

OFFICE OF THE STATE AUDITOR



Report on State Agency Procurement Practices

For the Period of July 1, 2013 through June 30, 2016

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OFFICIAL ROSTER

GENERAL SERVICES DEPARTMENT

Edwynn L. Burckle

Cabinet Secretary

Lawrence O. Maxwell

State Purchasing Agent

DEPARTMENT OF FINANCE AND ADMINISTRATION

Dorothy “Duffy” Rodriguez

Cabinet Secretary

DEPARTMENT OF INFORMATION TECHNOLOGY

Darryl Ackley

Cabinet Secretary

I. EXECUTIVE SUMMARY

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

The Code is a complex web of requirements, exemptions, exceptions and processes. The State of New Mexico (State) administers the Code through a decentralized system. State agencies are in charge of determining in the first instance what path each procurement must follow, what requirements apply, and what exceptions or exemptions may apply. Before a state agency enters a contract, the State Purchasing Division (SPD) of the New Mexico General Services Department (GSD) determines whether it is a contract for professional services. If it is a contract for professional services, the Department of Finance and Administration (DFA) Contracts Review Bureau (CRB) has oversight authority unless otherwise exempted. If it is a contract for goods or non-professional services, SPD has oversight authority. In addition, the Department of Information Technology (DoIT) reviews the requests for proposals and contracts for information technology goods and services.

On April 25, 2016, the Office of the State Auditor (OSA) designated GSD, DFA and DoIT for a special audit to address various concerns related to the competitive bidding process, exceptions and exemptions to the competitive bidding process and oversight of state agency procurement (the “Special Audit”). The OSA undertook this Special Audit in order to address a number of concerns raised through our Special Investigations Divisions. These concerns included non-compliance with policies and best practices, delays in approvals and other actions, a lack of coordination among oversight agencies, a lack of consistency in processing of requests for proposal (RFPs), and general overuse of non-competitive procurements resulting in higher costs to state agencies.

The data regarding the use of exceptions and exemptions to the Procurement Code is a staggering reminder that when laws and regulations are too complex or time-consuming, agencies are more likely to push the boundaries of available short-cuts. The table below shows that over \$6.5 billion in state agency expenditures have been made through paths other than competitive procurement.

Selected Exception and Exemption Data for Fiscal Year 2016

Sole Source Procurement documented in SPD database	\$55,358,888
Emergency Procurement documented in SPD database	\$105,537,965
Expenditures coded in SHARE with exemptions to the Procurement Code	\$768,664,110
Expenditures under HSD exempt Healthcare Contracts ^{iv}	\$5,600,000,000
Total	\$6,529,560,963

The State has taken measures to improve procurement in recent years, including posting all state agency contracts to the New Mexico Sunshine Portal and requiring state agencies to have a chief procurement officer (CPO) who receives training on the Procurement Code and is responsible for making procurement determinations for the agency. This reduces errors, decreases the number of protests or other litigation, develops more skilled procurement professionals, increases public trust,

and protects the integrity of the procurement process. In addition, Executive Order 2011-031 established the Task Force on Procurement Reform, which continues to meet regularly. Most recently, the Task Force has followed up from the Legislative Finance Committee's procurement study and electronic signature requirements. These efforts confirm that the State still faces challenges and additional procurement reform may be necessary.

With strong support from the agencies being audited, the OSA conducted two major efforts: (1) a high-level data review using the State's centralized database systems and (2) a detailed review of various samples of contracts and procurement files. Through this process the OSA identified 21 risk factors, including the following:

- Although reliance on sole source has decreased since the requirement to post sole-source justifications was implemented, the sole source exemption from the requirement to obtain competitive bids, resulting in over \$56 million of estimated expenditures in FY 2016, still poses serious risks because procuring agencies are using the sole source exemption in circumstances that are not permitted by law and oversight agencies do not always provide adequate scrutiny of sole source justifications.
- Procuring agencies use the emergency exemption from the requirement to obtain competitive bids, resulting in over \$105 million of estimated expenditures in FY 2016. In some circumstances, OSA testwork revealed emergency justifications that were not permitted by law, including a desire for convenience and misconceptions about the regular procurement process.
- The average time from SPD's initial receipt of an RFP packet to completion of a contract is over 180 days (6 months), including time for RFP publication, bidder responses, response evaluation, any required DoIT approvals and SPD approvals. For many types of procurement the time for approval was not tracked under the systems in place during the period being audited.
- Widespread errors in coding make it very difficult to determine whether agencies are properly claiming statutory exemptions to the Procurement Code. In addition to healthcare contracts, nearly \$1 billion of expenditures in FY 2016 were made under contracts for which agencies claimed statutory exemptions to the Procurement Code.
- The automatic extension provision for Risk Management Division legal contracts, while serving an important function in ongoing legal disputes, creates the opportunity for improper use of the small purchase rules of the Procurement Code.
- Weaknesses in the price agreement system include loopholes for increases after an initial price agreement is in place and disallowed purchases for goods that are not covered under a price agreement.
- SPD is using the federal government's Cooperative Purchasing Program in circumstances that, while they may be permitted by law, are discouraged by the Program.
- Procuring agencies are not complying with Procurement Code requirements to obtain Campaign Contribution Disclosure Forms, which requirements are also inadequate to ensure compliance with the various statutes that prohibit improper influence of procurement decisions through campaign contributions.

- Procuring and oversight agencies’ processes for data entry are duplicative and vulnerable to mistakes in entry that inhibit transparency and identification of errors.

To address these risk factors, the OSA proposes 27 best practices, including the following:

- Consolidating the State Purchasing Division and the DFA’s Contracts Review Bureau and moving toward a centralized oversight procurement office, as the Legislative Finance Committee has long recommended.
- Enhanced training for all state personnel involved in procurement.
- Fostering a culture of support for agency professionals who are trying to enforce the rules and implement best practices in procurement.
- Following the National Association of State Procurement Officials’ recommendation: “when in doubt, bid it out.”
- Implementing more drop-down menus and control lists to reduce errors in manual data entry in the Statewide Human Resources Accounting and Reporting System (SHARE) and other procurement databases.
- The Legislature should consider revisiting the Procurement Code and related statutes, including comprehensively reviewing exceptions and exemptions, imposing dollar limitations on exceptions and exemptions, and addressing loopholes in and expanding campaign contribution disclosure laws.

II. PURPOSE, METHODOLOGY AND SCOPE

The objective of this Report is to provide the public with an understanding of the processes by which billions of dollars in public funds are expended through contracts with private sector businesses, observations based on the OSA’s sample basis testing of procurements, and recommendations to increase purpose, transparency and accountability of state governmental entities.

In conducting this Special Audit, the OSA engaged in three main efforts. First, OSA staff researched the background and framework for state reporting by reviewing state and federal laws, regulations and policies. The OSA also interviewed constituents, agency staff, and personnel from GSD, DFA, and DoIT. The OSA reviewed existing research and best practices for state procurement.

Second, the OSA reviewed and evaluated data from statewide databases to understand the global picture of state agency procurement. This included review and analysis of available data within SHARE, the Sunshine Portal, agency records, and databases provided by the GSD, DFA, and DoIT. Some of the data in this Report from those sources were self-reported by state agencies. Inaccuracies and inconsistencies self-reporting by the agencies and inaccurate input into the various databases may affect the integrity of such data. For sole source and emergency procurements, the OSA used the data available on SPD’s website for sole source and emergency procurements (http://www.generalservices.state.nm.us/statepurchasing/Sole_Source_Emergency_View.aspx).

The OSA then estimated FY16 expenditures by dividing the total contract value by the number of months in the contract, and multiplying that by 12 to get a one-year estimate. For exemption and NASPO/ValuePoint expenditures, the OSA was able to use actual data from SHARE.

Third, the OSA conducted specific test work. This included reviewing select professional services, IT service, and general service contracts and other supporting documentation. On a sample basis for state agencies, and as detailed later in this Report, the OSA reviewed the supporting documentation for:

- Sole source procurements
- Emergency procurements
- Statewide Price Agreements and Agency-Specific Price Agreements
- Small Purchases
- Exemptions
- Federal Contract Mirroring
- WSCA-NASPO/ValuePoint Cooperative Purchasing
- Contracts outside of SHARE
- Campaign Contribution Disclosure Forms

The OSA coordinated with the Legislative Finance Committee (LFC) staff, which conducted its own review of procurement prior to this Special Audit. The LFC procurement report is available at: https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Obtaining%20Value%20in%20State%20Procurement%20and%20Issues%20with%20Non-Competitive%20Methods.pdf

All dollar figures in this Report represent expenditures reported in SHARE or annualized contract values from SPD's database. The dollar figures in reports from the OSA Government Accountability Office regarding in-state contracting are total contract values, and are not appropriate for comparison with the dollar figures in this Report.

Some statutes, regulations and policies refer to the State Purchasing Agent, who is an individual employee of GSD, while others refer to the State Purchasing Department. This Report uses the acronym SPD to refer to both the State Purchasing Agent and the State Purchasing Department.

III. PROCUREMENT OVERVIEW

The Procurement Process

The process of procurement begins with the state agency who identifies a need for goods, services or professional services. Detailed flow charts describing these processes appears in Appendix A. For background purposes, we provide a high-level overview that does not touch on the many permutations that this process may take.

When an agency identifies the need for a purchase, the agency develops a scope of work. A competitive bidding process may not be legally required because of the small size of the purchase, because an emergency exists, because there is only one source for the goods or services needed, or because one of the many exceptions or exemptions in the Procurement Code applies to the purchase.

Procurements that take these parallel paths are discussed in more detail later in this Report.

If the procurement is for professional services, the agency develops the scope of work. The agency then sends the scope of work to Horizons, which is the central nonprofit agency that gives businesses employing people with disabilities the opportunity to participate in state and local governmental contracts pursuant to the State Use Act (Sections 13-1C-1 et seq.). If Horizons declines the procurement, the agency sends the scope of work to the SPD. The SPD determines whether the scope of work is for professional services and notifies the agency of that determination. If the procurement is for professional services in the information technology (IT) sector, the agency sends the draft RFP to the Department of Information Technology (DoIT), which reviews, approves and returns the draft RFP to the agency. The agency then issues the RFP. The RFP remains open for a fixed amount of time and the agency undertakes various smaller processes related to communications with bidders. An evaluation committee at the agency selects a winning bidder.

If the procurement is for goods or non-professional services, again the first step is to determine if the goods or services can be provided by Horizons. If Horizons declines the procurement, the agency determines whether the scope of work is in the IT sector. If the scope of work is within the IT sector, the agency sends the draft RFP to the DoIT, which reviews, approves and returns the draft RFP to the agency. Then the agency delivers the RFP packet to the SPD. An SPD employee, known as a “buyer,” works with the agency to make any necessary changes or clarifications to the RFP and to enter the RFP into the GSD e-procurement system. The RFP is then formally issued, bidders respond, many smaller processes regarding bidder communication occur, and an evaluation committee at the agency selects a winning bidder.

Once the vendor is selected, the procurement moves into the contracting stage. Contracts for IT goods and services are prepared using a DoIT template and go to DoIT for review and approval. Contracts for professional services are prepared using a template from the Department of Finance and Administration and are reviewed and approved through DFA. All other contracts use a template from SPD. In each case, the contract is accompanied by an array of supporting documentation, some of which resides with the agency and some of which is transmitted to the appropriate oversight agency with the contract.

The Procurement Time Overview

In undertaking the testwork described throughout this Report, the OSA also tracked the amount of time it takes for the various agencies to approve contracts, contract amendments and RFPs. As the tables below reflect, each agency tracks data differently, preventing a clear comparison among agencies. Historically, GSD did not track of procurements that went through SPD, and provided OSA access to databases for the price agreements but not the invitations to bid (ITBs) or RFPs. However, GSD now has that capability in place. DoIT provided to OSA an excerpt of its database tracking contracts reviewed and approved, but that did not include data on RFP approval, so RFP approval times are not available. DFA does not have the statutory authority to review RFPs.

Average Time for DoIT Contract and Amendment Approval

Fiscal Year	Type	Avg. # of days from receipt for e-review to signature approval	Type	Avg. # of days
2014	Contract	46	Contract Amendments	35
2015	Contract	31	Contract Amendments	28
2016	Contract	41	Contract Amendments	31

Average Time for DFA Contract and Amendment Approval

Fiscal Year	Type	Avg. # of days from receipt to signature approval	Type	Avg. # of days
2014	Contract	9	Contract Amendments	24
2015	Contract	15	Contract Amendments	30
2016	Contract	16	Contract Amendments	9

Average Time for SPD Processes

Process	Avg. # of days
For SPD to review and approve a contract based on a federal GSA agreement	7
For SPD to review and approve a Price Agreement Amendment	12
For SPD to conduct an Invitation to Bid process for a statewide or agency-specific price agreement	64
From SPD’s initial receipt of an RFP packet to completion of a contract, including time for RFP publication, bidder responses, response evaluation, any required DoIT approvals and SPD approvals	188

Procurement Exceptions and Exemptions Overview

Possibly because the regular competitive bid process is so time-consuming and cumbersome, many agencies rely on exceptions and exemptions from the Procurement Code or certain provisions within the Procurement Code. Details on exceptions and exemptions are available in the OSA’s Procurement Overview, located on our website.

Selected Exception and Exemption Data for Fiscal Year 2016

Sole Source Procurement documented in SPD’s database	\$55,358,888
Emergency Procurement documented in SPD’s database	\$105,537,965
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Total	\$6,529,560,963

Centralization, Training and Staff Empowerment: Three Key Best Practices for a Better Procurement Process

For a variety of reasons detailed throughout this Report, the OSA agrees with the Legislative Finance Committee’s long-standing recommendation to consolidate the State Purchasing Division and the DFA Contracts Review Bureau and move toward a centralized oversight procurement office. DFA’s review focuses on compliance, form and legal sufficiency requirements after RFPs are complete, while the SPD is focused more on the entire procurement process and compliance with the Procurement Code. Combining and centralizing the procurement process would enable state agencies to benefit from the strengths of both agencies.

As just one example of the inefficiencies of the current system, SPD uses a tracking and numbering system for purchases of goods and services, which enables users to trace the procurement from requisition, to request for proposal or invitation to bid, to the contract. In contrast, professional service contracts have a requisition number, a request for proposal number, and a contract number that are each different, and none of the numbering is consistent from agency to agency. This decreases transparency and the ability to trace each procurement. Centralizing procurement would enable all contracts to go through SPD’s e-procurement system.

In addition, centralization would allow procurement professionals to focus more on the requirements of Procurement Code exemptions and exceptions. For example, NMSA 1978, Section 6-5-9 and NMAC 2.40.2.2(C) allow agencies to apply for an exemption from CRB review and approval when the secretary of DFA determines that efficiency or economy so requires. However, the Procurement Code specifically states that, “All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the general services department or the department of finance and administration if required by the regulations of either or both of the departments.” Section 13-1-118, NMSA 1978. One agency has availed itself of the CRB exemption, resulting in no oversight for professional service contracts.

Training is another key element to strengthening the state agency procurement process. Pursuant to NMSA 1978, Section 13-1-95.2 (2013), state agencies must designate a CPO who is certified by GSD. The CPO is responsible for the control of procurement of items of tangible personal property, services or construction. As of July 1, 2015, only an Agency’s CPO may make procurement determinations (such as exemptions under the Code); issue purchase orders (POs); authorize small purchases; and approve procurements. All CPOs must complete a certification program and register with the GSD. A CPO certification must be renewed every two years.

