NEW MEXICO COMMISSION for the BLIND

Allowable Cost Policy and Procedure

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# I. Sources of Federal Funds and Requirements

A. Federal Grant Awards and funds are received by the New Mexico Commission for the Blind (Commission) from three different Federal Agencies, specifically the Department of Education Rehabilitation Services Administration, the Social Security Administration, and the Department of Health and Human Services Administration for Community Living as a pass-through from the New Mexico Division of Vocational Rehabilitation. Pursuant to 2 CFR § 200.430, the Commission maintains "documentation of personnel expenses" for salaries and wages that are "based on records that accurately reflect the work performed," and that are supported by a "system of internal controls which provides reasonable assurance that the charges are accurate, allowable, and properly allocated." This system of internal controls ensures that costs are appropriately assigned to the proper grant.

The Commission is designated as the state agency to administer the vocational rehabilitation services portion of the Combined State Plan under which VR services are provided for individuals in New Mexico who are blind. The Commission receives 18.5% of the vocational rehabilitation grant awarded to the State of New Mexico, and the New Mexico Division of Vocational Rehabilitation (DVR) receives 81.5 percent of the award.

B. The Commission receives the large majority of its funding from the Rehabilitation Services Administration (RSA), which is located within the U.S. Department of Education. The Commission’s largest grant from RSA is the vocational rehabilitation award, referred to as Basic Support or Section 110 Funds. The Basic Support Grant is authorized by Title I of the Rehabilitation Act of 1973, as amended by Title IV of the Workforce Innovation and Opportunity Act (P.L. 114-95). The Basic Support award comprises the majority of Commission funding and consists of vocational rehabilitation services provided pursuant to 34 CFR Part 361. The Commission also receives a smaller amount of Supported Employment funds from RSA, authorized by Title VI of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701-744, and 34 CFR Part 363. The Basic Support and Supported Employment grants are restricted to purposes that are designed to enable specified individuals with disabilities to become and remain employed. The allowable employment outcomes also include employment achieved through the Randolph-Sheppard Act, which authorizes legally blind persons to operate vending facilities on federal property, 20 U.S.C. Section 107 et seq and 34 CFR Part 395.

C. Pursuant to 34 CFR § 361.60(a), the federal share of the vocational rehabilitation grant is 78.7 percent, and the Non-Federal share is 21.3 percent. The permissible match sources consist of direct state appropriation to the Commission, transfers, or allotments from other public agencies to the Commission, expenditures incurred by other public agencies pursuant to a cooperative agreement. Funds set aside from the Business Enterprise Program, and private contributions. Section 19(b) of the Act permits the Commission to carry over Federal funds for obligation and expenditure in the subsequent Federal fiscal year only to the extent that the Commission has provided sufficient Non-Federal expenditures to match those funds by the end of the Federal fiscal year in which the funds were awarded. Section 110(d) of the Act requires the Commission to reserve and spend at least 15 percent of the Basic Support allotment for provision of Pre-Employment Transition Services (Pre-ETS) on qualifying students who are blind or visually impaired. Pre-ETS funds that are eligible for carryover into the succeeding Federal fiscal year may only be obligated in that succeeding Federal fiscal year and expended for providing Pre-ETS services.

D. Title VI Supported Employment Funds can only be used when the eligible individual has secured employment. Supported Employment funds require a 10 percent match. Pursuant to 363.23(a)(2)(i), the Commission must provide Non-Federal expenditures in an amount that is not less than 10 percent of the total expenditures, including the Federal reserve funds and the Non-Federal share, incurred for the provision of supported employment services to youth with the most significant disabilities, including extended services. Pursuant to 34 CFR § 363.25, and Policy Directive 18-02, the Commission cannot carryover unobligated Supported Employment A funds allotted under 34 CFR § 363.20 into the succeeding year if the Supported Employment B funds allotted under 34 CFR § 363.22 have not been matched by September 30 of the fiscal year of appropriation.

E. The Title VII Chapter 2 Older Individuals who are Blind Grant (Chapter 2) is also awarded by the Rehabilitation Services Administration. The Chapter 2 funds are restricted to independent living services provided to blind persons 55 and older. The Chapter 2 grant requires a 10 percent state match.

