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**PURCHASING REGULATIONS
REGULATION 11 - PROTEST PROCEDURES**

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- 1 **SCOPE.** This regulation applies to all protests filed in connection with procurements made by the University.
- 2 **EFFECTIVE DATE.** April 3, 2000, unless a later date is cited at the end of a section or paragraph.
- 3 **DEFINITIONS.** As used in this regulation:
 - 3.1 **award of contract** means the Chief Procurement Officer or his designee has issued a Purchasing Department document to the successful bidder.
 - 3.2 **protestor** means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract and files a written protest.

4 **RIGHT TO PROTEST; TIME LIMITS FOR FILING.**

4.1 **Right to protest.**

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.

- 4.2 **Certain holidays excluded.** The time limit of fifteen calendar days shall not include the winter break in December when the University is closed but shall include all other holidays when the University is closed.
- 4.3 **Presumption of knowledge.** Any person or business that has been sent written notice of any fact or occurrence is presumed to have knowledge of the fact or occurrence.
- 4.4 **Time limits for filing protest.**
 - 4.4.1 For protests regarding specifications, the time limit runs from three (3) calendar days after the date the Chief Procurement Officer posts on the Internet or mails an Invitation for Bids, a Request for Proposals, or a written amendment to either.
 - 4.4.2 For protests regarding the type of solicitation or the solicitation process, the time limit runs from three (3) calendar days after the date the Chief Procurement Officer posts on the Internet or mails the Invitation for Bids or the Request for Proposals.
 - 4.4.3 For protests regarding award of a contract, the time limit runs from three (3)

calendar days after the date the Chief Procurement Officer posts on the Internet or mails the notice of award.

5 FILING A PROTEST.

- 5.1 **Subject of protest.** Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation or award.
- 5.2 **Where to file.** Protests must be addressed to the Chief Procurement Officer.
- 5.3 **Contents.** A protest shall be in writing and shall:
- 5.3.1 include the name and address of the protestor;
 - 5.3.2 include the solicitation number;
 - 5.3.3 contain a statement of the grounds for the protest;
 - 5.3.4 include supporting exhibits, evidence or documents to substantiate any claim; if such supporting exhibits, evidence or documents are not available within the time limit for filing, the protestor shall indicate the expected availability date; and
 - 5.3.5 specify the action the vendor wants the Chief Procurement Officer to take.
- 5.4 **Pleadings not required.** No formal pleading is required to initiate a protest, but protests should be concise, logically arranged, and direct.

6 EFFECT OF PROTEST ON PROCUREMENTS.

6.1 Before contract awarded.

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.

- 6.2 **After contract awarded.** A procurement shall not be halted after a contract has been awarded merely because a protest has been filed. After a contract has been awarded, the Chief Procurement Officer may, in his sole discretion, halt a procurement in exceptional circumstances or for good cause shown.

7 PROTEST PROCEDURE.

7.1 **Preliminary review.** Upon receipt of a timely filed protest, the Chief Procurement Officer or his designee shall review the protest and, whenever possible, attempt to resolve it informally. The Chief Procurement Officer or his designee may discuss the protest with the protester to determine whether the protest was based on a misconception, misinformation, or a misunderstanding of the procurement process. If such is the case, the Chief Procurement Officer or his designee shall note the informal resolution of the protest in the appropriate procurement file.

7.2 **Notice of protest.** If the Chief Procurement Officer or his designee is unable to informally resolve the protest, the Chief Procurement Officer or his designee shall give notice of the protest to the contractor if award has been made or to all bidders or offerors who responded to the solicitation if no award has been made.

7.3 **Parties.**

7.3.1 The protestor shall automatically be made a party to any protest proceeding before the Chief Procurement Officer.

7.3.2 Any person that receives notice of a protest and requests to be made a party shall be made a party to any further proceedings before the Chief Procurement Officer.

7.3.3 Neither the Chief Procurement Officer nor his employees shall be parties to a protest proceeding.

7.4 **Written comments.** Any party may file written comments regarding the subject matter of the protest.

7.5 **Appointment of designee.**

7.5.1 **Designation.** At any point during a protest proceeding, the Chief Procurement Officer may appoint a designee to preside over the proceeding. The designee shall have all of the powers described in this regulation except the power to issue a written determination.

7.5.2 **Who may be designated.** Any person may serve as a designee, except a procurement officer, procurement manager or other person who has been directly involved in the procurement.

7.6 **Time for decisions.** The Chief Procurement Officer or his designee shall make a decision on a protest as expeditiously as possible after receiving all relevant requested information.

7.7 **Written determinations required.** All determinations required by this regulation shall be in writing, shall set forth the basis for the determination, and shall be made part of the appropriate procurement file.

8 **REQUESTED INFORMATION.**

- 8.1 **Additional information.** In order to expedite consideration of a protest, any additional information requested by the Chief Procurement Officer or his designee or a party should be submitted within the time periods established by the requesting source.
- 8.1.1 The failure of any party to comply expeditiously with a request for information may result in resolution of the protest without consideration of information that is untimely filed pursuant to such request.
- 8.1.2 Any party may appeal to the Chief Procurement Officer or his designee if a request for information is unduly burdensome or the time period is unreasonably short.
- 8.2 **Making information available.** The Chief Procurement Officer or his designee shall, upon written request, make available to any party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation.