While the CPO program is a strong step in the right direction, additional training needs emerged throughout this Special Audit. This Report identifies many areas in which additional training is necessary, including:

- How to identify RFPs and contracts that require DoIT review
- Proper use of exceptions to competitive procurement, especially emergency and sole source procurement methods
- Proper coding of exemptions, exceptions, sole source and emergency procurements
- Campaign contribution disclosure forms and related requirements

Finally, empowering procurement professionals at the agency level to do their jobs correctly would also address many of the concerns OSA received and observed throughout this Special Audit. For example, the OSA observed one instance in which a CPO asserted that they approved a PO “under duress,” and refused to approve a change order related to this same PO. Under the process in effect at the time (which has since changed), the CPO sent the scope of work to DFA’s legal counsel who determined that the “scope of work stated would be general services. Therefore the procurement must be conducted through State Purchasing using SPD processes and procedures.” The CPO agreed with this determination, however the agency’s legal counsel disagreed and believed this purchase qualified for an exemption. Despite the statutory requirement that the CPO is responsible for making these determinations, the agency ignored this statute and bypassed the CPO’s authority.

Other states have pursued a model in which the statewide purchasing agency, in our case SPD, oversees CPOs for all agencies. Employees remain physically located at their respective agencies and are funded through the agency. However, this approach mitigates the risk that the CPO will be fired or removed from the position because of a disagreement on proper procurement procedures. This model also increases the likelihood that Procurement Code violations will be reported to SPD, which currently relies on the honor system of self-reporting.

IV. SOLE SOURCE PROCUREMENTS

Overview

The Procurement Code defines a “sole source” procurement as a purchase wherein (1) there is only one source for the required service, construction or item of tangible personal property; (2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and (3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract. Section 13-1-126, NMSA 1978. Such contracts may be awarded without competitive bids or proposals regardless of the estimated cost when SPD and/or DFA determines in writing that these criteria are met.

Sole source procurements require an agency to post notice for 30 days pursuant to Section 13-1-126.1, NMSA 1978, and NMAC 1.4.1.54.F to give other possible vendors a chance to protest. Agencies must also submit a Sole Source Request and Determination Form to DFA for proposed purchases of professional services, or to SPD for all other purchases. In addition if the agency did not post notice to SPD’s website, the agency must also submit the form to DoIT for posting on the state’s Sunshine Portal and to the Legislative Finance Committee. The notice must describe the parties to the proposed transaction, the contract amount and the nature of the goods or services being procured. The Sole Source Request and Determination Form states:

A sole source determination is not effective until the sole source request for determination has been posted for thirty (30) calendar days without challenge, and subsequently approved in writing by the State Purchasing Agent or, for Professional Services Agreements, the Secretary of the Department of Finance and Administration.

The form requires an explanation of the scope of work and “an explanation of the criteria developed and specified by the agency as necessary to perform and/or fulfill the contract and upon which the state agency reviewed available sources.” The form also requires “a detailed, sufficient explanation

of the reasons, qualifications, proprietary rights or unique capabilities of the prospective contractor that makes the prospective contractor the one source capable of providing the required professional service, service, construction or item(s) of tangible personal property.” The form cautions that stating that a source is the “best” or “least costly” is not an adequate justification. In addition to other information, the agency must explain the efforts it made to identify other possible sources.

Despite the requirements for qualifying for the sole source purchase exception to competitive bidding that the language of the statute and form impose, the OSA identified an estimated \$56 million in sole source purchases by state agencies in Fiscal Year 2016.

Sole Source Procurement by Agency, FY 2016

State Agency	Contract value as posted to SPD’s website, annualized
77000 – Corrections Department	\$21,197,360
92400 – Public Education Department	\$4,160,711
66500 – Department of Health	\$3,294,363
33300 – Taxation & Revenue Department (TRD)	\$3,233,391
79000 – Department of Public Safety	\$2,931,498
36100 – DoIT	\$2,282,835
62400 – Aging and Long Term Services	\$2,127,792
80500 – Department of Transportation	\$1,786,857
69000 – Children, Youth & Families Department (CYFD)	\$1,673,555
36600 – Public Employees Retirement Association (PERA)	\$1,237,190
41900 – Economic Development Department	\$1,195,625
42000 – Regulation & Licensing Department	\$1,063,705
50500 – Department of Cultural Affairs	\$978,239
63100 – Department of Workforce Solutions	\$973,783
37000 – Secretary of State	\$968,465
55000 – Office of the State Engineer	\$789,500
35200 – Educational Retirement Board	\$775,000
34100 – DFA	\$668,100
41700 – New Mexico Border Authority	\$600,000
66800 – Natural Resources Trustee	\$553,725
66700 – Environment Department	\$472,303
64400 – Division of Vocational Rehabilitation	\$351,298
49500 – NM Spaceport Authority	\$350,000
67000 – Department of Veterans Service	\$335,228
63000 – Human Services Department	\$276,000
00000 – Blanket Code for agencies without individual code	\$261,950
35000 – GSD	\$195,105
35500 – Public Defender	\$150,000
94000 – Public School Facilities Authority	\$88,726
23700 – Seventh Judicial District Court	\$85,164
95000 – Higher Education Department	\$82,782
21800 – Administrative Office of the Courts	\$73,000

State Agency	Contract value as posted to SPD's website, annualized
30500 – Attorney General's Office	\$63,375
63200 – Workers Compensation Administration	\$41,580
60600 – Commission for the Blind	\$26,281
43000 – Public Regulation Commission	\$14,400
Total	\$55,358,888

**Top 10 Vendors Receiving Contracts Made Pursuant to the
 Sole Source of the Procurement Code, FY 2016**

Vendor	Agency	Contract value as posted to SPD's website, annualized
Corrections Corporation of America	Corrections Department	\$21,197,360
Fast Enterprises LLC	TRD	\$2,700,000
Blackboard Inc.	Public Education Department	\$2,333,883
IBM Corporation	DoIT & TRD	\$1,695,047
Morphotrak	Department of Public Safety	\$1,587,674
New Mexico Senior Olympics	Aging and Long Term Services Department	\$1,505,042
NM Association of the Education of Young Children	CYFD	\$1,291,579
NM Economic Development Corporation	Economic Development Department	\$1,180,000
Maximus, Inc.	Department of Health	\$941,927
Hewlett Packard	PERA	\$937,190

Testwork

The OSA reviewed the files of a non-random sample of 13 sole source procurements, obtained from the state purchasing division's database. Ten out of the 13 sole source procurements tested (77%) did not meet all three requirements set forth in the Procurement Code for sole source procurements, as detailed below.

- In one out of 13 sole source procurements tested, the agency was excluded from the requirement to procure through SPD, but was not exempt from the requirement to comply with the Procurement Code. This agency was unable to provide proof that the notice of sole source contract was posted with all required information for 30 days as required by Section 13-1-126.1 NMSA 1978. This agency was also unable to provide proof that, prior to award, the agency sent all required information to the Department of Information Technology for posting to the Sunshine Portal and to the Legislative Finance Committee as required by Section 13-1-128(C) NMSA 1978. This sole source and one other (2 out of 13) justified the sole sources by stating that only one vendor was authorized to configure the software. It is

true that in these cases only one vendor could modify their proprietary software, however these agencies could have put out an RFP for a new system that could have meet their current and future needs. There were multiple software systems on the market that could have meet the agency’s needs.

- In five out of 13 sole source procurements tested, the justification contained wording that the vendor was initially contracted through an RFP in years prior and multiple vendors responded to the initial RFP. Although there are circumstances when historical purchasing decisions result in only one source being able to service, maintain or upgrade a purchase, in these instances, this wording should have resulted in a rejection or required revisions of the sole source justification form because the form itself stated that there was more than one source for the required service, construction or item of tangible personal property.
- In three out of 13 sole source procurements tested, the justification contained wording that the agency researched similar companies, but assumed that these vendors would be unable to provide the services needed or assumed that the price for these vendors to tailor to the agencies’ needs would exceed budget. This wording alone should have resulted in a rejection of the sole source justification form because the form itself stated that there was more than one source for the required service, construction or item of tangible personal property.

Risk Factors

The testwork revealed the following risk factors:

- Agencies excluded from oversight by DFA or SPD appear less compliant with the Procurement Code.
- Procuring agencies use the sole source exemption in circumstances that are not permitted by law, including a desire for convenience and assumptions about price.
- Oversight agencies, including DFA, DoIT and the SPD, do not always provide adequate scrutiny of sole source justification forms, resulting in the acceptance of forms that do not meet the requirements of a sole source purchase.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to help avoid overreliance on sole source procurement:

- As the National Association of State Procurement Officials recommends, “when in doubt, bid it out.”
- Agencies should make their procurement teams aware of and provide enough advance notice to allow procurement professionals to do market research and comply with the Procurement Code.
- Oversight agencies should consistently review the substance of sole source justifications to determine compliance with the Procurement Code and reject non-complying forms.
- Agency internal controls should ensure that sole source notices are timely and appropriately posted and that sole source justification forms are complete, correct and submitted to the appropriate oversight agencies.
- Amendments to the Procurement Code to require all state agencies post notice of sole source procurement (or a link to that notice) on the SPD website at the start of the 30-day notice and

protest period would increase transparency and accountability. This would also create a complete record of state sole source procurements so that the public can determine how many taxpayer dollars were contracted and spent as a result of sole source procurements by state agencies. House Bill 391 in the 2017 regular Legislative session was the latest bill to propose such amendments.

V. EMERGENCY PROCUREMENTS

Overview

The Procurement Code defines an emergency procurement as a purchase made in situations that create a threat to public health, welfare or safety, such as may arise by reason of floods, fires, epidemics, riots, acts of terrorism, equipment failures or similar events and includes the planning and preparing for an emergency response. Section 13-1-127, NMSA 1978. Furthermore, the existence of the emergency condition must create an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten: (1) the functioning of government; (2) the preservation of protection of property; or (3) the health or safety of any person.

The Governor of the State of New Mexico issued guidelines for contract review and re-evaluation in which she stated that a true “emergency” must exist for an emergency contract and states that emergencies do not exist simply from a need to procure the services “now” or from time pressure to implement a new contract.^{vi}

Agencies must make a written determination of the need for an emergency procurement using the Emergency Determination Form available on both SPD and DFA’s website. The form requires, among other things, a detailed description of the emergency and the steps being taken to mitigate its effects. State agencies with DFA oversight must also submit a memorandum for approval to the Financial Control Director pursuant to Model Accounting Practices (MAPS) FIN 4.11.

Emergency Procurement by Agency, FY 2016

Agency Number – Agency Name	Contract value as posted to SPD’s website, annualized
77000 – Corrections Department	\$100,540,765
52100 – Energy Minerals & Natural Resources Department (EMNRD)	\$2,408,658
80500 – NM Department of Transportation	\$1,379,735
35000 – GSD	\$687,782
79000 – Department of Public Safety	\$144,830
23300 – Third Judicial District Court	\$92,668
69000 – CYFD	\$90,323
51600 – Game and Fish Department	\$74,515
63000 – Human Services Department	\$50,000
50500 – Department of Cultural Affairs	\$36,930
66500 – Department of Health	\$13,022

Agency Number – Agency Name	Contract value as posted to SPD’s website, annualized
94000 – Public School Facilities Authority	\$9,325
63100 – Department of Workforce Solutions	\$6,612
42000 – Regulation & Licensing Department	\$2,800
Total	\$105,537,965

The largest emergency procurement in FY16 was an example of an appropriate use of the emergency procurement provisions. A fire or explosion caused a power outage for 450 Corrections Department inmates, with 250 left without power and on a longer term basis. The Corrections Department used an emergency procurement to contract with multiple vendors on contracts of up to \$20 million to repair the damages. OSA notes that while these contracts were compiled from the SPD website and listed as emergency procurements, some of the purchases may have been eligible for other exceptions to the competitive bidding requirements of the Procurement Code.

Vendor	Agency	Contract value as posted to SPD’s website, annualized
Great Southwestern Construction, RT Electric, Henry Medina, Lowes Company, Blueline Rental, and Hotel Encantado de las Cruces	Corrections Department	Unknown; maximum contract amount totaled \$100,000,000
Brasier Asphalt, Inc.	Department of Transportation	\$1,090,278
Transportation Equipment Sales Corp	EMNRD	\$671,598
Community Education Centers	Corrections Department	\$531,111
Alan Kuhn Associates, LLC	EMNRD	\$350,000
All-Rite Construction, Inc.	GSD	\$259,397
Uretek USA Inc.	Department of Transportation	\$205,117
Rock Gap Engineering	EMNRD	\$137,533
Motorola	Department of Public Safety	\$129,830
B&H Mechanical	GSD	\$100,000

Testwork

The OSA reviewed the files of a non-random sample of 14 emergency procurements, obtained from the state purchasing division’s database. Three out of the 14 sole source procurements tested (21%) did not comply with MAPS FIN 4.11. In addition, one procurement posted notice under the wrong agency name.

In addition, 11 of 14 emergency procurements tested (79%) stated a reason for the emergency procurement that did not appear to meet the definition of an emergency as defined in Statute or the governor’s guidelines. While a true emergency may have existed, the documentation did not support

that conclusion. In all cases except for one (an agency that has an exemption from DFA), DFA approved the emergency procurement. The reasons given for the emergency procurements that did not meet applicable laws and regulations were:

- The procuring agency stated that in its opinion, replacement or repairs occur within the next week to circumvent any potential litigation or liabilities that could occur with delays and the bidding process. However, the work was not completed until almost three months of the justification posting.
- The procuring agency stated that it was working to review and release the RFP and that this emergency would be in place for the shortest duration necessary to complete the competitive procurement.
- The procuring agency stated it needed to remedy a contamination issue that they became aware of a year prior to the request for approval of the emergency procurement.
- In two instances, the procuring agency stated it was involved in on-going litigation and they required assistance from a highly qualified legal firm and an attorney licensed to practice in federal court. That litigation was in a case that was first filed in 1988.
- The procuring agency's justification stated that the current price agreement did not meet its specifications and this emergency procurement would only be in place until a new price agreement could be established that met its specifications. This agency has an exemption from the requirement that DFA review its contracts, for which the agency re-applies annually. This agency does go through the SPD and DoIT for other approvals.
- In five instances, the procuring agency was conducting an audit of its current contractor's services and the agency believed this audit would result in one or more contractors being ineligible to provide services anymore. The agency stated it had vetted outside vendors that had the experience necessary to assume the role of providing these services while the other contractors were being audited. However, an audit does not result in termination of services, the contractor could still provide services while also providing documents requested for the audit.

Risk Factors

The testwork revealed that procuring agencies are using the emergency exemption in circumstances that are not permitted by law, including a desire for convenience and misconceptions about the regular procurement process.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to help avoid overreliance on emergency procurement:

- SPD should update its listing of agencies on the SPD database for sole source and emergency postings so that it encompasses every agency and local public body. This should prevent future mistakes in which one agency selects the name of another agency because the correct agency name is not listed in the drop-down function.

- Agencies, especially their chief financial officers (CFOs), should review the MAPS issued by the DFA Financial Control Division and ensure that their CPO’s are aware of MAPS requirements related to emergency procurements.

VI. EXEMPTIONS TO THE PROCUREMENT CODE

Overview

The Procurement Code contains numerous exemptions from the Procurement Code. Certain agencies are exempt from the Procurement Code, based on the statutes that formed those agencies, including the New Mexico Exposition Authority Act, NMSA 1978, § 6-25A-5.W, the University Research Park and Economic Development Act, NMSA 1978, § 21-28-7.A, the New Mexico Beef Council Act, NMSA 1978, § 77-2A-9, the Cumbres & Toltec Scenic Railroad Commission, NMSA 1978, § 16-5-6 NMSA 1978, and the New Mexico Health Insurance Exchange Act, NMSA 1978, § 59A-23F-3.M. The Procurement Code also provides for a number of exempt transactions, many of which are detailed in the table below.