F. The Social Security Administration also provides funding to the Commission. The Commission receives program income in the form of reimbursements from the Social Security Administration. This occurs when the Commission’s vocational rehabilitation services enable a Commission client to earn above the applicable Substantial Gainful Activity level, which enables the individual to exit from either SSI or SSDI benefits. The amount of the reimbursement is based on a calculated portion of the estimated savings to the Social Security Trust Fund. Pursuant to 34 CFR § 361.63(c)(2), Social Security reimbursement program income may be spent on vocational rehabilitation services, on Title VII Part B (Part B) Independent Living services, and on Chapter 2 OIB services. Federal rules also require that program income be disbursed prior to drawing down federal VR funds, as mandated by 34 CFR § 361.63(c)(3)(ii). In addition, pursuant to 20 CFR § 404.2117(c)(2), the “State VR agency shall submit” to the Social Security Administration “before the end of the first calendar quarter of each year a written statement certifying that cost-containment policies are in effect and are adhered to in procuring and providing goods and services for which the State VR agency requests payment under this subpart."

G. The Commission also receives funds through the Administration on Community Living (ACL). The ACL provides Part B Independent Living funds to the State of New Mexico. Pursuant to a Technical Amendment to the State Plan for Independent Living that was approved by the Administration on Community Living on August 22, 2017, the New Mexico Division of Vocational Rehabilitation (DVR) became the sole Designated State Entity for New Mexico on October 1, 2017. DVR receives and distributes all of the Part B funds. These Part B funds may be used to meet the independent living needs of persons of any age. As set forth in the State Plan for Independent Living, DVR will "annually disburse 18% of the state’s Part B funds to the New Mexico Commission for the Blind, which will use the Part B funds to provide independent living services to qualifying persons residing in the state of New Mexico."

H. All expending for the above-mentioned programs must meet the requirements of the applicable federal statute and any implementing regulations promulgated by any cognizant federal agency. For the Vocational Rehabilitation program, this means that Basic Support funds cannot be used for purposes that are not connected with the administration of the Vocational Rehabilitation program. For this reason, Basic Support funds cannot be used for Part B or Chapter 2 activities. However, because employment is an allowable activity under Part B and Chapter 2, Part B and Chapter 2 funds may be used in support of a consumer’s employment outcome. The Commission maintains all federally required documentation of Personnel Expenses for salaries and wages that are based on records that accurately reflect the work performed and has a federally approved Cost Allocation Methodology to ensure that funds are being tracked and spent appropriately.

I. The Commission also receives state General Funds that are appropriated every year by the New Mexico Legislature. This includes funds that are used to meet federal matching requirements for the Vocational Rehabilitation, Part B Independent Living, and Chapter 2 Older Individuals who are Blind (OIB) programs. The Vocational Rehabilitation program is subject to a federal Maintenance of Effort (MOE) requirement under 34 CFR § 361.62, and a portion of these General Funds constitute the “Non-Federal share” that is used to calculate the MOE requirement. The General Fund is also used to support Commission activities that are paid for with 100 percent state General Funds.

# II. Requirements for Pre-Employment Transition Services

A. Pursuant to 34 CFR § 361.65(a)(3), the Commission must "reserve at least 15 percent" of its vocational rehabilitation funds for the "provision of pre-employment transition services." The Commission must reserve and spend at least 15 percent of the Basic Support allotment for provision of Pre-Employment Transition Services (Pre-ETS) on qualifying students who are blind or visually impaired. Section 110(d)(2) of the Act prohibits the reserved funds from being used to pay for the "administrative costs of providing Pre-employment transition services." These administrative costs are defined at 34 CFR § 361.5(c)(2), and the Commission shall not assign any of these administrative costs to the Pre-ETS reserve.

B. The allowable Pre-ETS services are set forth under Section 113 of the Act. These services consist of five required services under Section 113(b), nine authorized services under Section 113(c), and four coordination activities under Section 113(d). In calculating the 15 percent amount to be reserved, the Commission must base the percentage on the total amount allotted in the federal fiscal year.

C. The Commission shall use the Comprehensive Statewide Needs Assessment and engage in comprehensive forecasting to determine the number of individuals potentially eligible for pre-employment transition services. Should the result of this process indicate that there are sufficient reserve funds to provide all of the required services at 34 CFR § 361.48(a)(2), the Commission shall use the remaining funds to provide the authorized activities at 34 CFR § 361.48(a)(3).

