified at a price determined to be fair and reasonable, negotiations with that business shall be formally terminated. The secretary or his designee or the designee of a local public body shall then undertake negotiations with the second most qualified business. Failing accord with the second most qualified business, the secretary or his designee or a designee of a local public body shall formally terminate negotiations with that business. The secretary or his designee or the designee of the local public body shall then undertake negotiations with the third most qualified business.

Should the secretary or his designee or a designee of a local public body be unable to negotiate a contract with any of the businesses selected by the committee, additional businesses shall be ranked in order of their qualifications and the secretary or his designee or the designee of a local public body shall continue negotiations in accordance with this section until a contract is signed with a qualified business or the procurement process is terminated and a new request for proposals is initiated. The secretary or the representative of a local public body shall publicly announce the business selected for award.

13-1-123. Architectural, engineering, landscape architectural and surveying contracts.

A. All contracts between a state agency and an architect for the construction of new buildings or for the remodeling or renovation of existing buildings shall contain the provision that all designs, drawings, specifications, notes and other work developed in the performance of the contract are the sole property of this state.

B. All documents, including drawings and specifications, prepared by the architect, engineer, landscape architect or surveyor are instruments of professional service. If the plans and specifications developed in the performance of the contract shall become the property of the contracting agency upon completion of the work, the contracting agency agrees to hold harmless, indemnify and defend the architect, engineer, landscape architect or surveyor against all damages, claims and losses, including defense costs, arising out of any reuse of the plans and specifications without the written authorization of the architect, engineer, landscape architect or surveyor.

C. A copy of all designs, drawings and other materials which are the property of this state shall be transmitted to the contracting agency. The contracting agency shall index these materials, and a copy of the index shall be provided to the records center.

13-1-124. Architect rate schedule.

The secretary shall adopt by regulation an architect rate schedule which shall set the highest permissible rates for each building-type group, which shall be defined in the regulations. The rate schedule shall be in effect upon the approval of the state board of finance and compliance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] and shall apply to all contracts between a state agency and an architect which are executed after the effective date of the architect rate schedule.

13-1-125. Small purchases.

A. A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding sixty thousand dollars ($60,000), excluding applicable state and local gross receipts taxes, in accordance with the applicable small purchase rules adopted by the secretary, a local public body or a central purchasing office that has the authority to issue rules.

B. Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding sixty thousand dollars ($60,000), excluding applicable state and local gross receipts taxes, except for the services of landscape architects or surveyors for state public works projects or local public works projects, in accordance with professional services procurement rules promulgated by the general services department or a central purchasing office with the authority to issue rules.

C. Notwithstanding the requirements of Subsection A of this section, a state agency or a local public body may procure services, construction or items of tangible personal property having a value not exceeding twenty thousand dollars ($20,000), excluding applicable state and local gross receipts taxes, by issuing a direct purchase order to a contractor based upon the best obtainable price.

D. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

ANNOTATIONS

Cross references. — For adoption of rules and regulations by director of department of finance and administration, *see* 9-6-5 NMSA 1978.

For adoption of rules and regulations by secretary of general services department, *see* 9-17-5NMSA 1978.

Temporary provisions. — Laws 2019, ch. 153, § 6 provided:

A. On the effective date of this act, all personnel, functions, appropriations, money, records, furniture, equipment and other property of, or attributable to, the contracts review bureau of the administrative services division of the department of finance and administration are transferred to the purchasing division of the general services department.

B. On the effective date of this act, all contractual obligations of the contracts review bureau of the administrative services division of the department of finance and administration become binding on the purchasing division of the general services department.

C. On and after the effective date of this act, rules of the department of finance and administration pertaining to the approval of professional services contracts shall be deemed to be the rules of the general services department until amended or repealed by the general services department, and all references in those rules to the department of finance and administration shall be deemed to be references to the general services department.

13-1-126. Sole source procurement.

A. A contract may be awarded without competitive sealed bids or competitive sealed proposals regardless of the estimated cost when the state purchasing agent or a central purchasing office determines, in writing, that:

(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.

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

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

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

E. The state purchasing agent or a central purchasing office shall not circumvent this section by narrowly drafting specifications so that only one predetermined source would satisfy those specifications.

13-1-126.1. Sole source contracts; notice; protest.

A. At least thirty days before it awards a sole source contract, the state purchasing agent shall post notice of its intent to award the contract on its website. At least thirty days before it awards a sole source contract, a central purchasing office shall post notice of its intent to award the contract on its website, if it maintains one, and shall transmit the notice to the state purchasing agent for posting on the state purchasing agent's website. In each case, the notice shall identify, at a minimum:

(1) the parties to the proposed contract;

(2) the nature and quantity of the service, construction or item of tangible personal property being contracted for; and

(3) the contract amount.

B. Any qualified potential contractor that was not selected for a proposed sole source contract may protest the selection in writing, within fifteen calendar days after the notice of intent to award the contract was posted by the state purchasing agent or central purchasing office, by submitting the protest to the state purchasing agent or central purchasing office, as appropriate. The state purchasing agent or central purchasing office shall then reconsider its selection.

13-1-127. Emergency procurement; required conditions; limitations; notice.

A. The state purchasing agent or a central purchasing office may only make an emergency procurement when the service, construction or item of tangible personal property procured:

(1) is needed immediately to:

(a) control a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; or

(b) plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event; and

(2) cannot be acquired through normal procurement methods.

B. The state purchasing agent or a central purchasing office:

(1) in making an emergency procurement, shall:

(a) employ a competitive process to the extent practicable under the circumstances; and

(b) use due diligence in determining the basis for the procurement and in selecting a contractor; and

(2) shall not make an emergency procurement for the purchase or lease of heavy road equipment.

C. The state purchasing agent or a central purchasing office that makes an emergency procurement shall outline its determination of the basis for the procurement and its selection of the contractor in writing and include the writing in the procurement file. Promptly thereafter:

(1) the state purchasing agent shall post notice of the procurement on its website; or

(2) the central purchasing office shall post notice of the procurement on its website, if it maintains one, and shall transmit the notice to the state purchasing agent for posting on the state purchasing agent's website.

D. The state purchasing agent or a central purchasing office that makes an emergency procurement to plan or prepare for the response to a serious threat to public health, welfare, safety or property caused by a flood, fire, epidemic, riot, act of terrorism, equipment failure or similar event shall account for the money spent in making the procurement and report on that accounting to the legislative finance committee and the department of finance and administration within sixty days after the end of the fiscal year in which the procurement was made.

ANNOTATIONS

Applicability to exempt transaction. — The emergency provisions of Section 13-1-127 NMSA 1978 did not apply to a contract for the purchase of water services by a school district from the water utility of a municipality which was within the exemptions contained in Subsections A and D of Section 13-1-98 NMSA 1978. *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, 120 N.M. 307, 901 P.2d 725.

Intent. — The intention of the emergency purchases statute is to keep a public record of such purchases and to provide some means of control over them. 1969 Op. Att'y Gen. No. 69-107.

Reason for exceptions. — Only where centralized control may be harmful or unproductive of savings were exceptions from the bid requirement allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Misuse remedy. — The remedy for any misuse of the emergency purchases provisions would appear to be in the form of reporting the same in an audit report rather than in approving or disapproving the purchase itself. 1969 Op. Att'y Gen. No. 69-107.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 38.

13-1-128. Sole source and emergency procurements; publication of award to agency web site and sunshine portal; content and submission of record.

A. Prior to award of a sole source procurement contract, the state purchasing agent or central purchasing office shall:

(1) provide the information described in Subsection E of this section to the department of information technology for posting on the sunshine portal; and

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

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

C. Within three business days of awarding an emergency procurement contract, the awarding central purchasing office within a state agency shall:

(1) provide the information described in Subsection E of this section to the department of information technology for posting on the sunshine portal; and

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

D. Within three business days of awarding an emergency procurement contract, the local public body central purchasing office shall post the information described in Subsection E of this section on the local public body web site, if one exists.

E. All central purchasing offices shall maintain, for a minimum of three years, records of sole source and emergency procurements. The record of each such procurement shall be public record and shall contain:

(1) the contractor's name and address;

(2) the amount and term of the contract;

(3) a listing of the services, construction or items of tangible personal property procured under the contract;

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

(5) the justification for the procurement method.

ANNOTATIONS

Intent. — The intention of the emergency purchases statute is to keep a public record of such purchases and to provide some means of control over them. 1969 Op. Att'y Gen. No. 69-107.

Reason for exceptions. — Only when centralized control may be harmful or unproductive of savings were exceptions from the bid requirement allowed by the former Public Purchases Act. 1969 Op. Att'y Gen. No. 69-87.

Misuse remedy. — The remedy for any misuse of the emergency purchases provisions would appear to be in the form of reporting the same in an audit report rather than in approving or disapproving the purchase itself. 1969 Op. Att'y Gen. No. 69-107.

13-1-129. Procurement under existing contracts.

A. Notwithstanding the requirements of Sections 13-1-102 through 13-1-118 NMSA 1978, the state purchasing agent or a central purchasing office may contract for services, construction or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

(1) at a price equal to or less than the contractor's current federal supply contract price (GSA), providing the contractor has indicated in writing a willingness to extend such contractor pricing, terms and conditions to the state agency or local public body and the purchase order adequately identifies the contract relied upon; or

(2) with a business which has a current exclusive or nonexclusive price agreement with the state purchasing agent or a central purchasing office for the item, services or construction meeting the same standards and specifications as the items to be procured if the following conditions are met:

(a) the quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and

(b) the purchase order adequately identifies the price agreement relied upon.

B. The central purchasing office shall retain for public inspection and for the use of auditors a copy of each federal supply contractor state purchasing agent price agreement relied upon to make purchases without seeking competitive bids or proposals.

13-1-130. Purchases; antipoverty program business.

A. Without regard to the bid requirements of Section 75 [13-1-102 NMSA 1978] of the Procurement Code, a central purchasing office may negotiate a contract for materials grown, processed or manufactured in this state by small businesses, cooperatives, community self-determination corporations or other such enterprises designed and operated to alleviate poverty conditions and aided by state or federal antipoverty programs or through private philanthropy.

B. Prior to negotiating a contract under this section, a central purchasing office shall make a determination of the reasonableness of the price and the quality of the materials and that the public interest will best be served by the procurement.

13-1-131. Rejection or cancellation of bids or requests for proposals; negotiations.

An invitation for bids, a request for proposals or any other solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part when it is in the best interest of the state agency or a local public body. A determination containing the reasons for cancellation shall be made part of the procurement file. If no bids are received or if all

bids received are rejected and if the invitation for bid was for any tangible personal property, construction or service, then new invitations for bids shall be requested. If upon rebidding the tangible personal property, construction or services, the bids received are unacceptable, or if no bids are secured, the central purchasing office may purchase the tangible personal property, construction or services in the open market at the best obtainable price.

ANNOTATIONS

Evaluation of proposals. — All the acts in question by the city - introducing a locality requirement after the bids were opened, awarding the contract to the fourth-ranked bidder, and rejecting the proposals after making a contract award - were arbitrary and capricious. Had the city simply rejected all proposals at any point before making an award, this matter would not be before the court. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Public contracts: authority of state or its subdivision to reject all bids, 52 A.L.R.4th 186.

13-1-132. Irregularities in bids or proposals.

The state purchasing agent or a central purchasing office may waive technical irregularities in the form of the bid or proposal of the low bidder or offeror which do not alter the price, quality or quantity of the services, construction or items of tangible personal property bid or offered.

13-1-133. Responsibility of bidders and offerors.

If a bidder or offeror who otherwise would have been awarded a contract is found not to be a responsible bidder or offeror, a determination that the bidder or offeror is not a responsible bidder or offeror, setting forth the basis of the finding, shall be prepared by the state purchasing agent or a central purchasing office. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination that the bidder or offeror is not a responsible bidder or offeror.

13-1-134. Prequalification of bidders.

A business may be prequalified by a central purchasing office as a bidder or offeror for particular types of services, construction or items of tangible personal property. Mailing lists of potential bidders or offerors shall include but shall not be limited to such prequalified businesses.

13-1-135. Cooperative procurement authorized.

A. Any state agency or local public body may either participate in, sponsor or administer a cooperative procurement agreement for the procurement of any services, construction or items of tangible personal property with any other state agency, local public body or external procurement unit in accordance with an agreement entered into and approved by the governing authority of each of the state agencies, local public bodies or external procurement units involved. The cooperative procurement agreement shall clearly specify the purpose of the agreement and the method by which the purpose will be accomplished. Any power exercised under a cooperative procurement agreement entered into pursuant to this subsection shall be limited to the central purchasing authority common to the contracting parties, even though one or more of the contracting parties may be located outside this state. An approved and signed copy of all cooperative procurement agreements entered into pursuant to this subsection shall be filed with the state purchasing agent. A cooperative procurement agreement entered into pursuant to this subsection is limited to the procurement of items of tangible personal property, services or construction.

B. Notwithstanding the provisions of Subsection A of this section, a cooperative procurement agreement providing for mutually held funds or for other terms and conditions involving public funds or property included in Section 11-1-4 NMSA 1978 shall be entered into pursuant to the provisions of the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978].

C. Central purchasing offices other than the state purchasing agent may cooperate by agreement with the state purchasing agent in obtaining contracts or price agreements, and such contract or agreed prices shall apply to purchase orders subsequently issued under the agreement.

13-1-135.1. Recycled content goods; cooperative procurement.

A. Beginning July 1, 1995, each central purchasing office shall, whenever its price, quality, quantity, availability and delivery requirements are met, purchase recycled content goods through contracts established by the purchasing division of the general services department or with other central purchasing offices.

B. For purposes of this section, "recycled content goods" means supplies and materials composed in whole or in part of recycled materials; provided that the recycled materials content meets or exceeds the minimum content standards required by bid specifications.

13-1-136. Cooperative procurement; reports required.

The general services department and the department of finance and administration shall notify the state purchasing agent on or before January 1 of each year of the cooperative procurement agreements entered into by state agencies with local public bodies or external procurement units during the preceding fiscal year.

13-1-137. Sale, acquisition or use of property by a state agency or a local public body.

Any state agency or local public body may sell property to, acquire property from or cooperatively use any items of tangible personal property or services belonging to another state agency or a local public body or external procurement unit:

A. in accordance with an agreement entered into with the approval of the state board of finance or the data processing and data communications planning council [information technology commission systems council]; or

B. subject to the provisions of Sections 3-46-1 through 3-46-45; 3-54-1 through 3-54-3; 3-60-1 through 3-60-37 and 3-60A-1 through 3-60A-48 NMSA 1978.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and it is not part of the law.

Pursuant to Laws 1984, ch. 64, the data processing and data communications planning council, was renamed the information systems council. That council was subsequently renamed as the commission on information and communication management and then again as the information technology commission. *See* 15-1C-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States § 66.
81A C.J.S. States §§ 145 to 147.

13-1-138. Cost or pricing data required.

When required by the state purchasing agent or a central purchasing office, a prospective contractor shall submit cost or pricing data when the contract is expected to exceed twenty-five thousand dollars ($25,000) and is to be awarded by a method other than competitive sealed bids.

13-1-139. Cost or pricing data not required.

The cost or pricing data relating to the award of a contract shall not be required when:

A. the procurement is based on competitive sealed bid;

B. the contract price is based on established catalogue prices or market prices;

C. the contract price is set by law or regulation;

D. the contract is for professional services; or

E. the contract is awarded pursuant to the Public Building Energy Efficiency Act [Public Facility Energy Efficiency and Water Conservation Act] [Chapter 6, Article 23 NMSA 1978].

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The title of the "Public Building Energy Efficiency Act" was changed to the "Public Facility Energy Efficiency and Water Conservation Act" by Laws 1997, ch. 42, § 1 and Laws 2001, ch. 247, § 1.

13-1-140. Cost or pricing data; change orders or contract modifications.

When required by the state purchasing agent or a central purchasing office, a contractor shall submit cost or pricing data prior to the execution of any change order or contract modification, whether or not cost or pricing data was required in connection with the initial award of the contract, when the change order or modification involves aggregate increases or aggregate decreases that are expected to exceed twenty-five thousand dollars ($25,000).

13-1-141. Cost or pricing data; change orders; contract modifications; exceptions.

The submission of cost or pricing data relating to the execution of a change order or contract modification shall not be required when unrelated change orders or contract modifications for which cost or pricing data would not be required are consolidated for administrative convenience.

13-1-142. Cost or pricing data; certification required.

A contractor, actual or prospective, required to submit cost or pricing data shall certify that to the best of its knowledge and belief the cost or pricing data submitted was accurate, complete and current as of a specified date.

13-1-143. Cost or pricing data; price adjustment provision required.

Any contract award, change order or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the state agency or a local public body, including profit or fee, shall be adjusted to exclude any significant sums by which the state agency or a local public body reasonably finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date specified.

13-1-144. Cost or price analysis.

A cost analysis or a price analysis, as appropriate, may be conducted prior to the award of a contract other than one awarded by competitive sealed bidding. A written record of such cost or price analysis shall be made a part of the procurement file.

13-1-145. Cost principles; regulations.

The secretary, a local public body or a central purchasing office which has the authority to issue regulations may promulgate regulations setting forth principles to be used to determine the allowability of incurred costs for the purpose of reimbursing costs to a contractor.

13-1-146. Requirement for bid security.

Bid security shall be required of bidders or offerors for construction contracts when the price is estimated by the procurement officer to exceed twenty-five thousand dollars ($25,000). Bid security in an amount equal to at least five percent of the amount of the bid shall be a bond provided by a surety company authorized to do business in this state, or the equivalent in cash, or otherwise supplied in a form satisfactory to the state agency or a local public body.

13-1-146.1. Directed suretyship prohibited; penalty.

A. Except to the extent necessary to ensure that a surety company meets the requirements of Subsection A of Section 13-4-18 NMSA 1978, an employee of the state or its political subdivisions, or a person acting or purporting to act on behalf of that employee, shall not require a bidder or an offeror in a procurement for a construction contract pursuant to the Procurement Code to make application or furnish financial data for a surety bond or to obtain a surety bond from a particular surety company, insurance company, broker or agent in connection with the bid or proposal.

B. A person who violates Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

ANNOTATIONS

Cross references. — For construction contract performance and payment bonds, *see* 13-4-18NMSA 1978.

13-1-147. Bid security; rejection of bids.

A. When the invitation for bids requires bid security, noncompliance by the bidder requires that the bid be rejected.

B. If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security.

13-1-148. Bid and performance bonds; additional requirements.

A. Bid and performance bonds or other security may be required for contracts for items of tangible personal property or services as the state purchasing agent or a central purchasing office deems necessary to protect the interests of the state agency or a local public body. Any such bonding requirements shall not be used as a substitute for a determination of the responsibility of a bidder or offeror.

B. As to performance and payment bonds for construction contracts, see the requirements of Section 13-4-18 NMSA 1978.

13-1-148.1. Bonding of subcontractors.

A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is one hundred twenty-five thousand dollars ($125,000) or more.

ANNOTATIONS

Cross references. — For the definition of a state public works project, *see* 13-1-91 NMSA 1978.

For the definition of a local public works project, *see* 13-1-66.1 NMSA 1978.

Applicability. — Section 13-1-148.1 NMSA 1978 applies only to a subcontractor that contracts directly with the primary contractor and only to subcontractor contracts that were executed after the effective date of Section 13-1-148.1 NMSA 1978. 2005 Op. Att'y Gen. No. 05-02.

13-1-149. Types of contracts.

Subject to the limitations of Sections 123 through 127 [13-1-150 to 13-1-154 NMSA 1978] of the Procurement Code, any type of contract, including but not limited to definite quantity contracts, indefinite quantity contracts and price agreements, which will promote the best interests of the state agency or a local public body may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited except for the purchase of insurance. A cost-reimbursement contract may be used when such contract is likely to be less costly or it is impracticable to otherwise obtain the services, construction or items of tangible personal property required.

ANNOTATIONS

Cross references. — For public works contracts, *see* Chapter 13, Article 4 NMSA 1978.

Option for exempt agencies or public bodies. — When the state purchasing agent has entered into a contract which permits, but does not require, those state agencies or local public bodies not under the supervision of the agent to purchase under the contract, the purchases may be made by submission to bids, purchasing under the state purchasing agent contract or purchasing from any other vendor, provided the price obtained, etc., is equal to or better than the terms of the contract. 1969 Op. Att'y Gen. No. 69-113.

When manner of delivery or charging immaterial. — Because it is the responsibility of the state purchasing agent to reduce, to the maximum extent possible, the number of purchase transactions by combining into bulk orders and contracts the requirements of all state agencies for common-use items or items repetitively purchased, the fact that it may be delivered in small quantities and charged as delivered through the use of credit cards seems immaterial. 1968 Op. Att'y Gen. No. 68-8.

13-1-150. Multi-term contracts; specified period.

A. A multi-term contract for items of tangible personal property, construction or services except for professional services, in an amount under twenty-five thousand dollars ($25,000), may be entered into for any period of time deemed to be in the best interests of the state agency or a local public body not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting. If the amount of the contract is twenty-five thousand dollars ($25,000) or more, the term shall not exceed ten years, including all extensions and renewals, except that for a contract entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act [Chapter 6, Article 23 NMSA 1978], the term shall not exceed twenty-five years, including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

B. A contract for professional services may not exceed four years, including all extensions and renewals, except for the following:

(1) services required to support or operate federally certified medicaid, financial assistance and child support enforcement management information or payment systems;

(2) services to design, develop or implement the taxation and revenue information management systems project authorized by Laws 1997, Chapter 125;

(3) a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement and other similar services, excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities, may be for the life of the securities or as long as the securities remain outstanding;

(4) services relating to the implementation, operation and administration of the Education Trust Act [Chapter 21, Article 21K NMSA 1978];

(5) services relating to measurement and verification of conservation-related cost savings and utility cost savings pursuant to the Public Facility Energy Efficiency and Water Conservation Act; and

(6) services relating to the design and engineering of a state public works project:

(a) for a period not to exceed the requisite time for project completion and a subsequent warranty period; and

(b) upon approval of the secretary of finance and administration.

ANNOTATIONS

Professional services contract with bond counsel or financial advisors may not exceed a term of four years, including all extensions and renewals. 1990 Op. Att'y Gen. No. 90-10.

13-1-151. Multi-term contracts; determination prior to use.

Prior to the utilization of a multi-term contract, the state purchasing agent or the central purchasing office involved shall make a determination that:

A. the estimated requirements cover the period of the contract and are reasonably firm and continuing; and

B. the contract will serve the best interests of the state agency or a local public body.

13-1-152. Multi-term contracts; cancellation due to unavailability of funds.

When funds are not appropriated or otherwise made available to support continuation of performance of a multi-term contract in a subsequent fiscal period, the contract shall be cancelled.

13-1-153. Multiple source award; limitations on use.

A multiple source award may be made pursuant to Section 13-1-110 NMSA 1978 or Section 1 of this 2007 act when awards to two or more bidders or offerors are necessary for adequate delivery or service. Multiple source awards shall not be made when a single award will meet the needs of the state agency or a local public body without sacrifice of economy or service. Awards shall be limited to the least number of suppliers in one geographical area necessary to meet the requirements of the state agency or a local public

body. A multiple source award shall be based upon the lowest responsible bid or proposal received in each geographical area unless the award is made in response to a qualifications-based proposal.

13-1-154. Multiple source award; determination required.

The state purchasing agent or central purchasing office shall make a determination setting forth the reasons for a multiple source award.

13-1-154.1. Multiple source contracts; architectural and engineering services contracts; indefinite quantity construction contracts.

A. A state agency or local public body may procure multiple architectural or engineering services contracts for multiple projects under a single qualifications-based request for proposals; provided that the total amount of multiple contracts and all renewals for a single contractor does not exceed seven million five hundred thousand dollars ($7,500,000) over four years and that a single contract, including any renewals, does not exceed six hundred fifty thousand dollars ($650,000).

B. A state agency or local public body may procure multiple indefinite quantity construction contracts pursuant to a price agreement for multiple projects under a single request for proposals; provided that the total amount of a contract and all renewals does not exceed twelve million five hundred thousand dollars ($12,500,000) over three years and the contract provides that any one purchase order under the contract may not exceed four million dollars ($4,000,000).

C. A state agency or local public body may make procurements in accordance with the provisions of Subsection A or B of this section if:

(1) the advertisement and request for proposals states that multiple contracts may or will be awarded, states the number of contracts that may or will be awarded and describes the services or construction to be performed under each contract;

(2) there is a single selection process for all of the multiple contracts, except that for each contract there may be a separate final list and a separate negotiation of contract terms; and

(3) each of the multiple contracts for architectural or engineering services has a term not exceeding four years, or for construction, has a term not exceeding three years, each including all extensions and renewals.

D. A contract to be awarded pursuant to this section to a firm that is currently performing under a contract issued pursuant to this section shall not cause the total amount of all contracts issued pursuant to this section to that firm to exceed:

(1) seven million five hundred thousand dollars ($7,500,000) in any four-year period for architectural or engineering services; or

(2) twelve million five hundred thousand dollars ($12,500,000) in any three-year period for construction.

E. Procurement pursuant to this section is subject to the limitations of Sections 13-1-150 through 13-1-154 NMSA 1978.

F. A state agency and a local public body, not including an agency of the legislative or judicial branch of state government, shall report to the legislative finance committee on an annual basis and to the purchasing division of the general services department on, at minimum, a quarterly basis the aggregate amount of contracts for each contractor and the corresponding amounts to be spent under each multiple source contract pursuant to this section. The general services department may promulgate rules regarding reporting to the department pursuant to this subsection.

13-1-155. Procurement of used items; appraisal required; county road equipment exception for auctions.

A. A central purchasing office, when procuring used items of tangible personal property the estimated cost of which exceeds five thousand dollars ($5,000), shall request bids as though the items were new, adding specifications that permit used items under conditions to be outlined in the bid specifications, including but not limited to requiring a written warranty for at least ninety days after date of delivery and an independent "certificate of working order" by a qualified mechanic or appraiser.

B. Notwithstanding the provisions of Subsection A of this section, the purchasing office for a county may purchase, at public or private auctions conducted by established, recognized commercial auction companies, used heavy equipment, having an estimated cost that exceeds five thousand dollars ($5,000), for use in construction and maintenance of county streets, roads and highways, subject to the following provisions:

(1) the commercial auction company shall have been in business for at least three years preceding the date of purchase and shall conduct at least five auctions annually;

(2) the value of each piece of equipment shall be appraised prior to the auction by a qualified disinterested appraiser retained and paid by the county, who shall make a written appraisal report stating the basis for the appraisal, including the age, condition and comparable sales, and stating that the appraiser has exercised his independent judgment without prior understanding or agreement with any person as to a target value or range of value;

(3) an independent "certificate of working condition" shall be obtained prior to the auction from a qualified mechanic who shall have made a detailed inspection of each major working or major functional part and certified the working condition of each; and

(4) the price paid, including all auction fees and buyer's surcharges, shall not exceed the appraised value.

13-1-156. Trade or exchange of used items; appraisal required.

A. A central purchasing office, when trading in or exchanging used items of tangible personal property the estimated value of which exceeds five thousand dollars ($5,000) as part-payment on the procurement of new items of tangible personal property, shall:

(1) have an independent appraisal made of the items to be traded in or exchanged. The appraisal shall be in writing, shall be made part of the procurement file and shall be a public record. The invitation for bids or request for proposals shall contain notice to prospective bidders or offerors of the description and specifications of the items to be traded in or exchanged, the appraised value of the items to be traded in or exchanged and the location where the items to be traded in or exchanged may be inspected; or

(2) have two written quotes for purchase of the property at a specified price.

B. Award shall be based upon the net bid. Bidders or offerors shall compute their net bid or offer by deducting the appraised value or highest quote of the items to be traded in or exchanged from the gross bid or offer on the new items of tangible personal property to be procured. If an amount offered in trade is less than the appraised value or the highest quote but is found to be a fair reflection of the current market, representative of the condition of the items of tangible personal property and in the best interest of the agency, the bid or offer may be accepted. Documentation of the terms of acceptance shall be in writing, shall be made a part of the procurement file and shall be a public record.

13-1-157. Receipt; inspection; acceptance or rejection of deliveries.

The using agency is responsible for inspecting and accepting or rejecting deliveries. The using agency shall determine whether the quantity is as specified in the purchase order or contract and whether the quality conforms to the specifications referred to or included in the purchase order or contract. If inspection reveals that the delivery does not conform to the quantity or quality specified in the purchase order or contract, the using agency shall immediately notify the central purchasing office. The central purchasing office shall notify the vendor that the delivery has been rejected and shall order the vendor to promptly make a satisfactory replacement or supplementary delivery. In case the vendor fails to comply, the central purchasing office shall have no obligation to pay for the nonconforming items of tangible personal property. If the delivery does conform to the quantity and quality specified in the purchase order or contract, the using agency shall certify to the central purchasing office that delivery has been completed and is satisfactory.

13-1-158. Payments for purchases.

A. No warrant, check or other negotiable instrument shall be issued in payment for any purchase of services, construction or items of tangible personal property unless the central

purchasing office or the using agency certifies that the services, construction or items of tangible personal property have been received and meet specifications or unless prepayment is permitted under Section 13-1-98 NMSA 1978 by exclusion of the purchase from the Procurement Code.

B. Unless otherwise agreed upon by the parties or unless otherwise specified in the invitation for bids, request for proposals or other solicitation, within fifteen days from the date the central purchasing office or using agency receives written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site and received, the central purchasing office or using agency shall issue a written certification of complete or partial acceptance or rejection of the services, construction or items of tangible personal property.

C. Except as provided in Subsection D of this section, upon certification by the central purchasing office or the using agency that the services, construction or items of tangible personal property have been received and accepted, payment shall be tendered to the contractor within thirty days of the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one-half percent per month. For purchases funded by state or federal grants to local public bodies, if the local public body has not received the funds from the federal or state funding agency, payments shall be tendered to the contractor within five working days of receipt of funds from that funding agency.

D. If the central purchasing office or the using agency finds that the services, construction or items of tangible personal property are not acceptable, it shall, within thirty days of the date of receipt of written notice from the contractor that payment is requested for services or construction completed or items of tangible personal property delivered on site, provide to the contractor a letter of exception explaining the defect or objection to the services, construction or delivered tangible personal property along with details of how the contractor may proceed to provide remedial action.

E. Late payment charges that differ from the provisions of Subsection C of this section may be assessed if specifically provided for by contract or pursuant to tariffs approved by the New Mexico public utility commission or the state corporation commission [public regulation commission].

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that all references to the state corporation commission be construed as references to the public regulation commission.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of 28 USCS § 2516(a) to government contractor's claim for interest expense or for loss of use of its capital caused by delay attributable to government, 59 A.L.R. Fed. 905.

13-1-159. Right to inspect plant.

A contract or a solicitation therefor may include a provision permitting a state agency or a local public body, at reasonable times, to inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded.

13-1-160. Audit of cost or pricing data.