By far, the largest share of exempt expenditures are purchases between a state agency and another state agency, local public body or external procurement unit. Examples of this type of purchase include healthcare contracts with local public bodies, construction and design of facilities for at risk youth, judicial complexes, police and fire, and miscellaneous capital outlay projects. In addition, many agencies use the SHARE code for the Procurement Code exemption for interagency purchases to record transfers of funds between agencies that are not purchases. For example, the Public Education Department uses the SHARE code for interagency purchases to record transfers of public school funding to the state’s school districts. As a result, nearly \$4 billion was coded under the exemption provided in NMSA 1978, Section 13-1-98A, only one-eighth of which represented actual purchases. This makes it challenging to use the SHARE exemption codes to determine the dollar value of procurements, as opposed to transfers for other reasons.

Expenditures Made Pursuant to Select Exemptions from the Procurement Code, FY 2016

Statute	Description	Amount Expended and Coded to Listed Exemption in SHARE
13-1-98 A	Purchases between a state agency or a local public body and another state agency, local public body or external procurement unit, except for cooperative procurements	\$496,882,631
13-1-98 CC	Contracts for investment advisory services, investment management services or other investment-related services entered into by the education retirement board, the state investment officer or the retirement board created pursuant to the Public Employees Retirement Act	\$65,665,634

Statute	Description	Amount Expended and Coded to Listed Exemption in SHARE
13-1-98.1B	An agreement with any other state agency, local public body or external procurement unit or any other person, corporation, organization or association for the purpose of creating a network of health care providers or jointly operating a common health care service, if the state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs, improve quality of care or improve access to care.	\$61,156,057
13-1-98.1	Hospital and health care exemption	\$48,734,284
13-1-98 FF	Procurement by or through the children, youth and families department of pre-kindergarten services pursuant to the Pre-Kindergarten Act	\$20,308,140
13-1-98 D	Purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services	\$17,526,898
13-1-98 V	Purchases of advertising in all media, including radio, television, print and electronic	\$13,252,929
13-1-98 F	Travel or shipping by common carrier or by private conveyance or to meals and lodging	\$7,148,899
13-1-98 I	Procurement of tangible personal property or services 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.	\$6,096,130
13-1-98 HH	Procurements exempt from the Procurement Code as otherwise provided by law	\$5,927,673
13-1-98 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	\$5,001,669
13-1-98 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	\$4,127,499
13-1-98 Z	Procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act	\$3,831,104
13-1-98 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	\$3,286,403

Statute	Description	Amount Expended and Coded to Listed Exemption in SHARE
13-1-98 T	Works of art for museums or for display in public buildings or places	\$3,039,380
13-1-98 AA	Purchases of products or services for eligible persons with disabilities pursuant to the federal rehabilitation act of 1973.	\$2,267,687
13-1-98.1A	An agreement with any other state agency, local public body or external procurement unit or any other person, corporation, organization or association that provides that the parties to the agreement shall join together for the purpose of making some or all purchases necessary for the operation of public hospitals or public and private hospitals, if the state purchasing agent or a central purchasing office makes a determination that the arrangement will or is likely to reduce health care costs	\$2,125,189
13-1-98 E	Purchases of books, periodicals and training materials in printed or electronic format from the publishers or copyright holders thereof	\$1,485,090
13-1-98 B	Purchases for the governor's mansion and grounds	\$303,360
13-1-98 GG	Procurement of services of commissioned advertising sales representatives for New Mexico magazine	\$205,562
13-1-98 X	Procurement of printing services for materials produced and intended for resale by the cultural affairs department	\$164,504
13-1-98 W	Purchases of promotional goods intended for resale by the tourism department	\$64,990
13-1-98 Q	Contracts with professional entertainers	\$23,000
13-1-98.2B	The lease or operation of a county hospital pursuant to the Hospital Funding Act	\$18,457
13-1-98 C	Printing and duplicating contracts involving materials in printed or electronic format from the publishers or copyright holders thereof	\$9,889
13-1-98 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	\$5,701
13-1-98 S	Contracts for service relating to the design, engineering, financing, construction and acquisition of public improvements undertaken in improvement districts and in county improvement districts	\$5,155
13-1-98 H	Contracts with businesses for public school transportation services	\$195
Total		\$768,664,110

In addition to the \$1 billion found under these exemptions, the Human Services Department has claimed exemptions and coded as a block grant another approximately \$5.6 billion, as noted by the Legislative Finance Committee in their Report #16-09 dated October 27, 2016.

As noted in the table above, the largest expenditures in FY16 were under exempt intergovernmental agreements. The following were the largest expenditures under exempt contracts other than intergovernmental agreements.

Vendors Receiving Ten Largest Expenditures Made Pursuant to Select Exemptions from the Procurement Code, FY 2016
 (excluding intergovernmental, utility and State Use Act exemptions)

Vendor	Exemption	Agency	Amount Expended in SHARE
United Behavioral Health	EXE 13-1-98.1 (healthcare)	Human Services Department	\$48,734,284
Talweg Creative Inc.	EXE 13-1-98 V (advertising in media)	Department of Tourism, CYFD	\$9,840,467
Merck Sharp & Dohme	EXE 13-1-98.1B (healthcare)	Department of Health	\$8,994,632
Pfizer Inc.	EXE 13-1-98.1B (healthcare)	Department of Health	\$5,058,060
Glaxosmithkline	EXE 13-1-98.1B (healthcare)	Department of Health	\$4,164,031
Blackrock Institutional Trust Company	EXE 13-1-98CC (investment services)	State Investment Council (SIC), PERA, Educational Retirement Board (ERB)	\$3,738,581
T Rowe Price Associates Inc.	EXE 13-1-98CC (investment services)	SIC	\$3,254,023
Harvest Fund Advisors LLC	EXE 13-1-98CC (investment services)	SIC, PERA	\$2,702,654
MFS Institutional Advisors Inc.	EXE 13-1-98CC (investment services)	SIC, PERA	\$2,541,000
Lithexcel	EXE 13-1-98F (travel)	Human Services Department	\$2,400,000

Risk Factors

Currently when an agency creates a purchase order it will select the origin code “EXE” for exemptions and then cite the section of the Procurement Code and the specific item of law (letter A-EE) that exempts the purchase from the requirements of the Procurement Code (MAPS Fin 4.3(B)). In compiling this data regarding exemptions, the OSA noted hundreds of inconsistencies in how individual agencies code exemptions in SHARE, including agencies citing the wrong section of the Procurement Code and citing statutes outside of the Procurement Code.

For example, Expo New Mexico/State Fair was coding every transaction as EXC 13-1-99H, which

is the statute that exempts that agency from SPD oversight for purchases under \$20,000. However, the agency used this code for purchases above \$20,000, which should have required the agency to get the best obtainable price or solicit formal request for proposals. The agency stated that this was an error and that the Chief Procurement Officer approved all exemptions; however, this last assertion was not documented.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to help improve the exemption process:

- SHARE should provide a drop-down function for exemptions that would list the statute numbers to eliminate the errors caused through manual input of the exemption statute.
- Exemptions are often shaped around a particular purpose or agency intending to accommodate the unique demands and requirements of those activities. However in the decentralized procurement environment in New Mexico, greater oversight of these procurement activities is necessary. The Legislature should consider engaging in comprehensive review of the exemptions in the Procurement Code.
- The Legislature should consider establishing a threshold that requires all contracts over a certain dollar amount to be approved by SPD, even if an exemption would otherwise apply.
- The Legislature should consider giving statutory authority to the State Purchasing Agent to oversee and approve the use of Procurement Code exemptions. This would help ensure consistent interpretation and application of the laws and regulations regarding exemptions.

VII. SMALL PURCHASES

Overview

The Procurement Code allows an agency to procure services, construction or items of tangible personal property between \$20,000 to \$60,000, excluding gross receipts tax, by issuing a direct purchase order to a contractor based upon the best obtainable price, without SPD review. The Procurement Code states that an agency may procure professional services (excluding services of landscape, architects or surveyors) in accordance with DFA rules. Despite the statutory small purchase threshold of \$60,000 excluding tax, DFA requires that state agencies must submit professional service contracts that result in expenditures greater than \$50,000, including gross receipts tax. The Code states that agencies may not artificially divide purchases into multiple contracts so as to constitute small purchases.

Testwork

The OSA reviewed the files of a non-random sample of 11 small purchase contracts, obtained from five different state agencies. The test work indicated two vendors for which GSD's Risk Management Division was procuring services under small purchase contracts and subsequently amending these contracts multiple times, resulting in total contract amounts that would have triggered the need for a competitive procurement. Rather than citing the Procurement Code, these transactions identified Section 15-7-10, NMSA 1978, which states that, "any valid contract between the risk management division and any law firm, to defend claims against the state or any of its public employees shall be automatically extended for the purpose of and as long as necessary for completing and concluding

any litigation, including appeals, referred to the firm for defense prior to the termination date stated in the contract or any applicable amendment thereto.” In both instances, the initial contract was for \$50,000. In one instance, the ultimate contract price was \$300,000, and in the other the ultimate contract price was \$350,000.

Risk Factors

The testwork revealed the following risk factors:

- While a technical violation may not have occurred and the volatility of litigation may necessitate extensions of legal contracts, the unlimited automatic extension provision for Risk Management Division contracts creates the opportunity for improper use of the small purchase exception to the Procurement Code.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to ensure efficient and appropriate use of the small purchase exception:

- The Legislature should consider amending the statute to define what ‘best obtainable price’ means. In line with best practices of other states and the federal government, the Procurement Code should require that at least three quotes be obtained.
- DFA should consider revising the regulations governing the approval of contracts for the purchase of professional services (NMAC 2.40.2.2.A) to increase the threshold from \$50,000 to \$60,000 in line with the Procurement Code.
- GSD’s Risk Management Division should exercise due diligence in evaluating litigation against the State and reasonably evaluate the type of legal services required so as to competitively procure the necessary services and obtain the best value for the State of New Mexico.
- The Legislature should consider amending the Section 15-7-10, NMSA 1978, to limit the automatic amendment provision at a level such as two times the original contract amount.

VIII. PRICE AGREEMENTS

Overview

SPD competitively procures certain goods and services on behalf of the State through the negotiation of statewide price agreements. State agencies and local public bodies can make use of these agreements at any time to procure needed goods or services from vendors listed. Similarly, agencies can also procure price agreements with vendors whose goods or services are needed on a regular basis. In a positive step towards transparency and accountability, SPD recently reorganized its employees and developed a new position similar to an auditor whose duties include auditing price agreements and purchases made by agencies to ensure agencies are abiding by the terms and conditions of the price agreements.

Several statewide price agreements contain multiple vendors with a range of prices for similar goods or services. However, agencies are not required to select the lowest price, solicit quotes from

additional sources, or in any way research that the agency is receiving the best value when using a price agreement. In addition, price agreements can be extended after one year and vendors are allowed to increase their prices for the subsequent extension.

Testwork

The OSA reviewed four statewide price agreements and eight agency-specific price agreements, in addition to an overall review of vendors on the statewide price agreement. In one out of 8 agency price agreements (12%), the price agreement did not match the initial bid provided by the vendor. In 2 out of 8 agency price agreements (25%), the procurement file did not contain evidence that SPD notified in writing any businesses that had signified their interest.

Risk Factors

The testwork revealed the following risk factor:

- Weaknesses in the price agreement system that allow increases after an initial price agreement is in place may result in agencies not getting the best price on purchases.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to ensure compliance with the Procurement Code:

- Agencies should always attempt to obtain at least three quotes on purchases, even when a statewide or agency price agreement is available for the needed goods or services.
- SPD should reconsider its process that currently allows vendors to increase prices in price agreement extensions.

VIII. FEDERAL CONTRACTS

Overview

“Piggybacking” is the commonly used term for the process by which one jurisdiction uses the contract terms and prices originated by another agency. One form of piggybacking occurs when state agencies make purchases pursuant to federal contracts. The U.S. General Services Administration (GSA) operates a Cooperative Purchasing Program, which allows state and local governments to purchase from pre-vetted vendors at prices that the federal government negotiated. The list of participating vendors and available goods and services is known as a “schedule.” State and local governments can currently make purchases using GSA Schedule 70 for information technology and schedule 84 for law enforcement and security products and services, at any time, for any reason, using any funds available. These are the only two of the 33 GSA Schedules currently being offered under the Cooperative Purchasing Program. A representative for GSA, FAS, Greater Southwest Region 7 stated that the “GSA does not encourage the use of mirroring GSA Schedules [other than 70 and 84] however, GSA has no control over State methods of procurement.”

Vendors interested in participating in a GSA schedule must file a solicitation document that contains numerous terms and conditions, including a “most favored customer” clause and a “price reduction

clause.” The most favored customer clause is based on the premise that the government deserves similar or better discounts than the best discount a vendor offers to a particular customer category. When vendors apply for a GSA schedule they are required to identify the best discounts granted to the following customer categories (1) dealers/retailers; (2) distributors/wholesalers; (3) educational institutions; (4) state, county, city and local governments; (5) original equipment manufacturers; and (6) others. Based on that information, GSA identifies the customer to which the vendor granted the largest discount as the “most favored customer,” and GSA negotiates a discount that is equal to, or better than, the discount given to the most favored customer. The price reduction clause states that if a vendor violates the contractually agreed-upon pricing/discount relationship by offering a better discount to its most favored customer, the vendor invokes the price reduction clause. This means that from the date the violation took place, the vendor will owe the federal government a discount proportionately equal to that given to the most favored customer.

A maximum order threshold is specified in the GSA request for proposal. The amount of the threshold is negotiable in the contracting process by both the contractor and the GSA. The price reduction clause does not allow orders to exceed the threshold. Specifically, the GSA states, “while ordering activities are encouraged to seek price reductions for any size Schedule contract order, they are required to seek price reductions if a requirement exceeds a Schedule contract’s maximum order threshold.”

Testwork

The OSA reviewed the files of a non-random sample of 10 GSA contracts, obtained from the state purchasing division. Seven of 10 price agreements (70%) mirrored GSA contracts that are not on Schedule 70 or 84, and thus discouraged under the Cooperative Purchasing Program. In one of 10 contracts reviewed (10%), the agency was purchasing items not allowable under the price agreement. One of 10 contracts tested (10%) was over the maximum allowable threshold amount under the GSA contract. Specifically, the GSA contract stated the maximum threshold for purchases under the agreement was \$1,000,000 but the contract was for \$1,600,000. DFA-CRB had approved this contract. In two out of 10 federal mirroring price agreements (20%), the file contained a memorandum sent to vendors that was on agency letterhead (instead of GSD letterhead) asking whether the vendor would extend the same terms as the GSA. The wording and the letter were not in accordance with SPD’s policies, which require the letter to be on GSD letterhead with SPD language for consistency.

Risk Factors

The testwork revealed the following risk factors:

- SPD is using the Cooperative Purchasing Program in circumstances that, while they may be permitted by law, are discouraged by the Program, including permitting agencies to purchase goods and services that are not available under this program.
- Oversight agencies are not providing adequate scrutiny of contracts made through the Cooperative Purchasing Program.
- Contrary to guidance from GSA, agencies are not obtaining quotes from multiple vendors on the GSA schedules prior to selecting a vendor for a purchase.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to help avoid inappropriate use of the Cooperative Purchasing Program.

- SPD should amend the intake packet (outlined in Appendix A) to require that each state agency submit proof that it requested quotes from at least three GSA contractors prior to selection of a GSA contract.
- DFA-CRB should review the procedures for ensuring that agencies making purchases under GSA schedules are not exceeding the maximum order threshold.
- Vendors that extend the State the same or better terms as a GSA schedule need to consider whether it is necessary to update their most favored customer with the GSA, to avoid civil and criminal penalties.