D. The Commission has implemented administrative methods and procedures to ensure proper data collection and financial accountability of the Pre-ETS reserved funds, as required by 34 CFR § 361.12, and by 2 CFR 200.302. These administrative methods and procedures ensure that the reserved funds are used only for the provision of services set forth in section 113 of the Act. Commission employees who are providing direct Pre-ETS services must complete a Personnel Activity Report (PAR) that meets the requirements of 2 CFR 200.430, or track their Pre-ETS activities using a combo code in SHARE that meets the requirements of 2 CFR § 200.430. The Commission also follows DCL 20-02 to report the total Federal expenditures for providing Pre-Employment Transition Services.

# III. Grant Awards and Requirements

A. Once an award is granted, the Commission will receive a Grant Award Notification, a Notice of Award, or a Letter of Award. It is this award notice that becomes an assurance of reimbursement for the Commission. In the case of Vocational Rehabilitation Basic Support funds, expenditures are tracked through the state procurement process and in SHARE, and then reimbursed by the Rehabilitation Services Administration through the federal government’s G5 Accounting System. In the case of Older Individuals who are Blind Chapter 2 funds, expenditures are tracked through the state procurement process and in SHARE, and then reimbursed by the Rehabilitation Services Administration through the federal government’s G5 Accounting System. In the case of Independent Living Part B funds, expenditures are tracked through the state procurement process and in SHARE and submitted to DVR for payment. In the case of program income generated by the Vocational Rehabilitation program, reimbursements are awarded by the Social Security Administration and paid directly to the State Treasury. Programs do not directly expend against the award. The Commission is reimbursed for allowable costs granted under the scope of work for the particular federal grant or program.

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# IV. Period of Performance

A. First Year

1. The Uniform Guidance at 2 CFR § 200.1 defines “period of performance” as the time during which the Non-Federal entity may incur new obligations to carry out the work authorized under the Federal award. The Federal awarding agency must include start and end dates of the period of performance in the Federal award. The Rehabilitation Services Administration (RSA) notifies the Commission for the Blind through the Grant Award Notification (GAN) in Box 6, which is the Federal Funding Period. That timeframe is from October 1 to September 30 of the Federal Fiscal Year (FFY). This represents a one-year period for which the award was made, and the Commission for the Blind may incur new obligations against the award.

B. Vocational Rehabilitation Carryover

1. Carryover is a process where unexpended funds allocated for a grant award are “rolled over” (carried over) into the next budget period. In this case, the budget period is a federal fiscal year. The Commission may carry over the unobligated balance of Federal Funds for one Federal Fiscal Year beyond the Federal Fiscal Year of appropriation. For example, the Federal Fiscal Year of appropriation for Federal Fiscal Year 21 began on October 1, 2020 and ended on September 30, 2021. The carryover year for the Federal Fiscal Year 21 awards started on October 1, 2021 and will end on September 30, 2022. In order to carry over Federal Funds, the Commission must:

a. Have an unobligated balance of Federal funds at the end of the appropriation year (which means the Commission has not spent or obligated some of the grant award dollars from that federal fiscal year); and

b. Have satisfied the applicable Non-Federal share (match) requirement which is 21.3% State funds spent to the federal share of 78.7% for the entire grant award. In this case, the Commission needs to match the entire award by September 30th, even though all the federal funds were not spent.

Upon receipt of the Commission's fourth quarter financial report (the reporting period ending on September 30th of the appropriation year), RSA will review the Commission's report to determine whether the Commission met the requirements necessary to carry over funds. If the Commission met the requirements, RSA will process an administrative change to the current grant award extending the period of performance to include the carryover year. RSA will provide the Commission a revised GAN with a new Action Number and a revised period of performance that will include the carryover year. If the conditions discussed above are met, the period of performance will be revised to include both the Federal Fiscal Year of appropriation and the carryover year.

C. Supported Employment Carryover

1. The Commission may carry over the unobligated balance of Supported Employment Federal funds for one Federal Fiscal Year beyond the Federal Fiscal Year of appropriation. For example, the Federal Fiscal Year of appropriation for Federal Fiscal Year 2020 began on October 1, 2020 and ended on September 30, 2021. The carryover year for Federal Fiscal Year 2021 awards started on October 1, 2021 and will end on September 30, 2022.