A state agency or a local public body may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data, to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which cost or pricing data is required shall maintain books and records that relate to such cost or pricing data for three years from the date of final payment under the contract unless a shorter period is otherwise authorized in writing.

13-1-161. Contract audit.

A state agency or a local public body shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract unless a shorter period is otherwise authorized in writing.

13-1-164. Specifications; maximum practicable competition.

All specifications shall be drafted so as to ensure maximum practicable competition and fulfill the requirements of state agencies and local public bodies. In preparing specifications, if, in the opinion of the state purchasing agent or central purchasing office, a proposed component is of a nature that would restrict the number of responsible bidders or responsible offerors and thereby limit competition, if practicable, the state purchasing agent or central purchasing office shall draft the specifications without the component and procure the component by issuing a separate invitation for bids or request for proposals or by entering into a sole source procurement.

13-1-165. Brand-name specification; use.

A brand-name specification may be used only when the state purchasing agent or a central purchasing office makes a determination that only the identified brand-name item or items will satisfy the needs of the state agency or a local public body.

13-1-166. Brand-name specification; competition.

The state purchasing agent or a central purchasing office shall seek to identify sources from which the designated brand-name items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 99 [13-1-126 NMSA 1978] of the Procurement Code.

13-1-167. Brand-name or equal specification; required characteristics.

Unless the state purchasing agent or a central purchasing office makes a determination that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand-name or equal specifications shall include a description of the particular design, function or performance characteristics which are required.

13-1-168. Brand-name or equal specification; required language.

Where a brand-name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition.

13-1-169. Purchase request; specifications; purchase orders.

A. All using agency requests for procurement shall contain:

(1) a statement of need and the general characteristics of the item, construction or service desired; and

(2) a statement of the quantity desired and a general statement of quality.

B. The central purchasing office may consolidate procurements and may contract for items of tangible personal property or services at a firm price at which the items or services needed during the year or portion of a year shall be purchased.

13-1-170. Uniform contract clauses.

A. A state agency, local public body or central purchasing office with the power to issue regulations may require by regulation that contracts include uniform clauses providing for termination of contracts, adjustments in prices, adjustments in time of performance or other contract provisions as appropriate, including but not limited to the following subjects:

(1) the unilateral right of a state agency or a local public body to order in writing:

(a) changes in the work within the scope of the contract; and

(b) temporary stoppage of the work or the delay of performance;

(2) variations occurring between estimated quantities of work in a contract and actual quantities;

(3) liquidated damages;

(4) permissible excuses for delay or nonperformance;

(5) termination of the contract for default;

(6) termination of the contract in whole or in part for the convenience of the state agency or a local public body;

(7) assignment clauses providing for the assignment by the contractor to the state agency or a local public body of causes of action for violation of state or federal antitrust statutes;

(8) identification of subcontractors by bidders in bids; and

(9) uniform subcontract clauses in contracts.

B. A state agency, local public body or central purchasing office with the power to issue regulations shall require by regulation that contracts include a clause imposing late payment charges against the state agency or local public body in the amount and under the conditions stated in Section 13-1-158 NMSA 1978.

ANNOTATIONS

Termination for convenience clause. — Where the city of Albuquerque contracted with plaintiff to be the primary supplier of certain fuels to the city's fleet management division, the city did not wrongfully terminate the contract when plaintiff was unable to meet the city's fuel needs, where the evidence established that the city terminated the contract for

default and convenience, and where the contract specifically stated that the city may terminate the contract at any time by giving plaintiff at least thirty days notice in writing of such termination; the city was not required to have any good cause or persuasive reason for terminating the contract. *MB Oil Ltd., Co. v. City of Albuquerque*, 2016-NMCA-090.

13-1-171. Price adjustments.

Adjustments in price shall be computed in one or more of the following ways as specified in the contract:

A. by agreement on a fixed-price adjustment before commencement of performance or as soon thereafter as practicable;

B. by unit prices specified in the contract or subsequently agreed upon by the parties;

C. by the costs attributable to the events or conditions as specified in the contract or subsequently agreed upon by the parties;

D. by a provision for both upward and downward revision of stated contract price upon the occurrence of specified contingencies if the contract is for commercial items sold in substantial quantities to the general public with prices based upon established catalogue or list prices in a form regularly maintained by the manufacturer or vendor and published or otherwise available for customer inspection. In the event of revision of the stated contract price, the contract file shall be promptly documented by the state purchasing agent or central purchasing office;

E. in such other manner as the contracting parties may mutually agree; or

F. in the absence of agreement by the parties, by a unilateral determination reasonably computed by the state agency or a local public body of the costs attributable to the events or conditions.

13-1-172. Right to protest.

Any bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest.

ANNOTATIONS

Appellate review of administrative protest. — A protest of the award of a contract for a campus electrical distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172), who were given authority to resolve protests pursuant to § 13-1-174, and therefore constituted an administrative tribunal whose decision

was appealable, as provided by § 13-1-183, pursuant to the provisions of § 39-3-1.1. *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Adequate legal remedy. — The Procurement Code provides an adequate legal remedy to disappointed bidders by giving them the right to protest pursuant to § 13-1-172 and the statutory remedy of judicial review pursuant to § 13-1-183. *State ex rel. Educ. Assessments Sys., Inc. v. Coop. Educ. Servs. of N.M.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

Triggering event. — It is clear from both this section and related regulations that the triggering event for the 15-day protest period is the knowledge of facts or occurrences giving rise to the protest during the entire procurement process, regardless of whether the protestant is protesting the solicitation, bid, or award process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

Knowledge. — This section does not limit knowledge of the facts to actual knowledge, but rather "knowledge" in this section can properly be construed as constructive as well as actual knowledge. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Works and Contracts § 83; 144 to 146.

Standing of disappointed bidder on public contract to seek damages under 42 U.S.C.S. § 1983 for public authorities' alleged violation of bidding procedures, 86 A.L.R. Fed. 904.

13-1-173. Procurements after protest.

In the event of a timely protest under Section 145 [13-1-172 NMSA 1978] of the Procurement Code, the state purchasing agent or a central purchasing office shall not proceed further with the procurement unless the state purchasing agent or a central purchasing office makes a determination that the award of the contract is necessary to protect substantial interests of the state agency or a local public body.

ANNOTATIONS

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

13-1-174. Authority to resolve protests.

The state purchasing agent, a central purchasing office or a designee of either shall have the authority to take any action reasonably necessary to resolve a protest of an aggrieved bidder or offeror. This authority shall be exercised in accordance with regulations promulgated by the secretary, a local public body or a central purchasing office which has the authority to issue regulations but shall not include the authority to award money damages or attorneys' fees.

ANNOTATIONS

Appellate review of administrative protest. — A protest of the award of a contract for a campus electrical distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172), who were given authority to resolve protests pursuant to § 13-1-174, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183, pursuant to the provisions of § 39-3-1.1. *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

13-1-175. Protest; determination.

The state purchasing agent, a central purchasing office or a designee of either shall promptly issue a determination relating to the protest. The determination shall:

A. state the reasons for the action taken; and

B. inform the protestant of the right to judicial review of the determination pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

ANNOTATIONS

An important goal of the Procurement Code is that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process. *James Hamilton Constr. Co. v. State ex rel. State Highway & Transp. Dep't*, 2003-NMCA-067, 133 N.M. 627, 68 P.3d 173; cert. quashed, 82 P.3d 534.

13-1-176. Protest; notice of determination.

A copy of the determination issued under Section 148 [13-1-175 NMSA 1978] of the Procurement Code shall immediately be mailed to the protestant and other bidders or offerors involved in the procurement.

13-1-177. Authority to suspend or debar.

A. The state purchasing agent or a central purchasing office, after consultation with the using agency, may suspend a person from consideration for award of contracts if the state purchasing agent or central purchasing office, after reasonable investigation, finds that a person has engaged in conduct that constitutes cause for debarment pursuant to Section 13-1-178 NMSA 1978.

B. The term of a suspension pursuant to this section shall not exceed three months; however, if a person, including a bidder, offeror or contractor, has been charged with a criminal offense that would be a cause for debarment pursuant to Section 13-1-178 NMSA 1978, the suspension shall remain in effect until the criminal charge is resolved and the person is debarred or the reason for suspension no longer exists.

C. The state purchasing agent or a central purchasing office, after reasonable notice to the person involved, shall have authority to recommend to the governing authority of a state agency or a local public body the debarment of a person for cause from consideration for award of contracts, other than contracts for professional services. The debarment shall not be for a period of more than three years. The authority to debar shall be exercised by the governing authority of a state agency or a local public body in accordance with rules that shall provide for reasonable notice and a fair hearing prior to debarment.

D. As used in this section, the terms "person", "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the person, bidder, offeror or contractor.

13-1-178. Causes for debarment or suspension; time limit.

A. The causes for debarment or suspension occurring within three years of the date final action on a procurement is taken include but are not limited to the following:

(1) criminal conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(2) civil judgment against a bidder, offeror or contractor for a civil violation related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(3) conviction of a bidder, offeror or contractor under state or federal statutes related to embezzlement, theft, forgery, bribery, fraud, falsification or destruction of records, making false statements or receiving stolen property or for violation of federal or state tax laws;

(4) conviction of a bidder, offeror or contractor under state or federal antitrust statutes relating to the submission of offers;

(5) criminal conviction against a bidder, offeror or contractor for any other offense related to honesty, integrity or business ethics;

(6) civil judgment against a bidder, offeror or contractor for a civil violation related to honesty, integrity or business ethics;

(7) civil judgment against a bidder, offeror or contractor pursuant to the Unfair Practices Act [Chapter 57, Article 12 NMSA 1978];

(8) violation by a bidder, offeror or contractor of contract provisions, as set forth in this paragraph, of a character that is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action, including:

(a) willful failure to perform in accordance with one or more contracts; or

(b) a history of failure to perform or of unsatisfactory performance of one or more contracts; provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment; and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(9) any other cause that the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

(10) for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code.

B. As used in this section, the terms "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the bidder, offeror or contractor.

13-1-179. Debarment or suspension; determination.

The governing authority of a state agency or a local public body shall issue a written determination to debar or suspend. The determination shall:

A. state the reasons for the action taken; and

B. inform the debarred or suspended business involved of its rights to judicial review pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

13-1-180. Debarment or suspension; notice of determination.

A copy of the determination made pursuant to Section 13-1-179 NMSA 1978 shall be:

A. mailed to the last known address on file with the state purchasing agent or central purchasing office, by first class mail, within three business days after issuance of the written determination; or

B. transmitted electronically within three business days after issuance of the written determination.

13-1-180.1. Continuation of current contracts; restrictions on subcontracting.

A. Notwithstanding the debarment, suspension or proposed debarment of a person, a state agency or local public body may continue contracts or subcontracts in existence at the time that the person is debarred, suspended or proposed for debarment unless the governing authority of the state agency or local public body directs otherwise.

B. Unless the governing authority of a state agency or local public body issues a written determination based on compelling reasons holding otherwise, a person that has been debarred or suspended or whose debarment has been proposed shall not, after the date that the person is debarred, suspended or proposed for debarment:

(1) incur financial obligations, including those for materials, services and facilities, unless the person is specifically authorized to do so under the terms and conditions of the person's contract; or

(2) extend the duration of the person's contract by adding new work, by exercising options or by taking other action.

C. Unless pursuant to written authorization based on the compelling reasons of the governing authority of a state agency or local public body, the state purchasing agent or a central purchasing office shall not consent to enter a subcontract subject to the Procurement Code with a person that has been debarred, suspended or proposed for debarment.

D. A person that has entered into a contract subject to the Procurement Code shall not subcontract with another person that has been debarred, suspended or proposed for debarment without the written authorization of the state purchasing agent or a central purchasing office. A person that wishes to subcontract with another person that has been debarred, suspended or proposed for debarment shall make a request to the applicable state agency or local public body that includes the following:

(1) the name of the proposed subcontractor;

(2) information about the proposed subcontractor's debarment, suspension or proposed debarment;

(3) the requester's compelling reasons for seeking a subcontract with the proposed subcontractor; and

(4) a statement of how the person will protect the interests of the state agency or local public body considering the proposed subcontractor's debarment, suspension or proposed debarment.

13-1-181. Remedies prior to execution of contract.

If prior to the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or proposed award of the proposed contract is in violation of law, then the solicitation or proposed award shall be canceled.

13-1-182. Ratification or termination after execution of contract.

If after the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of the contract was in violation of law and if the business awarded the contract did not act fraudulently or in bad faith:

A. the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interests of a state agency or a local public body; or

B. the contract may be terminated, and the contractor shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

ANNOTATIONS

"Award of contract". — Selection of the top-ranked lease offeror through the notice of award is an "award of a contract" under this section. *Renaissance Office, LLC v. Gen. Servs. Dep't*, 2001-NMCA-066, 130 N.M. 723, 31 P.3d 381, cert denied, 130 N.M. 713, 30 P.3d 1147 (now see 2002 amendments to this section).

Revised determinations. — For the purposes of this section, when a court rules that a central purchasing office has erroneously determined that a contract award was lawful, the office shall be deemed to have entered a revised determination that the award was invalid, regardless of whether the court expressly orders the issuance of a new determination. *Hamilton Roofing Co. v. Carlsbad Mun. Sch. Bd. of Educ.*, 1997-NMCA-053, 123 N.M. 434, 941 P.2d 515.

13-1-183. Judicial review.

All actions authorized by the Procurement Code for judicial review of a determination shall be filed pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

ANNOTATIONS

Administrative protest appealable. — A protest of the award of a contract for a campus electrical distribution upgrade project complied with the process outlined in the Procurement Code to protest a decision by protesting to the state purchasing agent or a central purchasing office (§ 13-1-172 NMSA 1978), who were given authority to resolve protests pursuant to § 13-1-174NMSA 1978, and therefore constituted an administrative tribunal whose decision was appealable, as provided by § 13-1-183 NMSA 1978, pursuant to the provisions of § 39-3-1.1. *State ex rel. ENMU Regents v. Baca*, 2008-NMSC-047, 144 N.M. 530, 189 P.3d 663.

Judicial review standard. — Judicial relief is available to the disappointed bidder when a municipality acts in an arbitrary and capricious manner and violates the integrity of the Procurement Code. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Common law action. — Nothing in the Procurement Code precludes an unsuccessful bidder from bringing a common-law action to challenge the acts of a third party whose protest results in the rejection of the bidder's bid. *Davis & Assocs., Inc. v. Midcon, Inc.*, 1999-NMCA-047, 127 N.M. 134, 978 P.2d 341.

Damages awarded to bidder. — Reliance damages compensate the bidder's interest in being reimbursed for loss caused by reliance on the contract. New Mexico, therefore, joins other jurisdictions that in similar situations have awarded to a disappointed bidder the expenses incurred in preparing and submitting a bid. *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628.

Exclusivity of remedy. — The Procurement Code does not expressly or impliedly authorize any private right of action for disappointed offerors, since Section 13-1-183 provides an adequate legal remedy. *State ex rel. Educ. Assessments. Sys. v. Coop. Educ. Servs.*, 1993-NMCA-024, 115 N.M. 196, 848 P.2d 1123.

Jurisdiction to review. — The court lacked jurisdiction to review a purported settlement agreement between a bidder and an incorporated electric cooperative since an incorporated electric cooperative is neither a state agency nor a local public body and the Procurement Code therefore does not apply to it. *Fratello v. Socorro Elec. Corp.*, 1988-NMSC-058, 107 N.M. 378, 758 P.2d 792.

13-1-185. Assistance to small business; duties of the state purchasing agent.

A. The state purchasing agent shall issue publications designed to assist small businesses in learning how to do business with the state agencies and local public bodies.

B. The state purchasing agent shall compile, maintain and make available source lists of small businesses for the purpose of encouraging procurement by the state agencies and local public bodies from small businesses.

C. The state purchasing agent and central purchasing offices shall take all reasonable action to ensure that small businesses are solicited on each procurement for which they appear to be qualified.

D. The state purchasing agent shall develop training programs to assist small businesses in learning how to do business with the state agencies and local public bodies.

E. The state purchasing agent or a central purchasing office may make special provisions for progress payments as such office or officer may deem reasonably necessary to encourage procurement from small businesses in accordance with regulations promulgated by the secretary or a central purchasing office with authority to issue regulations.

ANNOTATIONS

Cross references. — For adoption of rules and regulations by secretary of general services department, *see* 9-17-5 NMSA 1978.

13-1-186. Assistance to small business; bid bonds; reduction.

The state purchasing agent or central purchasing office may reduce bid bond, performance bond or payment bond requirements authorized by the Procurement Code to encourage procurement from small businesses.

13-1-189. Procurements pursuant to the Corrections Industries Act.

A. All state agencies shall purchase and all local public bodies may purchase items of tangible personal property and services offered pursuant to the provisions of the Corrections Industries Act [33-8-1 to 33-8-15 NMSA 1978].

B. The corrections industries commission shall prepare a catalogue containing an accurate and complete description of all items of tangible personal property and services available. A copy of the catalogue shall be provided to each state agency and local public body. The catalogue shall contain an approximate time required for delivery of each item of tangible personal property and service.

C. The state purchasing agent or a central purchasing office shall purchase available items of tangible personal property and services from the catalogue unless a determination is made that:

(1) an emergency exists requiring immediate action to procure the items of tangible personal property or service;

(2) the specifications for the items of tangible personal property or service, including quality, quantity and delivery requirements, cannot be met within a reasonable time by the corrections department; or

(3) the price to be paid to the corrections department for the items of tangible personal property or service is higher than the bid price of comparable items of tangible personal property or services.

13-1-190. Unlawful employee participation prohibited.

A. Except as permitted by the University Research Park and Economic Development Act [Chapter 21, Article 28 NMSA 1978] or the New Mexico Research Applications Act [53-7B-1 to 53-7B-10 NMSA 1978], it is unlawful for any state agency or local public body employee, as defined in the Procurement Code, to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's immediate family has a financial interest in the business seeking or obtaining a contract.

B. An employee or any member of an employee's immediate family who holds a financial interest in a disclosed blind trust shall not be deemed to have a financial interest with regard to matters pertaining to that trust.

13-1-191. Bribes; gratuities and kickbacks; contract reference required.

All contracts and solicitations therefor shall contain reference to the criminal laws prohibiting bribes, gratuities and kickbacks.

ANNOTATIONS

Cross references. — For bribery of public officer or public employee, *see* 30-24-1 NMSA 1978.

For demanding or receiving bribe by public officer or public employee, *see* 30-24-2 NMSA 1978.

For soliciting or receiving illegal kickback, *see* 30-41-1 to 30-41-3 NMSA 1978.

13-1-191.1. Campaign contribution disclosure and prohibition.

A. This section applies to prospective contractors with the state or a local public body.

B. A prospective contractor subject to this section shall disclose all campaign contributions given by the prospective contractor or a family member or representative of the prospective contractor to an applicable public official of the state or a local public body during the two years prior to the date on which a proposal is submitted or, in the case of a sole source or small purchase contract, the two years prior to the date on which the contractor signs the contract, if the aggregate total of contributions given by the prospective contractor or a family member or representative of the prospective contractor to the public official exceeds two hundred fifty dollars ($250) over the two-year period.

C. The disclosure shall indicate the date, the amount, the nature and the purpose of the contribution. The disclosure statement shall be on a form developed and made available electronically by the department of finance and administration to all state agencies and local public bodies. The state agency or local public body that procures the services or items of tangible personal property shall indicate on the form the name or names of every applicable public official, if any, for which disclosure is required by a prospective contractor for each competitive sealed proposal, sole source or small purchase contract. The form shall be filed with the state agency or local public body as part of the competitive sealed proposal, or in the case of a sole source or small purchase contract, on the date on which the contractor signs the contract.

D. A prospective contractor submitting a disclosure statement pursuant to this section who has not contributed to an applicable public official, whose family members have not contributed to an applicable public official or whose representatives have not contributed to an applicable public official shall make a statement that no contribution was made.

E. A prospective contractor or a family member or representative of the prospective contractor shall not give a campaign contribution or other thing of value to an applicable public official or the applicable public official's employees during the pendency of the procurement process or during the pendency of negotiations for a sole source or small purchase contract.

F. A solicitation or proposed award for a proposed contract may be canceled pursuant to Section 13-1-181 NMSA 1978 or a contract that is executed may be ratified or terminated pursuant to Section 13-1-182 NMSA 1978 if:

(1) a prospective contractor fails to submit a fully completed disclosure statement pursuant to this section; or

(2) a prospective contractor or family member or representative of the prospective contractor gives a campaign contribution or other thing of value to an applicable public official or the applicable public official's employees during the pendency of the procurement process.

G. As used in this section:

(1) "applicable public official" means a person elected to an office or a person appointed to complete a term of an elected office, who has the authority to award or influence the award of the contract for which the prospective contractor is submitting a competitive sealed proposal or who has the authority to negotiate a sole source or small purchase contract that may be awarded without submission of a sealed competitive proposal;

(2) "family member" means a spouse, father, mother, child, father-in-law, mother-in-law, daughter-in-law or son-in-law of:

(a) a prospective contractor, if the prospective contractor is a natural person; or

(b) an owner of a prospective contractor;

(3) "pendency of the procurement process" means the time period commencing with the public notice of the request for proposals and ending with the award of the contract or the cancellation of the request for proposals;

(4) "prospective contractor" means a person or business that is subject to the competitive sealed proposal process set forth in the Procurement Code or is not required to submit a competitive sealed proposal because that person or business qualifies for a sole source or small purchase contract; and

(5) "representative of the prospective contractor" means an officer or director of a corporation, a member or manager of a limited liability corporation, a partner of a partnership or a trustee of a trust of the prospective contractor.

13-1-192. Contingent fees prohibited.

It is unlawful for a person or business to be retained or for a business to retain a person or business to solicit or secure a contract upon an agreement or understanding that the compensation is contingent upon the award of the contract, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business and persons or businesses employed by a local public body which are providing professional services to the local public body in anticipation of the receipt of federal or state grants or loans.

13-1-193. Contemporaneous employment prohibited.

It is unlawful for any state agency or local public body employee who is participating directly or indirectly in the procurement process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.

13-1-194. Waivers from contemporaneous employment and unlawful employee participation permitted.

A state agency or a local public body may grant a waiver from unlawful employee participation pursuant to Section 163 [13-1-190 NMSA 1978] of the Procurement Code, or contemporaneous employment pursuant to Section 166 [13-1-193 NMSA 1978] of the Procurement Code, upon making a determination that:

A. the contemporaneous employment or financial interest of the employee has been publicly disclosed;

B. the employee will be able to perform his procurement functions without actual or apparent bias or favoritism; and

C. the employee participation is in the best interests of the state agency or a local public body.

13-1-195. Use of confidential information prohibited.

It is unlawful for any state agency or local public body employee or former employee knowingly to use confidential information for actual or anticipated personal gain or for the actual or anticipated personal gain of any other person.

13-1-196. Civil penalty.

Any person, firm or corporation that knowingly violates any provision of the Procurement Code is subject to a civil penalty of not more than one thousand dollars ($1,000) for each procurement in violation of any provision of the Procurement Code. The district attorney in the jurisdiction in which the violation occurs or the state ethics commission is empowered to bring a civil action for the enforcement of any provision of the Procurement Code; provided that the commission may refer a matter for enforcement to the attorney general or the district attorney in the jurisdiction in which the violation occurred. Any penalty collected under the provisions of this section shall be credited to the general fund of the political subdivision in which the violation occurred and on whose behalf the suit was brought.

13-1-197. Recovery of value transferred or received; additional civil penalty.

An amount equal to the value of anything transferred or received in violation of the provisions of the Procurement Code by a transferor and transferee may be imposed as a civil penalty upon both the transferor and transferee. The civil penalty provided for in this section is imposed in addition but pursuant to the terms and conditions of Section 169 [13-1-196 NMSA 1978] of the Procurement Code.

13-1-198. Kickbacks; additional civil penalty.

Upon a showing that a subcontractor made a kickback to a prime contractor or a higher-tier subcontractor in connection with the award of a subcontract or order thereunder, it is conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the state agency or a local public body. An amount equal to the kickback is imposed as a civil penalty by the state agency or a local public body upon the recipient and upon the subcontractor making such kickbacks in addition but pursuant to the terms and conditions of Section 169 [13-1-196 NMSA 1978] of the Procurement Code.

ANNOTATIONS

Cross references. — For soliciting or receiving illegal kickbacks, bribes or rebates, *see* Chapter 30, Article 41 NMSA 1978.

13-1-199. Penalties.

Any business or person that willfully violates the Procurement Code is guilty of:

A. a misdemeanor if the transaction involves fifty thousand dollars ($50,000) or less; or

B. a fourth degree felony if the transaction involves more than fifty thousand dollars ($50,000).

ANNOTATIONS

Cross references. — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

Chapter 13 – Public Purchases and Property: Article 6 – Sale of Public Property

13-6-1. Disposition of obsolete, worn-out or unusable tangible personal property.

A. The governing authority of each state agency, local public body, school district and state educational institution may dispose of any item of tangible personal property belonging to that authority and delete the item from its public inventory upon a specific finding by the authority that the item of property is:

(1) of a current resale value of five thousand dollars ($5,000) or less; and

(2) worn out, unusable or obsolete to the extent that the item is no longer economical or safe for continued use by the body.

B. The governing authority shall, as a prerequisite to the disposition of any items of tangible personal property:

(1) designate a committee of at least three officials of the governing authority to approve and oversee the disposition; and

(2) give notification at least thirty days prior to its action making the deletion by sending a copy of its official finding and the proposed disposition of the property to the state auditor and the appropriate approval authority designated in Section 13-6-2 NMSA 1978, duly sworn and subscribed under oath by each member of the authority approving the action.

C. A copy of the official finding and proposed disposition of the property sought to be disposed of shall be made a permanent part of the official minutes of the governing authority and maintained as a public record subject to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978].

D. The governing authority shall dispose of the tangible personal property by negotiated sale to any governmental unit of an Indian nation, tribe or pueblo in New Mexico or by negotiated sale or donation to other state agencies, local public bodies, school districts, state educational institutions or municipalities or through the central purchasing office of the governing authority by means of competitive sealed bid or public auction or, if a state agency, through the surplus property bureau of the transportation services division of the general services department.

E. A state agency shall give the surplus property bureau of the transportation services division of the general services department the right of first refusal when disposing of obsolete, worn-out or unusable tangible personal property of the state agency.

F. If the governing authority is unable to dispose of the tangible personal property pursuant to Subsection D or E of this section, the governing authority may sell or, if the property has no value, donate the property to any organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.

G. If the governing authority is unable to dispose of the tangible personal property pursuant to Subsection D, E or F of this section, it may order that the property be destroyed or otherwise permanently disposed of in accordance with applicable laws.

H. If the governing authority determines that the tangible personal property is hazardous or contains hazardous materials and may not be used safely under any circumstances, the property shall be destroyed and disposed of pursuant to Subsection G of this section.

I. No tangible personal property shall be donated to an employee or relative of an employee of a state agency, local public body, school district or state educational institution; provided that nothing in this subsection precludes an employee from participating and bidding for public property at a public auction.

J. This section shall not apply to any property acquired by a museum through abandonment procedures pursuant to the Abandoned Cultural Properties Act [18-10-1 to 18-10-5 NMSA 1978].

K. Notwithstanding the provisions of Subsection A of this section, the department of transportation may sell through public auction or dispose of surplus tangible personal property used to manage, maintain or build roads that exceeds five thousand dollars ($5,000) in value. Proceeds from sales shall be credited to the state road fund. The department of transportation shall notify the department of finance and administration regarding the disposition of all property.

L. If the secretary of public safety finds that the K-9 dog presents no threat to public safety, the K-9 dog shall be released from public ownership as provided in this subsection. The K-9 dog shall first be offered to its trainer or handler free of charge. If the trainer or handler does not want to accept ownership of the K-9 dog, then the K-9 dog shall be offered to an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 free of charge. If both of the above fail, the K-9 dog shall only be sold to a qualified individual found capable of providing a good home to the animal.

ANNOTATIONS

Cross references. — For managing surplus properties, *see* 15-4-2 and 15-4-3 NMSA 1978.

For Section 501(c)(3) of the Internal Revenue Code of 1986, *see* 26 U.S.C.S. § 501(c)(3).

13-6-2. Sale of property by state agencies or local public bodies; authority to sell or dispose of property; approval of appropriate approval authority.

A. Providing a written determination has been made, a state agency, local public body, school district or state educational institution may sell or otherwise dispose of real or tangible personal property belonging to the state agency, local public body, school district or state educational institution.

B. A state agency, local public body, school district or state educational institution may sell or otherwise dispose of real property:

(1) by negotiated sale or donation to an Indian nation, tribe or pueblo located wholly or partially in New Mexico, or to a governmental unit of an Indian nation, tribe or pueblo in New Mexico, that is authorized to purchase land and control activities on its land by an act of congress or to purchase land on behalf of the Indian nation, tribe or pueblo;

(2) by negotiated sale or donation to other state agencies, local public bodies, school districts or state educational institutions;

(3) through the central purchasing office of the state agency, local public body, school district or state educational institution by means of competitive sealed bid, public auction or negotiated sale to a private person or to an Indian nation, tribe or pueblo in New Mexico; or

(4) if a state agency, through the surplus property bureau of the transportation services division of the general services department.

C. A state agency shall give the surplus property bureau of the transportation services division of the general services department the right of first refusal to dispose of tangible personal property of the state agency. A school district may give the surplus property bureau the right of first refusal to dispose of tangible personal property of the school district.

D. Except as provided in Section 13-6-2.1 NMSA 1978 requiring state board of finance approval for certain transactions, sale or disposition of real or tangible personal property having a current resale value of more than five thousand dollars ($5,000) may be made by a state agency, local public body, school district or state educational institution if the sale or disposition has been approved by the state budget division of the department of finance and administration for state agencies, the local government division of the department of finance and administration for local public bodies, the public education department for school districts and the higher education department for state educational institutions.

E. Prior approval of the appropriate approval authority is not required if the tangible personal property is to be used as a trade-in or exchange pursuant to the provisions of the Procurement Code [13-1-28 to 13-1-199 NMSA 1978].

F. The appropriate approval authority may condition the approval of the sale or other disposition of real or tangible personal property upon the property being offered for sale or donation to a state agency, local public body, school district or state educational institution.

G. The appropriate approval authority may credit a payment received from the sale of such real or tangible personal property to the governmental body making the sale. The state agency, local public body, school district or state educational institution may convey all or any interest in the real or tangible personal property without warranty.

H. This section does not apply to:

(1) computer software of a state agency;

(2) those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico;

(3) the New Mexico state police division of the department of public safety;

(4) the state land office or the department of transportation;

(5) property acquired by a museum through abandonment procedures pursuant to the Abandoned Cultural Properties Act [18-10-1 NMSA 1978];

(6) leases of county hospitals with any person pursuant to the Hospital Funding Act [4-48B-1 NMSA 1978];

(7) property acquired by the economic development department pursuant to the Statewide Economic Development Finance Act [6-25-1 NMSA 1978]; and

(8) the state parks division of the energy, minerals and natural resources department.