IX. NASPO VALUEPOINT COOPERATIVE PROCUREMENTS

Overview

The National Association of State Procurement Officials (NASPO) is a non-profit professional and educational association of state chief procurement officers dedicated to advancing public procurement. NASPO ValuePoint is a cooperative purchasing program of all 50 states, the District of Columbia and the territories of the United States. The program is facilitated by the NASPO Cooperative Purchasing Organization LLC, a nonprofit subsidiary of the NASPO, doing business as NASPO ValuePoint. The NASPO ValuePoint management board is comprised of 21 state procurement officials appointed by the National Association of State Procurement Officials who oversee the strategic direction, operations and activities of the organization. NASPO ValuePoint facilitates public procurement solicitations and agreements using a lead state model.

NASPO solicitations are worded so that the lead state may accept all or a portion of any proposal received. Bidding is open to local companies and is not limited to national companies. Offerors are free to bid regionally or by state. NASPO encourages all NASPO states to advertise all solicitations. SPD is responsible for advertising NASPO ValuePoint opportunities in New Mexico.

Expenditures Made Pursuant to NASPO ValuePoint Contracts, FY 2016

Vendor Name	Description	Amount Expended in SHARE (All Agencies)
Verizon Wireless	Wireless Services & Accessories	\$3,792,209
Grainger Industrial Supply	Facilities maintenance, repair and operations	\$3,459,964
Dell Marketing LP	Computer Equipment, Peripherals and related services	\$2,064,116
Hewlett Packard Inc.	Computer Equipment, Peripherals and related services	\$1,317,172

Vendor Name	Description	Amount Expended in SHARE (All Agencies)
Motorola Solutions, Inc.	Public Safety Radio Communication Equipment & Services	\$1,238,400
Ricoh USA, Inc.	Copier, Printers & Related Devices	\$777,836
Fastenal Company	Facilities maintenance, repair and operations	\$449,133
Alcohol Monitoring Systems, Inc.	Electronic Monitoring of Offenders	\$290,166
Applied Concepts, Inc.	Police Radar, Lidar, Parts	\$231,533
Opex Corporation	Mail Room Equipment, Services and Support	\$126,826
MSC Industrial Supply	Facilities maintenance, repair and operations	\$127,767
Lenovo	Computer Equipment, Peripherals and related services	\$121,084
Xerox Corporation	Copier, Printers & Related Devices	\$80,401
Pitney Bowes Global Financial Services	Mail Room Equipment, Services and Support	\$59,364
Transource Computers	Computer Equipment, Peripherals and related services	\$59,141
Howard Technology Solutions	Computer Equipment, Peripherals and related services	\$51,654
AT&T Mobility II LLC	Wireless Services & Accessories	\$48,431
Ciara Technologies USA, Inc.	Computer Equipment, Peripherals and related services	\$37,755
Goodyear Tire & Rubber Company	Tires, Tubes & Related Services	\$35,721
Bridgestone Americas Tire Operations, LLC.	Tires, Tubes & Related Services	\$12,630
ICOM America, Inc.	Public Safety Radio Communication Equipment & Services	\$10,627
Voiance Language Services, LLC.	Telephone Based Interpreter Services	\$7,403
Corporate Translation Services, Inc.	Telephone Based Interpreter Services	\$4,455
T-Mobile USA Inc.	Wireless Services & Accessories	\$4,322
Linguistica International, Inc.	Telephone Based Interpreter Services	\$4,045
Sharp Electronics Corporation	Copier, Printers & Related Devices	\$3,248
Kustom Signals, Inc.	Police Radar, Lidar, Parts	\$1,550
Total		\$14,416,953

Note: Sixteen NASPO ValuePoint contracts in which New Mexico participates had no expenditures in FY16 and are not included in the table.

Testwork

The OSA reviewed the files of a non-random sample of 10 NASPO ValuePoint requests for proposal to determine whether GSD had advertised these opportunities in New Mexico. Four out of the 10 (40%) were not advertised in the New Mexico papers of record that GSD ordinarily uses for RFP notice publication.

Risk Factors

The testwork revealed the following risk factors:

- The State Purchasing Division did not have documentation to support that it is advertising all NASPO ValuePoint request for proposal solicitations.
- The SPD’s website does not list local fulfilment partners and supply chain distributors for NASPO price agreements.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to expand the opportunities available locally under the NASPO ValuePoint program.

- SPD should post advertisements for invitations for bids or proposals for all NASPO solicitations. This is in line with the State Purchasing Agent’s goal of “facilitating fair and open competition” and it ensures that local vendors have an opportunity to compete for cooperative contracts.
- DFA and DoIT should work collaboratively with SPD to modify or update the SHARE contract module to allow for multiple vendors in instances where an agency is using the price from a NASPO ValuePoint agreement with a manufacturer, but purchasing through a local retail or wholesale vendor. SPD has stated they would have no problem listing the local vendors for NASPO agreements, but without some change to SHARE agencies cannot buy from local vendors.

X. CAMPAIGN CONTRIBUTION DISCLOSURE FORMS

Overview

The Procurement Code, Section 13-1-191.1(C), NMSA 1978, requires campaign contribution disclosures in connection with each competitive sealed proposal, sole source or small purchase contract. Section 13-1-191.1(E) states: “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.” Emergency and exempt procurements do not require the form. The statute states:

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 [DFA] 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.

In contrast to the language of the statute, the form developed by DFA currently states that it is only applicable to contracts “for professional services, a design and build project delivery system, or the design and installation of measures the primary purpose of which is to conserve natural resources.” DFA is the only agency authorized to promulgate the campaign contribution form and, per emails exchanged in May 2017, agreed that this concern was valid.

SPD has also issued guidance that appears to conflict with the campaign contribution disclosure statute. A guidance memo dated November 9, 2006, stated the following: “The new law applies only to procurements that require a “competitive sealed proposal” process, and to contracts that end up being exempt from the request for proposal (“RFP”) process because they qualify as a small purchase contract or a sole source contract. The new law does not apply to all small purchase contracts or sole source contracts—just those contracts that normally would have to follow the competitive sealed proposal process but don’t have to because they qualify as a small purchase or sole source contract.” The statute does not appear to provide a basis for this interpretation.

Currently, each agency subject to the campaign contribution disclosure requirement is solely responsible for determining whether its prospective contractors are submitting a disclosure form. The statute does not require agencies to evaluate the accuracy of that disclosure form by searching the Secretary of State’s campaign finance information system.

Testwork

The OSA reviewed the files of a non-random sample of 34 competitive procurement files, 13 sole source procurement files and nine small purchase procurement files, obtained from various agencies. Eleven out of 34 competitive procurement files (32%), six out of 13 sole source procurement files (46%), and six out of nine small purchase procurement files (67%) did not contain the campaign contribution disclosure forms.

Risk Factors

The testwork revealed the following risk factors:

- Agencies are not complying with the requirement to obtain campaign contribution forms.
- Although the statute imposes an absolute prohibition on contributions during the pendency of a procurement, the statute does not require agencies to confirm whether bidders complied with this prohibition. While agencies can ratify contracts with vendors that violated this prohibition, it is difficult for them to do so in good faith without having the information on contributions during the prohibited period.

- The statute also does not require any confirmation that the information is accurate. Absent a list of people who meet the definition of “prospective contractor” and “family members or representatives of the prospective contractor,” no agency can perform a meaningful check on the accuracy of the form.
- The decentralized process for collection and maintenance of the form results in a lack of comprehensive data, which made performing the test procedures very difficult.
- The OSA noted inconsistent practices regarding whether a new campaign contribution disclosure form should be completed when a contract is amended. The statute states that the prospective contractor shall disclose all campaign contributions during the two years prior to the date on which a proposal is submitted. However, the statute does not address multi-year contracts that may last up to four years. For example, leases may be competitively procured and may have an initial term with options for extensions lasting upwards of 20 years. The statute does not address the validity of a campaign contribution disclosure form filed 20 years ago, despite the fact that subsequent contributions may influence decisions as to whether to extend a lease term.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices to ensure compliance with the campaign contribution disclosure requirements:

- DFA and SPD should revise the campaign contribution disclosure form and related guidance to reflect the broader language of the Procurement Code.
- To address the concerns caused by individual agency collection, the Legislature should consider requiring each agency to submit the campaign contribution disclosure as part of its procurement packet submitted to the appropriate oversight agency, or to post the form to the Sunshine Portal. As of January 1, 2017, the Sunshine Portal includes all state agency contracts and this could be an easy addition to increase transparency and accountability.
- DFA and SPD should consider processes or potential partnerships that would facilitate comparison of information from campaign contribution disclosure forms to the Secretary of State’s campaign finance information system. In order to make this meaningful, the campaign contribution disclosure form would need to be amended to include a full list of people from whom disclosure is required. This cross-check is also necessary after the award of a contract in order for the prohibition on contributions during the pendency of a procurement to be meaningful.
- The Legislature should consider amending the statute to clarify when and how often the campaign contribution disclosure form should be filed by a prospective contractor, especially addressing the issue of contract amendments and extensions.

XI. OVERSIGHT

Overview

As described in more detail in the Procurement Overview section of this Report and [Appendix A](#), three oversight agencies play a role in procurement. GSD provides review and approval of ITBs, RFPs and contracts for goods and non-professional services. DFA provides review and approval of

contracts for professional services. DoIT provides review and approval of RFPs and contracts for information technology goods, services and professional services.

Testwork

While conducting the data analysis and test work described throughout this Report, the OSA also observed the following regarding the oversight processes:

- The OSA noted several errors in the DFA Contracts Database, most commonly misclassifications (e.g. mislabeling a competitive proposal as ‘sole source’).
- The OSA observed contracts and supporting documentation missing from the DFA contracts files for FY13, FY14, FY15, and FY16 within the test work samples. Missing documentation included DFA Financial Control Division (FCD) approval of emergency procurements.
- Agencies can bypass DFA CRB entirely by coding a transaction as anything other than EXC 13-1-99A. The other origin codes allowable for use by agencies would only go through DFA FCD, and this division can only audit a sample of transactions received as they are overwhelmed by the sheer volume of transactions processed by each of the agencies. Mistakes in coding are difficult to identify because the volume of transactions FCD receives would make it impractical to review of each transaction for accuracy in coding.
- DFA and SPD have noted issues with the SHARE contract’s module entry screen. The current SHARE system does not have a designated approval person or agency and does not have a locking mechanism once a contract has been approved. Anyone can approve a contract in the SHARE contract module. Anyone can change the contract module once it has been approved by someone at either SPD or DFA. SHARE only shows the date of and person who made the last changes, but it currently does not track how many changes were made after the process of contract approval or by whom. A sample activity log from the SHARE contract module appears below. Note that the contract was approved in 2013, but the last date of modification was in 2017 and there is no way to know what was changed or how many changes were made in between those dates either.

Sample Activity Log in SHARE

Maintain Contracts	
Activity Log	
Entered	
By User:	[REDACTED]
Date :	07/29/2013
Modified	
By User:	[REDACTED]
Date/Time :	03/06/2017 9:58:00AM
Approved	
By User:	[REDACTED]
Date :	07/29/2013
<input type="button" value="Return"/>	

- DoIT’s review process included edits to the scope of work in the contract phase for several contracts we sampled. This increases the risk of a bid protest based on the concept that a scope of work becomes final and binding once published in the request for proposal.
- In five out of 36 (14%) contract amendments we reviewed that were sent to DoIT for approval, the contracts did not go through DoIT’s e-review process. It was simply noted that the hard copies of the contracts were received then signed by the Secretary.
- In one out of 36 (2%) contract amendments, the contract was approved and executed by DFA and the agency, but it was not approved by DoIT despite the fact that previous amendments to the same contract were approved by DoIT.
- SPD does not have all eligible vendors registered in the GSD e-procurement system. It is vital that all eligible vendors register with SPD (a free service) because SPD sends out automatic email notifications to vendors registered with that commodity code for all current solicitations. Instead, various separate systems and lists of vendors exist in different agencies, including the DoIT list of vendors, the Department of Game and Fish’s list of vendors, the DFA’s list of vendors, and the various lists maintained schools, higher education, and local public bodies.

Risk Factors

The testwork revealed the following risk factors:

- Manual and duplicative entry of codes in various databases is designed in a way that can lead to misclassification and other mistakes in data entry, which in turn hinder transparency in the procurement process.
- Vendors may not always be aware of bidding opportunities because of the processes for registering eligible vendors in GSD’s e-procurement system.
- The risk of bid protests is increased when scope of work revisions occur after bidding is complete.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices. However, the OSA notes that significant progress in some of these areas is already underway. A SHARE update expected to occur in the fall of 2017 should resolve the issues with the contract module. In addition, SPD is currently updating its policies and procedures for each type of procurement SPD handles and training all SPD buyers in the new procedures. DoIT is currently updating their procedures for RFP, contract, and contract amendment review and approval.

- DFA should consider developing a new process to track contracts that go to DFA for review, including emergency procurements. DFA’s current system is outdated and appears to be prone to manual entry errors because analysts input the same data twice, once in SHARE and once in their internal database.
- Since the beginning of FY17, DFA scans all contracts and all emergency procurements to its internal servers. We observed this to be true and were able to locate FY17 procurements without issue. DFA should continue this practice diligently.

- DFA should consider discontinuing its unique numbering system and adopt the State Purchasing Division’s numbering system. Having one consistent means of numbering procurements from start to finish allows for greater transparency and accountability.
- DFA, GSD, and DoIT should collaborate to develop a mechanism to inform vendors on all state agency approved vendor lists to also register with SPD. For example, when a new vendor is required to submit documentation to DFA, DFA could also have a checkbox on that same document asking if the vendor would like to receive electronic notifications of the State’s solicitation opportunities, view and download all pertinent information on one site (SPD’s e-procurement system) and have the ability to submit proposals and bids electronically.
- DoIT should consider revising its review processes to minimize scope of work revisions after bidding is complete, including encouraging agencies to more fully develop their scopes of work in the RFP stage, and raising awareness of when DoIT review is necessary.
- DoIT should review its procedures for ensuring that all information technology procurements are being reviewed by DoIT staff. DoIT should collaborate with DFA in this effort to ensure that other agencies’ staff is aware of which procurements require DoIT review, and DFA should continue the practice of sending contracts to DoIT when they are flagged as IT contracts.

XII. OTHER ISSUES

Testwork

The OSA evaluated the procurement files of 13 requests for proposals from various agencies. In three out of 14 files reviewed (21%), the agencies did not complete the evaluation committee scoring or have any proof that the proposals were evaluated for sufficiency. These were RFPs to which only one vendor responded.

One RFP bundled 32 total projects into one RFP, and it appeared that each of these projects could have easily been its own separate RFP. It appeared that the agency was trying to save time by submitting one RFP for all services needed. However, the manner in which this RFP was solicited did not foster competition. The advertising for this RFP did not inform vendors that the RFP was inclusive of 32 separate services, consultants, trainers, projects, or services and vendors would have only known about all the bidding opportunities by formally requesting the RFP then reading through the entire 142 pages to identify sections on which they could bid.

One state agency has ancillary receivership bank accounts held in trust for the benefit of policy holders and creditors processed outside of SHARE. From fiscal year 2013 through fiscal year 2016, the agency paid \$63,261 from these accounts to an attorney vendor. The original and only contract with this vendor was a contract for legal services and transactions related to ancillary receiverships, dated February 26, 1991. In 2013, an email stated an increase in rates, but the agency did not provide a formal contract amendment. None of these ancillary receivership transactions are processed through SHARE, which violates the MAPS, and DFA did not approve the original contract or amendments.

Recommendations and Best Practices

In addition to the centralization and enhanced training recommendations highlighted generally in this Report, the OSA notes the following best practices:

- Agencies should complete an evaluation/scoring for all RFPs, even when only one vendor responds. This is a best practice according to the State Purchasing Division. Agencies that do not score RFPs leave the agency vulnerable to litigation. In the event of a protest, the agency would have no documentation justifying why that vendor was selected and awarded the contract.
 - Agencies should avoid excessive bundling of goods and services within one RFP and oversight agencies should assist in safeguarding against this practice.
 - Internal controls for both procuring agencies and oversight agencies should have mechanisms to identify expired contracts and to prevent expenditures under those contracts.
-

EXIT CONFERENCE

On June 29, 2017, the OSA held an exit conference with the following individuals to discuss the results of the consulting services engagement and the findings.