9 COPIES OF COMMUNICATIONS.

- 9.1 **Copies to be provided to parties.** Each party to a protest proceeding shall certify that it has provided every other party with copies of all documents or correspondence addressed or delivered to the Chief Procurement Officer.
- 9.2 **Ex parte communications.** No party shall submit to the Chief Procurement Officer, *ex parte*, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.

10 AUTHORITY TO RESOLVE PROTEST.

10.1 Authority granted.

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.

10.2 Authorized actions.

The Chief Procurement Officer may:

- 10.2.1 issue a final determination summarily dismissing the protest;
- 10.2.2 obtain information from Purchasing Department staff;

- 10.2.3 require parties to produce for examination information or witnesses under their control;
- 10.2.4 require parties to submit legal briefs or otherwise express their positions on any issues raised by the protest;
- 10.2.5 establish procedural schedules;
- 10.2.6 regulate the course of the proceedings and the conduct of parties and witnesses;
- 10.2.7 receive, rule on, exclude or limit evidence;
- 10.2.8 take official notice of any fact that is among the traditional matters of official or administrative notice; and
- 10.2.9 conduct hearings.

11 HEARINGS ON PROTESTS.

- 11.1 **Requests deemed denied.** Any party may request a hearing, but such requests shall be deemed denied unless specifically granted.
- 11.2 **When hearings held.** The Chief Procurement Officer shall hold a hearing when he determines that substantial material factual issues are present that cannot be resolved satisfactorily through an examination of written documents in the record and in such other cases as he in his discretion deems appropriate.
- 11.3 **Notice of hearing.** If a hearing is to be held, the Chief Procurement Officer or his designee shall mail written notice of hearing to all parties at least ten (10) business days before the hearing unless all parties agree to an earlier date. The notice shall set forth the date, time, and place of the hearing.
- 11.4 **Hearings informal.** Hearings, when held, should be as informal as practicable under the circumstances, but the Chief Procurement Officer shall have absolute discretion to establish the degree of formality for any particular hearing. In no event shall the Chief Procurement Officer be required to adhere to formal rules of evidence or procedure.

12 RESOLUTION OF PROTEST.

12.1 Written determination required.

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 protestor of the right to judicial review of the determination pursuant to Section 156 [13-1-183 NMSA 1978] of the Procurement Code.

12.2 **When designee presides.** A designee shall present a recommended written determination to the Chief Procurement Officer. The Chief Procurement Officer shall review the recommendation of the designee and shall issue a determination.

12.3 **Notice of determination.** The Chief Procurement Officer or his designee shall send the notice of determination to all parties to the protest by certified mail, return receipt requested, and to all other bidders or offerors involved in the procurement by first-class mail.

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 **RELIEF.** If the Chief Procurement Officer determines that a protest should be granted, he shall award appropriate relief.

13.1 Prior to award.

13-1-181. Remedies prior to award.

If, prior to award, the state purchasing agent or a central purchasing office makes a determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be cancelled.

13.2 After award; no fraud or bad faith.

13-1-182. Ratification or termination after an award.

If, after an award, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of a contract is in violation of law and if the business awarded the contract has not acted 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 business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a

reasonable profit, prior to termination.

13.3 **After award; fraud or bad faith.** If, after an award, the Chief Procurement Officer makes a determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be canceled.

13.4 **Relief not allowed.** Except as provided in NMSA 1978 Section 13-1-182, the Chief Procurement Officer shall not award money damages or attorneys' fees.

14 REQUEST FOR RECONSIDERATION.

14.1 **Who may file.** Any party involved in a protest may file a request for reconsideration of a written determination.

14.2 **Contents.** The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification of the determination is deemed warranted, specifying any errors of law made, or information not previously considered.

14.3 **When to file.** A request for reconsideration shall be filed not later than ten (10) calendar days after the date the Chief Procurement Officer mails the written determination.

14.4 **Response to request.** The Chief Procurement Officer shall promptly issue a written response to the request for reconsideration. A copy of the written response shall be sent immediately by certified mail, return receipt requested, to the parties.

15 FINAL DETERMINATION.

15.1 **No request for reconsideration.** In those proceedings in which no request for reconsideration is filed, the written determination issued pursuant to 11 UPR 12.1 or 12.2 shall be the final determination for purposes of the time limits for seeking judicial review under NMSA 1978 Section 13-1-183.

15.2 **Request for reconsideration.** In those proceedings in which a request for reconsideration is filed, the written response to the request issued pursuant to 11 UPR 14.4 shall be the final determination for purposes of the time limits for seeking judicial review under NMSA 1978 Section 13-1-183.

15.3 **Judicial review.**

13-1-183. Judicial review.

All actions authorized by the Procurement Code [13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978] for judicial review of a determination shall be filed pursuant to the provisions of Section 12-8A-1 [39-3-1.1] NMSA 1978.

16 REVISION HISTORY.

March 31, 2000

To: File

From: Bruce Cherrin
Chief Procurement Officer

Subject: Approval of Purchasing Regulation - 11UPR, Protest Procedures

I have reviewed and approve Purchasing Regulation - 11UPR, Protest Procedures.