ANNOTATIONS

Cross references. — For sales subject to approval of legislature, *see* 13-6-3 NMSA 1978. For general powers and duties of state board of finance, *see* 6-1-1 NMSA 1978.

Exclusive rights to private or religious group. — If the public body concerned desires to enter into a lease of real property to any private party or religious group and proposes to give exclusive right of possession and occupancy to lands and buildings, the state board of finance must give its approval pursuant to this section. 1964 Op. Att'y Gen. No. 64-92.

State parks division must get permission. — This section gives the state park commission (now state parks division of the natural resources department), as well as any other commission or agency of the state, the authority to sell, or otherwise dispose of, any property owned by the state, subject to the approval of the state board of finance. 1961 Op. Att'y Gen. No. 61-123.

Insofar as a soil conservation district (now soil and water conservation district) does have power of sale of its assets, this power is subject to regulation by the legislature. 1963 Op. Att'y Gen. No. 63-125.

When permission not necessary. — When the use permitted by lease of a public body is temporary or brief, and limited to hours when the property is not needed for public purposes, the approval of the state board of finance is not necessary, and the public body may or may not authorize such usage according to its discretion. 1964 Op. Att'y Gen. No. 64-92.

When reimbursement necessary. — Because of the requirement of N.M. Const., art. IX, § 14, it is incumbent upon any public agency or commission to obtain reimbursement for any actual expenses occasioned by reason of permitted private use of public facilities. 1964 Op. Att'y Gen. No. 64-92.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions §§ 549 to 553; 63C Am. Jur. 2d Public Lands § 33; 72 Am. Jur. 2d States, Territories, and Dependencies §§ 64 to 67.

Constitutional prohibition of municipal corporation lending its credit or making donation as applicable to sale or leasing of its property, 161 A.L.R. 518.

Constitutionality of classification of purchaser in statutes respecting sale of public property, 169 A.L.R. 1399.

Power of municipal corporation to exchange its real property, 60 A.L.R.2d 220.

Power of municipality to sell, lease, or mortgage public utility plant or interest therein, 61 A.L.R.2d 595.

Power of municipal corporation to lease or sublet property owned or leased by it, 47 A.L.R.3d 19.

62 C.J.S. Municipal Corporations § 185; 81A C.J.S. States §§ 148 to 150.

13-6-2.1. Sales, trades or leases; state board of finance approval.

A. Except as provided in Section 13-6-3 NMSA 1978, for state agencies, any sale, trade or lease for a period of more than five years of real property belonging to a state agency, local public body or school district or any sale, trade or lease of such real property

for a consideration of more than twenty-five thousand dollars ($25,000) shall not be valid unless it is approved prior to its effective date by the state board of finance.

B. The provisions of this section shall not be applicable to:

(1) those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico;

(2) the state land office;

(3) the state transportation commission;

(4) the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act [6-25-1 NMSA 1978]; or

(5) a school district when leasing facilities to a locally chartered or state-chartered charter school.

13-6-3. Sale, trade or lease of real property by state agencies; approval of legislature; exceptions.

A. Any sale, trade or lease for a period exceeding twenty-five years in duration of real property belonging to any state agency, which sale, trade or lease shall be for a consideration of one hundred thousand dollars ($100,000) or more, shall be subject to the ratification and approval of the state legislature prior to the sale, trade or lease becoming effective. The provision specified in Section 13-6-2 NMSA 1978 requiring approval of the state budget division of the department of finance and administration as a prerequisite to consummating such sales or dispositions of realty shall not be applicable in instances wherein the consideration for the sale, trade or lease shall be for a consideration of one hundred thousand dollars ($100,000) or more and wherein a state agency not specifically excepted by Subsection B of this section is a contracting party, and, in every such instance, the legislature shall specify its approval prior to the sale, trade or lease becoming effective.

B. The provisions of this section shall not be applicable as to those institutions specifically enumerated in Article 12, Section 11 of the constitution of New Mexico, the state land office, the state transportation commission or the economic development department when disposing of property acquired pursuant to the Statewide Economic Development Finance Act [Chapter 6, Article 25 NMSA 1978].

13-6-4. Definitions.

As used in Chapter 13, Article 6 NMSA 1978:

A. "local public body" means all political subdivisions, except municipalities and school districts, of the state and their agencies, instrumentalities and institutions;

B. "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions other than state educational institutions;

C. "state educational institutions" means those institutions designated by Article 12, Section 11 of the constitution of New Mexico; and

D. "school districts" means those political subdivisions of the state established for the administration of public schools, segregated geographically for taxation and bonding purposes and governed by the Public School Code [Chapter 22 NMSA 1978].

13-6-5. Sale of real property by state agencies; land grant right of first refusal.

A. Notwithstanding the provisions of Section 13-6-2 or 67-3-8.2 NMSA 1978, a state agency shall give the board of trustees of a community land grant governed pursuant to the provisions of Chapter 49, Article 1 NMSA 1978 or by statutes specific to the named land grant the right of first refusal when selling real property belonging to the state agency if the property is land that is located within the boundaries of that community land grant as shown in the United States patent to the grant.

B. If the board of trustees of the community land grant elects not to purchase the land offered for sale or does not respond to the notice of sale within forty-five days of receipt of the notice, the state agency may otherwise dispose of the property in accordance with applicable law.

C. The provisions of this section do not apply to lands held in trust pursuant to the Enabling Act and for which that act prescribes how that land may be disposed of.

D. The provisions of this section do not apply to the conveyance or transfer of state highways to local government entities.

Chapter 13 – Public Purchases and Property: Article 8 – Public Building Plaques

13-8-1. Public buildings; acknowledgment of taxpayers when elected officials acknowledged.

On every new public building plaque that lists, acknowledges or thanks the elected officials who were in office at the time the building was funded, constructed or renovated, there shall be included a statement of equal size and visibility that thanks the taxpayers of New Mexico for their contribution in funding the construction or renovation.

Chapter 14 – Records, Rules, Legal Notices, Oaths: Article 2 – Inspection of Public Records

14-2-1. Right to inspect public records; exceptions.

Every person has a right to inspect public records of this state except:

A. records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;

B. letters of reference concerning employment, licensing or permits;

C. letters or memoranda that are matters of opinion in personnel files or students' cumulative files;

D. portions of law enforcement records that reveal:

(1) confidential sources, methods or information; or

(2) before charges are filed, names, address, contact information, or protected personal identifier information as defined in this Act of individuals who are:

(a) accused but not charged with a crime; or

(b) victims of or non-law-enforcement witnesses to an alleged crime of: 1) assault with intent to commit a violent felony pursuant to Section 30-3-3 NMSA 1978 when the violent felony is criminal sexual penetration; 2) assault against a household member with intent to commit a violent felony pursuant to Section 30-3-14 NMSA 1978 when the violent felony is criminal sexual penetration; 3) stalking pursuant to Section 30-3A-3 NMSA 1978; 4) aggravated stalking pursuant to Section 30-3A-3.1 NMSA 1978; 5) criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978; or 6) criminal sexual contact pursuant to Section 30-9-12 NMSA 1978.

Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this subsection; provided that the presence of such information on a law enforcement record does not exempt the record from inspection;

E. as provided by the Confidential Materials Act [14-3A-1, 14-3A-2 NMSA 1978];

F. trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;

G. tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and

H. as otherwise provided by law.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Retroactive application of the Supreme Court decision in Republication Party v. Taxation & Revenue. — Where, in 2007, plaintiff requested copies of a draft letter and emails relating to a federal program managed by defendant and defendant denied plaintiff's request on the grounds that the documents were protected by the deliberative process privilege and the rule of reason, the principles of Republican Party of N.M. v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853 applied retroactively to plaintiff's request because the supreme court did not announce a new rule regarding the deliberative process privilege, and although the supreme court overruled cases in which the rule of reason was endorsed, defendant did not rely on the precedent overruled by the supreme court when it denied plaintiff's request, retroactive application of the decision would further the purposes of the Inspection of Public Records Act, and retroactive application of the decision would not result in any inequity. *Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, 299 P.3d 424, cert. denied, 2013-NMCERT-002.

Rule of reason. — The rule of reason is a non-statutory exception to disclosure which provides a mechanism for addressing claims of confidentiality that have not been specifically addressed by the legislature. The rule of reason applies only to public records that do not fall into one of the statutory exceptions to disclosure and requires the custodian of public records to justify why the records sought to be inspected should not be furnished and the district court to balance the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor confidentiality and nondisclosure. *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246.

Inspection of Public Records Act is statutory scheme of general application. *Crutchfield v. Taxation & Revenue Dep't*, 2005-NMCA-022, 137 N.M. 26, 106 P.3d 1273.

Citizen complaints concerning law enforcement officer. — Citizen complaints concerning the on-duty conduct of a law enforcement officer are public records available to the public for inspection. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Right of citizen to inspect. — A citizen has a fundamental right to have access to public records. The citizen's right to know is the rule, and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

Nondisclosure of names of terminated employees. — Where the reason for termination of public employees is a matter of public knowledge before the individuals are terminated, the privacy of the disciplinary proceeding can only be protected by upholding the administrative decision not to disclose the names of the individuals affected. *State ex rel. Barber v. McCotter*, 1987-NMSC-046, 106 N.M. 1, 738 P.2d 119.

Defendant failed to meet burden of establishing privilege in request for public records action. — In an underlying enforcement action under the New Mexico Inspection of Public Records Act, 14-2-1 to -12 NMSA 1978, where plaintiffs made a combined seven written requests of the Albuquerque public schools (APS) to inspect documents referencing complaints or allegations of misconduct regarding the former superintendent of APS, the district court did not err in ordering the non-party appellant to answer plaintiffs' deposition questions, because appellant failed to identify any privilege, either adopted by the New Mexico supreme court or recognized under the New Mexico constitution, on which to base her argument that communications regarding "limited personnel matters" that occur during a closed public meeting are immune from discovery, and failed to meet her burden of establishing the essential elements necessary to prove the applicability of the attorney-client privilege, based on a claimed common interest, to her communications with APS attorneys. *Albuquerque Journal v. Board of Educ.*, 2019-NMCA-012, *cert. granted*.

II. RECORDS SUBJECT TO INSPECTION.

Property valuation records. — The valuation records statute, § 7-38-19, expressly recognizes that valuation records are public records except to the extent that they contain information regarding income, certain expenses, profits and losses relating to the property or owner, or diagrams of the interior arrangements of buildings or alarm, electrical, or plumbing systems; the presence of any of the above information on a property card does not render the entire card excepted from being a public record, since such a literal reading of the statute is unreasonable and would effect a nullification of the statutes providing that valuation records are, in general, public. *Gordon v. Sandoval Cnty. Assessor*, 2001-NMCA-044, 130 N.M. 573, 28 P.3d 1114.

Voter registration records. — A county chairman of a political party is entitled to have the working master record of the voter registration records of the county copied, or duplicated at his expense under the county clerk's supervision, as these records are public records. *Ortiz v. Jaramillo*, 1971-NMSC-041, 82 N.M. 445, 483 P.2d 500.

Military and arrest records of state employees. — Supreme court declined to hold that all information in employment records of state university regarding military discharges or

arrest records should be exempted from disclosure. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

III. EXCEPTIONS.

A. IN GENERAL.

Rule of reason has no application to the inspection of public records. — The rule of reason, whereby courts determine whether records not specifically exempted by the Inspection of Public Records Act, Section 14-2-1 NMSA 1978 et seq., nevertheless should be withheld from the requestor on the grounds that disclosure would not be in the public interest, has no application to the inspection of public records under the act. Courts should restrict their analysis to whether disclosure under the act may be withheld because of a specific exception contained within the act, or statutory or regulatory exceptions, or privileges adopted by the supreme court or grounded in the constitution. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853, *overruling City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246 and *Board of Comm'rs of Dona Ana Cnty. v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

The deliberative process privilege does not exist under New Mexico law. — The common law deliberative process privilege, which applies to decision making of executive officials generally and which only covers material that is predecisional and deliberative, does not exist under New Mexico law. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853, *rev'g* 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444 and disavowing *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Executive privilege. — The executive privilege in New Mexico, which derives from the constitution and which is reserved to and can be invoked only by the governor, extends only to documents that are communicative in nature, that are made to and from individuals in very close organizational and functional proximity to the governor, and that relate to decisions made by the governor in the performance of the governor's constitutionally-mandated duties. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

Application of the executive privilege to the inspection of public records. — Courts considering the application of the executive privilege to a request for the inspection of public records under the Inspection of Public Records Act, Section 14-2-1 NMSA 1978 et seq., must independently determine whether the documents at issue are in fact covered by the privilege and whether the privilege has been invoked by the governor, to whom the privilege is reserved. Courts are not required to balance the competing needs of the executive and the party seeking disclosure. Where appropriate, courts should conduct an in camera view of the documents at issue as part of their evaluation of the privilege. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

Executive privilege did not apply to drivers' license records. — Where petitioners requested public documents from the motor vehicle division relating to the issuance of drivers' licenses to foreign nationals and to an audit of the license program ordered by the governor; the motor vehicle division redacted information pursuant to executive privilege; the redacted documents included communications regarding New Mexico's negotiations with the Mexican government regarding access to identity documents and discussions related to implementing the audit of the driver's license program; the documents at issue were principally internal emails between staff of the motor vehicle division, not communications with the governor or the governor's immediate staff; and the motor vehicle division, not the governor, asserted the executive privilege; the documents at issue did not qualify for the executive privilege. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853, *rev'g* 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444.

Driver's license records. — Where plaintiffs, who wanted to research whether undocumented aliens were voting in elections in New Mexico, requested information about driver's licenses issued to persons who were not citizens or legal residents of the United States, defendants properly redacted individual tax identification numbers and the names, driver's license numbers, and addresses of drivers who obtained their license with proof of identification other than a social security number, because the redacted information was personal information which defendants were prohibited from disclosing by 18 U.S.C. § 2721(a)(1) and by Section 66-2-7.1 NMSA 1978. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Executive privilege is a non-statutory exception to disclosure which requires the court to balance the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor confidentiality and nondisclosure. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Executive privilege. — Where plaintiffs, who wanted to research whether undocumented aliens were voting in elections in New Mexico, requested information about driver's licenses issued to persons who were not citizens or legal residents of the United States, defendants were authorized by the executive privilege exception to redact communications between the governor's office and the defendants regarding New Mexico's negotiations with the Mexican government regarding driver's identification confirmation, discussions about drivers who applied for licenses using documents whose authenticity the motor vehicle division had not been able to confirm, and discussions related to an audit to determine whether licenses had been issued to individuals who submitted documents of questionable authenticity. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Attorney-client privilege. — Where plaintiffs, who wanted to research whether undocumented aliens were voting in elections in New Mexico, requested information about driver's licenses issued to persons who were not citizens or legal residents of the United States, defendants were authorized by the attorney-client privilege exception to redact communications between the general counsel for the governor's office and executive branch personnel about communications with the Mexican government regarding the issuance of driver's licenses in New Mexico, an audit of drivers who obtained licenses with individual tax identification numbers, communications with drivers whose documentation could not be verified, and legal analysis of the process for obtaining a driver's license. *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

B. PARTICULAR RECORDS EXCEPTED.

Draft documents are public documents that are subject to public inspection. *Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, 299 P.3d 424, cert. denied, 2013-NMCERT-002.

Draft letter and emails. — Where plaintiff requested a copy of a draft letter and a string of emails that related to a federal program managed by defendant; defendant denied plaintiff the right to inspect the emails on the ground that the emails were protected by the deliberative process privilege because they were deliberative communications between defendant's employees before any final determinations were made; and defendant denied plaintiff the right to inspect the draft letter on the grounds that the draft letter, as a draft document, was not subject to public records status and was exempt from disclosure by the rule of reason and the same principles upon which the deliberative process privilege is grounded, the draft letter and the emails were subject to disclosure because neither the deliberative process privilege nor the rule of reason are recognized in New Mexico and there was no specific statutory, regulatory, court adopted privilege, or constitutional provision that exempts draft documents from inspection. *Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, 299 P.3d 424, cert. denied, 2013-NMCERT-002.

The contents of an officeholder's personal election campaign Facebook page are not public records of a public body. — In a superintending control proceeding arising from an Inspection of Public Records Act (IPRA) action filed in the fifth judicial district court (district court), where the real party in interest, a party to a civil case in the first judicial district court, sought to inspect the contents of a personal election Facebook page maintained by a first judicial district court judge (judge), the district court did not err in determining that the contents of the judge's personal election campaign Facebook page were not public records of a public body subject to IPRA disclosure requirements, because IPRA is aimed at the affairs of government and the official acts of public officers and employees, and there was no evidence that the judge's personal election campaign or its Facebook site were acting on behalf of the first judicial district court or any other public body, that any government funding was involved in maintenance of the Facebook site or any of its activities, or that the judge conducted public business through the site. *Pacheco v. Hudson*, 2018-NMSC-022.

Judicial deliberation privilege. — There exists a judicial deliberation privilege protecting the confidentiality of draft judicial orders and other internal judicial-making processes between judges and between judges and the court's staff made in the course of the performance of their judicial duties and related to official court business. *Pacheco v. Hudson*, 2018-NMSC-022.

In a superintending control proceeding arising from an Inspection of Public Records Act (IPRA) action filed in the fifth judicial district court (district court), where the real party in interest, a party to a civil case in the first judicial district court, sought to inspect email communications related to a draft copy of a preliminary injunction order that a judge in the first judicial district court had been preparing for issuance in the underlying civil case, email exchanges between the judge and court staff, as well as an email exchange between the judge and the supreme court law librarian, were protected by the judicial deliberation privilege, because the email exchanges reflected the judge's internal judicial decision-making processes. *Pacheco v. Hudson*, 2018-NMSC-022.

Child abuse and neglect proceedings. — Section 32A-4-33 NMSA 1978 of the Children's Code exempts the child's records in a civil abuse and neglect proceeding from the public's right to inspect public records authorized by Section 14-2-1(F) NMSA 1978 (1993) (now 14-2-1(A)(12) NMSA 1978). *State ex rel. Children, Youth & Families Dep't v. George F.*, 1998-NMCA-119, 125 N.M. 597, 964 P.2d 158.

Criminal investigation records. — The legislature has expressed its intent to protect from disclosure police investigatory materials in an on-going criminal investigation through the Inspection of Public Records Act (Section 14-2-1(A)(4) NMSA 1978). *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, 139 N.M. 671, 137 P.3d 611.

Property valuation records. — The valuation records statute, Section 7-38-19 NMSA 1978, expressly recognizes that valuation records are public records except to the extent that they contain information regarding income, certain expenses, profits and losses relating to the property or owner, or diagrams of the interior arrangements of buildings or alarm, electrical, or plumbing systems; the presence of any of the above information on a property card does not render the entire card excepted from being a public record, since such a literal reading of the statute is unreasonable and would effect a nullification of the statutes providing that valuation records are, in general, public. *Gordon v. Sandoval Cnty. Assessor*, 2001-NMCA-044, 130 N.M. 573, 28 P.3d 1114.

Driver's license records. — Where plaintiffs, who wanted to research whether undocumented aliens were voting in elections in New Mexico, requested information about drivers' licenses issued to persons who were not citizens or legal residents of the United States, defendants properly redacted individual tax identification numbers and the names, drivers' license numbers, and addresses of drivers who obtained their license with proof of identification other than a social security number, because the redacted information was personal information which defendants were prohibited from disclosing by 18 U.S.C. § 2721(a)(1) and by Section 66-2-7.1 NMSA 1978. *Republican Party of N.M. v. N.M.*

Taxation & Revenue Dep't, 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Computerized database of public record. — There is no intent on the part of the legislature with respect to Section 14-3-15.1 C NMSA 1978 that that statute and the policy underlying it, and not the Inspection of Public Records Act and the policies underlying it, apply to a copy of a medium containing a computerized database of a public record. *Crutchfield v. Taxation & Revenue Dep't*, 2005-NMCA-022, 137 N.M. 26, 106 P.3d 1273.

Letters of reference. — A letter of reference, as that term is used in Paragraph (2) of Subsection A of Section 14-2-1 NMSA 1978, is generally considered to be a statement of support for an applicant that assists a future employer or licensor in evaluation of an applicant for a job, license, or permit; is typically solicited either by a prospective applicant or the prospective employer; and addresses the prospective applicant's general qualifications for employment or licensing. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Citizen complaints concerning law enforcement officer. — Citizen complaints concerning the on-duty conduct of a law enforcement officer are not letters of reference as that term is used in Paragraph (2) of Subsection A of Section 14-2-1 NMSA 1978. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Records in personnel files. — The location of a record in a personnel file is not dispositive of whether the exception in Paragraph (3) of Subsection A of Section 14-2-1 NMSA 1978 applies. The critical factor is the nature of the document itself. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Matters of opinion in personnel files. — Matters of opinion in personnel files, as that term is used in Paragraph (3) of Subsection A of Section 14-2-1 NMSA 1978, constitute personnel information regarding the employer/employee relationship, such as internal evaluations; disciplinary reports or documentation; promotion, demotion or termination information; or performance evaluations. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Citizen complaints concerning law enforcement officer. — Citizen complaints regarding a law enforcement officer's conduct while performing the officer's duties as a public official are not the type of opinion material this is excluded from public inspection by Paragraph (3) of Subsection A of Section 14-2-1 NMSA 1978. *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, 148 N.M. 934, 242 P.3d 501, cert. granted, 2010-

NMCERT-010, 149 N.M. 64, 243 P.3d 1146, cert. quashed, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Records of non-mandated university employment office. — Student complaints against man who utilized the services of university employment office to obtain domestic help by means of job postings were not "public records," since there was no legal mandate for the operation of the employment office, nor was there an obligation of the office to make or keep records of the complaints. *Spadaro v. Univ. of N.M. Bd. of Regents*, 1988-NMSC-064, 107 N.M. 402, 759 P.2d 189.

Personnel records of state university employees pertaining to illness may be confidential.— Personnel records of employees of state university which pertain to illness, injury, disability, inability to perform a job task and sick leave are considered confidential under this section and not subject to release to the public, except by the consent or waiver of the particular employee. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

Faculty salary matters are not public records until the culmination of the contract between the board and the individual thought processes, or the offer of a contract, are not such a public record as would require public inspection, so that the right to inspect records of the board of regents of a state university on the subject of salary contract negotiations before the task was completed should be denied. *Sanchez v. Board of Regents*, 1971-NMSC-065, 82 N.M. 672, 486 P.2d 608.

Meaning of "as otherwise provided by law". — The exception in Subsection F of this section incorporates an administrative regulation that effectuates the legislature's intent in enacting the Public Employee Bargaining Act [now repealed]; any benefit to the public from inspecting the representation petition filed under that act would be significantly outweighed by a public employee's privacy interest. *City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451.

Exception to public policy.— The legislature, in enacting 14-3-15.1 C NMSA 1978, intended to permit state agencies to specifically limit public use of a certain type of record, thereby creating an exception to the general public policy underlying the Inspection of Public Records Act. *Crutchfield v. Taxation & Revenue Dep't*, 2005-NMCA-022, 137 N.M. 26, 106 P.3d 1273.

Jury lists. — A jury list is a public record and the media are entitled to inspect and publish it. *State ex rel. N.M. Press Ass'n v. Kaufman*, 1982-NMSC-060, 98 N.M. 261, 648 P.2d 300.

Common-law concept. — The right of the public to inspect records which are in custody of a public officer is a common-law concept and exists even without statute. 1954 Op. Att'y Gen. No. 54-5933.

Public's right to inspection is not absolute. 1969 Op. Att'y Gen. No. 69-89.

Dissemination of information not necessarily included. — The right to inspect public records does not necessarily include the right to disseminate the information contained in those records. 1969 Op. Att'y Gen. No. 69-89.

Limited privacy of accused. — Section 29-10-4 NMSA 1978 protects the confidentiality of information concerning the identity of a person who has been accused, but not charged, with a crime only if that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime. However, information in other records which identifies a person accused but not charged with or arrested for a crime may be protected from public disclosure under this section. Finally, even if it would otherwise be protected under either statute, information about a person accused but not charged with a crime is open to public inspection if it is contained in a document listed in 29-10-7 NMSA 1978. 1994 Op. Att'y Gen. No. 94-02.

Identity of individuals arrested or charged with crime not protected. — Neither the Arrest Record Information Act [27-10-1 NMSA 1978] nor the Inspection of Public Records Act [14-2-4NMSA 1978] authorizes a law enforcement agency to protect the identity of persons who have been arrested or charged with a crime. 1994 Op. Att'y Gen. No. 94-02.

No defense to invasion of privacy action. — The right of inspection is no defense to an action for invasion of privacy based upon publication of matters which an individual has the right to keep private. 1969 Op. Att'y Gen. No. 69-89.

Criterion for determining what information is public record is whether the information is required by law to be kept or is necessarily kept in the discharge of a duty imposed by law. 1969 Op. Att'y Gen. No. 69-89.

Provisions of section contemplate some exception to the Public Records Act, 14-3-1 NMSA 1978 et seq. 1964 Op. Att'y Gen. No. 64-19.

Court opinions subject to inspection or copying. — The supreme court and the court of appeals are required to make available their current and past opinions to the public for inspection or for copying. 1979 Op. Att'y Gen. No. 79-14.

All records which do not deal with physical or mental examinations or medical treatment of patients are public records. This type of record would include payrolls, receipts and disbursements, etc. Any record which might fairly be called a record of examination of a patient or a record of medical treatment of a patient of any institution is not a public record and need not be submitted to public scrutiny. 1960 Op. Att'y Gen. No. 60-155.

Data compiled from case histories. — Case histories furnished by attending physicians on individual patients from which mortality data is to be taken are confidential records, but

the data compiled from such case histories where the individual identity is lost are not confidential. 1959 Op. Att'y Gen. No. 59-158.

Workers' compensation claim files. — The workers' compensation division maintains workers' compensation claim files in the course of its statutory function of adjudicating claims filed by workers, which makes them public records within the meaning of state freedom of information laws. 1988 Op. Att'y Gen. 88-16.

Medical records introduced into evidence. — To the extent any medical records that otherwise are exempt from disclosure are introduced into evidence during the course of a formal workers' compensation hearing which is open to the public, such records lose their exempt status and may be inspected by the public. 1988 Op. Att'y Gen. No. 88-16.

Records of state penitentiary are public records and should be made available for public inspection in accordance with the provisions of this section. 1951 Op. Att'y Gen. No. 51-5342.

Public school records. — Business records, expenditures, daily attendance records and permanent records of an individual student's grades kept by the public schools are public records. 1961 Op. Att'y Gen. No. 61-137.

Public school records. — Any citizen of this state has a right to examine the public records of a school district when such records have been made a part of central records of such school district. This right to inspection is spelled out by statute, and the legislature has specified that the denial of such right of access is punishable as a misdemeanor. 1961 Op. Att'y Gen. No. 61-137.

Instructional material used in public school. — Local school boards have no authority to prohibit citizens of the state from inspecting instructional material used in a public school within the district. 1988 Op. Att'y Gen. No. 88-37.

Immunization records of school children are available to the public. 1959 Op. Att'y Gen. No. 59-158.

Names and addresses of teachers employed in New Mexico school systems which are contained in lists compiled by the department of education are public records. 1969 Op. Att'y Gen. No. 69-89.

Employee's file held by state personnel office. — Personnel actions, supervisor's ratings, arrest records, letters of commendation or condemnation from the employing agency, present employment history, the job application itself and educational history in an employee's file held by the state personnel office is a matter of public record. 1968 Op. Att'y Gen. No. 68-110.

Salary information pertaining to state employee which is possessed by the state personnel office is a matter of public record, since the state personnel director is required

by law to establish and maintain a roster for all state employees showing the employee's pay rate, 10-9-12 NMSA 1978. 1968 Op. Att'y Gen. No. 68-110.

Job applicant's test score and position on eligibility list under 10-9-13 NMSA 1978, possessed by the state personnel office, is a public record. 1968 Op. Att'y Gen. No. 68-110.

Minutes of board of bar examiners meet the requirements of the definition of public records, and, as such, are required under the common law adopted by this state and also by this section, as amended, to be public records and, as such, are subject to the inspection of the public. 1954 Op. Att'y Gen. No. 54-5933.

Interstate stream commission. — Under the provisions of this section, any public records reflecting the work or action of the interstate stream commission are subject to public inspection. 1962 Op. Att'y Gen. No. 62-80.

County fair board. — Since the legislature has specifically granted counties the authority to conduct county fairs, a county fair board is an arm of the county and its records are county records which are subject to inspection as provided in this section and former 14-2-2 NMSA 1978. 1964 Op. Att'y Gen. No. 64-109.

Data of personal nature used in educating pupils not subject. — Such records or memoranda as may be kept by a teacher, or other school official, for informational purposes on individual students, and which may contain data of a personal nature for use in assisting teachers or school personnel in educating pupils, do not fall within the classification of public records entitled to be scrutinized by the public. 1961 Op. Att'y Gen. No. 61-137.

Temporary or partial grades or records kept by individual teachers are not public records. 1961 Op. Att'y Gen. No. 61-137.

Portions of applicant's file may be classified as confidential by state personnel board. — Not all records kept by a public officer are public records. The state personnel board has, within statutory limits, a limited and restricted right to classify certain portions of an applicant's file as confidential. Any portion which would be made available to the state only on a confidential and restricted basis may be treated by the state personnel board as confidential. This right, however, should be narrowly and restrictively applied. 1968 Op. Att'y Gen. No. 68-110.

Personnel file. — Under the rule-making authority of 10-9-10 and 10-9-13 NMSA 1978, the state personnel board has a limited and restricted right to classify as confidential certain portions of an individual's personnel file which would not otherwise be made available to the state unless on a confidential or restricted basis. 1964 Op. Att'y Gen. No. 64-19.

Medical history and employment history solicited from applicant's previous employer for 10-9-13 NMSA 1978 are not public records. 1968 Op. Att'y Gen. No. 68-110.

Criminal complaints. — Complaints filed in J. P. (now magistrate) court by district attorney and sheriff's office do not constitute public records when the person complained against has not been arrested and is not subject to public inspection. 1947 Op. Att'y Gen. No. 47-5074.

Information obtained under Mental Health and Developmental Disabilities Code. — A district court clerk may not release the information identified in 43-1-19A NMSA 1978, governing disclosure under the Mental Health and Developmental Disabilities Code, without obtaining the consent of the person to whom that information pertains. 1988 Op. Att'y Gen. No. 88-75.

Human services department records. — Since other statutory provisions are made for inspection of records of the welfare department (now human services department), they are open for inspection only in accordance with 27-2-35. 1947 Op. Att'y Gen. No. 47-5032.

Law reviews. — For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For survey of 1988-89 Administrative Law, see 21 N.M.L. Rev. 481 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 1 et seq. 52 Am. Jur. 2d Mandamus § 204; 66 Am. Jur. 2d Records and Recording Laws §§ 12 to 31.

Enforceability by mandamus of right to inspect public records, 60 A.L.R. 1356, 169 A.L.R. 653.

Right to inspect motor vehicle records, 84 A.L.R.2d 1261.