General Services Department:

Edwynn L. Burckle, Secretary
Lawrence O. Maxwell, State Purchasing Agent
Anna Silva, Strategic Sourcing Bureau Chief
Zella Cox, Chief Financial Officer and Director, Administrative Services Division
Rebecca Abbo, Internal Auditor

Department of Finance and Administration:

Dorothy “Duffy” Rodriguez, Secretary
Paul Kippert, Assistant General Counsel
Clinton Nicley, Deputy General Counsel

Department of Information Technology:

Darryl Ackley, Secretary
Susan Pentecost, Managing Director, Office of the Chief Information Officer

Office of the State Auditor:

Sanjay Bhakta, Deputy State Auditor
Sarita Nair, Chief Government Accountability Officer & General Counsel
Chelsea Martin, Audit Supervisor

ENDNOTES

ⁱ See Laws 1984, Chapter 65, Section 176.

ⁱⁱ Section 13-1-29.C, NMSA 1978.

ⁱⁱⁱ *Planning and Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P. 2d 628 (S. Ct. 1994).

^{iv} As detailed in Legislative Finance Committee Report #16-09: “The \$6 billion spent on HSD-related healthcare is listed in SHARE as a block grant, but HSD has claimed an exemption from state purchasing oversight and the Procurement Code and it is missing from the sunshine portal. Previous Medicaid contracts (2009) followed the typical procurement procedure through DFA.

^v As detailed in Legislative Finance Committee Report #16-09: “The \$6 billion spent on HSD-related healthcare is listed in SHARE as a block grant, but HSD has claimed an exemption from state purchasing oversight and the Procurement Code and it is missing from the sunshine portal. Previous Medicaid contracts (2009) followed the typical procurement procedure through DFA.

^{vi} *Governor's Guidelines for Contract Review and Re-Evaluation*. Available at: <http://nmdfa.state.nm.us/uploads/FileLinks/65d145f7463743d893de23b07cf91d5c/Governor's%20Guidelines%20for%20Contract%20Review%20and%20Re-Evaluation.pdf>.

Timothy M. Keller
State Auditor



Sanjay Bhakta, CPA, CGFM, CFE, CGMA
Deputy State Auditor

State of New Mexico
OFFICE OF THE STATE AUDITOR

August 10, 2017

Cabinet Secretary Ed Burckle
General Services Department
1100 South St. Francis Dr.
Santa Fe, New Mexico 87504

Cabinet Secretary Duffy Rodriguez
Department of Finance and Administration
407 Galisteo Street
Santa Fe, New Mexico 87501

Cabinet Secretary Darryl Ackley
Department of Information Technology
715 Alta Vista Street
Santa Fe, New Mexico 87502

Dear Secretaries Burckle, Rodriguez, and Ackley:

We have performed consulting services for the General Services Department (GSD), the Department of Finance and Administration (DFA) and the Department of Information Technology (DoIT) for the period of July 1, 2013, through June 30, 2016. This engagement is solely for the purpose of reviewing compliance with laws, regulations, policies and procedures related to procurement practices to assist GSD, DFA, and DoIT in determining the possibility of non-compliance with compliance with laws, regulations, policies and procedures.

This consulting services engagement was conducted in accordance with Standards for Consulting Services established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of the parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described herein either for the purpose for which this report has been requested or for any other purpose.

We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on the consulting service procedures. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you. In addition, our consulting procedures do not provide a legal determination of GSD, DFA, or DoIT's compliance with applicable laws and regulations.

This report is intended solely for the information and use of management of GSD, DFA, and DoIT and the New Mexico State Auditor, and is not intended to be and should not be used by anyone other than these specified parties. Please do not hesitate to contact us at (505) 476-3800 if you have any questions regarding this report.

Sincerely,


Office of the State Auditor

2540 Camino Edward Ortiz, Suite A, Santa Fe, New Mexico 87507

Phone (505) 476-3800 * Fax (505) 827-3512

www.osanm.org * 1-866-OSA-FRAUD

Management Responses



STATE OF NEW MEXICO
DEPARTMENT OF INFORMATION TECHNOLOGY

SUSANA MARTINEZ
Governor

DARRYL ACKLEY
Cabinet Secretary
ESTEVAN LUJAN
Deputy Secretary

July 14, 2017

Chelsea Martin
Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507

Re: Report on State Agency Procurement Practice

Dear Ms. Martin,

This letter represents the Department of Information Technology's (DOIT's) formal response to the findings outlined in the draft Report on "State Agency Procurement Practices" For your convenience, an itemized list of our review is chronologically excerpted below:

1. "...DoIT did not provide to OSA a database tracking RFPs reviewed and approved, so RFP approval times are not available." (Page 5)

Comment

DoIT was not requested to provide the full tracking database to the OSA auditor; rather, we provided an extract from the procurement tracking database for a specified set of contracts. The auditor did not request any information on RFPs.

2. Table presents "average number of days from receipt to signature approval" (Page 6)

Comment

The title of this table is misleading and unclear. The table does not specify what "receipt- to signature approval" is; is this the period of time a contract is received for e-review or received for signature? If the period of time is between receipt for e-review and signature approval, that time period is highly dependent of factual circumstances and often outside of DoIT control. Complexity, parties involved and agency dependencies may all affect the time period.

3. "In one out of 13 sole source procurements tested, the agency was excluded from the requirement to procure through SPD, but was not exempt from the requirement to comply with the Procurement Code.

715 ALTA VISTA STREET, SANTA FE NEW MEXICO 87505
505.827.0000

WWW.DOIT.STATE.NM.US

This agency was unable to provide proof that the notice of sole source contract was posted with all required information for 30 days as required by Section 13-1-126.1 NMSA 1978. This agency was also unable to provide proof that, prior to award, the agency sent all required information to the Department of Information Technology for posting to the Sunshine Portal and to the Legislative Finance Committee as required by Section 13-1-128(C) NMSA 1978. This sole source and one other (2 out of 13) justified the sole sources by stating that only one vendor was authorized to configure the software. It is true that in these cases only one vendor could modify their proprietary software, however these agencies could have put out an RFP for a new system that could have met their current and future needs. There were multiple software systems on the market that could have met the agency's needs.” (Page 10-11)

Comment

Regarding the underlined point, often in this situation an agency already has a significant investment in a software solution and is likely to have implemented such a solution. It is not realistic to assume an agency can competitively procure (and implement) a brand-new solution rather than do a sole source procurement of services to configure what they already have. Implementation of a large IT project can run into the hundred-million-dollar range, and most require multi-year funding and multi-year implementation. Realistically, within the market of IT government projects, after a solution and vendor is chosen, that relationship will, by necessity, exist for many years to come.

4. “In five out of 13 sole source procurements tested, the justification contained wording that the vendor was initially contracted through an RFP in years prior and multiple vendors responded to the initial RFP. This wording alone should have resulted in a rejection of the sole source justification form because the form itself stated that there was more than one source for the required service, construction or item of tangible personal property.” (Page 11, bullet 1)

Comment

This is related to the preceding point. An initial competitive procurement may result in implementation of a specific solution. Once that path is undertaken, especially of a commercial-off-the-shelf product, it does not necessarily follow that another full-and-open procurement can sustain the solution that has been implemented. In many cases, once a solution is implemented, the range of alternative providers and solutions originally possible and considered may no longer be relevant. This is not dictated by procurement procedures or issues, but merely a by-product of the current IT government market.

5. Exemptions to the Procurement Code (Pages 15-19)

Comment

This section presents a table showing SFY 2016 expenditures that were made pursuant to exemptions from the Procurement Code. The largest share of these is \$3,907,743,011 made between state agencies, or between a state agency and a local public body or external procurement unit. The narrative doesn't make it clear that this is an entirely appropriate and correct way to handle these expenditures; rather, it implies that these expenditures are circumventing appropriate application of the procurement code. As discussed during the debriefing on this audit, we request that this be explicitly clarified or that the table be amended.

6. “DFA and DoIT should work collaboratively with SPD to modify or update the SHARE contract module to allow for multiple vendors. SPD has stated they would have no problem listing the local vendors for NASPO agreements, but without some change to SHARE agencies cannot buy from local vendors.” (Page 25, bullet 4) (Recommendations and Best Practices)

Comment

The SHARE Financials Contracts module will be significantly improved as part of the overall upgrade of SHARE to version 9.2. This specific recommendation entails the use of a very new PeopleSoft feature for Multi-Supplier Contracts. While the functionality can be configured, this requires that detailed business requirements be captured, that standard processes and procedures be developed, and that users receive adequate training. Management reporting and/or audit requirements also need to be identified and implemented. While useful, this is not a simple change to implement, will require focused resources from impacted groups, and needs to be prioritized along with other desired enhancements to SHARE.

7. “DoIT’s review process included edits to the scope of work in the contract phase for several contracts we sampled. This is not allowable in the contract stage. The scope of work becomes final and binding once published in the request for proposal.” (Page 28, bullet 5)

8. “DoIT should consider revising its review processes to guard against scope of work revisions after bidding is complete and raising awareness of when DoIT review is necessary.” (Page 29, bullet 3) (Risk Factors)

9. “DoIT should consider changing its procedures regarding scopes of work to discontinue any substantive changes to the scope of work in the contract stage. DoIT should emphasize review of these procedures during the RFP approval stage instead.” (Page 30, bullet 2) (Recommendations and Best Practices)

Comment

Regarding the recommendation that DoIT not recommend any substantive changes to the SOW at the contract stage, DoIT strongly disagrees with this recommendation. To do this would be to fail in DoIT oversight responsibilities. While it would be an improvement if every RFP included a draft contract statement of work (Attachment A to contract), few RFPs include one today. However, it is neither practical nor appropriate to say that an agency issuing an RFP for a complex requirement – especially one combining professional services and a technology solution – can design an appropriate SOW that does not change in any way as a result of the competitive procurement process. Part of the value of the competitive procurement process is that offerors have the opportunity to propose solutions (services or technology or both) that reflect best practices, varied methodologies, and technology selections and combinations that offer greatest value to the State. In addition, offerors have the opportunity to propose services or solutions that offer greater value – differentiating their proposal from the competition. This is not considered, from an offeror’s point of view, an unfair situation or to make an uneven playing field; it is considered an integral part of competing to win such work.

Beyond that, it is not a procurement best practice for state agencies to specify how their requirements will be met (unless the requirements are very narrow, such as procuring a specific piece of hardware). Rather, across public sector procurement agencies are encouraged to specify

what they need (e.g., what business processes must be supported, what outcomes must be achieved, what service levels or quality must be delivered).

To assert that a SOW cannot change once it is written in an RFP negates the value of the competitive procurement process, other than to assess different prices for a specified set of services. This approach is likely to result in lower quality/value solutions and services for the state OR in an increased number of contract modifications post award to try to arrive at more appropriate results.

10. “DoIT should review its procedures for ensuring that all information technology procurements are being reviewed by DoIT staff. DoIT should collaborate with DFA in this effort to ensure that each agency’s staff is aware of which procurements require DoIT review.” (Page 30, bullet 2)
(Recommendations and Best Practices)

Comment

There may be other reasons why IT procurements may not be reviewed by DoIT, but this is not often one. The working relationship between DFA and DoIT is very collaborative. DFA regularly sends DoIT procurements that they suspect may be IT related to ensure that DoIT reviews and, if necessary, provides approval.

Sincerely,



Darryl M. Ackley
Cabinet Secretary
Department of Information Technology



Susana Martinez
GOVERNOR

State of New Mexico
Department of Finance & Administration
180 Bataan Memorial Building
Santa Fe, New Mexico 87501
Phone: (505) 827-4985
Fax: (505) 827-4984
www.nmdfa.state.nm.us

Duffy E. Rodriguez
Cabinet Secretary Designate

Date: August 15, 2017

To: Chelsea Martin, Audit Supervisor

From: Duffy Rodriguez, Cabinet Secretary, Department of Finance and Administration

Re: Audit Response

Dear Ms. Martin:

Thank you for the opportunity to clarify our comments regarding the final draft of the OSA Audit Report. Please see below for our supplemental feedback, organized chronologically for your convenience:

1. Page 1 (paragraph 3): Regarding the phrase “general overuse of non-competitive procurements,” it seems, based on the report, to be conjecture. Some of the methodology underlying this process is questionable.
2. Page 1 (paragraph 4): This is an extraordinary leap. It presumes agency intent and infers too much from the number alone. Also, it fails to explain the substantive reasoning behind many of the exemptions. The problems detailed therein are also human in nature, and difficult to avoid on that front along.
3. Page 1 (paragraph 5): The claim that “This reduces errors, decreases the number of protests or other litigation...” is largely unsupported by the report; assumptive at best.
4. Page 2 (first bullet): It should be mentioned that sole sources have, in fact, decreased from past years thanks to the 30-day posting and other statutory requirements (see LFC report). Also, “desire for convenience” is an accusatory conclusion with no clear path from the findings.
5. Page 2 (second bullet): How was this data determined? How many emergencies were there? How is this reflected as a percentage?
6. Page 2 (fourth bullet): DFA has communicated this information to the SHARE team, and remedial action is underway for the exempt/user defined fields.
7. Page 2 (fifth bullet): We disagree regarding the Risk Management Division exemption to Procurement; it is vital, from a legal standpoint, not to lose representation during the midst of a case and this statute is essential to the proper defense of the state in an ongoing situation. Further, there are ethical considerations in terminating representation which would be caused by forcing such situations under the normal methods of procurement.
8. Page 3 (final paragraph): We have folders for emergency procurements that contain all the necessary information.
9. Page 9 (paragraph 2): Having qualifying factors does not automatically mean that qualification is difficult.
10. Page 10 (paragraph 1): This “non-random sampl[ing]” language appears several times in the Report. Though it may be useful for an audit to target potential problem areas, it’s a near statistical certainty that the percentages of the problem are inflated as a result. We certainly want to see Procurement Code compliance, but the small and non-random samples change the complexion of the audit.
11. Page 11 (first bullet): This remains an incorrect statement since the service being procured cannot be provided by any vendor other than the original successful offeror to the RFP as the maintenance would be



State of New Mexico
Department of Finance & Administration

180 Bataan Memorial Building

Santa Fe, New Mexico 87501

Phone: (505) 827-4985

Fax: (505) 827-4984

www.nmdfa.state.nm.us

Susana Martinez
GOVERNOR

Duffy E. Rodriguez
Cabinet Secretary Designate

proprietary. The service acquired by the RFP was the IT system/software itself. The service now being acquired through the sole source is the maintenance on same. **They are two distinct services.** One has to conflate them to make OSA's statements true.

12. Page 11 (fifth bullet): Strongly disagree with entire statement (beginning with "Oversight agencies, including DFA, DoIT and the SPD ..."). Not supported by the Report.
13. Page 14 (fourth bullet): On-going litigation is unpredictable and volatile. The fact that the case was first filed in 1988 is not relevant to the analysis.
14. Page 14 (final bullet): We already annotate this process heavily. To suggest otherwise is false.
15. Page 15 ("Recommendations and Best Practices"): Emergencies are not solely the result of "force majeure" type events. Many situations implicate health and safety concerns that cannot be compromised.
16. Page 20 (first bullet): Again, litigation should not be improper use due to its unpredictability and volatility.
17. Page 21 (first bullet): No one particular agency or state entity "owns" exemptions.
18. Page 27 (third bullet): There is no statutory authority for DFA or SPD to impose such processes on agencies.
19. Page 29 (first bullet): This remains a complicated point. If a particular thing is being requested through the RFP, then the scope of work shouldn't change. However, if a vendor's best system or offer is being requested, then the scope of work would necessarily change once the successful offeror is chosen. So a blanket statement that "This increases the risk of a bid protest..." is not true in all cases.
20. Page 31 (second bullet): What is "excessive bundling of goods and services?" This concept should be better explained.

