

AN ACT
RELATING TO GOVERNMENT CONTRACTING; ENACTING THE PERFORMANCE
CONTRACTING ACT; PROVIDING FOR CONTRACT MANAGEMENT AND
ACCOUNTABILITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the
"Performance Contracting Act".

Section 2. DEFINITIONS. -- As used in the Performance
Contracting Act:

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

B. "performance contract" means a contract for
professional services that focuses on the outputs, quality
and outcomes of service provision and that ties at least a
portion of the contractor's payment or any contract
extension or renewal to the achievement of those goals; and

C. "professional services" means the services of
architects, archaeologists, engineers, surveyors, landscape
architects, medical arts practitioners, scientists,
management and systems analysts, certified public
accountants, registered public accountants, lawyers,
psychologists, planners, information technology experts,
researchers, construction managers and other persons or
businesses providing similar professional services.

Section 3. DETERMINATION OF CONTRACT NEED. --

A. Prior to making the decision to contract for professional services, an agency shall perform a cost-benefit analysis that uses a methodology similar to the federal office of management and budget's cost-benefit evaluation for the performance of commercial activities and that includes an objective evaluation of state and private resources. The cost-benefit analysis shall assess the need to contract, considering whether the agency has the necessary skills and expertise to deliver the service; whether the agency can provide the service at a competitive price; and whether there are deadline requirements that the agency may not be able to meet. The agency shall proceed with the contracting process only if the results of the analysis show that the benefits of the contract are likely to exceed the costs.

B. The agency's administrative services division, general counsel and secretary, or their equivalent personnel in noncabinet state agencies, shall substantively review the decision to contract, the request for proposal process, final contract negotiations and contract form and legal sufficiency.

C. Before entering into a contract for professional services, an agency shall certify to the department that the agency has complied with the provisions of Subsections A and B of this section. The cost-benefit analysis shall remain on file with the contracting agency.

Section 4. PERFORMANCE CONTRACTING REQUIRED--
SPECIFICATIONS--TERMS AND CONDITIONS--DOCUMENTATION.--

A. Unless exempted pursuant to the provisions of the Performance Contracting Act, every contract for professional services entered into by an agency shall be a performance contract.

B. The following elements shall be included in a performance contract:

(1) performance measures to be used by the agency to evaluate the services provided to the agency and the outcomes resulting from those services;

(2) an accountability section that requires the contractor to report regularly on how performance levels are meeting the performance measures and that allows the agency to withhold payment until successful completion of all or part of a contract; and

(3) monitoring requirements that outline the agency's evaluation of the contractor's performance, including progress reports, activity data, site visits, inspections or outcomes.

C. The agency shall use department guidelines or similar guidelines to identify and develop an effective system for contract management, including:

(1) documentation to support the contract solicitation and selection process;

(2) policies and procedures to ensure that

contractors do not provide services until a fully executed and approved contract is in place;

(3) cost-effective methods to track contracts; and

(4) filing of contracts and related documentation.

D. If review is required by rule of the department or the general services department pursuant to Section 13-1-118 NMSA 1978, the contracting agency shall submit the contract for review no less than thirty days prior to the effective date.

Section 5. DEPARTMENT--ADDITIONAL DUTIES.--The department shall:

A. assist agencies in performance contract development and management, including providing training courses;

B. develop policies and procedures for performance accountability in contract management;

C. using principles similar to those developed by the federal office of management and budget, prepare guidelines for agencies to conduct and document a meaningful cost-benefit analysis; the guidelines shall provide for different types of cost-benefit analyses depending on the types and amounts of the professional services contracts;

D. prepare guidelines for agencies on performance contract specifications, terms and conditions that include

performance measures, accountability clauses, monitoring provisions and auditing;

E. actively participate in the development of major requests for proposals and performance contract awards of agencies for competitive procurement over twenty thousand dollars (\$20,000); and

F. selectively monitor contract procedures and projects in agencies.

Section 6. APPLICABILITY. --

A. Except as provided in this section and pursuant to the schedule developed by the department, the Performance Contracting Act applies to any department, institution, board, bureau, commission, district or committee of the state and every contract for professional services entered into by any of the above; provided that the provisions do not apply to a contract for professional services:

(1) for 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;

(2) for hospital and health care related services exempt from the provisions of the Procurement Code pursuant to Section 13-1-98.1 NMSA 1978;

(3) in response to an emergency procurement

under Section 13-1-127 NMSA 1978; or

(4) exempted by rule of the department or order of the secretary of finance and administration, but only to the extent specified in the rule or order.

B. The department shall develop a state agency schedule so that all agencies, including the legislative and judicial branches of government and institutions of higher education, are implementing the provisions of the Performance Contracting Act by the end of fiscal year 2005.

C. The Performance Contracting Act applies to contracts entered into by agencies of the legislative branch of state government, the judicial branch of state government and public post-secondary educational institutions, but such agencies and institutions:

(1) may develop their own policies, procedures and guidelines similar to those required of the department in Section 5 of the Performance Contracting Act;

(2) may provide for exemptions similar to those allowed pursuant to Subsection A of this section; and

(3) are not required to report or make submissions to the department.

D. No provision of the Performance Contracting Act shall be applied to any situation, decision, proposed contract or contract if the application of that provision to the situation, decision, proposed contract or contract would directly or indirectly impair a legally protected right.