Confidentiality of records as to recipients of public welfare, 54 A.L.R.3d 768.

Payroll records of individual government employees as subject to disclosure to public, 100 A.L.R.3d 699.

Validity, construction, and effect of state laws requiring public officials to protect confidentiality of income tax returns or information, 1 A.L.R.4th 959.

What constitutes preliminary drafts or notes provided by or for state or local governmental agency, or intra-agency memorandums, exempt from disclosure or inspection under state freedom of information act, 26 A.L.R.4th 639.

Patient's right to disclosure of his or her own medical records under state freedom of information act, 26 A.L.R.4th 701.

What are "records" of agency which must be made available under state freedom of information act, 27 A.L.R.4th 680.

What constitutes an agency subject to application of state freedom of information act, 27 A.L.R.4th 742.

What constitutes "trade secrets" exempt from disclosure under state freedom of information act, 27 A.L.R.4th 773.

What constitutes legitimate research justifying inspection of state or local public records not open to inspection by general public, 40 A.L.R.4th 333.

State freedom of information act requests: right to receive information in particular medium or format, 86 A.L.R.4th 786.

Use of Freedom of Information Act (5 USCS § 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal, or administrative proceedings, 57 A.L.R. Fed. 903.

What constitutes "confidential source" within Freedom of Information Act exemption permitting nondisclosure of identity of confidential source and, in specified instances, of confidential information furnished only by confidential source (5 USCS § 552(b)(7)(D)), 59 A.L.R. Fed. 550.

Waiver by federal government agency as affecting agency's right to claim exemption from disclosure requirements under the Freedom of Information Act (5 USCS § 552(b)), 67 A.L.R. Fed. 595.

When are government records "similar files" exempt from disclosure under Freedom of Information Act provision (5 USCS § 552(b)(6)) exempting certain personnel, medical, and "similar" files, 106 A.L.R. Fed. 94.

What constitutes "final opinion" or "order" of federal administrative agency required to be made available for public inspection and copying within meaning of 5 USCS § 552(a)(2)(A), 114 A.L.R. Fed. 287.

What constitutes "trade secrets and commercial or financial information obtained from person and privileged or confidential," exempt from disclosure under Freedom of Information Act (5 USCS § 552 (b)(4)) (FOIA), 139 A.L.R. Fed. 225.

What are "records" of agency which must be made available under Freedom of Information Act (5 USCA § 552(a)(3)), 153 A.L.R. Fed. 571.

Actions brought under Freedom of Information Act, 5 U.S.C.A. § 522 et seq. - supreme court cases, 167 A.L.R. Fed. 545.

What are interagency or intra-agency memorandums or letters exempt from disclosure under the Freedom of Information Act (5 U.S.C.A. § 552(b)), 168 A.L.R. Fed. 143.

What constitutes "confidential source" within Freedom of Information Act exemption permitting nondisclosure of confidential source and, in some instances, of information furnished by confidential source (5 U.S.C.A. § 552(b)), 171 A.L.R. Fed. 193.

14-2-1.1. Personal identifier information.

Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection. Unredacted records that contain protected personal identifier information shall not be made available on publicly accessible websites operated by or managed on behalf of a public body.

14-2-4. Short title.

Chapter 14, Article 2 NMSA 1978 may be cited as the "Inspection of Public Records Act".

14-2-5. Purpose of act; declaration of public policy.

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978] is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

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Purpose and intent. — The legislature has clearly and unequivocally indicated that public records are to be made public with the exception of certain confidential information and except as otherwise provided by law. 1958 Op. Att'y Gen. No. 58-197.

14-2-6. Definitions.

As used in the Inspection of Public Records Act:

A. "custodian" means any person responsible for the maintenance, care or keeping of a public body's public records, regardless of whether the records are in that person's actual physical custody and control;

B. "file format" means the internal structure of an electronic file that defines the way it is stored and used;

C. "inspect" means to review all public records that are not excluded in Section 14-2-1 NMSA 1978;

D. "person" means any individual, corporation, partnership, firm, association or entity;

E. "protected personal identifier information" means:

(1) all but the last four digits of a:

(a) taxpayer identification number;

(b) financial account number; or

(c) driver's license number;

(2) all but the year of a person's date of birth; and

(3) a social security number;

F. "public body" means the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education;

G. "public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained; and

H. "trade secret" means trade secret as defined in Subsection D of Section 57-3A-2 NMSA 1978.

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A private actor that contracts with a governmental entity to perform a public function is subject to the Inspection of Public Records Act. *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364.

Factors to determine whether a private entity is subject to the Inspection of Public Records Act. — Courts should consider the following factors in deciding whether private entities are subject to the Inspection of Public Records Act: (1) the level of public funding; (2) commingling of funds; (3) whether the activity was conducted on publicly owned property; (4) whether the services contracted for are an integral part of the agency's chosen

decision-making process; (5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity is functioning. *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364.

A private entity was subject to the Inspection of Public Records Act. — Where the municipality acquired a public access channel and adopted an ordinance that required the municipality to be responsible for management of the access channel and to adopt rules, regulations and procedures for the use of the access channel; the municipality contracted with a private entity to operate the access channel; the operation agreement required the private entity to operate the access channel in a manner that was consistent with the ordinance; the municipality funded the private entity with an annual grant that was released to the private entity when it gave the municipality an annual activity plan and budget; the private entity was required to account for how the funds were spent; for a nominal rent, the municipality leased the basement of the municipal civic center to the private entity to use as the public access television center; the municipality had the right to terminate the operating agreement without cause; the operating agreement identified the private entity as an independent contractor and stated that no principal or agent relationship existed between the municipality and the private entity; and the municipality denied plaintiff's request for recordings of city commission meetings that the private entity had recorded and played on the access channel, the private entity was acting on behalf of the municipality in its role as the access channel operational organization, and the recordings of city commission meetings made by the private entity were public records subject to inspection. *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364.

Settlement agreement documents were public records. — Where respondent, a private prison medical services provider that provided contracted healthcare services for the New Mexico corrections department (NMCD), negotiated and settled at least fifty-nine civil claims alleging instances of improper care and/or sexual assault of inmates, and where petitioners submitted written requests pursuant to the Inspection of Public Records Act seeking all settlement documents involving respondent in its role as medical services contractor for NMCD, the district court did not err in issuing a writ of mandamus ordering respondent to produce the settlement agreements and pay petitioners' reasonable attorney fees, because the settlement agreements were created as a result of respondent's public function acting on behalf of NMCD. Third-party settlement agreements resulting from medical care provided under a contract with the state are public documents subject to disclosure. *N.M. Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, cert. denied.

Definition of "public records" in Public Records Act (14-3-1 to 14-3-16 NMSA 1978) does not apply to section, the Inspection of Public Records Act. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

"Relate to public business" construed. — Where plaintiff submitted an IPRA request to the New Mexico department of game and fish (NMDGF) seeking the names and email address given by all applicants for hunting licenses in 2015 and 2016, which NMDGF determined amounted to over 300,000 entries, and where NMDGF concluded that plaintiff's request sought personal identifier information that did not constitute a public record subject to disclosure and agreed to produce only the applicants' names, the district court did not err in granting plaintiff's motion for summary judgment because IPRA's definition of "relating to public business" means that the requested records are connected to governmental affairs or official actions by or on behalf of public bodies, and therefore the email addresses NMDGF collected in connection with its licensing system constitute public records that are subject to disclosure. *Dunn v. N.M. Dep't of Game & Fish*, 2020-NMCA-026.

Faculty salary matters are not public records until the culmination of the contract between the board and the individual; thought processes, or the offer of a contract, are not such a public record as would require public inspection, so that the right to inspect records of the board of regents of a state university on the subject of salary contract negotiations before the task was completed should be denied. *Sanchez v. Board of Regents*, 1971-NMSC-065, 82 N.M. 672, 486 P.2d 608.

Term "public records" is intended to include all papers or memoranda in the possession of public officers which are required by law to be kept by them. 1966 Op. Att'y Gen. No. 66-131.

Public records. — Elements essential to constitute a public record are that it be made by a public officer and that the officer be authorized by law to make it. 1963 Op. Att'y Gen. No. 63-55.

14-2-7. Designation of custodian; duties.

Each public body shall designate at least one custodian of public records who shall:

A. receive requests, including electronic mail or facsimile, to inspect public records;

B. respond to requests in the same medium, electronic or paper, in which the request was made in addition to any other medium that the custodian deems appropriate;

C. provide proper and reasonable opportunities to inspect public records;

D. provide reasonable facilities to make or furnish copies of the public records during usual business hours; and

E. post in a conspicuous location at the administrative office and on the publicly accessible web site, if any, of each public body a notice describing:

(1) the right of a person to inspect a public body's records;

(2) procedures for requesting inspection of public records, including the contact information for the custodian of public records;

(3) procedures for requesting copies of public records;

(4) reasonable fees for copying public records; and

(5) the responsibility of a public body to make available public records for inspection.

ANNOTATIONS

Transferring duty as custodian prohibited. — By reason of this section, the records of the director of the department of public health (now secretary of health) are, in some instances, not open to public inspection, and the duty of the custodian of those records, to wit, the director of public health (now secretary), in the maintenance of the secrecy of those records would prohibit him, the governor or any other person from transferring the duty as custodian of the records to any other person. 1954 Op. Att'y Gen. No. 54-5943.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 1 et seq.

What are "records" of agency which must be made available under Freedom of Information Act (5 USCA § 552(a)(3)), 153 A.L.R. Fed. 571.

14-2-8. Procedure for requesting records.

A. Any person wishing to inspect public records may submit an oral or written request to the custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

B. Nothing in the Inspection of Public Records Act shall be construed to require a public body to create a public record.

C. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records.

D. A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

E. In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

F. For the purposes of this section, "written request" includes an electronic communication, including email or facsimile; provided that the request complies with the requirements of Subsection C of this section.

ANNOTATIONS

Documenting an oral request for public records does not convert an oral request into a written request for purposes of the Inspection of Public Records Act. — Where news reporter orally requested police lapel videos from the Albuquerque Police Department (APD), and where APD public information officer e-mailed the APD records custodian with the request for public records, the e-mail documenting the records request did not convert the oral request for public records into a written request for public records subjecting the records custodian to penalties pursuant to this section. *Holland v. City of Albuquerque*, 2015-NMCA-014.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 414 et seq.

What are "records" of agency which must be made available under Freedom of Information Act (5 USCA § 552(a)(3)), 153 A.L.R. Fed. 571.

14-2-9. Procedure for inspection.

A. Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. If necessary to preserve the integrity of computer data or the confidentiality of exempt information contained in a database, a partial printout of data containing public records or information may be furnished in lieu of an entire database. Exempt information in an electronic document shall be removed along with the corresponding metadata prior to disclosure by utilizing methods or redaction tools that prevent the recovery of exempt information from a redacted electronic document.

B. A custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested. However, a custodian is only required to provide the electronic record in the file format in which it exists at the time of the request.

C. A custodian:

(1) may charge reasonable fees for copying the public records, unless a different fee is otherwise prescribed by law;

(2) shall not charge fees in excess of one dollar ($1.00) per printed page for documents eleven inches by seventeen inches in size or smaller;

(3) may charge the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device;

(4) may charge the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile;

(5) may require advance payment of the fees before making copies of public records;

(6) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and

(7) shall provide a receipt, upon request.

D. Nothing in this section regarding the provision of public data in electronic format shall limit the ability of the custodian to engage in the sale of data as authorized by Sections 14-3-15.1 and 14-3-18 NMSA 1978, including imposing reasonable restrictions on the use of the database and the payment of a royalty or other consideration.

ANNOTATIONS

Right subject to reasonable restrictions and conditions. — The right to inspect public records commonly carries with it the right to make copies thereof, subject, however, to reasonable restrictions and conditions imposed as to their use, reasonable regulations as to appropriate times when and places where they may be inspected and copied and such reasonable supervision by the custodian thereof as may be necessary for their safety and as will secure equal opportunity for all to inspect and copy them. *Ortiz v. Jaramillo*, 1971-NMSC-041, 82 N.M. 445, 483 P.2d 500.

Recording Act governs real property records request. — Where plaintiff corporation sought all of Lea county's real property image and index records, the production provisions of the Recording Act, 14-8-1 to -17 NMSA 1978, rather than those of the Inspection of Public Records Act (IPRA), 14-2-1 to -12 NMSA 1978, governed the county's obligation in responding to plaintiff's records request, because IPRA creates a records inspection scheme of general application granting, with various exceptions, a right to inspect public records of this state, and the Recording Act more specifically provides a mechanism by which prospective purchasers can examine real property records, and places on county

clerks associated duties to make these records available and searchable for the public. TexasFile LLC v. Board of Cty. Comm'rs of Lea Cty., 2019-NMCA-038, cert. denied.

Right to make copies. — The right to inspect or examine public records commonly includes the right of making copies thereof as the right to inspect would be valueless without this correlative right. 1959 Op. Att'y Gen. No. 59-170.

It is permissible for an individual or a company such as an abstractor to photocopy voter registrations in the offices of the county clerks so long as adequate precautions are taken to ensure the integrity of the records and to preserve their availability for inspection by others. 1959 Op. Att'y Gen. No. 59-170.

Charges not to be imposed. — A charge of $25.00 per month may not be imposed by counties upon abstract and title companies for such facilities as lights, telephone and janitorial services to reimburse the counties therefor in connection with abstract and title companies inspecting and copying public records, because this practice amounts to a denial of the right to inspect records. 1957 Op. Att'y Gen. No. 57-102.

Public's right to inspection is not absolute. 1969 Op. Att'y Gen. No. 69-89.

Court opinions subject to inspection or copying. — The supreme court and the court of appeals are required to make available their current and past opinions to the public for inspection or for copying. 1979 Op. Att'y Gen. No. 79-14.

Reimbursement or other consideration to courts for copying costs. — The supreme court and the court of appeals should require reasonable reimbursement for the costs incurred by them for copying opinions for the public or for retrieving their opinions for inspection. However, such a charge need not be made in those cases in which the courts receive some other form of consideration in return for supplying their opinions to private individuals or enterprises. 1979 Op. Att'y Gen. No. 79-14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 434 et seq.

What are "records" of agency which must be made available under Freedom of Information Act (5 USCA § 552(a)(3)), 153 A.L.R. Fed. 571.

14-2-10. Procedure for excessively burdensome or broad requests.

If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request. The requester may deem the request denied and may pursue the remedies available pursuant to

the Inspection of Public Records Act if the custodian does not permit the records to be inspected in a reasonable period of time.

ANNOTATIONS

Custodian may make reasonable restrictions and conditions on access. — Fact that request for inspection would pose an extreme burden on personnel office of state university was not a legitimate reason, by itself, for failure to make records available for inspection or for copying, but custodian could make reasonable restrictions and conditions on access to the records. Reasonable regulations could be made as to times when and places where they may be inspected or copied, and custodian could insist upon reasonable supervision for the safekeeping of the records. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 425 et seq.

14-2-11. Procedure for denied requests.

A. Unless a written request has been determined to be excessively burdensome or broad, a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied. The person requesting the public records may pursue the remedies provided in the Inspection of Public Records Act.

B. If a written request has been denied, the custodian shall provide the requester with a written explanation of the denial. The written denial shall:

(1) describe the records sought;

(2) set forth the names and titles or positions of each person responsible for the denial; and

(3) be delivered or mailed to the person requesting the records within fifteen days after the request for inspection was received.

C. A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the Inspection of Public Records Act and the requester may be awarded damages. Damages shall:

(1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable;

(2) not exceed one hundred dollars ($100) per day;

(3) accrue from the day the public body is in noncompliance until a written denial is issued; and

(4) be payable from the funds of the public body.

ANNOTATIONS

In camera review. — When a public entity seeks to withhold public records, in camera review is most efficient, if not imperative. The public entity must designate the sealed records for review by the court. *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

County not permitted to circumvent established procedure of in camera review. — Where a county sought to circumvent the procedure outlined in *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236, for in camera review of disputed documents by filing a motion for a protective order and asserting to the district court that it could only consider the settlement records if the motion for protective order was granted, the county's decision to bypass established procedure effectively obstructed full review by the district court and the court of appeals and the district court did not abuse its discretion in denying the motion for protective order. *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

The threshold requirements for an in camera inspection are that the custodian of the records must first determine whether the person requesting disclosure is a citizen and whether the request is for a lawful purpose; second, the custodian must justify why the records should not be furnished. *State ex rel. Blanchard v. City Comm'rs*, 1988-NMCA-008, 106 N.M. 769, 750 P.2d 469.

Justification for refusing to release records. — Fact that information was obtained under a promise of confidentiality, standing alone, would not suffice to preclude disclosure. The promise would have to coincide with reasonable justification, based on public policy, for refusing to release the records. Furthermore, the justification would have to be articulated by the custodian for the record. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

Duty of custodian to determine whether information can be justifiably withheld. — There may be circumstances under which the information contained in the record can be justifiably withheld. The custodian has the initial duty to make this determination as to each record requested. He must first determine that the person requesting access is a citizen and that he is requesting the information for a lawful purpose. The burden is upon the custodian to justify why the records sought to be examined should not be furnished. It shall then be the court's duty to determine whether the explanation of the custodian is reasonable and to weigh the benefits to be derived from nondisclosure against the harm which may result if the records are not made available. *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, 90 N.M. 790, 568 P.2d 1236.

Denial of request to review applications for position of city manager. — A municipality's denial of a request to inspect applications received by the municipality for the position of city manager on the grounds that disclosure of the applications would deter potential applicants and reduce the quality and scope of the applicant pool was insufficient, under the rule of reason, to outweigh the public's interest in disclosure. *City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246.

The Inspection of Public Records Act provides for two separate remedies. — This section and 14-2-12 NMSA 1978 create separate remedies depending on the stage of the Inspection of Public Records Act (IPRA) request. This section requires a public entity to respond to a records request within fifteen days unless the request has been determined to be excessively burdensome or broad. If the request is denied, the custodian shall provide the requester with a written explanation of the denial. It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to damages pursuant to this section. The enforcement and damages provisions of 14-2-12 NMSA 1978 apply in an action for the post-denial enforcement of the IPRA request. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Where the attorney general's office received a request for public records pursuant to the Inspection of Public Records Act (IPRA) and denied the request the next day, damages pursuant to this section were not applicable because the attorney general's office timely answered the request with a denial by following the denial procedures set out in this section. When the district court held that the attorney general's office wrongfully withheld the public records, the enforcement and damages provisions of 14-2-12(D) NMSA 1978 applied. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Separate remedies distinguished. — Section 14-2-11 NMSA 1978 is focused on deterring nonresponsiveness and noncompliance by public bodies in the first instance, while 14-2-12 NMSA 1978 is focused on making whole a person who, believing his or her right of inspection has been impermissibly denied, brings a successful enforcement action. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Incomplete or inadequate responses to IPRA requests. — Where plaintiff made a request for documents from the Attorney General's Office (AGO) pursuant to the Inspection of Public Records Act, §§ 14-2-1 to -12 NMSA 1978, and where the AGO incompletely and inadequately responded to the request, the district court erred in concluding that plaintiff's action is exclusively one that proceeds under 14-2-12 NMSA 1978 and limiting the damages plaintiff can recover to actual damages under Subsection D of that provision, because a public body that permits only partial inspection, that is inspection of some but not all nonexempt responsive records, has not complied with its obligation to provide the greatest possible information regarding the affairs of government. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Remedy for inadequate response to IPRA request. — Where plaintiff made a request for documents from the Attorney General's Office (AGO) pursuant to the Inspection of Public Records Act, §§ 14-2-1 to -12 NMSA 1978, and where the AGO failed to permit

inspection of approximately 350 records that were responsive to plaintiff's request and for which no claim of exemption was ever asserted or written explanation of denial issued, the district court erred in concluding that plaintiff's action is exclusively one that proceeds under 14-2-12 NMSA 1978 and limiting the damages plaintiff can recover to actual damages under Subsection D of that provision, because the AGO's failure to either produce for inspection or deliver or mail a written explanation of denial regarding the 350 documents is the type of wrong that 14-2-11 NMSA 1978's statutory penalty seeks to remedy. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 443 et seq.

What are "records" of agency which must be made available under Freedom of Information Act (5 USCA § 552(a)(3)), 153 A.L.R. Fed. 571.

14-2-12. Enforcement.

A. An action to enforce the Inspection of Public Records Act may be brought by:

(1) the attorney general or the district attorney in the county of jurisdiction; or

(2) a person whose written request has been denied.

B. A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.

C. The exhaustion of administrative remedies shall not be required prior to bringing any action to enforce the procedures of the Inspection of Public Records Act.

D. The court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.

ANNOTATIONS

A district court is without constitutional jurisdiction to enforce an IPRA action against another court of equal or superior jurisdiction. — In a superintending control proceeding arising from an Inspection of Public Records Act (IPRA) action filed in the fifth judicial district court (district court), where the real party in interest, a party to a civil case in the first judicial district court, sought to inspect email communications related to a draft copy of a preliminary injunction order that a first judicial district court judge (judge) had been preparing for issuance in the underlying civil case and the contents of a personal election Facebook page maintained by the judge, not only did the enforcement action fail to name the proper defendant, because the designated records custodian is the only official who is assigned IPRA compliance duties, but because the action was a coercive judgment ordering production under IPRA, the fifth judicial district court had no constitutional

jurisdiction to litigate any aspect of an IPRA enforcement action against the first judicial district court, because Article VI, Section 13 of the New Mexico constitution prohibits a district court from issuing writs of mandamus or injunction directed to judges or courts of equal or superior jurisdiction. *Pacheco v. Hudson*, 2018-NMSC-022.

An undisclosed principal cannot, as a plaintiff in an enforcement action, enforce a denial of records requested by its agent. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612, *aff'd in part, rev'd in part*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884.

Undisclosed principal. — A principal, whether disclosed or not, can delegate the function of requesting public records to an agent, such as the principal's attorney, and either the agent or the principal, even if previously unknown to the public records custodian, can enforce the request if it is denied. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, *rev'g* 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612.

Where a law firm made a request to inspect public records on behalf of plaintiff; the request included the law firm's name, address, and telephone number; and the request did not disclose the fact that the request was being made on behalf of plaintiff, plaintiff had standing to enforce the public records request that it made through the law firm. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, *rev'g* 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612.

A person who has not requested public records, either personally or through an agent, does not have standing to seek judicial enforcement of the Inspection of Public Records Act. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, *aff'g* 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612.

Undisclosed principal has no standing. — Where a law firm made an inspection request for records relating to a news documentary program and the request failed to disclose that the law firm was making the request as attorney for or agent of plaintiffs, plaintiffs lacked standing to enforce the Inspection of Public Records Act. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612, *aff'd in part, rev'd in part*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884.

Individuals who do not request access to documents cannot enforce a denial of a records request by another individual. *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612, *aff'd in part, rev'd in part*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884.

Citizen must follow court-ordered arrangement to inspect records. — When a citizen enforces this section through an action to compel production of documents, the citizen must comply with the court-ordered arrangements for inspection. *Newsome v. Farer*, 1985-NMSC-096, 103 N.M. 415, 708 P.2d 327.

Protective order precludes disclosure of records. — Where plaintiff was a petitioner in a domestic relations matter in district court that involved his ten-year-old child, and where, on plaintiff's motion, the district court appointed defendant as guardian ad litem to the child, and where plaintiff served defendant with a discovery request seeking all correspondence received or produced with either party or any other person in relation to the domestic relations case, and where the district court issued a protective order stating that defendant was not required to respond to plaintiff's request for production, prompting plaintiff to request from defendant and the designated custodian of records in the district court, pursuant to the Inspection of Public Records Act, 14-2-1 to -12 NMSA 1978, to produce all records of communications sent or received in any form in the domestic relations case, the district court did not err in granting summary judgment in favor of defendant, because the protective order barred disclosure of the requested records to plaintiff, and persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order. *Dunn v. Brandt*, 2019-NMCA-061.

Successful action to enforce is prerequisite for damages. — It is only in the event that a court action is brought to enforce the Inspection of Public Records Act that a plaintiff may be awarded mandatory costs, fees, and damages, and then only if the plaintiff is successful in that action. *Derringer v. State*, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237.

Successful litigation interpreted. — Where the secretary of state's office did not fully comply with an inspection of public records request, claiming that its late production of records to plaintiff cannot constitute success under the Inspection of Public Records Act (IPRA) because plaintiff already had possession of the records at the time the litigation was filed, and as a result, the secretary of state's office did not withhold or deny plaintiff access to the records, the district court did not abuse its discretion in awarding attorney's fees because IPRA does not include prior possession as a legitimate ground for withholding public documents, and the fact that plaintiff's litigation secured the production of the denied responsive public records, the litigation was "successful" as that word is used in IPRA. *ACLU of New Mexico v. Duran*, 2016-NMCA-063.

Reasonable attorney's fees. — Where the secretary of state's office did not fully comply with an inspection of public records request, claiming that its late production of records to plaintiff cannot constitute success under the Inspection of Public Records Act (IPRA) because plaintiff already had possession of the records at the time the litigation was filed, and as a result, did not withhold or deny plaintiff access to the records, the district court's award of attorney's fees was not an abuse of discretion because fees incurred in obtaining documents from a state agency are prima facie reasonable, and when withheld records are subsequently revealed and determined to be responsive, those records may become the basis for an award of attorney's fees in IPRA litigation. *ACLU of New Mexico v. Duran*, 2016-NMCA-063.

No action for damages after compliance. — The Inspection of Public Records Act does not provide for damages pursuant to an action brought after a public body has complied

with the act. *Derringer v. State*, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237.

Indefinite delay as denial. — Under the Inspection of Public Records Act's enforcement provision, there is no distinction between a denial and an indefinite delay. *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

The Inspection of Public Records Act provides for two separate remedies. — Section 14-2-11 NMSA 1978 and this section create separate remedies depending on the stage of the Inspection of Public Records Act (IPRA) request. Section 14-2-11 NMSA 1978 requires a public entity to respond to a records request within fifteen days unless the request has been determined to be excessively burdensome or broad. If the request is denied, the custodian shall provide the requester with a written explanation of the denial. It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to damages pursuant to 14-2-11 NMSA 1978. The enforcement and damages provisions of this section apply in an action for the post-denial enforcement of the IPRA request. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Where the attorney general's office received a request for public records pursuant to the Inspection of Public Records Act (IPRA) and denied the request the next day, damages pursuant to 14-2-11 NMSA 1978 were not applicable because the attorney general's office timely answered the request with a denial by following the denial procedures set out in 14-2-11 NMSA 1978. When the district court held that the attorney general's office wrongfully withheld the public records, the enforcement and damages provisions of this section applied. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Mandamus is an appropriate remedy to enforce IPRA requests. — Where respondent, a private prison medical services provider that provided contracted healthcare services for the New Mexico corrections department (NMCD), negotiated and settled at least fifty-nine civil claims alleging instances of improper care and/or sexual assault of inmates, and where petitioners submitted written requests pursuant to the Inspection of Public Records Act (IPRA) seeking all settlement documents involving respondent in its role as medical services contractor for NMCD, and where the district court issued a writ of mandamus ordering respondent to produce the settlement agreements, mandamus was a proper remedy to require respondent to produce public records pursuant to IPRA because petitioners had a clear legal right of enforcement and respondent had a clear legal duty to provide public records. *N.M. Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, cert. denied.

Award of attorney fees was supported by substantial evidence. — Where respondent, a private prison medical services provider that provided contracted healthcare services for the New Mexico corrections department (NMCD), negotiated and settled at least fifty-nine civil claims alleging instances of improper care and/or sexual assault of inmates, and where petitioners submitted written requests pursuant to the Inspection of Public Records Act (IPRA) seeking all settlement documents involving respondent in its role as medical services contractor for NMCD, and where the district court issued a writ of mandamus

ordering respondent to produce the settlement agreements and pay petitioners' reasonable attorney fees, the district court's attorney fee award was supported by substantial evidence where the court considered the attorneys' years of experience and record of fee awards as well as an expert witness's testimony explaining market rates in the relevant jurisdiction. *N.M. Found. for Open Gov't v. Corizon Health*, 2020-NMCA-014, cert. denied.

Separate remedies distinguished. — Section 14-2-11 NMSA 1978 is focused on deterring nonresponsiveness and noncompliance by public bodies in the first instance, while 14-2-12 NMSA 1978 is focused on making whole a person who, believing his or her right of inspection has been impermissibly denied, brings a successful enforcement action. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Incomplete or inadequate responses to IPRA requests. — Where plaintiff made a request for documents from the Attorney General's Office (AGO) pursuant to the Inspection of Public Records Act, §§ 14-2-1 to -12 NMSA 1978, and where the AGO incompletely and inadequately responded to the request, the district court erred in concluding that plaintiff's action is exclusively one that proceeds under 14-2-12 NMSA 1978 and limiting the damages plaintiff can recover to actual damages under Subsection D of that provision, because a public body that permits only partial inspection, that is inspection of some but not all nonexempt responsive records, has not complied with its obligation to provide the greatest possible information regarding the affairs of government. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Remedy for inadequate response to IPRA request. — Where plaintiff made a request for documents from the Attorney General's Office (AGO) pursuant to the Inspection of Public Records Act, §§ 14-2-1 to -12 NMSA 1978, and where the AGO failed to permit inspection of approximately 350 records that were responsive to plaintiff's request and for which no claim of exemption was ever asserted or written explanation of denial issued, the district court erred in concluding that plaintiff's action is exclusively one that proceeds under 14-2-12 NMSA 1978 and limiting the damages plaintiff can recover to actual damages under Subsection D of that provision, because the AGO's failure to either produce for inspection or deliver or mail a written explanation of denial regarding the 350 documents is the type of wrong that 14-2-11 NMSA 1978's statutory penalty seeks to remedy. *Britton v. Office of the Att'y Gen.*, 2019-NMCA-002.

Findings as to damages. — If the district court awards damages under Section 14-2-12(D) NMSA 1978 for enforcement of a denied request to inspect records, the district court is required to enter findings specifying the nature and measure of the damages. *Faber v. King*, 2013-NMCA-080, cert. granted, 2013-NMCERT-007.

Where plaintiff represented employees of defendant in an employment dispute in federal court; the federal court ordered a stay of discovery; plaintiff filed a request for inspection of employment records from defendant's office; defendant denied the request; the district court held that the discovery stay did not preempt rights granted by the Inspection of Public Records Act and ruled that defendant had violated the act; the district court awarded

damages of $10 per day from the date of the wrongful denial to the date the federal court lifted the stay and thereafter damages of $100 per day until the records were provided; and although the district court did not specify the nature and purpose of the damage award, the record indicated that the damages were punitive, the award was unsupported by findings supporting compensatory damages, which are a prerequisite to punitive damages. *Faber v. King*, 2013-NMCA-080, cert. granted, 2013-NMCERT-007.