This concludes the itemized list of DFA responses to the final "Report on State Agency Procurement Practices."

Sincerely,

Duffy Rodriguez

Cabinet Secretary

Department of Finance and Administration



SUSANA MARTINEZ
GOVERNOR

ED BURCKLE
CABINET SECRETARY

State of New Mexico
General Services Department

ADMINISTRATIVE SERVICES DIVISION
(505) 476-1857

FACILITIES MANAGEMENT DIVISION
(505) 827-2141

PURCHASING DIVISION
(505) 827-0472

RISK MANAGEMENT DIVISION
(505) 827-2036

STATE PRINTING & GRAPHIC SERVICES BUREAU
(505) 476-1950

TRANSPORTATION SERVICES DIVISION
(505) 827-1958

August 9, 2017

Mr. Timothy M. Keller
State Auditor
Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507

Re: Response to the revised Report on State Agency Procurement Practices for the period of July 1, 2013 through June 30, 2016

Dear Mr. Keller,

Thank you for the opportunity to respond to the above referenced Report's Risk Factors and Recommendations/Best Practices pertaining to the General Services Department (GSD) and the State Purchasing Division (SPD). This response is not intended to be all inclusive, and there may be portions of the report that are not mentioned, either because those portions address a different agency, or we are uncertain of either the meaning or the data from which the conclusions are derived.

In the working spirit of the participants, and in recognition of the consulting efforts of the OSA, GSD agrees that efficiency and strengthening of the procurement process could be gained through many of the recommendations contained within the report including but not limited to the following concepts:

- Consolidating the SPD and the DFA Contracts Review Bureau into a single organization to provide increased customer support while improving oversight of the procurement process
- Increased training for all CPOs including:
 - Identification of RFPs and contracts that require DoIT review
 - Proper use of exceptions and exclusions to competitive procurement
 - Proper coding of exemptions, exceptions, sole source and emergency procurements
- Empowering CPOs at the agency level to do their jobs by:
 - Pursuing the statewide purchasing agency that oversees all CPOs for all agencies;
 - Having CPOs physically located at their respective agency and funded through that agency
 - Such a reporting relationship should help reduce procurement code violations, reduce Sole Source procurements, and assure proper approval of Emergency procurements
 - Mitigating the risk that the CPO will be fired or removed from the position because of a disagreement on proper procurement procedures
- Participation by GSD/SPD in a comprehensive review of exemptions to the Procurement Code
- Encouraging the oversight by SPD of the approval and use of Procurement Code exemptions

Generically speaking, the Report makes reference to "non-random" samples, and does not identify the samples involved or the method of selection or notice of "non-random" samples. Accordingly, as SPD

did not track the files requested by the Auditor, it has no way of knowing which contracts comprised the samples tested. Thus, SPD has no way to comment on some of the statements involved in the Report without additional information

Regarding the OSA's comments and recommendations on Small Purchases, GSD notes the following:

- The infrequent use of small purchase professional services contracts by the Risk Management Division (RMD) allows RMD to meet tight, court imposed deadlines (twenty and thirty days depending on the jurisdiction)
- Small purchase professional services contracts are occasionally necessary for RMD to address the unforeseen need for specialty legal experience—a factor that is critical to meeting state interests both substantively and fiscally
- The statutory provision allowing RMD to automatically extend contracts during the life of a litigated file ultimately serves the best interests of the state
 - Transferring files between lawyers and firms during the course of litigation causes disruption in the defense and costs money because the newly assigned firm must use billable time to re-learn both factual and legal issues

The GSD appreciates the OSA modifying its comments regarding “Test work” and “Risk Factors” for the use of GSA's, however, GSD is requesting a change in language from the use of, “discouraged” to “not encouraged”.

Further, on behalf of the Procurement Reform Task force created by the Governor, I invite you to present an overview of your findings and recommendations at the next meeting of that group scheduled for September 29, 2017.

We assume that after review of these comments with the attachment hereto and the comments of other agencies, the OSA will be able to assess more carefully the scope or severity of any procurement problems identified; and will be able to clarify more thoroughly the alleged problems that exist in procurement. GSD does not agree, as stated before, with the conclusions drawn from “non-random”, unspecified audit files.

We appreciate the opportunity to comment.