Attorney's fees. — Where plaintiff's made two requests for records of payments the school district made to a former employee; the school district denied both requests; the district court ordered the school district to produce the records; to support plaintiffs' request for attorneys' fees in the amount of $22,899, plaintiffs proffered their attorneys' itemized billing statements and resumes together with the affidavit of an attorney familiar with the prevailing rates charged by attorneys who attested to the reasonableness of the fees charged and the competency of plaintiffs' attorneys; the district court awarded plaintiffs an arbitrary fee of $5,000 on the grounds that plaintiffs' attorneys charged "strikingly high hourly rates", plaintiff filed only four pleadings, and there were no hearings; the court refused to review the billing statements, rejected the affidavit, and relied on its own assessment of a reasonable hourly rate and a reasonable amount of time to litigate the case; the court did not have a clear grasp of the time and labor involved in litigating the case to a successful conclusion or consider the novelty of the issues addressed in plaintiffs' pleadings or the policy goals of the Inspection of Public Records Act; and the court failed to utilize an objective basis for determining a reasonable award of attorney fees, the court abused its discretion. *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, 287 P.3d 318, cert. denied, 2012-NMCERT-008.

It is clear the Legislature intended to enforce disclosure by imposing a cost – including attorney fees – for nondisclosure within the time frames set by the Inspection of Public Records Act, regardless of whether the public entity characterizes the nondisclosure as a "denial" or as an indefinite "delay". *Board of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36.

Remedy for denial of access to tax assessment records. — Taxpayers who believed that assessor wrongfully denied them access to public records should have pursued the remedies provided in this section. To the extent the board found that the information sought was irrelevant to the assessment of taxpayers' property, there was no error in the board's refusal to sanction assessor. *Hannahs v. Anderson*, 1998-NMCA-152, 126 N.M. 1, 966 P.2d 168, cert. denied, 126 N.M. 532, 972 P.2d 351.

This section does not authorize punitive damages. — Although government liability for punitive damages would deter the abuse of governmental power and promote accountability among government officials, the countervailing policy of protecting public revenues must prevail unless punitive damages are specifically authorized by statute. This section does not specifically authorize punitive damages. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

This section authorizes the recovery of compensatory damages. — The damages provisions contained in the Inspection of Public Records Act (IPRA) are designed to promote compliance and accountability from New Mexico's public servants. This section ensures that IPRA requests are not wrongfully denied, and if the requester is not made whole by the provision of the documents, the legislature authorized a successful litigant, in an action to enforce a wrongfully denied IPRA request, to seek compensatory or actual damages, costs, and attorneys' fees. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Where plaintiff was successful in his state court action against the attorney general's office to enforce the provisions of the Inspection of Public Records Act (IPRA), and the state district court issued a writ of mandamus ordering the attorney general's office to comply with the request for public records, and further awarded per diem damages and costs to plaintiff, but failed to clarify the nature of the damages, the supreme court held that this section does not authorize punitive damages or per diem damages for the post-denial enforcement of an IPRA request. In a court action to enforce the provisions of IPRA, this section authorizes costs, reasonable attorneys' fees and compensatory or actual damages only. *Faber v. King*, 2015-NMSC-015, *rev'g* 2013-NMCA-080, 306 P.3d 519.

Damages. — Damages for enforcement of a denied request to inspect records are governed by 14-2-12(D) NMSA 1978, not 14-2-11(C) NMSA 1978. The statutory maximum per-day penalty of 14-2-11(C) NMSA 1978 does not create any standard for an amount of damages under 14-2-12(D) NMSA 1978. *Faber v. King*, 2013-NMCA-080, cert. granted, 2013-NMCERT-007.

Chapter 41 – Torts: Article 4 – Tort Claims

41-4-1. Short title.

Sections 41-4-1 through 41-4-27 NMSA 1978 may be cited as the "Tort Claims Act".

ANNOTATIONS

Cross references. — For immunity from liability for employers for statements in references of former employees, *see* 50-12-1 NMSA 1978.

Constitutionality. — The legislature acted constitutionally in enacting the Tort Claims Act [41-4-1to 41-4-27 NMSA 1978] following judicial abolition of sovereign immunity. *Ferguson v. N.M. State Hwy. Comm'n*, 1982-NMCA-180, 99 N.M. 194, 656 P.2d 244, cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Act does not violate Equal Protection Clauses of the United States and New Mexico constitutions. *Garcia v. Albuquerque Pub. Sch. Bd. of Educ.*, 1980-NMCA-081, 95 N.M. 391, 622 P.2d 699, cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Policy of act. — The declared policy of this act indicates that the legislature authorized the filing of claims against governmental entities except in situations where the state may not have been able to act for some specific reason, so long as the act complained of falls within the list set out in this act. *Methola v. County of Eddy*, 1980-NMSC-145, 95 N.M. 329, 622 P.2d 234.

This act was enacted in response to the judicial abrogation of sovereign immunity in *Hicks v. State*, 1975-NMSC-056, 88 N.M. 588, 592, 544 P.2d 1153, and the basic intent was to reestablish government immunity, while creating specific exceptions for which the government could be sued for tort liability. *Board of Cnty. Comm'rs v. Risk Mgmt. Div.*, 1995-NMSC-046, 120 N.M. 178, 899 P.2d 1132.

Important policies underlying enactment of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] were to protect the public treasury, to enable the government to function unhampered by the threat of legal actions that would inhibit the administration of traditional state activities, and to enable the government to effectively carry out its services. *Maestas v. Zager*, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, *rev'd on other grounds*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

Common-law sovereign immunity abolished. — Common-law sovereign immunity may no longer be interposed as a defense by the state or any of its political subdivisions in tort actions. *Hicks v. State*, 1975-NMSC-056, 88 N.M. 588, 544 P.2d 1153 (decided under prior law).

Reasons justifying legislature's determination to partially retain governmental immunity are: (1) there is a need to protect the public treasuries; (2) partial immunity

enables the government and its various subdivisions to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities; and (3) in order to effectively carry out its services, many of which are financially unprofitable and which would not be provided at a reasonable cost by private enterprise, the government needs the protection provided by some immunity. *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, 95 N.M. 391, 622 P.2d 699, cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Act is remedial act which applies only prospectively, in the absence of expressed legislative intent to make it retroactive. *Methola v. County of Eddy*, 1980-NMSC-145, 95 N.M. 329, 622 P.2d 234.

Act is extension of previous similar statutes. — This act is an extension of previous statutes that recognized a limited waiver of sovereign immunity. Accordingly, a claimant's remedy under former 5-6-20, 1953 Comp., to redress a 1974 injury due to the alleged negligence of a state agency did not abate upon the repeal of that statute in 1975, nor upon the enactment of the Tort Claims Act in 1976. The claim was, thus, not barred under common-law sovereign immunity, but rather retained its vitality pursuant to former 5-6-20, 1953 Comp. *Romero v. N.M. Health & Env't Dep't*, 1988-NMSC-073, 107 N.M. 516, 760 P.2d 1282.

Traditional concepts of negligence. — Liability under this act is premised on traditional concepts of negligence. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Requirements of negligence action. — A negligence action under this act requires that there be a duty owed from the defendant to the plaintiff, that based on a standard of reasonable care under the circumstances, the defendant breached that duty, and that the breach was a cause in fact and proximate cause of the plaintiff's damages. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Duty of ordinary care. — The state has a duty to exercise ordinary care in the maintenance of its highways, but foreseeability is not a factor to consider when determining the existence of a duty and is relevant only to determining whether there is a breach of duty. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Questions of fact for a jury. — Whether a defendant breached the duty of ordinary care and whether an act or omission may be deemed a proximate cause of an injury are questions of fact for a jury to decide. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Wrongful death action. — In a wrongful death action, where the state department of transportation had a duty to maintain roadways in a safe condition for the benefit of the public, including reasonable inspections of roadways in order to identify and remove dangerous debris, and where department failed to exercise ordinary care in its duty, there

were questions of fact as to whether the department had constructive notice of the dangerous debris, whether the department breached a duty to decedent, and whether the department's failure to act was the proximate cause of the accident, making summary judgment improper. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Action not barred by concurrent § 1983 action. — The New Mexico Tort Claims Act does not prohibit a plaintiff from bringing an action for damages under that act against a governmental entity or public employee if the plaintiff also pursues, by reason of the same occurrence or chain of events, an action against the same entity or employee pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983. *Wells v. County of Valencia*, 1982-NMSC-048, 98 N.M. 3, 644 P.2d 517.

Strict construction. — Since this act is in derogation of petitioner's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. *Methola v. County of Eddy*, 1980-NMCA-145, 95 N.M. 329, 622 P.2d 234.

This article is in derogation of one's common-law right to sue and is to be strictly construed. *Estate of Gutierrez v. Albuquerque Police Dep't*, 1986-NMCA-023, 104 N.M. 111, 717 P.2d 87, cert. denied *sub nom. Haney v. Albuquerque Police Dep't.*, 103 N.M. 798, 715 P.2d 71 (1986), *overruled on other grounds by Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155.

The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] must be strictly construed. *Fought v. State*, 1988-NMCA-088, 107 N.M. 715, 764 P.2d 142, *overruled in part on other grounds by Folz v. State*, 1993-NMCA-066, 115 N.M. 639, 857 P.2d 39, cert. denied, 115 N.M. 602, 856 P.2d 250.

Where there is no liability insurance, defense of sovereign immunity is valid as to a tort committed prior to July 1, 1976. *New Mexico Livestock Bd. v. Dose*, 1980-NMSC-022, 94 N.M. 68, 607 P.2d 606.

Indemnification contract impermissible. — Provision in a contract between a city and a beverage company under which the city agreed to indemnify the company against certain liabilities is impermissible to the extent it required the city to assume liability outside the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]. 2000 Op. Att'y Gen. No. 00-04.

Law reviews. — For note, "Doctrine of Sovereign Immunity - Statute - Municipal Tort Liability," see 2 Nat. Resources J. 170 (1962).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

For note, "Comparative v. Contributory Negligence: The Effect of Plaintiff's Fault," see 6 N.M.L. Rev. 171 (1975).

For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

For note, "Negligent Hiring and Retention - Availability of Action Limited by Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

For note, "Torts - Government Immunity Under the New Mexico Tort Claims Act," see 11 N.M.L. Rev. 475 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For comment, "Survey of New Mexico Law: Torts," see 15 N.M.L. Rev. 363 (1985).

For note, "Tort Claims Act - The Death of the Public Duty - Special Duty Rule: Schear v. Board of County Commissioners," see 16 N.M.L. Rev. 423 (1986).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For case note, "Civil Procedure - New Mexico Adopts the Modern View of Collateral Estoppel: *Silva v. State*," see 18 N.M.L. Rev. 597 (1988).

For note, "The New Mexico Tort Claims Act: The King Can Do 'Little' Wrong," see 21 N.M.L. Rev. 441 (1991).

For note, "Contracts - The Supreme Court Speaks Where the Legislature Was Silent: *Torrance County Mental Health Program, Inc. v. New Mexico Health & Environment*," see 23 N.M.L. Rev. 291 (1993).

For note, "Tort Law - Either the Parents or the Child May Claim Compensation for the Child's Medical and Nonmedical Damages: *Lopez v. Southwest Community Health Services*," see 23 N.M.L. Rev. 373 (1993).

For note, "Tort Law - New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: *Saiz v. Belen School District*," see 23 N.M.L. Rev. 399 (1993).

For note, "Torts - Sovereign Immunity: *Caillouette v. Hercules*," see 23 N.M.L. Rev. 423 (1993).

For note, "In the aftermath of M.D.R., Holding the State to Its Promises: *M.D.R. v. State Human Services Dep't*," see 24 N.M.L. Rev. 557 (1994).

For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

For note, "Foreseeability vs. Public Policy Considerations in Determining the Duty of Physicians to Non-Patients - *Lester v. Hall,*" see 30 N.M.L. Rev. 351 (2000).

For note, "New Mexico Limits Recovery of Negligent Infliction of Emotional Distress to Sudden, Traumatic Accidents - *Fernandez v. Walgreen Hastings Co.,*" see 30 N.M.L. Rev. 363 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability, §§ 61, 62, 67 to 69, 184 to 190.

Damage to property caused by negligence of governmental agents, as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state, 81 A.L.R.3d 1239.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived, 91 A.L.R.3d 316.

Liability for overflow of water confined or diverted for public waterpower purposes, 91 A.L.R.3d 1065.

Liability of one negligently causing fire for injuries sustained by person other than firefighter in attempt to control fire or to save life or property, 91 A.L.R.3d 1202.

Governmental liability from operation of zoo, 92 A.L.R.3d 832.

Products liability: air guns and BB guns, 94 A.L.R.3d 291.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Governmental tort liability for injuries caused by negligently released individual, 6 A.L.R.4th 1155.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury - modern status, 7 A.L.R.4th 1063.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances, 38 A.L.R.4th 1194.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Recoverability from tort-feasor of cost of diagnostic examinations absent proof of actual bodily injury, 46 A.L.R.4th 1151.

Right of insured, precluded from recovering against owner or operator of uninsured motor vehicle because of governmental immunity, to recover uninsured motorist benefits, 55 A.L.R.4th 806.

Social worker malpractice, 58 A.L.R.4th 977.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 A.L.R.4th 81.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 A.L.R.4th 266.

Liability in tort for interference with attorney-client relationship, 90 A.L.R.4th 621.

Liability of private operator of "halfway house" or group home housing convicted prisoners before final release for injury to third person caused by inmate, 9 A.L.R.5th 969.

Municipal liability for negligent performance of building inspector's duties, 24 A.L.R.5th 200.

Liability of school or school personnel for injury to student resulting from cheerleader activities, 25 A.L.R.5th 784.

Collateral source rule: admissibility of evidence of availability to plaintiff of free public special education on issue of amount of damages recoverable from defendant, 41 A.L.R.5th 771.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 A.L.R.5th 49.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student, 85 A.L.R.5th 301.

Liability of municipality or other governmental unit for failure to provide police protection from crime, 90 A.L.R.5th 273.

What constitutes "claim arising in a foreign country" under 28 U.S.C.A. § 2680(k), excluding such claims from Federal Tort Claims Act, 158 A.L.R. Fed. 137.

Applicability of 28 §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A.L.R. Fed. 848.

Calculations of attorneys' fees under Federal Tort Claims Act - 28 USCS § 2678, 86 A.L.R. Fed. 866.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 UCSC § 2680(h)), 88 A.L.R. Fed. 7
Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of interference with contract rights (28 USCS § 2680(h)), 92 A.L.R. Fed. 186.

Application of collateral source rule in actions under Federal Tort Claims Act (28 USCS § 2674), 104 A.L.R. Fed. 492.

Appealability, under collateral order doctrine, of order denying qualified immunity in 42 USCS § 1983 or Bivens action for damages where claim for equitable relief is also pending - post-Harlow cases, 105 A.L.R. Fed. 851.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.A. § 2671), 166 A.L.R. Fed. 187.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of federal Tort Claims Act (28 U.S.C.A. § 2680(a)), 167 A.L.R. Fed. 1

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to federal Tort Claims Act, 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to federal Tort Claims Act (28 U.S.C.A. § 2680(a)), 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to federal Tort Claims Act, 171 A.L.R. Fed. 655.

41-4-2. Legislative declaration.

A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act.

B. The Tort Claims Act shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees. Determination of the standard of care required in any particular instance should be made with the knowledge that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities.

ANNOTATIONS

"In derogation of common law." — Insofar as it reestablished sovereign immunity, the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] was in derogation of the common law, but in its exceptions, the act restored the common law right to sue in those specific situations; because of the complex relationship between the act and the common law, the more useful canon of construction is that requiring courts to give effect to the legislature's intent. *Brenneman v. Board of Regents of UNM*, 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Traditional concepts of negligence. — Liability under this act is premised on traditional concepts of negligence. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Wrongful death action. — In a wrongful death action, where the state department of transportation had a duty to maintain roadways in a safe condition for the benefit of the public, including reasonable inspections of roadways in order to identify and remove dangerous debris, and where department failed to exercise ordinary care in its duty, there were questions of fact as to whether the department had constructive notice of the dangerous debris, whether the department breached a duty to decedent, and whether the department's failure to act was the proximate cause of the accident, making summary judgment improper. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Different treatment of government and private tortfeasors. — The legislature never intended government and private tortfeasors to receive identical treatment. The liabilities of the private tortfeasor in no way compare with the potential liabilities of the state highway and transportation department [department of transportation] for the multitude of daily injuries and deaths on the state's highways. *Marrujo v. N.M. State Hwy. Transp. Dep't*, 1994-NMSC-116, 118 N.M. 753, 887 P.2d 747.

Identification of entity against whom liability asserted. — Plaintiffs may not, by relying on the doctrine of respondeat superior, avoid the need to identify the particular entity against whom liability is asserted. *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

To hold municipality liable for the conduct of third persons would be contrary to sound public policy and create policing requirements difficult to fulfill. *Trujillo v. City of Albuquerque*, 1979-NMCA-127, 93 N.M. 564, 603 P.2d 303, cert. denied, 94 N.M. 629, 614 P.2d 546.

The Tort Claims Act grants immunity for strict liability in tort. *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292.

Immunity waiver is not for indirect or incidental victims. — The legislature did not intend by this section to waive immunity for injuries to indirect or incidental victims of tortious acts committed by government employees. The plaintiff's, as children of the deceased killed by law enforcement officers, were unforeseeable; as injured parties; therefore, the officers owed no duty to them. *Lucero v. Salazar*, 1994-NMCA-066, 117 N.M. 803, 877 P.2d 1106, cert. denied, 117 N.M. 802, 877 P.2d 1105.

But extends to claims for loss of consortium. – Once a duty is established, loss of consortium damages flow from the principles of tort liability; as loss of consortium is a damage resulting from bodily injury and loss of consortium plaintiffs are foreseeable, loss of consortium is exactly the type of damage "based upon the traditional tort concepts of duty" that the legislature intended to include under the applicable waivers of sovereign immunity in the Tort Claims Act. *Brenneman v. Board of Regents of UNM*, 2004-NMCA-003, 135 N.M. 68, 84 P.3d 685, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Claim for loss of consortium is permissible under the Tort Claims Act. — Where plaintiffs' father was shot and killed by law enforcement officers during a stolen vehicle investigation, the district court erred in dismissing plaintiffs' complaint on the ground that their loss of consortium claims did not fall within the Tort Claims Act (TCA), because the TCA waives a law enforcement officer's sovereign immunity from liability for personal injury and for bodily injury damages resulting from battery, and loss of consortium damages may be characterized as either personal or bodily injury damages, and therefore both the injury and the tort from which the plaintiff's claim for loss of consortium damages

derive are specifically enumerated under 41-4-12 NMSA 1978. *Thompson v. City of Albuquerque*, 2017-NMSC-021, *aff'g* 2017-NMCA-002, 386 P.3d 1015.

Damages for loss of consortium may be recovered. — Where plaintiffs' father was shot and killed by law enforcement officers during a stolen vehicle investigation, the district court erred in dismissing plaintiffs' complaint on the ground that their loss of consortium claims did not fall within the Tort Claims Act (TCA), because generally, plaintiffs should be allowed to recover for loss of consortium if the evidence shows that their relationships with the decedent were sufficiently close financially, socially, or both, and if it was foreseeable that the injury to the decedent would harm the relationships, and loss of consortium can be asserted against New Mexico government actors, despite that it is not specifically mentioned in the TCA, provided that the underlying tort, the one that caused direct physical injury, itself triggers an immunity waiver under the TCA. *Thompson v. City of Albuquerque*, 2017-NMCA-002, cert. granted.

No distinction shall be drawn with regard to "public" or "special" duty of governmental employees whose immunity to suit for acts of negligence has been excepted under this article. *Schear v. Board of Cnty. Comm'rs*, 1984-NMSC-079, 101 N.M. 671, 687 P.2d 728.

The distinction between public and private duty is invalid, and applied retrospectively. *Schear v. Board of Cnty. Comm'rs*, 1984-NMSC-079, 101 N.M. 671, 687 P.2d 728; *Wittkowski v. State*, 1985-NMCA-066, Corr. Dep't, 103 N.M. 526, 710 P.2d 93, cert. quashed, 103 N.M. 446, 708 P.2d 1047, *overruled on other grounds by Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

Personal actions against public employees barred. — The language of Subsection F of 5-1-1NMSA 1978 constitutes a bar to personal actions against public employees; it does not provide an independent statutory waiver of governmental immunity. *Gallegos v. Trujillo*, 1992-NMCA-090, 114 N.M. 435, 839 P.2d 645, cert. denied, 114 N.M. 314, 838 P.2d 468.

Governmental entities can share maintenance responsibilities for road by agreement. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

City duty to maintain road. — Whether a city had either a statutory or a common law duty to maintain a road is dispositive on the issue of immunity. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Waiver of immunity inapplicable. — Where there is no question that the highway department had the sole responsibility to maintain the street in the vicinity where the accident occurred, the waiver of immunity in Subsection A of this section does not apply to the city because it had no duty upon which negligence could be premised. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Navajo police officer not New Mexico "public employee". — Fact that Navajo Nation police officer was cross-deputized as a county sheriff did not make the officer a "public employee" of a New Mexico governmental body. *Williams v. Board of Cnty. Comm'rs*, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818.

Immunity for wrongful decision to perform autopsy. — In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if 24-12-4 NMSA 1978, which provides for consent for post-mortem examinations, created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Begay v. State*, 1985-NMCA-117, 104 N.M. 483, 723 P.2d 252, *rev'd on other grounds sub nom., Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677.

School district immune from liability for breach of nondelegable duty. — Direct liability of the possessor of land under a nondelegable duty to ensure against an unreasonable risk of injury for a special danger is based not on what the possessor knew or should have known, but upon breach of duty imputed as a matter of law. This is strict liability for which the legislature granted immunity under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. Consequently, a school district was immune from its joint and several liability for the acts of independent contractors in constructing a high voltage lighting system that caused the death of a student attending a school football game. *Saiz v. Belen Sch. Dist.*, 1992-NMSC-018, 113 N.M. 387, 827 P.2d 102.

Suit against state hospital in federal court not permitted. — Congress does not have the power to make statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA) applicable to state-run hospitals without the state's express consent. As indicated by this section, 41-4-4 NMSA 1978 and 41-4-18 NMSA 1978, New Mexico has not consented to be sued in federal court for violations of EMTALA, nor for any other tort. *Ward v. Presbyterian Healthcare Servs.*, 72 F. Supp. 2d 1285 (D.N.M. 1999).

Ordinary care for preservation of life and health of arrestee. — When a governmental entity through its agents, by virtue of its law enforcement powers, has arrested and imprisoned a human being, it is bound to exercise ordinary and reasonable care, under the circumstances, for the preservation of the arrestee's life and health. *Doe v. City of Albuquerque*, 1981-NMCA-049, 96 N.M. 433, 631 P.2d 728.

Jury instruction on "financial limitations". — Without evidence on the issue of "financial limitations," a party is not entitled to a jury instruction as to a governmental entity's standard of care as circumscribed by the "financial limitations" within which it must exercise authorized power. *Doe v. City of Albuquerque*, 1981-NMCA-049, 96 N.M. 433, 631 P.2d 728.

Texas' sovereign immunity recognized as a matter of comity in tort claim lawsuit. — In a medical negligence case filed agains t a Texas-based physician who was acting within

the scope of his employment at Texas tech hospital, a governmental unit of the state of Texas, the district court erred in failing to extend comity to Texas and apply provisions of the Texas Tort Claims Act (TTCA), because it is not a violation of New Mexico public policy when a similar action would not be barred under the New Mexico Tort Claims Act, when Texas appellate courts have previously extended comity and applied tort claims provisions from other jurisdictions that differed from the TTCA's provisions, when Texas' strong public policy interest in applying uniform standards of liability and immunity to the conduct of state-employed physicians who provide medical care at state-run facilities is not outweighed by New Mexico's interest in providing a forum for New Mexicans who seek redress for medical negligence, and when failing to extend immunity to Texas in this case would encourage forum shopping by allowing plaintiffs to name Texas state employees in lawsuits in New Mexico when those plaintiffs could not do so in Texas. *Montaño v. Frezza*, 2017-NMSC-015, *rev'g*, 2015-NMCA-069.

Principles of comity applied to determine choice of law when tort is committed by non-resident. — Comity, the principle that the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign, not as a rule of law, but rather out of deference or respect, should be extended to other states but only if doing so will not violate or undermine New Mexico's public policies. In determining whether to extend immunity, courts should consider whether the forum state would enjoy similar immunity under similar circumstances, whether the state sued has or is likely to extend immunity to other states, whether the forum state has a strong interest in litigating the case, and whether extending immunity would prevent forum shopping. *Montaño v. Frezza*, 2015-NMCA-069, cert. granted, 2015-NMCERT-006, and cert. granted, 2015-NMCERT-006.

In a medical negligence case filed against a Texas-based physician, where the district court was required to determine whether the New Mexico Tort Claims Act (NMTCA) [41-4-1 through 41-4-27NMSA 1978] or Texas law should apply, the district court did not err in determining that New Mexico law should apply because applying Texas law would be contrary to New Mexico's public policies in that applying Texas law would contravene New Mexico's broader waiver of immunity, would limit suits to governmental entities and prohibit suits against individuals, and would impose a notice requirement substantially more restrictive than that in the NMTCA. *Montaño v. Frezza*, 2015-NMCA-069, cert. granted, 2015-NMCERT-006, and cert. granted, 2015-NMCERT-006.

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For note and comment, "The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence," see Correctional Services Corp. v. Malesko, 33 N.M. L. Rev. 401 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 11, 75 to 81, 110; 63A Am. Jur. 2d Public Officers and Employees § 358 et seq.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 16 A.L.R.2d 1079.

Tort liability of public schools and institutions of higher learning, 160 A.L.R. 7, A.L.R.2d 489, 33 A.L.R.3d 703, 34 A.L.R.3d 1166, 34 A.L.R.3d 1210, 35 A.L.R.3d 725, 35 A.L.R.3d 758, 36 A.L.R.3d 361, 37 A.L.R.3d 712, 37 A.L.R.3d 738, 38 A.L.R.3d 830, 23 A.L.R.5th 1.

Tort liability of public schools and institutions of higher learning for accidents occurring in physical education classes, 66 A.L.R.5th 1.

Tort liability of schools and institutions of higher learning for personal injury suffered during school field trip, 68 A.L.R.5th 519.

Tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events, 68 A.L.R.5th 663.

Tort liability of public schools and institutions of higher learning for injury to student walking to or from school, 72 A.L.R.5th 469.

67 C.J.S. Officers and Public Employees §§ 206 to 209, 251.

41-4-3. Definitions.

As used in the Tort Claims Act:

A. "board" means the risk management advisory board;

B. "governmental entity" means the state or any local public body as defined in Subsections C and H of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978;

D. "law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor;

E. "maintenance" does not include:

(1) conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner; or

(2) an activity or event relating to a public building or public housing project that was not foreseeable;

F. "public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10), (14) and (17) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act [Chapter 21, Article 21A NMSA 1978], the Small Business Investment Act [Chapter 58, Article 29 NMSA 1978] or the Mortgage Finance Authority Act [Chapter 58, Article 18 NMSA 1978] or a licensed health care provider, who has no medical liability insurance, providing voluntary services as defined in Paragraph (16) of this subsection and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or department of health, but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act [Chapter 33, Article 9 NMSA 1978];

(6) members of state or local selection panels established pursuant to the Juvenile Community Corrections Act [Chapter 33, Article 9A NMSA 1978];

(7) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(8) members of the board of directors of the New Mexico medical insurance pool;

(9) individuals who are members of medical review boards, committees or panels established by the educational retirement board or the retirement board of the public employees retirement association;

(10) licensed medical, psychological or dental arts practitioners providing services to the children, youth and families department pursuant to contract;

(11) members of the board of directors of the New Mexico educational assistance foundation;

(12) members of the board of directors of the New Mexico student loan guarantee corporation;

(13) members of the New Mexico mortgage finance authority;

(14) volunteers, employees and board members of court-appointed special advocate programs;

(15) members of the board of directors of the small business investment corporation;

(16) health care providers licensed in New Mexico who render voluntary health care services without compensation in accordance with rules promulgated by the secretary of health. The rules shall include requirements for the types of locations at which the services are rendered, the allowed scope of practice and measures to ensure quality of care;

(17) an individual while participating in the state's adaptive driving program and only while using a special-use state vehicle for evaluation and training purposes in that program;

(18) the staff and members of the board of directors of the New Mexico health insurance exchange established pursuant to the New Mexico Health Insurance Exchange Act [59A-23F-1 to 59A-23F-8 NMSA 1978]; and

(19) members of the insurance nominating committee;

G. "scope of duty" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance; and

H. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Scope of duties. — Where school administrators allegedly used procedures ostensibly based upon statute and regulations and used the mechanism of their employment to harass and attempt to force plaintiff out of her job, the school administrators were acting within the scope of their duties as school administrators and were immune from liability under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Henning v. Rounds*, 2007-NMCA-139, 142 N.M. 803, 171 P.3d 317.

Under the definition of "scope of duties" in Subsection G of this section, when reconciled with the indemnification provisions in Subsection E of 41-4-4 NMSA 1978 and Subsection

A of 41-4-17 NMSA, an employee's acts are not excluded simply because they are criminal. *Risk Mgmt. Div. v. McBrayer*, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, cert. denied, 130 N.M. 17, 16 P.3d 442.

Failing to perform a regular duty, such as timely responding to requests for records, still falls with the scope of duties for purposes of the Tort Claims Act. *Derringer v. State*, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237.

Public employee may be within scope of authorized duty even if the employee's acts are fraudulent, intentionally malicious, or even criminal. *Seeds v. Lucero*, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied, sub nom. *Seeds v. Vandervossen*, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Co-conspirator's acts are imputed to employee. — As long as the act of conspiring is within the scope of a public employee's duties, any co-conspirator's acts that are imputed to the public employee will be, by definition, within the scope of the employee's duties. *Seeds v. Lucero*, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied *sub nom. Seeds v. Vandervossen*, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. *Cozart v. Town of Bernalillo*, 1983-NMCA-053, 99 N.M. 737, 663 P.2d 713.

II. GOVERNMENTAL ENTITIES.

Issue of whether town or municipality is "local public body" is not open to question. *Cozart v. Town of Bernalillo*, 1983-NMCA-053, 99 N.M. 737, 663 P.2d 713.

State police and highway departments are "state agencies". — The state police department and the state highway department fit the statutory description of "state" or "state agency." *Ferguson v. N.M. State Hwy. Comm'n*, 1981-NMCA-071, 98 N.M. 718, 652 P.2d 740, *rev'd on other grounds*, 1982-NMSC-107, 98 N.M. 680, 652 P.2d 230.

Irrigation district is "local public body" for purposes of this section. *Tompkins v. Carlsbad Irrigation Dist.*, 1981-NMCA-072, 96 N.M. 368, 630 P.2d 767.

Privately owned irrigation company is not "local public body" under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978], even though it performs the same function as a public irrigation district, where the company has had the option of reorganizing as a body politic and gaining the benefits and obligations of such status but has chosen not to do so. *Carmona v. Hagerman Irrigation Co.*, 1998-NMSC-007, 125 N.M. 59, 957 P.2d 44.