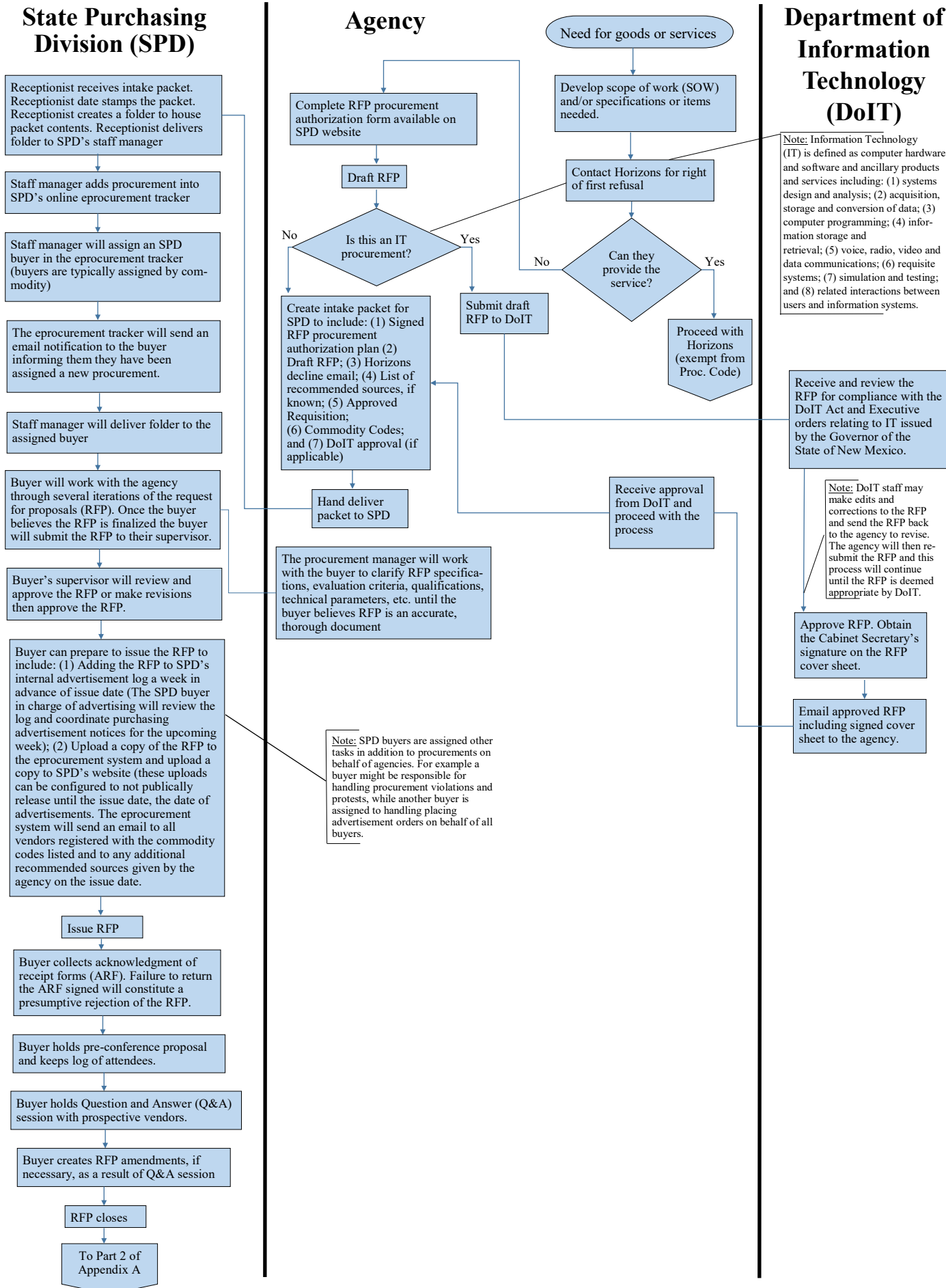
Respectfully,



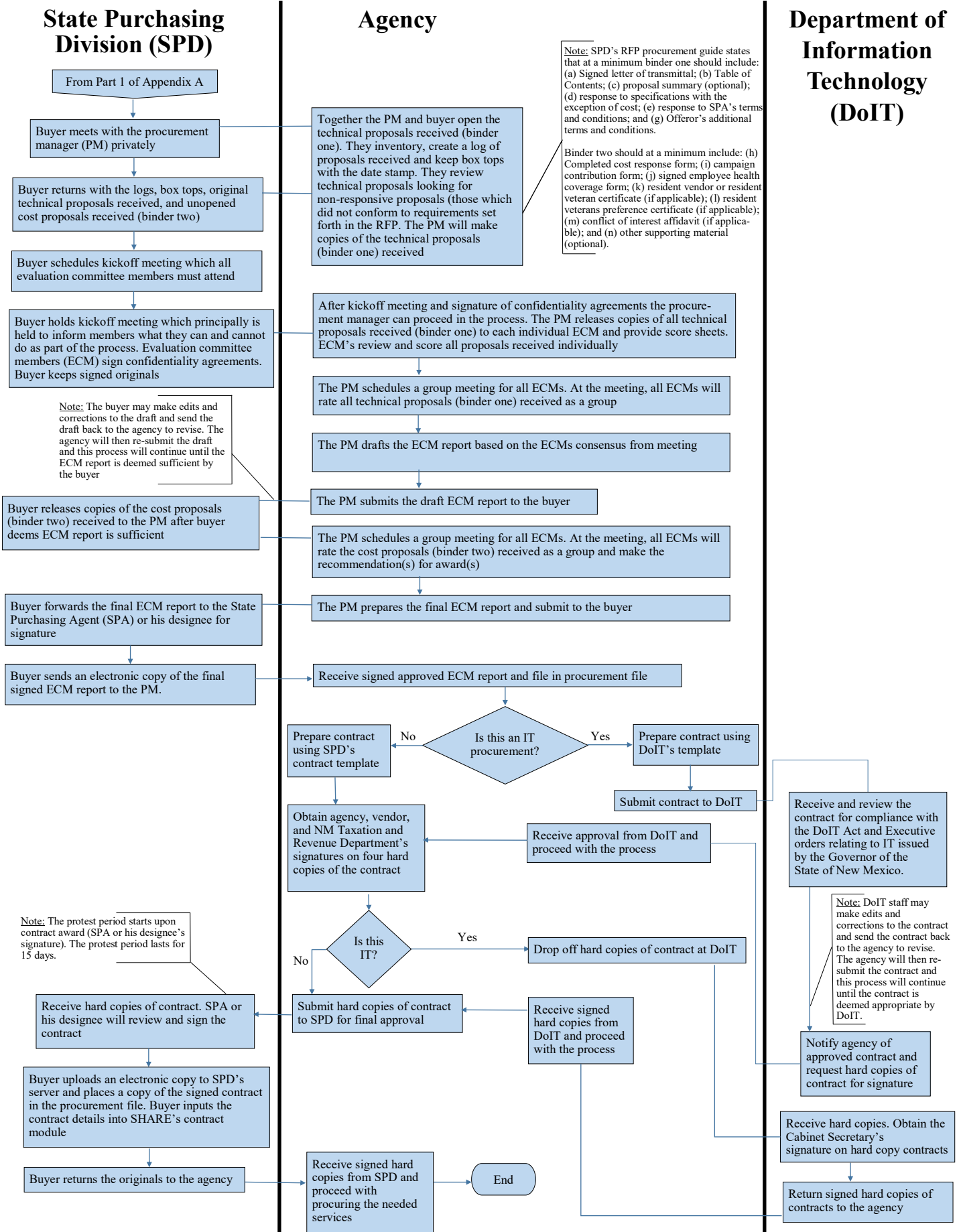
Ed Burckle

APPENDIX A: PROCESSES AT GSD, DFA AND DoIT

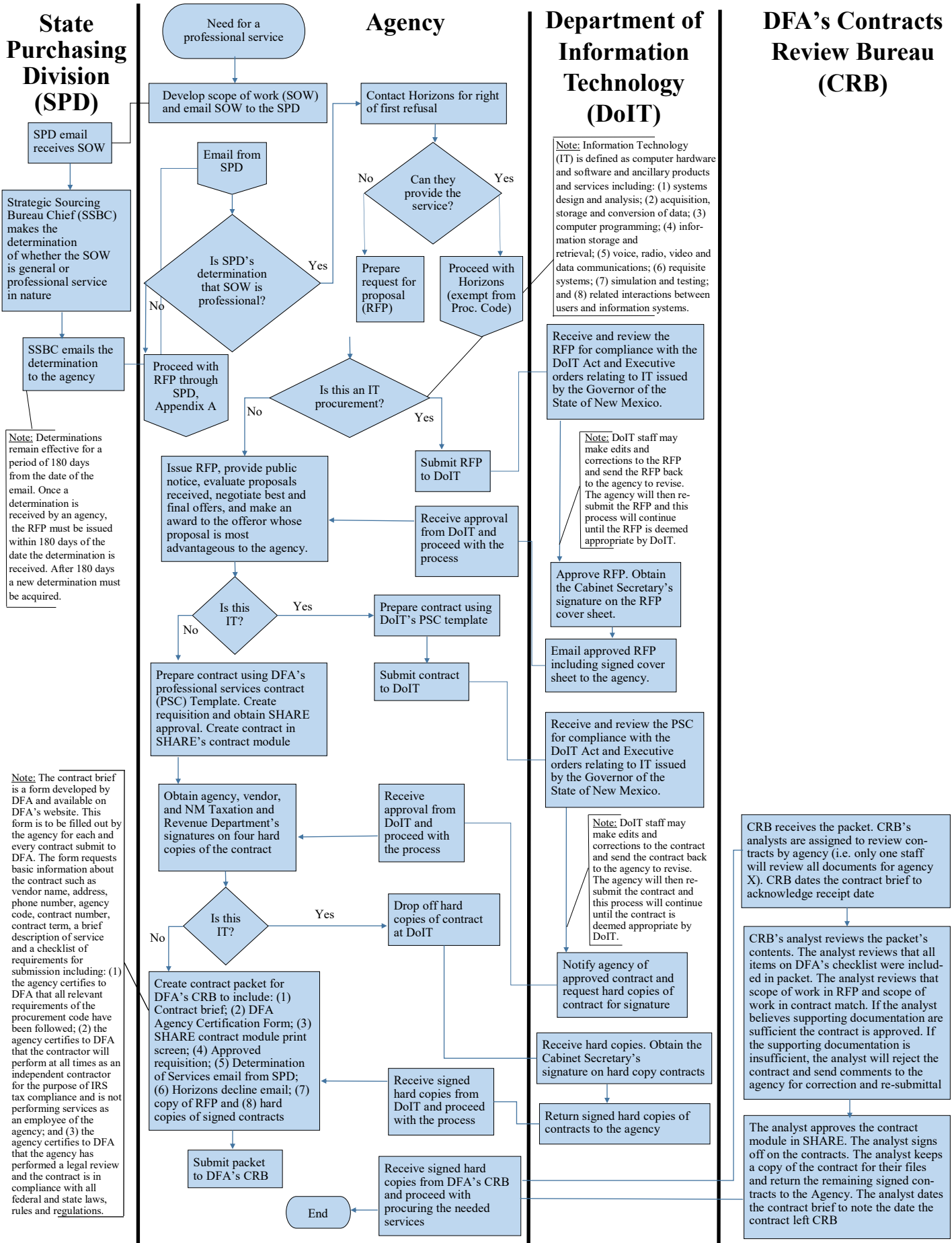
RFP FOR GOODS OR SERVICES RESULTING IN A CONTRACT >\$60,000 PART 1 of 2



RFP FOR GOODS OR SERVICES RESULTING IN A CONTRACT >\$60,000 PART 2 of 2

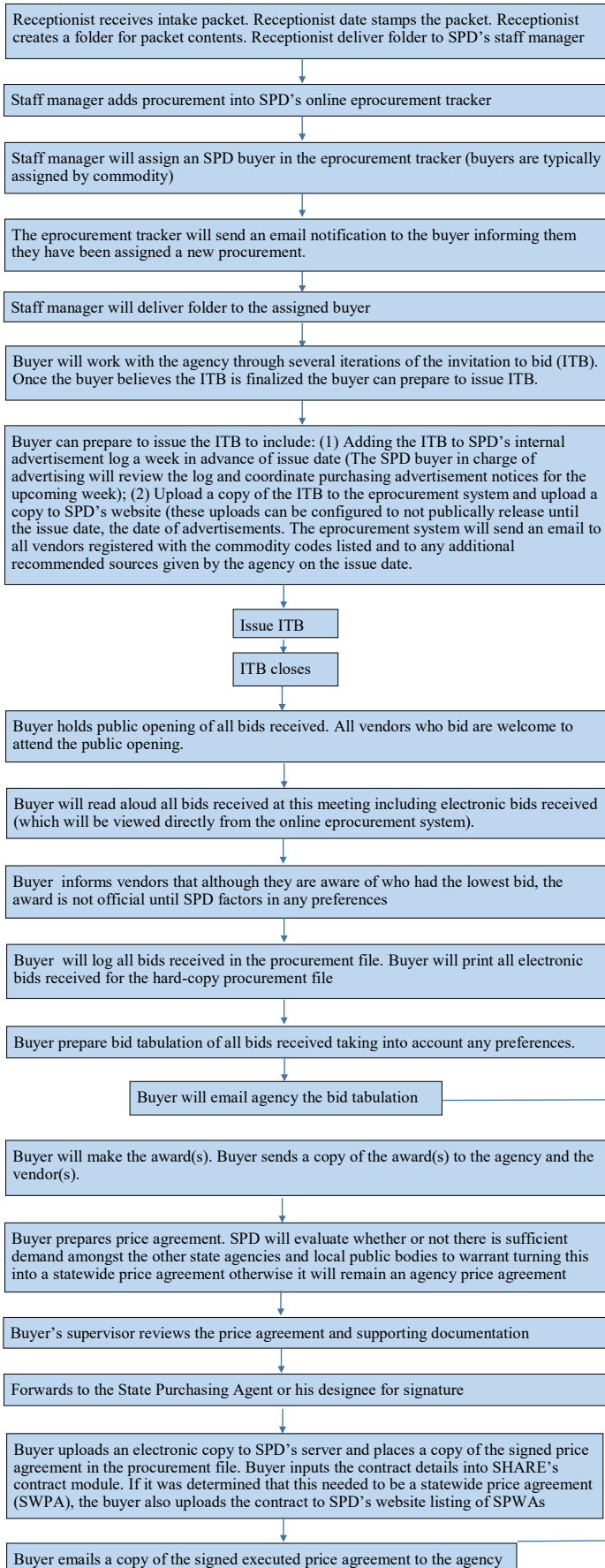


RFP FOR PROFESSIONAL SERVICES RESULTING IN A CONTRACT >\$60,000

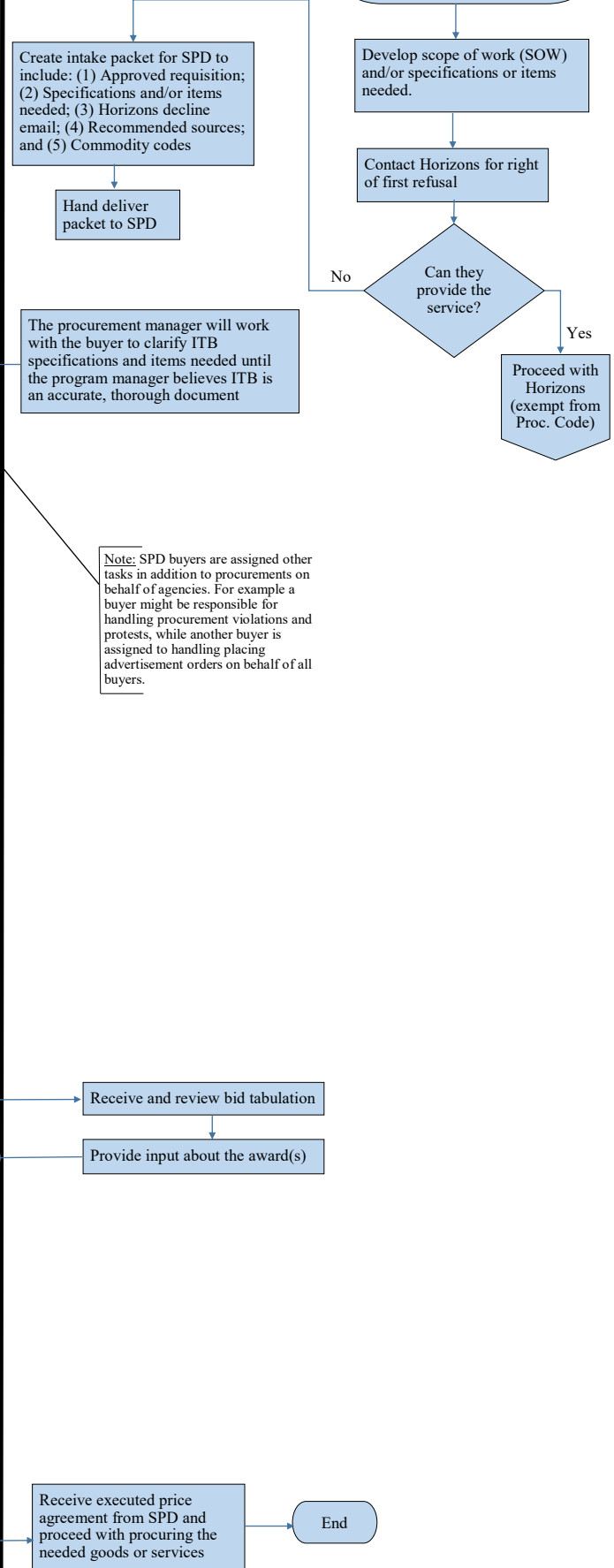


ITB FOR GOODS OR SERVICES RESULTING IN AGENCY PRICE AGREEMENTS OR STATEWIDE PRICE AGREEMENTS

State Purchasing Division (SPD)



Agency



Note: SPD buyers are assigned other tasks in addition to procurements on behalf of agencies. For example a buyer might be responsible for handling procurement violations and protests, while another buyer is assigned to handling placing advertisement orders on behalf of all buyers.

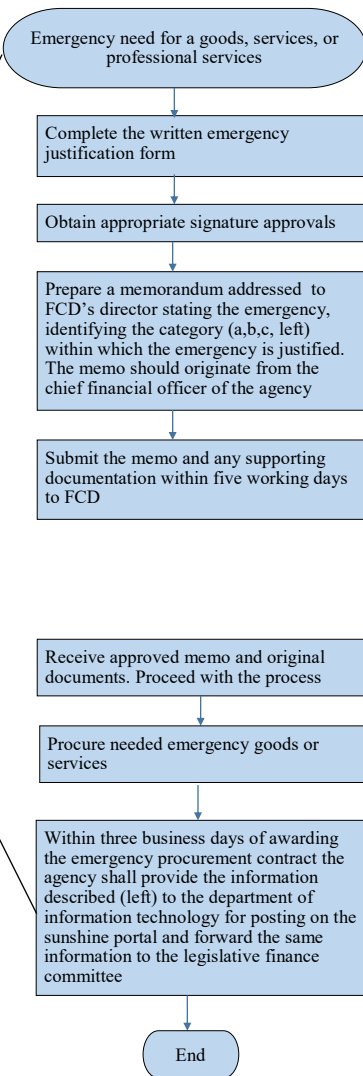
EMERGENCY PROCUREMENTS

Note: Determine if an emergency condition exists that requires the purchase of services or items of tangible personal property, or immediate construction, which cannot be met through normal procurement methods.

Emergency condition means that without the purchase, any of the following would be seriously threatened:
 (a) the functioning of government,
 (b) the preservation or protection of property, or
 (c) the health or safety of any person

The Governor of the State of New Mexico has also issued guidelines which states, "a true 'emergency' must exist (i.e. a threat to the function of government, lives, health or property). Emergencies do not simply exist from a need to procure the services 'now', or from time pressure to implement a new contract.

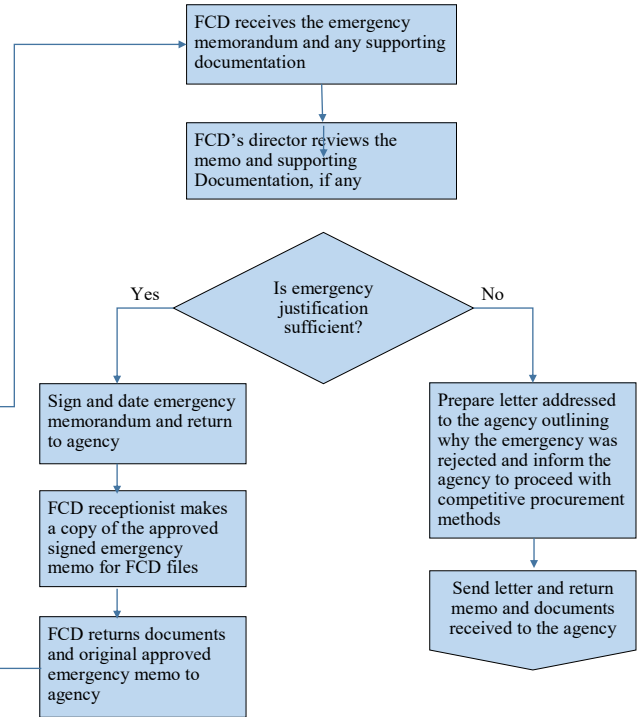
Agency



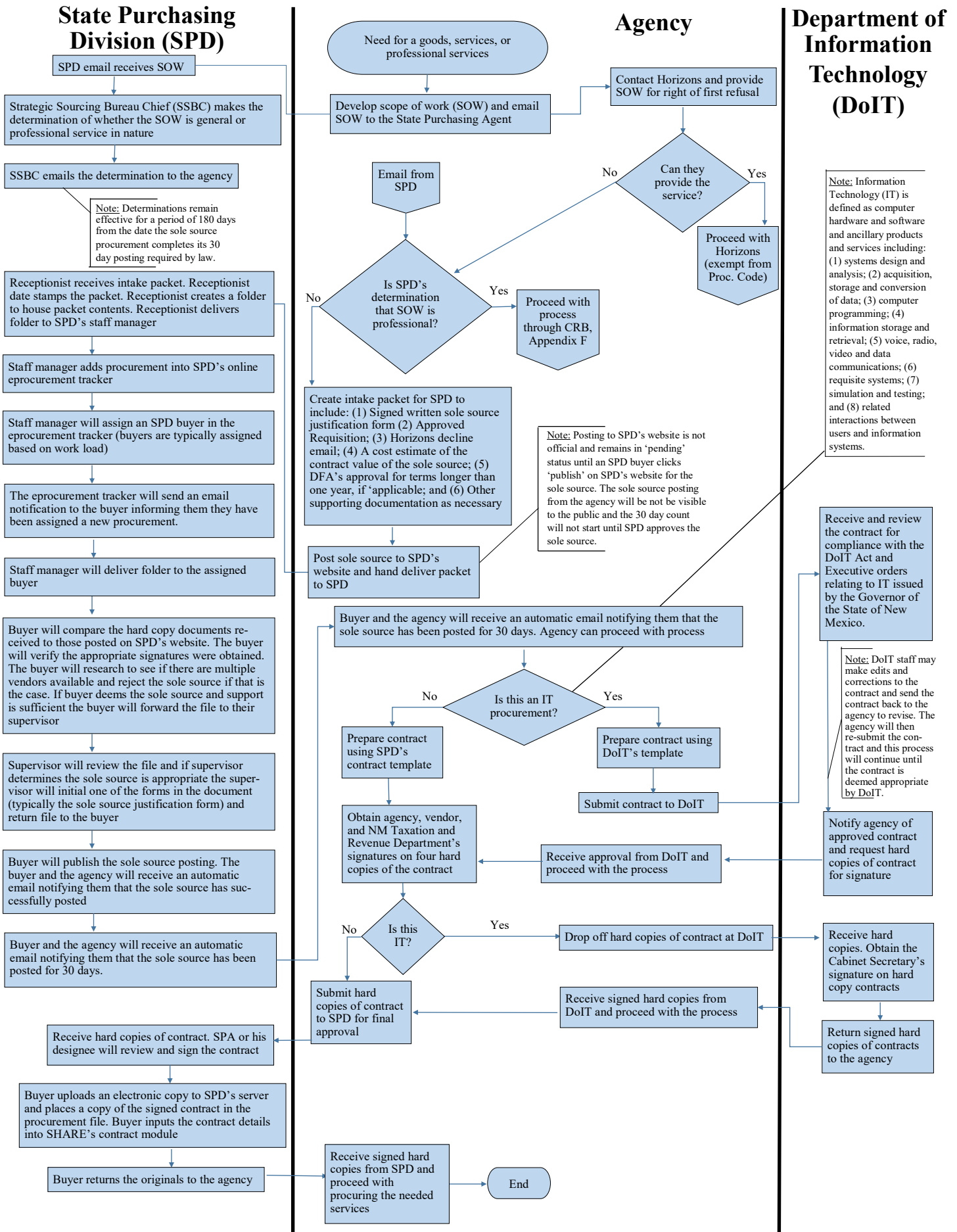
Note: The following is required by Statute to be made public:
 (1) the contractor's name and address;
 (2) the amount and term of the contract;
 (3) a listing of the services, construction or items of tangible personal property procured under the contract;
 (4) state it was an emergency procurement contract; and
 (5) the justification for the procurement method

The State Purchasing Department (SPD) has on its website an emergency/sole source database where agencies can post such procurements. Agencies are not required to publish their procurements through SPD's website, however those that choose to do so will fulfill their statutory obligations by entering the required information only one time and in only one place. Once an emergency procurement is entered into SPD's database this information is forwarded to the LFC and DoIT to be posted on the sunshine portal.