Water and Sanitation District Act districts are a quasi-municipal governmental entity and fall within the definition of "governmental entity" under the Tort Claims Act. *El Dorado*

Utils., Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305.

Public defenders' immunity not violation of equal protection. — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a former prisoner. *Coyazo v. State*, 1995-NMCA-056, 120 N.M. 47, 897 P.2d 234.

III. LAW ENFORCEMENT OFFICERS.

To determine whether positions are of a law enforcement nature, the court will look at the character of the principal duties involved, those duties to which employees devote the majority of their time. *Anchondo v. Corrections Dep't*, 1983-NMSC-051, 100 N.M. 108, 666 P.2d 1255.

The statutory requirement that the defendants be law enforcement officers does not focus on the defendants' specific acts at the time of their alleged negligence; instead, it simply requires that the defendants' principal duties, those duties to which they devote a majority of their time, be of a law enforcement nature. The requirement in 41-4-12 NMSA 1978 that the officer must be acting within the scope of his duties simply means that the officer must be acting within the scope of employment in order to be sued in his or her capacity as a law enforcement officer. *Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't*, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978] and by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 to 41-13-3 NMSA 1978].

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorney fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort that was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

I. A jointly operated public school, community center or athletic facility that is used or maintained pursuant to a joint powers agreement shall be deemed to be used or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978.

J. For purposes of this section, a "jointly operated public school, community center or athletic facility" includes a school, school yard, school ground, school building, gymnasium, athletic field, building, community center or sports complex that is owned or

leased by a governmental entity and operated or used jointly or in conjunction with another governmental entity for operations, events or programs that include sports or athletic events or activities, child-care or youth programs, after-school or before-school activities or summer or vacation programs at the facility.

K. A fire station that is used for community activities pursuant to a joint powers agreement between the fire department or volunteer fire department and another governmental entity shall be deemed to be operated or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978. As used in this subsection, "community activities" means operations, events or programs that include sports or athletic events or activities, child care or youth programs, after-school or before-school activities, summer or vacation programs, health or education programs and activities or community events.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Joint operation of a facility. — Without proof of a joint powers agreement plaintiff cannot apply 41-4-4 I and J NMSA 1978. *Gutierrez v. W. Las Vegas Sch. Dist.*, 2002-NMCA-068, 132 N.M. 372, 48 P.3d 761.

Modification of common law requires strict construction. — Since the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] is in derogation of petitioner's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. *Methola v. County of Eddy*, 1980-NMSC-145, 95 N.M. 329, 622 P.2d 234.

Right to sue and recover under act is limited to the rights, procedures, limitations and conditions prescribed in this act. *Methola v. County of Eddy*, 1980-NMSC-145, 95 N.M. 329, 622 P.2d 234.

Agency to be named in complaint. — Under the Tort Claims Act, the particular agency that caused the harm is the party that must be named in the complaint and against whom a judgment may be entered. *Begay v. State*, 1985-NMCA-117, 104 N.M. 483, 723 P.2d 252, *rev'd on other grounds sub nom.*, *Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 93 L. Ed. 2d 727, 107 S. Ct. 677.

Proper defendant. — The statutory structure of the Tort Claims Act indicates that either a governmental entity or an individual public employee can be the sole named defendant. The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] does not require a plaintiff to name a specific public employee as a defendant to recover damages and a plaintiff may state a claim by naming only a governmental entity. *Lopez v. Las Cruces Police Dep't*, 2006-NMCA-074, 139 N.M. 730, 137 P.3d 670, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Lawsuit alleging claims against county detention center must name board of county commissioners as a defendant. — Where plaintiff filed a lawsuit asserting claims against the Bernalillo county metropolitan detention center (BCMDC) for violations of the New Mexico Tort Claims Act (NMTCA) after plaintiff was remanded to BCMDC to participate in a methadone program to decrease his level of dependence so that he would not incur life endangering withdrawal symptoms, but nonetheless suffered life threatening withdrawal symptoms for approximately two months, BCMDC was not a suable entity under the NMTCA, because 4-46-1NMSA 1978 provides a limitation on the NMTCA, requiring that the proper defendant in all suits against a county is the county's board of county commissioners. *Gallegos v. Bernalillo County Board of County Commissioners*, 272 F.Supp.3d 1256 (D.N.M. 2017).

Duty and immunity are distinct. — The concepts of duty and immunity are different under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. The Act is not a source of duties to be imposed on government entities. Duty or responsibility must be found outside the act either at common law or by statute. *Rutherford v. Chaves Cnty.*, 2002-NMCA-059, 132 N.M. 289, 47 P.3d 448, *aff'd* 2003-NMSC-010, 133 N.M. 756, 69 P.3d 119.

Tort is separate and distinct from constitutional deprivation. — The New Mexico legislature recognizes that a tort is separate and distinct from a constitutional deprivation. *Wells v. County of Valencia*, 1982-NMSC-048, 98 N.M. 3, 644 P.2d 517.

Denial of immunity claim not immediately appealable. — Since Subsection A of this section provides a defense to liability, and not absolute immunity from suit, a denial of a claim of immunity under that section does not meet the requirements for immediate appellate review under the collateral order exception to the traditional requirement of finality. *Allen v. Board of Educ.*, 1987-NMCA-152, 106 N.M. 673, 748 P.2d 516.

Legislature acted within its powers in limiting liability of public employees in the same manner as it limited the liability of the entity for whom they work. *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, 95 N.M. 391, 622 P.2d 699, cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981).

Suit against state hospital in federal court not permitted. — Congress does not have the power to make statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA) applicable to state-run hospitals without the state's express consent. As indicated by this section, 41-4-2 NMSA 1978 and 41-4-18 NMSA 1978, New Mexico has not consented to be sued in federal court for violations of EMTALA, nor for any other tort. *Ward v. Presbyterian Healthcare Servs.*, 72 F. Supp. 2d 1285 (D.N.M. 1999).

Suits in federal court. — Although the state has waived its immunity from suit in its own state courts for actions of law enforcement officers, it has not waived its Eleventh Amendment immunity from suit in federal courts. *Flores v. Long*, 926 F. Supp. 166 (D.N.M. 1995), *appeal dismissed*, 110 F.3d 730 (10th Cir. 1997).

Governmental entities liable for discriminatory practices. — The Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] does not override or supersede the Human Rights Act [28-1-1NMSA 1978 et seq.], so as to shield a governmental entity from liability otherwise flowing from a discriminatory practice proscribed by the latter act. Section 28-1-13D NMSA 1978 constitutes a waiver of sovereign immunity for liability imposed on public entities by the human rights commission, or by a district court on appeal from a commission decision, for violations of the Human Rights Act. *Luboyeski v. Hill*, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353.

Subpoena power. — The Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] does not protect government actors from a court's subpoena power. *Seeds v. Lucero*, 2005-NMCA-067, 137 N.M. 589, 113 P.3d 859, cert. denied *sub nom. Seeds v. Vandervossen*, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Liability question of fact. — Question of whether boy scout troop using school district's swimming pool was a business invitee to whom school district owed duty of reasonable care to avoid risk of harm and question as to negligence of school district for failing to provide lifeguard and safety equipment were questions raising genuine issue of material fact precluding summary judgment in wrongful action. *Seal v. Carlsbad Indep. Sch. Dist.*, 1993-NMSC-049, 116 N.M. 101, 860 P.2d 743.

Duty to defend. — Where a police officer was sued individually in federal court for violation of plaintiff's constitutional rights; the officer asked the municipality to provide a defense and gave a copy of the complaint to the municipal attorney; the municipality refused to provide a defense, the municipality had actual notice of the federal action and was asked to provide a defense within the time for filing an answer to the complaint; the municipality did not dispute that the officer acted within the scope of the officer's employment; the officer defended the federal action pro se; and the officer and plaintiff settled the federal claims; and plaintiff did not give the municipality written notice of the incident within ninety days after the incident occurred, 41-4-16 NMSA 1978 does not require notice to be given by a claimant who sues, only a governmental employee, and the municipality was required to defend and indemnify the officer and pay the judgment against the officer. *Niederstadt v. Town of Carrizozo*, 2008-NMCA-053, 143 N.M. 786, 182 P.3d 769, cert. denied 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

II. IMMUNITY AND WAIVER.

Tort Claims Act grants immunity for strict liability in tort. *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292.

Subsection A provides government entities with immunity from liability for any tort, except as waived in other sections of the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Prima facie tort is not included in the specific provisions of the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]; government entities and public employees acting within the scope of duty therefore enjoy immunity to such claims. *Derringer v. State*, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237.

Tort Claims Act clearly contemplates including employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity. *Celaya v. Hall*, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Liability of governmental entity for torts of employees. — A governmental entity is not immune from liability for any tort of its employee acting within the scope of duties for which immunity is waived. *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380. It is only when a public entity is itself acting through its employee with the right to control the manner in which the details of work are to be done, that the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] comes into play. *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

The supervision required for naming a public entity includes more than "direct supervision"; it includes the right of control regardless of whether exercised. *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

Constructive fraud not basis for waiver. — Constructive fraud is not one of the causes of action for which a city's sovereign immunity is waived under this section. *Health Plus v. Harrell*, 1998-NMCA-064, 125 N.M. 189, 958 P.2d 1239, cert. denied, 125 N.M. 145, 958 P.2d 103; *Cordova v. N.M. Taxation & Revenue Dep't*, 2005-NMCA-009, 136 N.M. 713, 104 P.3d 1104.

Economic compulsion and constructive fraud are not specifically waived by the statute. *Valdez v. State*, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

Immunity not waived where negligence did not result in enumerated tort or where law enforcement officer did not breach a statutory duty. — Where plaintiff was traveling on a highway in Bloomfield, New Mexico when her vehicle struck an intoxicated pedestrian, and where plaintiff brought suit against defendants alleging negligence based on the fact that a San Juan County deputy left the pedestrian near the highway after taking the pedestrian into custody due to the pedestrian's intoxication, the district court did not err in dismissing plaintiff's tort claim based on its determination that defendant's immunity was not waived because the negligence of the officer did not result in one of the enumerated torts listed in 41-4-12 NMSA 1978, and the deputy's conduct did not breach a statutory duty owed to plaintiff. *Milliron v. County of San Juan*, 2016-NMCA-096.

Waiver of immunity. — Section 41-4-21 NMSA 1978 was designed to preserve employment relations between the state, or a subdivision thereof, and its employees; it may not be read to expand Subsection A of this section and to provide a waiver of immunity to allow an educational malpractice action against a public school board. *Rubio ex rel. Rubio v. Carlsbad Mun. Sch. Dist.*, 1987-NMCA-127, 106 N.M. 446, 744 P.2d 919.

Limited liability of law enforcement officers. — The clear meaning of this section is that law enforcement officers are not personally liable for malicious or fraudulent torts when committed while acting within the scope of their duties, except as provided in 41-4-12 NMSA 1978. *Methola v. County of Eddy*, 1980-NMSC-145, 95 N.M. 329, 622 P.2d 234.

Waiver of public employees' immunity not allowed. — Section does not allow an attorney of public employees who enjoy sovereign immunity to waive such immunity at trial. *Garcia v. Board of Educ.*, 777 F.2d 1403 (10th Cir. 1985), cert. denied, 479 U.S. 814, 107 S. Ct. 66, 93 L. Ed. 2d 24 (1986).

III. SCOPE OF DUTY.

No distinction shall be drawn with regard to "public" or "special" duty of governmental employees whose immunity to suit for acts of negligence has been excepted under this article. *Schear v. Board of Cnty. Comm'rs*, 1984-NMSC-079, 101 N.M. 671, 687 P.2d 728.

Act provides immunity to public employee acting within scope of duty. — If either district attorney or assistant district attorney was acting within the scope of his duty as a public employee at the time of an alleged defamation, he is immune from liability under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] regardless of any other immunity afforded to a district attorney or assistant district attorney. *Candelaria v. Robinson*, 1980-NMCA-003, 93 N.M. 786, 606 P.2d 196.

Scope of duties/course of employment. — One is not in the course of employment unless the conduct in controversy is of the same general nature as that authorized or incidental thereto. *Stull v. City of Tucumcari*, 1975-NMCA-105, 88 N.M. 320, 540 P.2d 250, cert. denied, 88 N.M. 319, 540 P.2d 249.

Scope of duties. — Under the definition of "scope of duties" in Subsection G of 41-4-3 NMSA 1978, when reconciled with the indemnification provisions in Subsection E of this section and Subsection A of 41-4-17 NMSA, an employee's acts are not excluded simply because they are criminal. *Risk Mgmt. Div. v. McBrayer*, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, cert. denied, 130 N.M. 17, 16 P.3d 442.

Where plaintiff contended that intentional torts are outside the scope of duties of certain state officials, but she failed to specify any actions by the officials which they were not "requested, required, or authorized to perform," defendants were entitled to summary judgment against her on her claims of intentional infliction of emotional distress and defamation. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084.

Horseplay did not take place in the course and scope of employee's employment. *Rivera v. N.M. Hwy. & Transp. Dep't*, 1993-NMCA-057, 115 N.M. 562, 855 P.2d 136, cert. denied, 115 N.M. 545, 854 P.2d 872.

Failing to perform a regular duty, such as timely responding to requests for records, still falls with the scope of duties for purposes of the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Derringer v. State*, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961, cert. denied, 133 N.M. 727, 69 P.3d 237.

The defendant failed to show that he was acting in the scope of his duties as a matter of law where his evidence primarily consisted of habit evidence combined with lack of memory and he could not recall anything about his most recent official acts before the accident occurred. *Celaya v. Hall*, 2003-NMCA-086, 134 N.M. 19, 71 P.3d 1281, *aff'd in part and rev'd in part*, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Actions outside employment scope. — An officer of the state, who acts outside the scope of authority and in so doing commits a willful and malicious tort, may be held liable for those actions. *Allen v. McClellan*, 1967-NMSC-114, 77 N.M. 801, 427 P.2d 677, *overruled on other grounds by*, *N.M. Livestock Bd. v. Dose*, 1980-NMSC-022, 94 N.M. 68, 607 P.2d 606.

IV. SPECIFIC CASES.

Constitutional claims. — The Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] does not waive immunity for separation of powers for unlawful taxation on unlawful special tax claims. *Valdez v. State*, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

Operation of a swimming pool is not an inherently dangerous activity giving rise to the strict liability from which a school district and its employees would have enjoyed sovereign immunity under this section for the drowning of a handicapped 18-year-old boy. *Seal v. Carlsbad Indep. Sch. Dist.*, 1993-NMSC-049, 116 N.M. 101, 860 P.2d 743.

Charter schools are public schools subject to the Tort Claims Act. — A charter school is a public school that operates as part of a political subdivision of the state and, as such, is a governmental entity within the meaning of the Tort Claims Act. *Kreutzer v. Aldo Leopold High School*, 2018-NMCA-005.

Where plaintiff sued defendant charter school, asserting a negligence claim based on allegations that defendant owed a duty to plaintiff to use ordinary care to keep the premises of its school safe and breached that duty by failing to take reasonable precautions to keep the school safe, the district court did not err in granting defendant's motion for summary judgment and in ruling that defendant is a public school and, as such, a governmental entity subject to suit only as permitted by an exception to the Tort Claims Act's general rule of immunity. *Kreutzer v. Aldo Leopold High School*, 2018-NMCA-005.

Police owe no duty to unforeseeable plaintiffs. — As a matter of law, the plaintiffs, children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and, therefore, the defendant officers owed no duty to them. *Lucero v. Salazar*, 1994-NMCA-066, 117 N.M. 803, 877 P.2d 1106, cert. denied, 117 N.M. 802, 877 P.2d 1105.

No waiver of immunity for conducting physical agility test prior to employment. — There is no waiver of immunity which can impose liability on a school board or school officers when the plaintiff's decedent, while interviewing for the job of security officer and attempting to complete a physical agility test, suffered a heart attack and subsequently died. The conduction of the physical agility test was an administrative function and, additionally, simple negligence in the performance of a law enforcement officer's duty does not amount to commission of a tort. *Tafoya v. Bobroff*, 865 F. Supp. 742 (D.N.M. 1994), *aff'd*, 74 F.3d 1250 (10th Cir. 1996).

Liability where ordinance void. — An officer who makes an arrest for the violation of an ordinance committed in his presence, which by law he is required to make, should not be subjected to liability if thereafter it should be judicially determined that the ordinance was void and in fact no offense had been committed. *Miller v. Stinnett*, 257 F.2d 910 (10th Cir. 1958).

Liability for placement of signals and signs. — Because the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. *Blackburn v. State*, 1982-NMCA-073, 98 N.M. 34, 644 P.2d 548.

No liability for assault of one citizen by another. — A city is not liable for failure to provide adequate policing to protect one citizen from being assaulted by another citizen. A municipality will not be held liable for failure to carry out either a statutory function or a governmental function. *Trujillo v. City of Albuquerque*, 1979-NMCA-127, 93 N.M. 564, 603 P.2d 303, cert. denied, 94 N.M. 629, 614 P.2d 546.

Government liability for individual assault — Liability for failure to protect one citizen from being assaulted by another citizen would exist only if there had been a specific promise of protection by the police to the victim or if the police officer had affirmatively caused the damage of which the plaintiff was complaining. *Trujillo v. City of Albuquerque*, 1979-NMCA-127, 93 N.M. 564, 603 P.2d 303, cert. denied, 94 N.M. 629, 614 P.2d 546.

Intentional interference with contract. — Under the Tort Claims Act, a governmental entity may not be held liable for damages resulting from the tort of intentional interference with contract. *El Dorado Utils., Inc. v. Eldorado Area Water and Sanitation Dist.*, 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305.

V. DEFENSE AND INDEMNITY.

A tribal police officer, also commissioned as a county deputy sheriff and acting under his state authority as a deputy sheriff, is a "public employee" under the New Mexico Tort Claims Act and is entitled to its benefits. — A tribal officer, who is also commissioned as a county deputy sheriff, is a "public employee" under the New Mexico Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] when the tribal officer is acting in an official capacity and on behalf or in service of the county, and is therefore entitled to the benefits of the New Mexico Tort Claims Act, including a legal defense and indemnification. *Loya v. Gutierrez*, 2015-NMSC-017, *rev'g*2014-NMCA-028, 319 P.3d 656.

Where an on-duty, full time pueblo tribal law enforcement officer, who was also commissioned as a Santa Fe county deputy sheriff, stopped plaintiff's vehicle on a state-maintained highway within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving, the tribal officer was acting under his state authority as a deputy sheriff, not under tribal authority, when he charged, detained, and prosecuted plaintiff under state law; the tribal officer was therefore a "public employee" under the New Mexico Tort Claims Act because he was a person acting on behalf or in service of a governmental entity, in an official capacity, whether with or without compensation. As a "public employee" under the New Mexico Tort Claims Act, the tribal officer was entitled to the benefits of the New Mexico Tort Claims Act, including a legal defense and indemnification. *Loya v. Gutierrez*, 2015-NMSC-017, *rev'g* 2014-NMCA-028, 319 P.3d 656.

A governmental entity must provide a defense when liability is sought against its public employees for violation of federal constitutional rights. — This section requires the governmental entity to provide a defense equally for claims that are torts for which sovereign immunity has been waived and for claims that are not torts, such as federal civil rights claims, for which sovereign immunity has not been waived under the New Mexico Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Loya v. Gutierrez*, 2015-NMSC-017, *rev'g* 2014-NMCA-028, 319 P.3d 656.

Where an on-duty, full time pueblo tribal law enforcement officer, who was also commissioned as a Santa Fe county deputy sheriff, stopped plaintiff's vehicle on a state-maintained highway within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving, the tribal officer was acting under his state authority as a deputy sheriff, not under tribal authority, when he charged, detained, and prosecuted plaintiff under state law; the tribal officer was therefore a "public employee" under the New Mexico Tort Claims Act because he was a person acting on behalf or in service of a governmental entity, in an official capacity, whether with or without compensation. As a "public employee" under the New Mexico Tort Claims Act, the tribal officer was entitled to the benefits of the New Mexico Tort Claims Act, including a legal defense and indemnification against claims of federal constitutional rights violations. *Loya v. Gutierrez*, 2015-NMSC-017, *rev'g* 2014-NMCA-028, 319 P.3d 656.

Tribal police officer was not a "public employee". — Where an on-duty, full-time pueblo tribal law enforcement officer, acting in the officer's capacity as a commissioned deputy sheriff for the county stopped plaintiff's vehicle on a state-maintained road within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving; the officer was dressed in a full tribal police uniform, displaying a tribal badge of office, and driving a tribal police vehicle; in addition to acting under tribal law, the officer was on duty as a duly commissioned deputy sheriff, which gave the officer authority to arrest, charge, and jail non-Indians for violations of New Mexico state laws; the officer took plaintiff to the tribal police department for processing and later transported plaintiff to the county jail; the officer was not a salaried officer employed by the county; the pueblo was a sovereign Indian tribe; plaintiff sued the officer for violation of plaintiff's constitutional rights, the officer was not a "law enforcement officer" or a "public employee" of a "governmental entity" as defined in 40-4-3 NMSA 1978 and the county did not have a duty under 40-4-4 NMSA 1978 to defend or indemnify the officer for tortious acts committed while exercising the officer's authority as a commissioned deputy sheriff. *Loya v. Gutierrez*, 2014-NMCA-028, cert. denied, 2014-NMCERT-002.

Attorney fees incurred by an employee in a mandamus action to compel the employee's governmental employer to appoint independent defense counsel to defend the employee are not recoverable by the employee under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Paz v. Tijerina*, 2007-NMCA-109, 142 N.M. 391, 165 P.3d 1167.

Defense for mandamus actions. — Subsection B, requiring that the government provide a defense for employees subject to a claim for liability, does not include providing a defense for mandamus actions. *Board of Cnty. Comm'rs v. Risk MgMt. Div.*, 1995-NMSC-046, 120 N.M. 178, 899 P.2d 1132.

The Tort Claims Act does not waive immunity from liability for invasions of privacy. 1987 Op. Att'y Gen. No. 87-63.

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For note, "Torts - Government Immunity Under the New Mexico Tort Claims Act," see 11 N.M.L. Rev. 475 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Constitutional Law: Qualified Immunity and 'Factual Correspondence' in New Mexico: The Tension Between Formalism and Legal Realism," see 32 N.M.L. Rev. 439 (2002).

For note, "The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence: Correctional Services Corp. v. Malesko," see 33 N.M.L. Rev. 401 (2003).

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For article, "What Does the Natural Rights Clause Mean to New Mexico?", see 35 N.M. L. Rev. 375 (2009).

For article, "Reticent Revolution and Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M. L. Rev. 173 (1995).

For note, "Torts – Sovereign Immunity: Caillouette v. Hercules," see 23 N.M. L. Rev. 423 (1993).

For note, "Tort Law – New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm from Dangerous Work, but Bestows Immunity on a Government Employer," see 25 N.M. L. Rev. 173 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 4, 130, 184 to 205; 63 Am. Jur. 2d Public Officers and Employees §§ 362, 363, 373.

Municipal immunity from liability for torts, 60 A.L.R.2d 1198.

Right of contractor with federal, state or local public body to latter's immunity from tort liability, 9 A.L.R.3d 382.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning, 33 A.L.R.3d 703.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 A.L.R.4th 722.

State's liability to one injured by improperly licensed driver, 41 A.L.R.4th 111.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit, 43 A.L.R.4th 19.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Official immunity of state national guard members, 52 A.L.R.4th 1095.

Liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher, 60 A.L.R.4th 260.

Tort liability of public authority for failure to remove apparently abused or neglected children from parents' custody, 60 A.L.R.4th 942.

Liability of operator of ambulance service for personal injuries to person being transported, 68 A.L.R.4th 14.

Municipal liability for negligent fire inspection and subsequent enforcement, 69 A.L.R.4th 739.

Immunity of police or other law enforcement officer from liability in defamation action, 100 A.L.R.5th 341.

Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 USCS § 1983, 63 A.L.R. Fed. 744.

Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

81A C.J.S. States § 196 to 202.

41-4-5. Liability; operation or maintenance of motor vehicles, aircraft and watercraft.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.

ANNOTATIONS

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] on plaintiff's claim that the van driver negligently operated the van. *Lessen v. City of Albuquerque*, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Immunity not waived where negligence did not result in enumerated tort or where law enforcement officer did not breach a statutory duty. — Where plaintiff was traveling on a highway in Bloomfield, New Mexico when her vehicle struck an intoxicated pedestrian, and where plaintiff brought suit against defendants alleging negligence based on the fact that a San Juan County deputy left the pedestrian near the highway after taking the pedestrian into custody due to the pedestrian's intoxication, the district court did not err in dismissing plaintiff's tort claim based on its determination that defendant's immunity was not waived because the negligence of the officer did not result in one of the enumerated torts listed in this section, and the deputy's conduct did not breach a statutory duty owed to plaintiff. *Milliron v. County of San Juan*, 2016-NMCA-096.

"Maintenance of motor vehicles" construed. — The "maintenance of motor vehicles" connotes the act of keeping them safe for public use. Certainly, burning of automobiles is inconsistent with this concept. *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292.

In a wrongful death suit, the actions of a state police emergency response officer, in supervising the removal of a privately owned trailer from a highway in a condition that eventually caused the death of plaintiff's decedent, were not within the meaning of "maintenance" or "operation" as those terms are used in this section and, accordingly, immunity was not waived. *Caillouette v. Hercules, Inc.*, 1992-NMCA-008, 113 N.M. 492, 827 P.2d 1306, cert. denied, 113 N.M. 352, 826 P.2d 573.

Operation of school bus. — Neither the adoption and enforcement of regulations to govern the design and operation of school buses, nor the design, planning and enforcement of safety rules for school bus transportation, fall within the meaning of "operation" of a motor vehicle, for purposes of this section. *Chee Owens v. Leavitts Freight Serv., Inc.*, 1987-NMCA-037, 106 N.M. 512, 745 P.2d 1165, cert. denied *sub nom. Chee Owens v. Loshbough*, 107 N.M. 106, 753 P.2d 352 (1988).

The fact that a school district may be immune from liability for alleged improper design, planning and enforcement of school bus transportation procedures does not mean it is immune if one of its drivers negligently operates a bus. *Chee Owens v. Leavitts Freight Serv., Inc.*, 1987-NMCA-037, 106 N.M. 512, 745 P.2d 1165, cert. denied *sub nom. Chee Owens v. Loshbough*, 107 N.M. 106, 753 P.2d 352 (1988).

A bus driver, who pulled off the pavement of a highway, across which a child, while attempting to board the bus, ran before being struck by a truck, may have been negligent. Causal connection between the accident and the defendant's action was not resolved and summary judgment in favor of the defendant was improper. *Chee Owens v. Leavitts Freight Serv., Inc.*, 1987-NMCA-037, 106 N.M. 512, 745 P.2d 1165, cert. denied *sub nom. Chee Owens v. Loshbough*, 107 N.M. 106, 753 P.2d 352 (1988).

Operation of school bus. — Operation of a school bus under this section includes making decisions, while driving the bus, about whether to stop the vehicle on the pavement, with

lights flashing, or off the road. Therefore, when a bus driver decided, while driving the bus each day, not to pick up a child on the child's side of a state road, but to pick the child up on the opposite side on the driver's return trip, that decision constituted operation of the bus; it occurred while the driver was in control of the bus, and it affected the manner in which the driver performed his driving duties. *Gallegos v. Sch. Dist. of W. Las Vegas*, 1993-NMCA-086, 115 N.M. 779, 858 P.2d 867, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Applicability to law enforcement officers. — This section, which waives immunity for negligent operation or maintenance of a motor vehicle, watercraft, or aircraft, applies to all public employees, including law enforcement officers. Section 41-4-12 NMSA 1978, which applies only to law enforcement officers, waives immunity only for the acts enumerated in that provision, such as assault and battery. *Wilson v. Grant Cnty.*, 1994-NMCA-001, 117 N.M. 105, 869 P.2d 293.

Immunity not waived for third-party negligence. — This section does not provide for a waiver of immunity for acts of public employees that cause or allow third parties to negligently operate motor vehicle resulting in injuries. *Blea v. City of Espanola*, 1994-NMCA-008, 117 N.M. 217, 870 P.2d 755, cert. denied, 117 N.M. 328, 871 P.2d 984.

Law reviews. — For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Liability of Law Enforcement Officers While in the Line of Duty: *Wilson v. Grant County,*" see 25 N.M.L. Rev. 329 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 236, 577.

Responsibility of public officer for negligence of subordinate in operation of vehicle, 3 A.L.R. 149.

Criminal or penal responsibility of public officer or employee for violating speed regulation, 9 A.L.R. 367.

Personal liability of public official for personal injury on highway, 40 A.L.R. 39, 57 A.L.R. 1037.

"Motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicle, 77 A.L.R.2d 945.

Nonuse of automobile seatbelts as evidence of comparative negligence, 95 A.L.R.3d 239.

Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R.3d 1280.

Municipal or state liability for injuries resulting from police roadblocks or commandeering of private vehicles, 19 A.L.R.4th 937.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students, 23 A.L.R.5th 1.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim, 69 A.L.R.5th 625.

Admiralty jurisdiction: maritime nature of tort - modern cases, 80 A.L.R. Fed. 105.

60 C.J.S. Motor Vehicles § 14; 60A C.J.S. Motor Vehicles § 428.

41-4-6. Liability; buildings, public parks, machinery, equipment and furnishings.

A. The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings.

B. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

C. All irrigation and conservancy districts and their public employees acting lawfully and within the scope of their duties that authorize any part of their property to be used as part of trails within a state park, the state trails system or a trail established and managed by a local public body are excluded from the waiver of immunity under Subsection A of this section for damages arising out of the operation or maintenance of such trails if the irrigation or conservancy district has entered into a written agreement with the state agency or local public body operating or maintaining the trail and that state agency or local public body has agreed to assume the operation and maintenance of that portion of the district's property used for the trail; the state agency or local public body operating or maintaining the trail shall be subject to liability as provided in the Tort Claims Act.

ANNOTATIONS

I. GENERAL CONSIDERATION.

No risk to general public. — Defendants' mishandling of a firearm and handcuffs while apprehending plaintiff, did not put the general public at risk, and therefore, immunity was not waived under this section. *Oliveros v. Mitchell*, 449 F.3d 1091 (10th Cir. 2006).

Negligent performance of administrative function. — Defendant misclassified plaintiff for work in the prison kitchen contrary to his medically ordered restriction prohibiting heavy lifting. Section 41-4-6 NMSA 1978 does not waive immunity when public employees negligently perform such administrative functions. *Lymon v. Aramark*, 728 F.Supp.2d 1222 (D.N.M. 2010).

Administrative decision. — Denial of prisoner's use of the formal grievance process was a discrete administrative decision and does not waive immunity under 41-4-6 NMSA 1978. *Lymon v. Aramark*, 728 F.Supp.2d 1222 (D.N.M. 2010).

Purpose of section. — This section contemplates waiver of immunity where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government. *Rivera v. King*, 1988-NMCA-093, 108 N.M. 5, 765 P.2d 1187, cert. denied, 107 N.M. 785, 765 P.2d 758.

Strict liability instruction prohibited. — UJI 13-506, pertaining to liability for dog bites, is a strict liability instruction, thus, it cannot be given to the jury in an action for relief under this section because it does not embody a negligence theory of recovery. *Smith v. Village of Ruidoso*, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Claim alleging unconstitutional activities. — In a suit under this article, the individual defendants (state officials) were not stripped of immunity by their alleged unauthorized, unconstitutional activities. Any claim that an individual was not acting within the scope of duties is not a claim under this article. *Gallegos v. State*, 1987-NMCA-150, 107 N.M. 349, 758 P.2d 299, cert. quashed, 107 N.M. 314, 757 P.2d 370, *overruled on other grounds by Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

State prisoner protected. — A prisoner injured in a manner contemplated by the operation of this section is as much a member of the general public as anyone else. *Garner v. Department of Corrs.*, 1995-NMCA-103, 120 N.M. 547, 903 P.2d 858.

Student's negligent supervision suit disallowed. — This section does not provide a remedy for an injured student to sue a school board on the theory of negligent supervision. *Pemberton v. Cordova*, 1987-NMCA-020, 105 N.M. 476, 734 P.2d 254, *overruled on other grounds by Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

Negligent supervision of student lunch area. — Where plaintiff sued defendant for legal malpractice on the ground that defendant failed to file plaintiff's suit against a public high school and school district within the statute of limitations; defendant claimed that plaintiff would not have prevailed on the underlying claim because the claim would have been barred by sovereign immunity; plaintiff was badly beaten by a classmate in an area outside the school property on a street that the school had cordoned off so that students could patronize food vendors parked in the street; an assistant principal at the school stated that the area where the vendors parked was considered a hot zone for student violence; the area

was not monitored by security cameras; and the security guards and teachers assigned to monitor the area were not present at the time plaintiff was attacked, plaintiff established the existence of a genuine issue of material fact regarding the presence of a dangerous condition at the high school and summary judgment for defendant on the malpractice claim was inappropriate. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, *rev'g* 2013-NMCA-003, 294 P.3d 1245.

Where plaintiff was attacked during the lunch period at plaintiff's high school by fellow students, one of whom was a suspended student; the attack occurred on a street adjacent to the school that was roped off by the school for lunch vendors to provide food to the students; plaintiff presented evidence that a security guard or teacher usually patrolled the food vendor area, that no security guard or teacher was monitoring the area at the time of the attack, that school personnel knew that the vendor food area was a "hot zone" for potential trouble, and that the suspended student had entered the school campus for the purpose of attacking plaintiff; and plaintiff claimed that the school's negligent execution of its safety policies for patrolling the food vendor area during the lunch period and failure to keep a suspended student off campus resulted in plaintiff's injuries, the school did not waive immunity because plaintiff solely alleged negligent supervision and failed to provide sufficient evidence of a dangerous condition requiring supervision. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, 294 P.3d 1245, cert. granted, 2012-NMCERT-012, *rev'd*, 2013-NMSC-045.

Charter schools are public schools subject to the Tort Claims Act. — A charter school is a public school that operates as part of a political subdivision of the state and, as such, is a governmental entity within the meaning of the Tort Claims Act. *Kreutzer v. Aldo Leopold High School*, 2018-NMCA-005.

No waiver of immunity for negligent supervision. — Where plaintiff sued defendant charter school, asserting a negligence claim based on allegations that defendant owed a duty to plaintiff to use ordinary care to keep the premises of its school safe and breached that duty by failing to take reasonable precautions to keep the school safe, the district court did not err in granting defendant's motion for summary judgment, because there is no waiver of immunity under this section for negligent supervision. *Kreutzer v. Aldo Leopold High School*, 2018-NMCA-005.

Negligent supervision of children by town. — This section did not waive sovereign immunity for a town's failure to exercise ordinary care in the supervision of children who participated in its summer day camp program. *Espinoza v. Town of Taos*, 1995-NMSC-070, 120 N.M. 680, 905 P.2d 718.

Summary judgment in favor of state police was affirmed in the case of an automobile passenger's action for injuries sustained in a traffic accident following a rock concert, in the absence of any allegations giving rise to a duty on the part of the state police to exercise ordinary care for the passenger's safety. *Bober v. N.M. State Fair*, 1991-NMSC-031, 111 N.M. 644, 808 P.2d 614.

Loose dogs as unsafe condition. — Under the right circumstances, dogs roaming loose upon the common grounds of a government-operated residential complex could represent an unsafe condition. *Castillo v. County of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, 755 P.2d 48.

Dog-bite victim may pursue negligence claim. — A negligence claim is appropriate where the municipality as dog owner lacks knowledge of the dog's vicious propensities and ineffectively controls the animal in a situation where it would reasonably be expected that injury could occur. *Smith v. Village of Ruidoso*, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

II. BUILDINGS.

Duty to inspect not tantamount to operation or maintenance. — For premises liability under 41-4-6 NMSA 1978, the governmental entity must be shown to have both a legal interest and control of the property. The element of a legal interest is consistent in case law. Responsibility for inspection may have given the county some measure of control over the property. But the courts have never equated control alone with the specific duty of "operation or maintenance." *Cobos v. Dona Ana Cnty. Hous. Auth.*, 1995-NMCA-132, 121 N.M. 20, 908 P.2d 250.

Duty of care to baseball spectators. — An owner/occupant of a commercial baseball stadium owns a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086, *rev'g Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827.

The court declined to adopt the "baseball rule", which provides that in the exercise of reasonable care, the proprietor of a ballpark need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is greatest, and that such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, because comparative negligence principles allow the fact finder to take into account the risks that spectators voluntarily accept when they attend baseball games as well as the ability of stadium owners to guard against unreasonable risks that are not essential to the game itself. *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, 147 N.M. 62, 216 P.3d 827, *rev'd*, *Edward C. v. City of Albuquerque*, 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

Immunity not waived. — Where the decedent was experiencing the effect of withdrawal from heroin when the metropolitan court ordered his release; the decedent was initially released to be transported by van as required by jail policy, but he exited the van; the decedent re-entered the metropolitan jail; the decedent was released to the jail parking lot without signing a waiver of van transportation contrary to jail policy; the decedent

wandered off into the desert and died of hypothermia; and the medical director of the jail opined that at the time of his release, the decedent had no medical condition that required treatment, the city was not liable under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] on plaintiff's claim that the city negligently operated and maintained the jail. *Lessen v. City of Albuquerque*, 2008-NMCA-085, 144 N.M. 314, 187 P.3d 179, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Operation or maintenance of buildings. — The department of corrections was not a proper defendant in a wrongful death suit arising out of the escape of state prisoners, who killed a store owner during a robbery, since the injury alleged did not occur due to a physical defect in a building, as contemplated by this section. *Wittkowski v. State, Corr. Dep't*, 1985-NMCA-066, 103 N.M. 526, 710 P.2d 93, cert. quashed, 103 N.M. 446, 708 P.2d 1047, *overruled on other grounds by Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

The "maintenance of any building" includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees. *Castillo v. County of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, 755 P.2d 48.

Waiver of immunity under this section applies to maintenance of school grounds as well as to the school building itself. *Schleft v. Board of Educ.*, 1989-NMCA-087, 109 N.M. 271, 784 P.2d 1014, cert. denied, 109 N.M. 232, 784 P.2d 419.

While this section may appropriately be termed a "premises liability" statute, the liability envisioned by the statute is not limited to claims caused by injuries occurring on or off a certain "premises," as the words "machinery" and "equipment" reveal. Moreover, liability is predicated not only on "maintenance" of a piece of publicly owned property, such as a building, park, or item of machinery or equipment, but it also arises from the "operation" of any such property. *Bober v. N.M. State Fair*, 1991-NMSC-031, 111 N.M. 644, 808 P.2d 614.

This section applies to "any building," public or private, that public employees have a duty to operate and maintain with ordinary care. *Cobos v. Dona Ana Cnty. Hous. Auth.*, 1998-NMSC-049, 126 N.M. 418, 970 P.2d 1143.

Where victim's injury was caused by county's failure to correct a dangerous condition created when waste transfer facility was constructed, facility came within the waiver of liability in this section negligent operation and maintenance of county facility. *Romero v. Valencia Cnty.*, 2003-NMCA-019, 133 N.M. 214, 62 P.3d 305.

Where the child suffered from asthma; the child's parents informed the child's physical education teacher about the child's asthmatic condition; the physical education teacher agreed that the child could limit participation if the child felt that the physical exercise was triggering an attack; the child's parents noted the child's condition in the child's Individualizing Education Plan with the school; the child's parents gave consent so school personnel could immediately call medical personnel directly in the event of an attack; on

the day of the child's death, a substitute physical education teacher required exercise that was more strenuous than normal; the child began having difficulty breathing and became red in the face; when the child asked the substitute teacher for permission to stop, the teacher refused; after the physical education class, the child collapsed; it took the school fifteen minutes to call 911; school personnel tried to give the child an inhaler treatment but did not administer CPR even though the child was not breathing well and was turning blue, the school district's failure to implement the child's Individualizing Education Plan and the specific assurances given to the child's parents about the care the school was to provide in light of the child's special needs created a dangerous condition in the operation of the school for all special-needs children at the school and the school district's failure to respond adequately to the emergency created a dangerous condition for every student at the school. *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, 140 N.M. 205, 141 P.3d 1259, *rev'g* 2005-NMCA-085, 137 N.M. 779, 115 P.3d 795.

Unsafe, dangerous or defective property conditions. — The waiver of immunity under this section may arise from an unsafe, dangerous, or defective condition on property owned and operated by the government. *Castillo v. County of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, 755 P.2d 48.

Negligent design claims. — This section does not waive immunity for a plaintiff's claims of negligent design. *Rivera v. King*, 1988-NMCA-093, 108 N.M. 5, 765 P.2d 1187, cert. denied, 107 N.M. 785, 765 P.2d 758; *Callaway v. N.M. Dep't of Corrs.*, 1994-NMCA-049, 117 N.M. 637, 875 P.2d 393, cert. denied, 118 N.M. 90, 879 P.2d 91.

In an action against a county race track by a jockey who was injured when his horse veered, causing him to fall and strike a post and track rail, the trial court correctly ruled that failure to correct an alleged hazardous condition caused by an exposed gooseneck rail did not constitute a design defect, but rather the case involved whether the rail was safe and related to the operation and maintenance of the track. *Yardman v. San Juan Downs, Inc.*, 1995-NMCA-106, 120 N.M. 751, 906 P.2d 742, cert. denied, 120 N.M. 636, 904 P.2d 1061.

There is no exception to premises liability for defects originating in design. *Williams v. Central Consol. Sch. Dist.*, 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

A school district could be held liable for negligence in failing to correct a dangerous condition in a building regardless of whether the condition originated in a defect in design. *Williams v. Central Consol. Sch. Dist.*, 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978.

Life guards. — Failure of a city to provide adequate life guard protection, which resulted in plaintiff's injury, came within the ambit of negligent "operation" of a municipal swimming pool, and, therefore, there was a waiver of sovereign immunity. *Leithead v. City of Santa Fe*, 1997-NMCA-041, 123 N.M. 353, 940 P.2d 459.

III. PUBLIC PARKS.

Condition creating risk to general public. — The policy of the state fair officials to require security officers to blindly follow instructions of parking attendants to eject persons from fairgrounds property created a potentially dangerous condition and, in a case when the negligence of parking attendants combined with that policy to cause injury to the plaintiff, immunity of the state fair was waived. *Baca v. State*, 1996-NMCA-021, 121 N.M. 395, 911 P.2d 1199.

Original purpose of recreational park not controlling. — Sovereign immunity was waived since the plaintiff was injured by diving off a raft in a lake at a park even though the original purpose of the lake may have been for storage and diversion of water. Under the lease between the stream commission (owner) and the recreation division (lessee), the park was to be used "for recreational purposes and for no other purpose," the park was not used for diversion or storage of water at the time of the accident, but the park was in fact used only for swimming, diving, boating, fishing, and other recreational activities. *Bell v. N.M. Interstate Stream Comm'n*, 1993-NMCA-164, 117 N.M. 71, 868 P.2d 1296, cert. denied, 117 N.M. 121, 869 P.2d 820 (1994).

IV. MACHINERY.

Operation of machinery and equipment. — This section by its terms operates as a waiver of immunity for claims arising from the operation of machinery and equipment. *Garner v. Department of Corrs.*, 1995-NMCA-103, 120 N.M. 547, 903 P.2d 858.

This section applied to a prisoner's claim for injures sustained in the prison industries paint shop, allegedly due to failure to provide the prisoner with safety glasses or training in the use of an electric wire brush, because the claim did not relate to administrative functions of the corrections system, such as supervision and classification of prisoners, but related to the operation or maintenance of machinery or equipment. *Garner v. Department of Corrs.*, 1995-NMCA-103, 120 N.M. 547, 903 P.2d 858.

"Maintenance" or "operation" of a vehicle. — In a wrongful death suit, the actions of a state police emergency response officer, in supervising the removal of a privately owned trailer from a highway in a condition that eventually caused the death of plaintiff's decedent, were not within the meaning of "maintenance" or "operation" as those terms are used in this section and, accordingly, immunity was not waived. *Caillouette v. Hercules, Inc.*, 1992-NMCA-008, 113 N.M. 492, 827 P.2d 1306, cert. denied, 113 N.M. 352, 826 P.2d 573.

V. EQUIPMENT AND FURNISHINGS.

Negligent maintenance of equipment may include failure to act. *Rickerson v. State*, 1980-NMCA-050, 94 N.M. 473, 612 P.2d 703, cert. denied, 94 N.M. 675, 615 P.2d 992.

Placement of signals and signs. — Where the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. *Blackburn v. State*, 1982-NMCA-073, 98 N.M. 34, 644 P.2d 548.

Fire trucks and all pertinent equipment could be included in the phrase "machinery, equipment and furnishings." *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292.

VI. IRRIGATION AND CONSERVANCY FACILITIES.

Operation of lake used for water diversion or storage. — A father could not maintain an action against state agencies for injuries caused to son while tubing on a man-made lake which was used for the diversion or storage of water. The statutory immunity found in the first sentence of this section must give way to the more specific statutory provisions in the second sentence which reestablishes immunity in "works used for diversion or storage of water". *Allocca v. N.M. Dep't of Energy Minerals & Natural Res.*, 1994-NMCA-117, 118 N.M. 668, 884 P.2d 824, cert. denied, 118 N.M. 731, 885 P.2d 1325.

Operation of lake used for both recreation and diversion and storage purposes. — Since water diversion and storage were among the current uses of a lake which was also used for recreational purposes, government entities and their employees responsible for the existence and maintenance of the park in which the lake was located were entitled to immunity. *Bell v. N.M. Interstate Stream Comm'n*, 1996-NMCA-010, 121 N.M. 328, 911 P.2d 222.

The Parks and Recreation Division was entitled to governmental immunity under this section; the Elephant Butte Reservoir is a "works used for diversion or storage of water" for the purposes of this section, although the state operates the area as a recreational park. *Chaleunphonh v. Parks & Recreation Div.*, 1996-NMCA-066, 121 N.M. 801, 918 P.2d 717, cert. denied, 121 N.M. 783, 918 P.2d 369.

Liability arising from the maintenance of water diversion channels. — The natural interpretation of the second sentence of this section is that it preserves immunity with respect to damages arising out of the operation and maintenance of works used for diversion or storage of water in public parks and on the grounds of public buildings. The immunity preserved by this sentence does not, however, extend to liability arising from the maintenance of diversion channels on public property in general. *Espander v. City of Albuquerque*, 1993-NMCA-031, 115 N.M. 241, 849 P.2d 384, *overruled on other grounds by Bybee v. City of Albuquerque*, 1995-NMCA-061, 120 N.M. 17, 896 P.2d 1164.

The city was immune from liability for injuries caused when the plaintiff stepped in a flood control diversion channel running through a city park. *Bybee v. City of*

Albuquerque, 1995-NMCA-061, 120 N.M. 17, 896 P.2d 1164 (*overruling City of Albuquerque v. Redding*, 1980-NMSC-011, 93 N.M. 757, 605 P.2d 1156 and *Espander v. City of Albuquerque*, 1993-NMCA-031, 115 N.M. 241, 849 P.2d 384).

Operation of canals and ditches by irrigation district immune. — This section does not waive immunity for the operation of canals and ditches by an irrigation district. *Tompkins v. Carlsbad Irrigation Dist.*, 1981-NMCA-072, 96 N.M. 368, 630 P.2d 767.

Plaintiffs' claim against a state irrigation district for injuries sustained by their son while playing near an irrigation ditch on state land was barred by the Tort Claims Act because an injury in an irrigation ditch falls within the exception to the state's waiver of immunity set forth in this section for injuries that arise out of "the operation or maintenance of works used for diversion or storage of water." *Noriega v. Stahmann Farms, Inc.*, 1992-NMCA-010, 113 N.M. 441, 827 P.2d 156, cert. denied, 113 N.M. 449, 827 P.2d 837.

Unsafe, dangerous or defective property conditions. — This section probably waives immunity where, due to public employee negligence, an injury arises from an unsafe, dangerous or defective condition on governmental property. 1990 Op. Att'y Gen. No. 90-13.

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Torts: Smith v. Ruidoso: Tightening the Leash on New Mexico's Dogs," see 32 N.M.L. Rev. 335 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 125, 126, 274 et seq.; 59 Am. Jur. 2d Parks, Squares, and Playgrounds §§ 43 to 56.

Governmental liability from operation of zoo, 92 A.L.R.3d 832.

Liability of university, college, or other school for failure to protect student from crime, 1 A.L.R.4th 1099.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

State's liability for personal injuries from criminal attack in state park, 59 A.L.R.4th 1236.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

67 C.J.S. Officers and Public Employees § 208.

41-4-8. Liability; public utilities.

A. The immunity granted pursuant to Subsection A of Section 4 [41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: gas; electricity; water; solid or liquid waste collection or disposal; heating; and ground transportation.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage:

(1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or

(2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

ANNOTATIONS

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year (now two) limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. *Cozart v. Town of Bernalillo*, 1983-NMCA-053, 99 N.M. 737, 663 P.2d 713 (decided prior to 2011 amendment).

"Operation" of public utilities and services. — The inspection by a city of a private sewer clean-out at the time of its initial construction is not part of the "operation" of a liquid waste collection or disposal utility for the purposes of Subsection A and is not activity for which sovereign immunity is waived. *Adams v. Japanese Car Care*, 1987-NMCA-113, 106 N.M. 376, 743 P.2d 635.

Fire department is not a public utility and the legislature intended the application of this section only to public utilities. *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, 643 P.2d 292.

Runoff water. — Paragraph B(2) of this section did not preserve a city's immunity for liability arising from property damage and personal injury caused by flooding onto

resident's property by water that came from a city arroyo. This paragraph does not include runoff water. *Espander v. City of Albuquerque*, 1993-NMCA-031, 115 N.M. 241, 849 P.2d 384, *overruled on other grounds byBybee v. City of Albuquerque*, 1995-NMCA-061, 120 N.M. 17, 896 P.2d 1164.

Storm runoff water was not "liquid waste" and, therefore, a flood control diversion channel carrying the runoff was not a public utility for which immunity is waived under this section. *Bybee v. City of Albuquerque*, 1995-NMCA-061, 120 N.M. 17, 896 P.2d 1164 (*overruling City of Albuquerque v. Redding*, 1980-NMSC-011, 93 N.M. 757,605 P.2d 1156 and *Espander v. City of Albuquerque*, 1993-NMCA-031, 115 N.M. 241, 849 P.2d 384).

No exemption from liability for negligent maintenance of service facility. — If the city negligently maintains an adequate service facility provided by it, that negligence has no statutory exemption from liability. *Holiday Mgmt. Co. v. City of Santa Fe*, 1980-NMSC-048, 94 N.M. 368, 610 P.2d 1197.

Liability for maintenance of bicycle path. — City is not immune from suit brought for personal injuries sustained where front wheel of bicycle slipped through drain grate located in road designated as bicycle path. *City of Albuquerque v. Redding*, 1980-NMSC-011, 93 N.M. 757, 605 P.2d 1156, *overruled on other grounds by Bybee v. City of Albuquerque*, 1995-NMCA-061, 120 N.M. 17, 896 P.2d 1164.

Negligent maintenance of gas service. — If a city negligently maintains a gas service provided by it beyond the statutorily prescribed five-mile limit, that negligence is actionable and there exists no sovereign immunity to shield it from liability under the Tort Claims Act [41-4-1 through 41-4-27NMSA 1978]. *Cole v. City of Las Cruces*, 1983-NMSC-007, 99 N.M. 302, 657 P.2d 629.

Law reviews. — For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of gas or electric light or power company for injury to fireman, policeman or other public employee seeking to prevent damage to person or property of others, 61 A.L.R. 1028.

Liability for overflow of water confined or diverted for public water purposes, 91 A.L.R.3d 1065.

Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line, 33 A.L.R.4th 809.

41-4-11. Liability; highways and streets.

A. The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

B. The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:

(1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;

(2) the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

(3) a deviation from standard geometric design practices for any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area allowed on a case-by-case basis for appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical reasons; provided that the deviation:

(a) is required by extraordinary circumstances;

(b) has been approved by the governing authority; and

(c) is reasonable and necessary as determined by the application of sound engineering principles taking into consideration the appropriate cultural, ecological, economic, environmental, right-of-way through Indian lands, historical or technical circumstances.

C. All irrigation and conservancy districts that authorize a portion of their property to be used as a road available for use by the general public, and their employees acting lawfully and within the scope of their duties, are excluded from the waiver of immunity under Subsection A of this section in regard to that portion of property; provided that the:

(1) irrigation or conservancy district has entered into a written agreement with the state agency or governmental entity operating and maintaining that road; and

(2) state agency or governmental entity has agreed to assume the operation and maintenance of that portion of the district's property used for that road.

D. The state agency or governmental entity operating and maintaining the road available for use by the general public pursuant to Subsection C of this section shall be subject to liability as provided in the Tort Claims Act.

ANNOTATIONS

Slip and fall instruction. — Where plaintiff tripped and fell over a city water meter in an alley, the court erred in refusing to give the basic slip and fall instruction, UJI 1318 NMRA, together with UJI 13-1317 NMRA, which states the general duty of a city to maintain its alleys in a safe condition, because the slip and fall instruction includes the elements that a city has a duty to maintain alleys in a safe condition whether or not a dangerous condition is obvious and whether or not the city has notice of any condition that it would have discovered upon reasonable inspection. *Benavidez v. City of Gallup*, 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853.

Purpose of section. — This section must be construed to effectuate its remedial purpose of ensuring that highways are made safe and kept safe for the traveling public. *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Traditional concepts of negligence. — Liability under this act is premised on traditional concepts of negligence. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Requirements of negligence action. — A negligence action under this act requires that there be a duty owed from the defendant to the plaintiff, that based on a standard of reasonable care under the circumstances, the defendant breached that duty, and that the breach was a cause in fact and proximate cause of the plaintiff's damages. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Duty of ordinary care. — The state has a duty to exercise ordinary care in the maintenance of its highways, but foreseeability is not a factor to consider when determining the existence of a duty and is relevant only to determining whether there is a breach of duty. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Questions of fact for a jury. — Whether a defendant breached the duty of ordinary care and whether an act or omission may be deemed a proximate cause of an injury are questions of fact for a jury to decide. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

Wrongful death action. — In a wrongful death action, where the state department of transportation had a duty to maintain roadways in a safe condition for the benefit of the public, including reasonable inspections of roadways in order to identify and remove dangerous debris, and where department failed to exercise ordinary care in its duty, there were questions of fact as to whether the department had constructive notice of the dangerous debris, whether the department breached a duty to decedent, and whether the department's failure to act was the proximate cause of the accident, making summary judgment improper. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, cert. denied, 2014-NMCERT-010.

The legislature did not intend design immunity to continue in perpetuity. *Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, 296 P.3d 468, *rev'g* 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Remediation measures are maintenance. — Maintenance is not limited to upkeep and repair. The duty to maintain a roadway subsumes within it a duty to remediate a known, dangerous condition, regardless of whether the source of that danger can be traced back to a design feature. It requires a reasonable response to the known dangerous condition on a roadway. When the reasonableness of that response pertains to traffic controls, it is not measured just by size and weight, permanence or mobility, whether the defect is a structural element or is more transitory in nature. *Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, 296 P.3d 468, *rev'g* 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Where a state road was designed partially with and partially without center lane barriers to prevent cross-over collisions; while passing another car, the driver of a car in the eastbound lane lost control of the car, skidded, and collided head-on with the decedents' car in the west bound lane; barriers were not installed at the site of the cross-over collision; and plaintiffs offered evidence of other cross-median, fatal collisions that had occurred within the two mile stretch of road that included the site of the collision and citizen complaints regarding the lack of a center barrier, defendant's decision not to install post-construction barriers at the site of the collision, after being alerted of a potentially dangerous condition at the general location of the collision, was a matter of maintenance, not of design. *Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, 296 P.3d 468, *rev'g* 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Relevant evidence of dangerous condition. — Depending on the particular characteristics of the road, evidence of other collisions occurring in the general area of a particular collision or in other areas with similar characteristics, may be relevant to whether the department of transportation was on notice of a dangerous condition. *Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, 296 P.3d 468, *rev'g* 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Where a state road was designed partially with and partially without center lane barriers to prevent cross-over collisions; while passing another car, the driver of a car in the east bound lane lost control of the car, skidded, and collided head-on with the decedents' car in the west bound lane; barriers were not installed at the site of the cross-over collision; and plaintiffs offered evidence of other cross-median, fatal collisions that had occurred within the two mile stretch of road that include the site of the collision and citizen complaints regarding the lack of a center barrier to show that defendant negligently failed to remedy a dangerous condition when it chose not to install cross-over barriers after it had been put on notice of a dangerous condition, the district court erred in limiting the evidence to the site of the collision. *Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, 296 P.3d 468, *rev'g* 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483.

Purpose of waiver of sovereign immunity in maintenance of highways is to protect the public. *Fireman's Fund Ins. Co. v. Tucker*, 1980-NMCA-082, 95 N.M. 56, 618 P.2d 894.

"Maintenance" as used in this section means upkeep and repair. *Cardoza v. Town of Silver City*, 1981-NMCA-061, 96 N.M. 130, 628 P.2d 1126, cert. denied, 96 N.M. 116, 628 P.2d 686 ; *Smith v. Village of Corrales*, 1985-NMCA-121, 103 N.M. 734, 713 P.2d 4, cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

The 1991 legislative amendment specifically repudiated the decision of the New Mexico Supreme Court in *Miller v. N.M. Dep't of Transp.*, 1987-NMSC-081, 106 N.M. 253, 741 P.2d 1374, which construed "maintenance" such that the issuance of oversize vehicle permits for transport of a mobile home over a winding road on a busy holiday weekend fit within the statutory waiver of immunity under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978]. *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Subsection B grants immunity for road design issues. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Presence of condition on one side of road which might spill over to other side of road did not create a duty on the part of a state entity to alter the road and areas off the road so that the road becomes a barrier to those conditions *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, 136 N.M. 197, 96 P.3d 322.

Absence of guardrail is defect in design, not maintenance. *Moore v. State*, 1980-NMCA-170, 95 N.M. 300, 621 P.2d 517, cert. denied *sub nom. State v. City of Albuquerque*, 95 N.M. 426, 622 P.2d 1046 (1981).

Negligent maintenance of barrier not "plan" nor "design". — Negligent maintenance of a barrier, consisting of posts and a cable, across a service road is neither a "plan" nor "design" within the meaning of Subsection B. *O'Brien v. Middle Rio Grande Conservancy Dist.*, 1980-NMCA-075, 94 N.M. 562, 613 P.2d 432.

State liable for negligent fence maintenance. — The state highway department has always had a common law duty to exercise ordinary care to protect the general public from foreseeable harm on the highways of the state. It is for the factfinder to decide whether this duty includes either the erection or maintenance of fences along an urban freeway for the protection of pedestrians; but if the department is found to have breached it's duty by negligently failing to erect or maintain fences along the highway, it may be held liable because such negligence falls within the waiver of sovereign immunity. *Lerma ex rel. Lerma v. State Hwy. Dep't*, 1994-NMSC-069, 117 N.M. 782, 877 P.2d 1085.

Addition of wheelchair ramps not "maintenance". — The waiver of immunity for maintenance of streets and sidewalks does not create duty for city to add wheelchair ramps to sidewalks and intersections; instead, such addition is a reconstruction, immunity for which is expressly restored by Subsection B(2). *Villanueva v. City of Tucumcari*, 1998-NMCA-138, 125 N.M. 762, 965 P.2d 346.

Traffic controls constitute maintenance activities under the Tort Claims Act. *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Placement of signals and signs. — Where the plaintiff's allegations, in large part, concern the placement of signals and signs, the state of New Mexico does not enjoy immunity for such decisions, and whether signs or signals were necessary is a question for the jury. *Blackburn v. State*, 1982-NMCA-073, 98 N.M. 34, 644 P.2d 548.

The absence of traffic controls is a condition of a highway and is, therefore, the subject of maintenance, and the state is not immune from liability. *Grano v. Roadrunner Trucking, Inc.*, 1982-NMCA-080, 99 N.M. 227, 656 P.2d 890, cert. denied, 99 N.M. 358, 658 P.2d 433 (1983).

Placement of signals and signs. — The erection of permanent concrete barriers as part of a road is a matter of road design, not maintenance, and is outside the Tort Claims Act's waiver of immunity. *Martinez v. N.M. Dep't of Transp.*, 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483, cert. granted, 2011-NMCERT-008, 268 P.3d 514.

Placement of concrete barriers was not maintenance. — Where the driver of a vehicle was using the center turn lane to pass a vehicle, lost control, and collided with decedents' vehicle, killing the decedents; and the decedents' estates claimed that the department of transportation negligently failed to maintain the highway because the department failed to perform its duty to erect concrete barriers separating the driving lanes, the lack of permanent barriers in the center turn lane was an attribute of the design of the highway and the department was immune from suit for the alleged failure to install concrete barriers. *Martinez v. N.M. Dep't of Transp.*, 2011-NMCA-082, 150 N.M. 204, 258 P.3d 483, cert. granted, 2011-NMCERT-008, 268 P.3d 514.

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Identification and remediation of roadway hazards constitutes highway maintenance under this section. *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

Placement of school bus stop deemed "maintenance". — The placement of a school bus stop involves elements of traffic control, both pedestrian and vehicular, that are quite similar to the placement of traffic lights or other controls on a road. The placement of such controls, or the lack thereof, constitutes "maintenance" of a road under this section. *Gallegos v. School Dist. of W. Las Vegas*, 1993-NMCA-086, 115 N.M. 779, 858 P.2d 867, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Bus stop designation not part of road design. — The state transportation division of the state board of education was not immune from liability under Subsection A in connection with an accident at a school bus stop, since there was sufficient evidence to support a finding that designation of the bus stop by the division was not a part of the design of the road. *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, 123 N.M. 362, 940 P.2d 468, cert. denied, 123 N.M. 215, 937 P.2d 76.