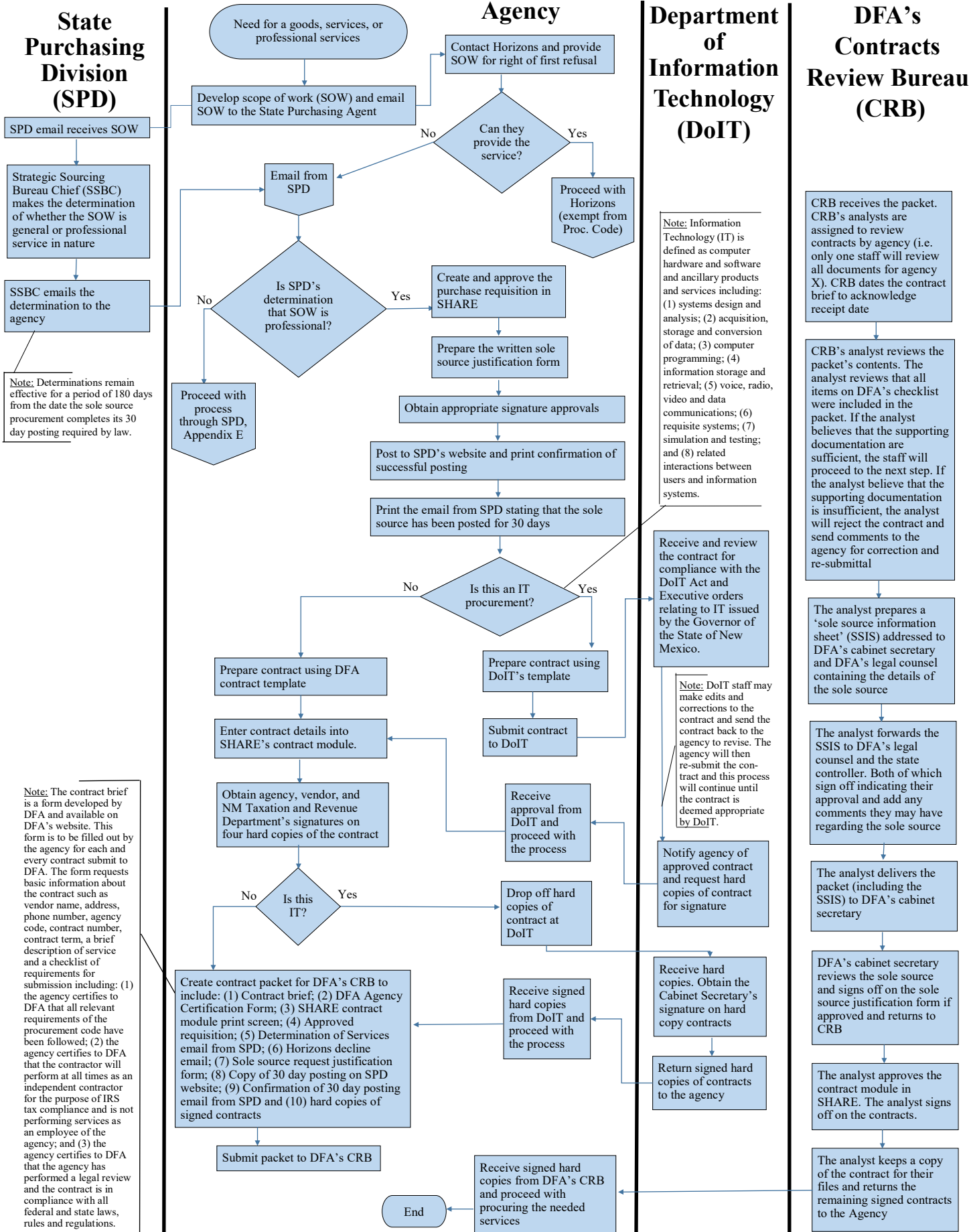
DFA's Financial Control Division (FCD)



SOLE SOURCE PROCUREMENT FOR GOODS OR SERVICES



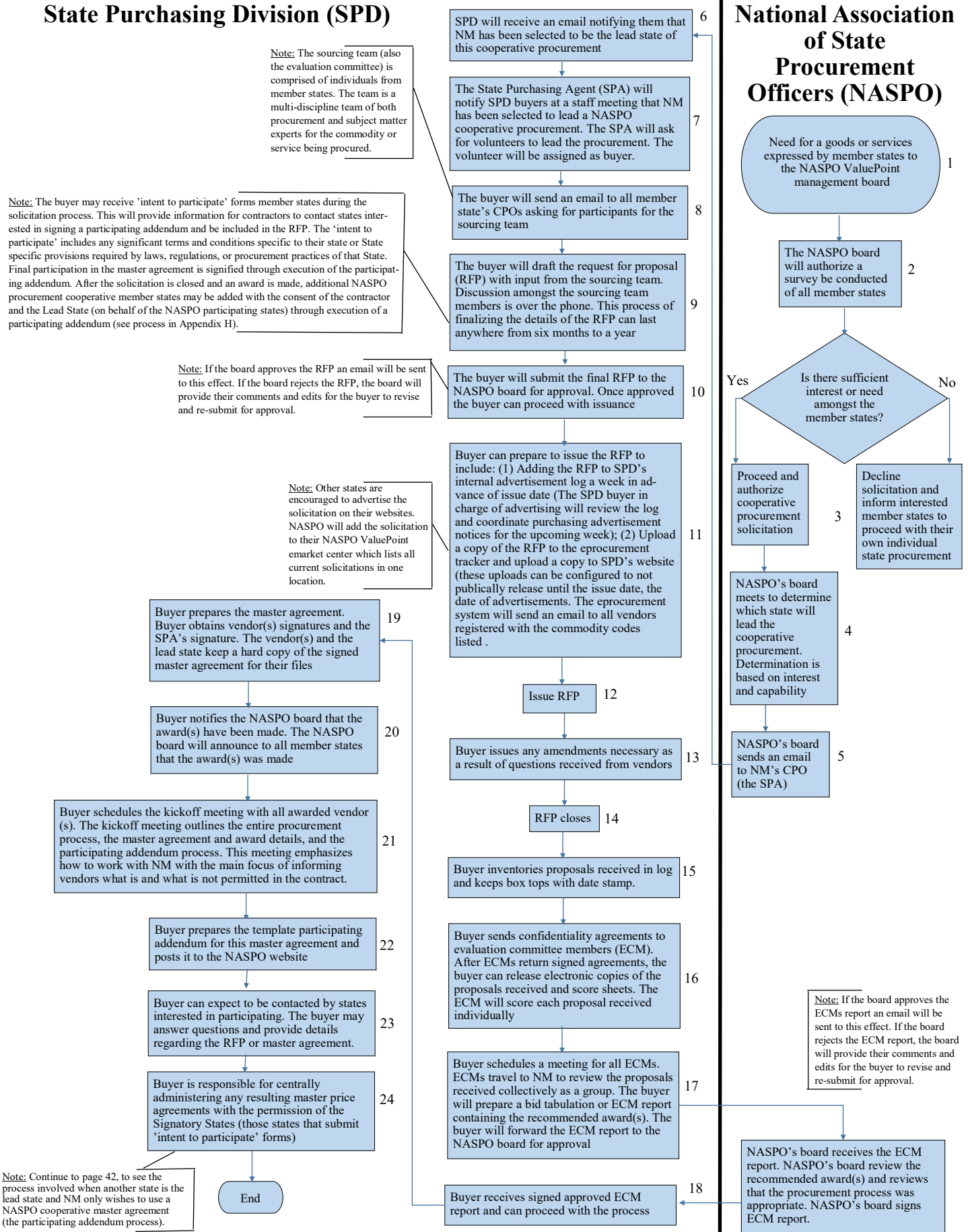
SOLE SOURCE PROCUREMENT FOR PROFESSIONAL SERVICES



NASPO ValuePoint PROCUREMENT WHEN NM IS THE LEAD STATE IN A NASPO COOPERATIVE PROCUREMENT RESULTING IN A MASTER AGREEMENT

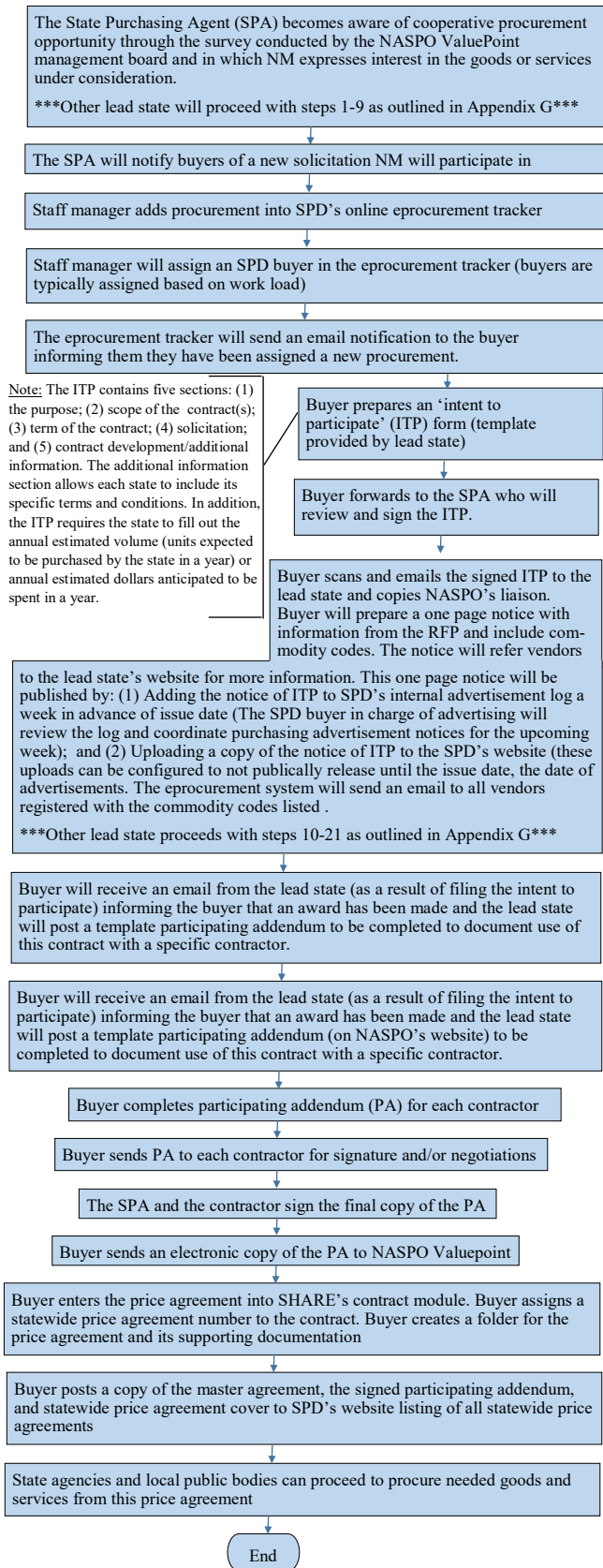
State Purchasing Division (SPD)

National Association of State Procurement Officers (NASPO)



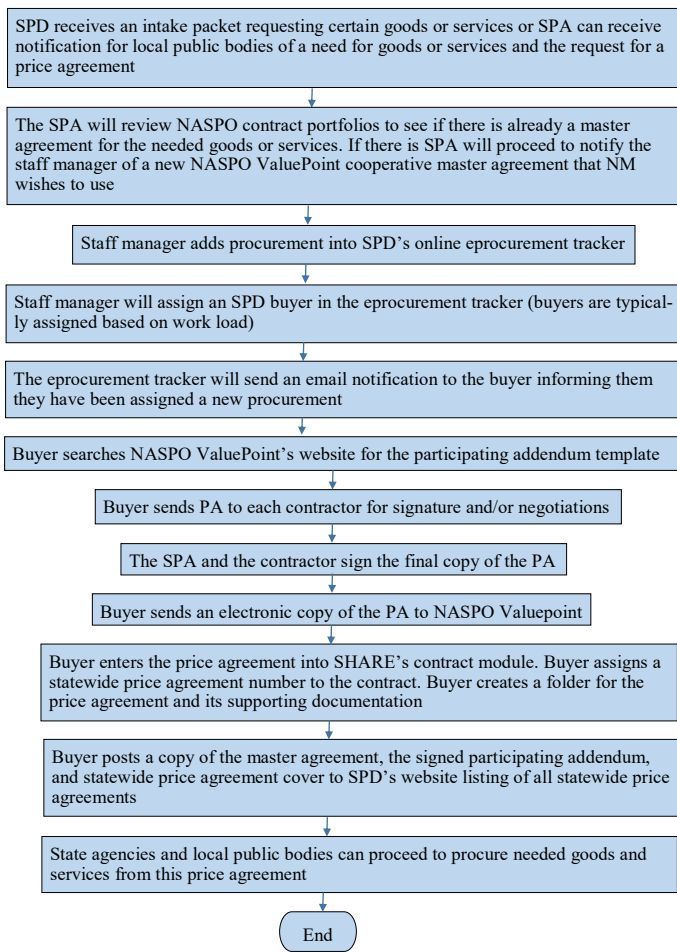
NASPO ValuePoint FOR A CURRENT SOLICITATION WHEN NM IS NOT THE LEAD STATE AND WANTS TO USE THE NASPO ValuePoint COOPERATIVE MASTER AGREEMENT

State Purchasing Division (SPD)



NASPO ValuePoint FOR A CLOSED SOLICITATION (FINAL MASTER AGREEMENT SIGNED) AND NM WANTS TO USE THE NASPO ValuePoint COOPERATIVE MASTER AGREEMENT

State Purchasing Division (SPD)



Note: The PA is a contractual document that binds the contractor and the participating entity to the terms and conditions of the master agreement. Participating entities have the flexibility of negotiating additional terms and conditions to meet the unique needs of their state. Negotiations of the PA are between the participating entity and the contractor. The lead state or NASPO ValuePoint generally do not become involved in these negotiations.

MIRRORING A FEDERAL GENERAL SERVICES ADMINISTRATION (GSA) CONTRACT

State Purchasing Division (SPD)

Receptionist receives intake packet. Receptionist date stamps the packet. Receptionist creates a folder to house packet contents. Receptionist delivers folder to SPD's staff manager

Staff manager adds procurement into SPD's online eprocurement tracker

Staff manager will assign an SPD buyer in the eprocurement tracker (buyers are typically assigned based on work load)

The eprocurement tracker will send an email notification to the buyer informing them they have been assigned a new procurement.

Staff manager will deliver folder to the assigned buyer

Staff manager reviews current price agreements in place and NASPO agreements to see if the needed goods or services have already been solicited. If not, buyer can proceed

Buyer visits the GSA's acquisition service elibrary to download a copy of the contract

Buyer researches the contract to see if the contract is allowable under the cooperative purchasing program

Note: The Cooperative Purchasing Program allows states and local governments to purchase from Schedule 70 for information technology and Schedule 84 for law enforcement and products and services.

Buyer determines whether or not the agency needs the entire GSA contract mirrored or just individual products or services.

Buyer prepares a memorandum on General Services Department letterhead addressed to the GSA contractor asking if contractor is willing to extend the pricing, terms and conditions in their Federal Supply Schedule.

Buyer sends memorandum to the contractor

Buyer prepares SPD's contract cover sheet containing pertinent details about the GSA contract award. SPD will evaluate whether or not there is sufficient demand amongst the other state agencies and local public bodies to warrant turning this into a statewide price agreement otherwise it will remain an agency price agreement

Buyer's supervisor reviews and approves contract and supporting documentation. Forwards contract to the State Purchasing Agent or their designee for signature

Buyer receives signed final contract. Buyer enters contract into SHARE's contract module. If it was determined that this needed to be a statewide price agreement (SWPA), the buyer also uploads the contract to SPD's website listing of SPWAs

Buyer sends an electronic copy of the contract award to the Agency

Agency

Need for a goods or services

Develop scope of work (SOW)

Contact Horizons and provide SOW for right of first refusal

Can they provide the service?

Yes
Proceed with Horizons (exempt from Proc. Code)

Note: The U.S. Government's General Services Administration (GSA) maintains a large list of multiple award purchasing schedules. Contractors are selected through an open and continuous qualification process instead of competitive bids or proposals.

No
Search the GSA's acquisition service elibrary for the needed goods or services
Locate a contractor that can provide the services needed

Note: There is currently no requirement in NM that agencies research multiple GSA contractors and their pricing before selecting a contract. The GSA encourages entities to receive the best value from GSA schedule contractors by using the GSA's Schedule Ordering Procedures which guides entities on how to obtain quotations from multiple GSA contractors, evaluate them award. For more information see page 21.

Create intake packet for SPD to include: (1) An approved requisition; and (2) A letter requesting approval to use the pricing, terms and conditions of the desired GSA contract and expressing their need for the contract

Hand deliver packet to SPD

Receive PDF copy of contract award from SPD and the agency can proceed with procuring the needed services

End