Failure to enforce procedures not "maintenance". — The waiver of immunity contained in this section does not apply to tort claims against the director of the motor vehicles division for failure to implement or enforce procedures, as that is not covered by the definition of "maintenance." *Dunn v. State ex rel. Taxation & Revenue Dep't*, 1993-NMCA-059, 116 N.M. 1, 859 P.2d 469.

Gaps in fence along right-of-way. — The question of whether the department complied with its highway fence design necessarily involves questions of fact such as whether the department secured an agreement from the property owners to construct or maintain fences, or alternatively whether the department made a fact determination that livestock could not enter the highway. If the fact finder determines that the department failed to comply with the design of the highway as governed by 30-8-13 and 30-8-14 NMSA 1978, the lack of agreements or other protective measures would be considered maintenance, and the department would not be entitled to immunity under 41-4-11 NMSA 1978. Because these questions of fact remain to be resolved, summary judgment in favor of the department is precluded. *Madrid v. N.M. State Hwy. Dep't*, 1994-NMCA-006, 117 N.M. 171, 870 P.2d 133.

Traffic control during flood. — In wrongful death action, where county failed to control traffic on a county road to keep it from entering a crossing when water was high, an objective consistent with the notion of regular highway maintenance, the county was not immune from suit where passengers were washed downstream and drowned during a flood. *Rutherford v. Chaves Cnty.*, 2002-NMCA-059, 132 N.M. 289, 47 P.3d 448, *aff'd*, 2003-NMSC-010, 133 N.M. 756, 69 P.3d 1199.

No sovereign immunity for negligent highway maintenance. — Under this section, sovereign immunity does not apply to liability damages caused by negligent maintenance of highways; rather, the highway department has a common-law duty to exercise ordinary care to protect the public from foreseeable harm on the state's highways. *Ryan v. N.M. State Hwy. & Transp. Dep't*, 1998-NMCA-116, 125 N.M. 588, 964 P.2d 149, cert. denied, 126 N.M. 107, 967 P.2d 447.

Waiver of immunity extends to private service roads. — Waiver of immunity for negligence in the maintenance of a roadway is not limited to a public roadway, but includes a private service road. *O'Brien v. Middle Rio Grande Conservancy Dist.*, 1980-NMCA-075, 94 N.M. 562, 613 P.2d 432.

Waiver of immunity includes negligence in maintenance of highway fences. *Fireman's Fund Ins. Co. v. Tucker*, 1980-NMCA-082, 95 N.M. 56, 618 P.2d 894.

Waiver of immunity for maintenance of culvert. — This section waives immunity for the negligent maintenance of a culvert by an irrigation district. *Tompkins v. Carlsbad Irrigation Dist.*, 1981-NMCA-072, 96 N.M. 368, 630 P.2d 767.

Waiver not applicable. — Plaintiffs' claim against a state irrigation district for injuries sustained by their son while playing on state property did not fall within the waiver of immunity set forth in this section for the negligent maintenance of a roadway where plaintiffs' complaint did not even allege the existence of a road, much less that the road was owned by the irrigation district or that the road had any causal relationship with the accident. *Noriega v. Stahmann Farms, Inc.*, 1992-NMCA-010, 113 N.M. 441, 827 P.2d 156, cert. denied, 113 N.M. 449, 827 P.2d 837.

Notice of bridge fire not imputed. — Although deputy sheriff had received actual notice of the bridge fire prior to plaintiff's accident, the deputy had no official responsibility to receive or relay notice of the fire to the officials charged with the duty of maintenance of county highways or roads. Thus, actual notice to the deputy sheriff could not have been actual notice to the board of county commissioners of Valencia county. *Sanchez v. Board of Cnty. Comm'rs*, 1970-NMCA-058, 81 N.M. 644, 471 P.2d 678, cert. denied, 81 N.M. 668, 472 P.2d 382.

Expert testimony regarding dangerous road condition. — Trial court did not abuse its discretion in allowing expert testimony concerning allegedly dangerous road conditions in the case of a single car collision. In such a case, a twofold inquiry is called for: (1) what was the plan or design of the roadway; and (2) did the evidence concern itself solely with that plan or design. *Romero v. State*, 1991-NMSC-071, 112 N.M. 332, 815 P.2d 628.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Highways, Streets, and Bridges §§ 104 to 106, 111, 112, 119, 341 to 350, 552; 40 Am. Jur. 2d Highways, Streets and Bridges § 615; 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 232, 326 to 331.

Liability of municipality for injury to traveler in alley, 44 A.L.R. 814, 48 A.L.R. 434.
Snow removal operations as within doctrine of governmental immunity from tort liability, 92 A.L.R.2d 796.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land, 95 A.L.R.3d 778.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 A.L.R.3d 11.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from failure to repair pothole in surface of highway or street, 98 A.L.R.3d 101.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip, 98 A.L.R.3d 439.

Liability of governmental unit, private owner or occupant of land abutting highway for injuries or damages sustained when motorist strikes tree or stump on abutting land, 100 A.L.R.3d 510.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge, 2 A.L.R.4th 635.
Liability, in motor vehicle-related cases, of governmental entity for injury, death or property damage resulting from defect or obstruction in shoulder of street or highway, 19 A.L.R.4th 532.

Governmental tort liability as to highway median barriers, 58 A.L.R.4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects, 58 A.L.R.4th 1197.

Governmental liability for failure to post highway deer crossing warning signs, 59 A.L.R.4th 1217.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

Governmental tort liability for detour accidents, 1 A.L.R.5th 163.

Measure and elements of damages for injury to bridge, 31 A.L.R.5th 171.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 A.L.R.5th 49.

41-4-13. Exclusions from waiver of immunity; community ditches or acequias; Sanitary Projects Act associations.

All community ditches or acequias, and their public employees acting lawfully and within the scope of their duties, and all associations created pursuant to the Sanitary

Projects Act [Chapter 3, Article 29 NMSA 1978] are excluded from the waiver of immunity of liability under Sections 41-4-6 through 41-4-12 NMSA 1978.

41-4-14. Defenses.

A governmental entity and its public employees may assert any defense available under the law of New Mexico.

41-4-15. Statute of limitations.

A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

B. The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Fraudulent concealment. — The doctrine of fraudulent concealment applies to toll 41-4-15NMSA 1978. *Armijo v. Regents of Univ. of N.M.*, 1984-NMCA-118, 103 N.M. 183, 704 P.2d 437, *rev'd in part on other grounds*, 1985-NMSC-057, 103 N.M. 174, 704 P.2d 428.

Constitutionality. — The failure of this section to provide a tolling provision for persons under a legal disability with claims against governmental entities does not violate the right of a mentally handicapped plaintiff to equal protection of the laws. *Jaramillo v. State Hwy. Dep't*, 1991-NMCA-008, 111 N.M. 722, 809 P.2d 636, cert. denied, 111 N.M. 416, 806 P.2d 65.

The two-year time period of limitations under this section is a reasonable period of time and does not violate a plaintiff's rights to due process. *Jaramillo v. State Hwy. Dep't*, 1991-NMCA-008, 111 N.M. 722, 809 P.2d 636, cert. denied, 111 N.M. 416, 806 P.2d 65.

The language of Subsection A of this section and 41-5-13 NMSA 1978 are both very different than the language of 37-1-8 NMSA 1978. *Maestas v. Zager*, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert. granted, 2005-NMCERT-001, *rev'd*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

Claims allowed not limited. — Subsection A of this section required the additional words "resulting in loss, injury or death" because the claims allowed under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] are not limited to only one act or occurrence. *Maestas v. Zager*, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert.

granted, 2005-NMCERT-001, 137 N.M. 18, 106 P.3d 579, *rev'd*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

Once loss occurs, limitation period begins. — Until an occurrence resulting in loss takes place, the statute of limitations cannot begin to run. *Aragon & McCoy v. Albuquerque Nat'l Bank*, 1983-NMSC-020, 99 N.M. 420, 659 P.2d 306.

Time for giving notice in medical malpractice action is calculated from the time the injury manifests itself in a physically objective manner and is ascertainable. *Tafoya v. Doe*, 1983-NMCA-070, 100 N.M. 328, 670 P.2d 582, cert. quashed *sub nom.*, 100 N.M. 327, 670 P.2d 581.

If governmental entity creates condition that causes injury, notice is still required of a claim for damages. Section 41-4-16 NMSA 1978, the notice provision, operates in conjunction with this section on the issue of a timely claim. *Tafoya v. Doe*, 1983-NMCA-070, 100 N.M. 328, 670 P.2d 582, cert. quashed *sub nom.*, 100 N.M. 327, 670 P.2d 581.

No relation back. — The amended complaint sought damages against the state, the department of corrections and its employees under the Tort Claims Act, and because the original complaint was a nullity, there was no relation back. *DeVargas v. State ex rel. N.M. Dep't of Corrs.*, 1982-NMSC-025, 97 N.M. 563, 642 P.2d 166.

Relation back of amendments. — An action for malpractice and wrongful death brought under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] by the natural parents of a deceased child within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of this section, due to the operation of Rules 15(c) (relation back of amendments) and 17(a) (real party in interest), N.M.R.C.P., (now *see* Paragraph C of Rule 1-015 NMRA and Paragraph A of Rule 1-017 NMRA). *Chavez v. Regents of Univ. of N.M.*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

General savings provision inapplicable. — The general savings provision of 37-1-14 NMSA 1978, which protects from limitations a new suit filed within six months after dismissal of a prior suit, does not apply to an action under this article. *Estate of Gutierrez v. Albuquerque Police Dep't*, 1986-NMCA-023, 104 N.M. 111, 717 P.2d 87, cert. denied sub nom., 103 N.M. 798, 715 P.2d 71, *overruled on other grounds by Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155.

No equitable tolling while federal jurisdiction asserted. — Principles of equitable tolling did not apply to an action under this article during the time the claim was being asserted on the basis of pendent jurisdiction in a federal court. *Estate of Gutierrez v. Albuquerque Police Dep't*, 1986-NMCA-023, 104 N.M. 111, 717 P.2d 87, cert. denied sub nom., 103 N.M. 798, 715 P.2d 71, *overruled on other grounds by Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, 107 N.M. 463, 760 P.2d 155.

When last day of limitation period falls on Saturday. — Rule 1-006A NMRA, which provides that if the last day of a statutory time period falls on a Saturday, Sunday, or legal holiday, the period runs until the next day that is not a Saturday, Sunday or legal holiday, supersedes former 12-2-2G NMSA 1978 (now 12-2A-7 NMSA 1978), which only extends the time period to the following Monday if the last day falls on a Sunday. Therefore, a claim under the Torts Claim Act was not barred by the two-year statute of limitations of this section when the last day of the two-year period fell on a Saturday and the plaintiff filed a claim on the following Monday. *Dutton v. McKinley Cnty. Bd. of Comm'rs*, 1991-NMCA-130, 113 N.M. 51, 822 P.2d 1134.

Application of Arizona statute. — New Mexico, as the forum state, is not required to recognize Arizona's statute of limitations attaching or the sovereign immunity granted to its public employees. Therefore, the one-year limitations period applicable to Arizona public employees is not applicable to actions involving these employees when the cause of action accrues in New Mexico. *Sam v. Estate of Sam*, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066, *rev'd*, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

II. APPLICABILITY.

Tort Claims Act statute of limitations. — Where child was eight years old when she was assaulted and statute of limitations required that she file suit by age ten, it was unreasonable as a matter of law to expect the child to comply with the requirements of the statute limitations at such a young age and the application of the statute to the child violated her right to due process of law. *Campos v. Davis*, 2006-NMSC-020, 139 N.M. 474, 134 P.3d 761.

Section inapplicable to federal civil rights action. — An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in this section but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, 37-1-4 NMSA 1978. *Gunther v. Miller*, 498 F. Supp. 882 (D.N.M. 1980).

Under New Mexico law, the most closely analogous state cause of action for a federal civil rights cause of action under 42 U.S.C. § 1983 is provided for under 41-4-12 NMSA 1978. The statute of limitations applicable to such a cause of action is set forth in this section. *DeVargas v. State ex rel. N.M. Dep't of Corrs.*, 1982-NMSC-025, 97 N.M. 563, 642 P.2d 166.

Since claims under 42 U.S.C. § 1983 are in essence actions to recover for injury to personal rights, 37-1-8 NMSA 1978, not this section, provides the appropriate limitations period. *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985).

For New Mexico, the United States Supreme Court has identified 37-1-8 NMSA 1978, governing the right to recover for injury to personal rights, as the relevant limitations statute in civil rights cases under 42 U.S.C. § 1983 as a matter of federal law. The court specifically

rejected this section's statute of limitations applicable for wrongs committed by public officials. *Walker v. Maruffi*, 1987-NMCA-048, 105 N.M. 763, 737 P.2d 544, cert. denied, 105 N.M. 707, 736 P.2d 985.

Public capacity determined by facts. — District court correctly applied the law when it estopped the doctor from asserting the statute of limitations defense under this section because by choosing to place the doctor at a private institution, and not identify him as a public employee working in a public capacity, the state engaged in conduct that conveyed the indisputable impression to persons wishing to assert a claim that the doctor was an employee of the private institution; as such, the claim was timely filed within the statute of limitations for actions against private entities, 41-5-13 NMSA 1978. *Hagen v. Faherty*, 2003-NMCA-060, 133 N.M. 605, 66 P.3d 974, cert. denied, 133 N.M. 593, 66 P.3d 962.

Act limited to New Mexico public employees. — The Tort Claims Act [41-4-1 through 41-4-27NMSA 1978] specifies that only public employees employed by New Mexico governmental entities, not simply any governmental entity, are covered by the act. *Sam v. Estate of Sam*, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066, *rev'd*, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

Application of section to action by subrogated insurance company. — Because a subrogated insurance company is considered to be standing in the shoes of the insured, the two-year statute of limitations in a subrogated action governed by this section begins to run when the insured's cause of action arises. *Health Plus v. Harrell*, 1998-NMCA-064, 125 N.M. 189, 958 P.2d 1239, cert. denied, 125 N.M. 145, 958 P.2d 103.

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — This section, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. *Cozart v. Town of Bernalillo*, 1983-NMCA-053, 99 N.M. 737, 663 P.2d 713.

Deadline does not apply to child incapable of meeting it. — As a matter of due process, a child who is incapable of meeting the deadline in this section cannot have that deadline applied to bar the child's right to legal relief; therefore, dismissal of claim filed shortly after child's ninth birthday is reversed. *Jaramillo v. Board. of Regents*, 2001-NMCA-024, 130 N.M. 256, 23 P.3d 931.

Minority exception under Subsection A applies only to living minors. *Regents of Univ. of N.M. v. Armijo*, 1985-NMSC-057, 103 N.M. 174, 704 P.2d 428.

Tort Claims Act statute of limitations applies to states sued in New Mexico courts. — In the interests of comity, New Mexico will extend the tort claims statute of limitations to states with similar tort claims acts when they are sued in New Mexico district courts. *Sam v. Estate of Sa*m, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761.

III. ACCRUAL OF ACTION.

Accrual of action. — Section 41-4-15A NMSA 1978 is a discovery-based statute of limitations that accrues when a plaintiff knows or with reasonable diligence should have known of the injury and its cause. *Maestas v. Zager*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

Abuse of process. — A malicious-abuse-of-process claim accrues immediately upon the improper use of process. Plaintiff's malicious-abuse-of-process claim accrued when police sergeant defendant filed an amended criminal complaint. Pursuant to the 41-4-15A NMSA 1978, plaintiff had two years from that point to file his state tort claims. *Mata v. Anderson*, 685 F.Supp.2d 1223 (D.N.M. 2010), *aff'd*, 635 F.3d 1250 (10th Cir. 2011).

False arrest and false imprisonment. — The statute of limitations for claims of false arrest and false imprisonment begins to run, under New Mexico law, when the imprisonment ends. Where plaintiff filed her complaint within two years of the end of her imprisonment, her NMTCA claims are timely. *Gose v. Board of Cnty. Comm'rs of the Cnty. of McKinley*, 727 F.Supp.2d 1256 (D.N.M. 2010).

The temporal focus of Subsection A of this section seems to be on the date of the occurrence rather than the loss, injury, or death. *Maestas v. Zager*, 2005-NMCA-013, 136 N.M. 764, 105 P.3d 317, cert. granted, 2005-NMCERT-001, *rev'd*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.

The limitation period commences when an injury manifests itself and is ascertainable,rather than when the wrongful or negligent act occurs. *Long v. Weaver*, 1986-NMCA-108, 105 N.M. 188, 730 P.2d 491.

Where, in 1998, the municipality constructed a flood retention pond next to plaintiff's building; in 2004, plaintiff's tenant informed plaintiff that the northeast side of the foundation of the building was substantially cracking, that the ground around the around it was saturated with water, and that the tenant believed that the retention pond caused the damage; and plaintiff filed suit against the municipality for damages in 2008, plaintiff's claims against the municipality were time barred because the tenant's information was sufficient to notify plaintiff, more than three years before plaintiff filed suit, of both serious structural damage requiring further investigation and a causal link between the retention pond and the injury to plaintiff's property. *Yurcic v. City of Gallup*, 2013-NMCA-039, 298 P.3d 500.

An incident does not give rise to a claim until the resulting injury manifests itself in a physically objective manner and is ascertainable. Until these factors are established, the question of fraudulent concealment need not be addressed. *Long v. Weaver*, 1986-NMCA-108, 105 N.M. 188, 730 P.2d 491.

Where plaintiff fell in a ditch and broke an ankle, and it was certain at that time that plaintiff had suffered an injury as a consequence of the alleged wrongful act of another for which the law afforded a remedy, the statute of limitations attached. The fact that the full extent of the injury was not known did not affect the running of the statute of limitations. *Bolden v. Village of Corrales*, 1990-NMCA-096, 111 N.M. 721, 809 P.2d 635, cert. denied, 111 N.M. 77, 801 P.2d 659.

It is not required that all the damages resulting from the negligent act be known before the statute of limitations begins to run. Once plaintiff suffers loss or injury, the statute begins to run. *Bolden v. Village of Corrales*, 1990-NMCA-096, 111 N.M. 721, 809 P.2d 635, cert. denied, 111 N.M. 77, 801 P.2d 659.

Time presents factual matter. — Where plaintiffs' complaint alleges that the work took place in the last week of July and into the first week of August 2001, and the city does not appear to dispute this factual claim, but argues that the clean-up work was commenced in the last week of July 2001 and therefore the trigger for the statute of limitations was the date the work began, plaintiffs' allegation about the time the work was performed and when the time the injury manifested itself presents a factual matter that must be resolved. *Henderson v. City of Tucumcari*, 2005-NMCA-077, 137 N.M. 709, 114 P.3d 389, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Law reviews. — For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).
For note and comment, "Statutes of Limitations Applied to Minors: The New Mexico Court of Appeals Balance of Competing State Interests to Favor Children," see 35 N.M. L. Rev. 535 (2005).

For note, "Tort Law — Either the Parents or the Child may Claim Compensation for the Child's Medical and Non-medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M. L. Rev. 373 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What statute of limitations governs actions based on strict liability in tort, 91 A.L.R.3d 455.

Liability of hotel or motel operator for injury or death resulting to guest from defects in furniture in room or suite, 91 A.L.R.3d 483.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

41-4-16. Notice of claims.

A. Every person who claims damages from the state or any local public body under the Tort Claims Act shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the Tort Claims Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased person or any person claiming benefits of the proceeds of a wrongful death action, or the consular officer of a foreign country of which the deceased was a citizen, within six months after the date of the occurrence of the injury which resulted in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

41-4-17. Exclusiveness of remedy.

A. The Tort Claims Act shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim. No rights of a governmental entity to contribution, indemnity or subrogation shall be impaired by this section, except a governmental entity or any insurer of a governmental entity shall have no right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death, property damage or violation of rights, privileges or immunities secured by the constitution and laws of the United States or laws of New Mexico resulting in the settlement or final judgment. Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction or quo warranto.

B. The settlement or judgment in an action under the Tort Claims Act shall constitute a complete bar to any action by the claimant, by reason of the same occurrence against a governmental entity or the public employee whose negligence gave rise to the claim.

C. No action brought pursuant to the provisions of the Tort Claims Act shall name as a party any insurance company insuring any risk for which immunity has been waived by that act.

41-4-19. Maximum liability.

A. Unless limited by Subsection B of this section, in any action for damages against a governmental entity or a public employee while acting within the scope of the employee's duties as provided in the Tort Claims Act, the liability shall not exceed:

(1) the sum of two hundred thousand dollars ($200,000) for each legally described real property for damage to or destruction of that legally described real property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars ($300,000) for all past and future medical and medically related expenses arising out of a single occurrence; and

(3) the sum of four hundred thousand dollars ($400,000) to any person for any number of claims arising out of a single occurrence for all damages other than real property damage and medical and medically related expenses as permitted under the Tort Claims Act.

B. The total liability for all claims pursuant to Paragraphs (1) and (3) of Subsection A of this section that arise out of a single occurrence shall not exceed seven hundred fifty thousand dollars ($750,000).

C. Interest shall be allowed on judgments against a governmental entity or public employee for a tort for which immunity has been waived under the Tort Claims Act at a rate equal to two percentage points above the prime rate as published in the Wall Street Journal on the date of the entry of the judgment. Interest shall be computed daily from the date of the entry of the judgment until the date of payment.

D. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

41-4-20. Coverage of risks; insurance.

A. It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act or any liability imposed under Section 41-4-4NMSA 1978 as follows:

(1) local public bodies shall cover every such risk or liability as follows:

(a) for a risk for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10and 41-4-12 NMSA 1978, the local public body shall cover the risk, and for any commercially uninsurable risk for which public liability fund coverage is made available, the local public body may insure the risk in accordance with the provisions of Section 41-4-25 NMSA 1978;

(b) for excess liability for damages arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, the local public body shall provide coverage in accordance with the provisions of Subsection B of Section 41-4-27 [41-4-28] NMSA 1978, if coverage is available; and

(c) for a risk or liability not covered pursuant to Subparagraphs (a) and (b) of this paragraph, the local public body shall purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law; and

(2) for state agencies, the risk management division shall insure or otherwise cover every such risk or liability in accordance with the provisions of Section 41-4-23 NMSA 1978. Coverage shall include but is not limited to coverage for all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America.

B. The department of finance and administration shall not approve the budget of any governmental entity that has not budgeted an adequate amount of money to insure or otherwise cover pursuant to this section or Section 3-62-2 NMSA 1978 every risk of the governmental entity for which immunity has been waived under the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978. The public school finance division of the department of finance and administration shall not approve the budget of any school district which has failed to budget sufficient revenues to insure or otherwise cover pursuant to this section every risk for which immunity has been waived pursuant to the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978.

C. No liability insurance may be purchased by any governmental entity other than as authorized by the Tort Claims Act.

41-4-23. Public liability fund created; purposes.

A. There is created the "public liability fund". The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the general services department with the prior approval of the state board of finance.

B. Money deposited in the public liability fund may be expended by the risk management division of the general services department:

(1) to purchase tort liability insurance for state agencies and their employees and for any local public body participating in the public liability fund and its employees;

(2) to contract with one or more consulting or claims adjusting firms pursuant to the provisions of Section 41-4-24 NMSA 1978;

(3) to defend, save harmless and indemnify any state agency or employee of a state agency or a local public body or an employee of such local public body for any claim or liability covered by a valid and current certificate of coverage to the limits of such certificate of coverage;

(4) to pay claims and judgments covered by a certificate of coverage;

(5) to contract with one or more attorneys or law firms on a per-hour basis, or with the attorney general, to defend tort liability claims against governmental entities and public employees acting within the scope of their duties;

(6) to pay costs and expenses incurred in carrying out the provisions of this section;

(7) to create a retention fund for any risk covered by a certificate of coverage;

(8) to insure or provide certificates of coverage to school bus contractors and their employees, notwithstanding Subsection F of Section 41-4-3 NMSA 1978, for any comparable risk for which immunity has been waived for public employees pursuant to Section 41-4-5 NMSA 1978, if the coverage is commercially unavailable; except that coverage for exposure created by Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978 shall be provided to its member public school districts and participating other educational entities of the public school insurance authority, by the authority, and except that coverage shall be provided to a contractor and his employees only through the public school insurance authority or its successor, unless the district to which the contractor provides services has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services; and

(9) to insure or provide certificates of coverage for any ancillary coverage typically found in commercially available liability policies provided to governmental entities, if the coverage is commercially unavailable.

C. No settlement of any claim covered by the public liability fund in excess of twenty-five thousand dollars ($25,000) shall be made unless the settlement has first been approved

in writing by the director of the risk management division of the general services department. This subsection shall not be construed to limit the authority of an insurance carrier, covering any liability under the Tort Claims Act, to compromise, adjust and settle claims against governmental entities or their public employees.

D. Claims against the public liability fund shall be made in accordance with rules or regulations of the director of the risk management division of the general services department. If the director of the risk management division has reason to believe that the fund would be exhausted by payment of all claims allowed during a particular state fiscal year, pursuant to regulations of the risk management division, the amounts paid to each claimant and other parties obtaining judgments shall be prorated, with each party receiving an amount equal to the percentage his own payment bears to the total of claims or judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal years.

41-4-25. Public liability fund; municipal public liability fund; local public body participation; educational entity participation.

A. Except as provided in Subsections B and C of this section, local public bodies shall obtain coverage for all risks for which immunity has been waived under the Tort Claims Act pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978 through the public liability fund by paying into the fund an assessment, to be determined by the director of the risk management division, which shall be based on the risks to be insured. In addition, any local public body upon application to the risk management division may obtain coverage for any risk for which immunity has been waived under the Tort Claims Act through the public liability fund if the director of the risk management division determines that:

(1) the risk is, in fact, commercially uninsurable or insurable only at a cost or subject to conditions which the director deems unreasonable. To make this determination, the director may require the local public body to submit such information as he deems appropriate and may also seek information from any other source; and

(2) the local public body has paid all insurance premiums and public liability fund assessments in a timely manner or has had good cause for failing to do so. The local public body shall pay for coverage of uninsurable risks by paying into the fund an assessment, to be determined by the director, which shall be based on risks to be insured. However, payment of all or part of any such assessment may be deferred or postponed without penalty until future years if the local public body certifies to the director's satisfaction that it has insufficient funds available to pay all or a part of any assessment. A municipality or county shall be deemed to have insufficient funds only if it is, in the current fiscal year, levying the full property tax millage allotted it under law and, in addition, has levied during the current fiscal year a five-mill levy above the constitutional twenty-mill limit to pay tort judgments. Any deferred or postponed assessment is payable in any succeeding fiscal year, subject to the same limitations on duty to pay, until paid in full.

B. A municipality which has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, by ordinance of the governing body, elect to create a "municipal public liability fund" to insure or otherwise cover any risk for which immunity has been waived under the Tort Claims Act. A municipal public liability fund created pursuant to this subsection shall provide that:

(1) the fund and any income from the fund shall be held in trust, deposited in a segregated account and invested in accordance with law;

(2) any money deposited in the fund may only be expended to purchase liability insurance; to contract with one or more consulting or claims adjusting firms; to defend, save harmless and indemnify any employee of the municipality for any liability covered by the municipal public liability fund; to contract with one or more attorneys or law firms on a per-hour basis to defend tort liability claims against the municipality and its officers and employees acting within the scope of their duties; and to create a retention fund adequate to cover all uninsured risks of the municipality;

(3) if the municipal public liability fund will be exhausted by the payment of all judgments and claims allowed during a particular fiscal year, amounts paid to each claimant or person obtaining a judgment shall be prorated, with each person receiving an amount equal to the percentage his own payment bears to the total of claims and judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal year;

(4) no tort, civil rights or workers' compensation judgment shall be paid by a tax levy upon real or personal property unless the judgment exceeds one hundred thousand dollars ($100,000). The tax levy shall be made only on that portion of the judgment which is in excess of one hundred thousand dollars ($100,000). Judgments arising out of a single occurrence shall be paid by tax levies for the portions of the judgments in excess of one hundred thousand dollars ($100,000);

(5) the governing body shall review all judgments set forth in Paragraph (4) of this subsection prior to transmitting them to the county assessor for inclusion in the property tax assessment. The review by the governing body shall include a finding by the governing body that the judgment properly arose under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or under the Tort Claims Act. After so finding, the governing body shall by resolution direct the county assessor to provide an assessment as required; and

(6) the ordinance shall not become effective until the department of finance and administration and the general services department have reviewed and approved the ordinance as complying with all of the provisions of this subsection.

C. A local public body, other than one that has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico, may elect to obtain coverage from the public liability fund in accordance with Subsection A of this section or may:

(1) purchase commercial insurance coverage for the risks for which immunity is waived under the Tort Claims Act; or

(2) obtain coverage for the risks for which immunity is waived under the Tort Claims Act in accordance with the provisions of Chapter 3, Article 62 NMSA 1978.

D. The risk management division may assess any local public body with a risk covered by the public liability fund:

(1) a penalty in a percentage or minimum amount to be fixed by the director of the risk management division, with the advice of the board, for the failure to make timely payment of any assessment of the division; or

(2) a surcharge not exceeding seventy-five percent of the rate established by the division for coverage under the public liability fund, if:

(a) the local public body fails to meet any of the underwriting standards or claims procedures prescribed by regulations of the division; or

(b) the local public body fails to carry out any safety program prescribed by regulations of the division.

E. Any school district as defined in Section 22-1-2 NMSA 1978 or educational institution established pursuant to Chapter 21, Article 13, 16 or 17 NMSA 1978 may, upon application to and acceptance by the risk management division, purchase, if the coverage is commercially unavailable, any coverage offered by the division, through the public liability fund, including school bus coverage for school bus contractors, notwithstanding the limitation in Subsection E of Section 41-4-3 NMSA 1978; except that coverage other than for risks for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10, 41-4-12 and 41-4-28 NMSA 1978 shall be provided to a school district only through the public school group insurance authority or its successor, unless the district has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services.

F. If any local public body fails to insure or otherwise cover any risk, the immunity for which has been waived under the provisions of the Tort Claims Act, any resident of the local public body shall have standing to bring suit to compel compliance with the provisions of the Tort Claims Act. Nothing in this section shall be construed to allow any recovery against any governmental entity for any damages resulting from the failure of the governmental entity to insure or otherwise cover any risk.

G. Nothing in this section shall be construed as requiring the risk management division to provide coverage to any local public body, except coverage for those risks for which immunity has been waived under Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, or

as requiring the division to provide coverage on terms deemed to be unreasonable by the director of the division.

41-4-30. Liability coverage; certain community land grants.

Notwithstanding the provisions of Paragraph (1) of Subsection A of Section 41-4-25 NMSA 1978 to the contrary, a community land grant governed as a political subdivision of the state upon application to the risk management division of the general services department shall be authorized to purchase coverage for any risk for which immunity has been waived under the Tort Claims Act through the public liability fund, exclusive of coverage of an activity conducted by the community land grant that is determined by the director of the risk management division pursuant to division rules to be a business enterprise.