2. In order to carry over Supported Employment funds, the Commission must:

a. Have an unobligated balance of Supported Employment A funds at the end of the appropriation year (which means that the Commission has not spent or obligated some of the Supported Employment A award funds from that Federal Fiscal Year); and

b. Match the Supported Employment B funds allotted under 34 CFR § 363.22 by September 30 of the fiscal year of appropriation. Pursuant to 34 CFR § 363.25, and Policy Directive 18-02, the Commission cannot carryover unobligated Supported Employment A funds allotted under 34 CFR § 363.20 into the succeeding year if the Supported Employment B funds allotted under 34 CFR § 363.22 have not been matched by September 30 of the fiscal year of appropriation.

D. Maintenance of Effort

1. The Vocational Rehabilitation program is subject to a federal Maintenance of Effort (MOE) requirement under 34 CFR § 361.62, which requires States to maintain a level of Non-Federal expenditures, from all allowable Non-Federal sources, for the vocational rehabilitation program that is at least equal to Non-Federal expenditures for the vocational rehabilitation program from two years prior.

E. Financial Obligations

“Obligations” are orders placed for property and services, contracts and subawards made, and similar transactions during a given period that require payment by the Non-Federal entity during the same or future period (2 CFR § 200.1). The future period in which obligations may be paid is limited by Federal requirements and the terms and conditions applicable to the award. Subawards are only permissible in the Independent Living Services for Older Individuals Who are Blind program because that program is specifically authorized by statute to make grants to public and nonprofit private agencies or organizations. The vocational rehabilitation program may not subaward.

F. When are obligations made?

1. When an obligation is made depends upon the nature of the service. The Education Department General Administrative Regulations at 34 CFR § 76.707 set forth a chart that specifies when obligations are considered made for different kinds of property and services. For some kinds of property and services, 34 CFR § 76.707 will dictate when the obligation is made. For instance, an obligation for travel is considered made at the time the travel is taken. The Commission must also follow State laws, regulations, and policies/procedures as applicable. For contracted services, the obligation is made on the date that the State makes a binding written commitment to obtain the services. Whether the Commission has made a binding written commitment to obtain a service is determined by state law, specifically 13-1-118 through 13-1-199 NMSA 1978

G. Impact of Period of Performance on ability to obligate Federal funds

1. If the Commission has not met the requirements to carry over Federal funds, obligations must be incurred by the end of the Federal Fiscal Year of appropriation (fourth quarter or September 30th).

2. If the Commission has met the requirements, there is an additional Federal Fiscal Year in which to expend the funds.

H. Tracking and Recording Obligations

1. All expenditures incurred against an obligation must be tracked and reported in terms of when the obligation was incurred, not when the liquidation occurs. For example, if the Commission enters into a contract for the provision of services under the vocational rehabilitation program in Federal Fiscal Year 2023, it constitutes an obligation for purposes of 34 CFR § 76.707 for Federal Fiscal Year 2023. Should invoices be paid in Federal Fiscal Year 2024, the Commission must report those expenditures (liquidation of the obligations) on its financial reports for Federal Fiscal Year 2023, not Federal Fiscal Year 2024 when payments were made.

2. For services that are acquired by purchase orders, the obligation date is tracked by reference to when an order for services is accepted by a vendor.

3. The date that the finalized purchase order or purchase order number is sent to the vendor constitutes the obligation date, provided that the vendor does not subsequently reject the purchase order or make a counteroffer. The Commission is responsible for ensuring that any obligations assigned to a particular period of performance ending on September 30 were liquidated by January 29 of the subsequent calendar year (120 days after the end of the period of performance) in accordance with 2 CFR § 200.343(a).

I. Obligation, Liquidation of Match, and Period of Performance

1. State dollars can only be counted as match when they are fully expended in the first year of a grant award. This must be completed by September 30th. The Commission does not use encumbrances as obligations toward match in the event they are canceled or not liquidated in time. Pursuant to 34 CFR § 361.63(c)(4) and 34 CFR § 363.24(b)(3), the Commission is prohibited from using program income funds for match in the vocational rehabilitation and Supported Employment programs. In addition, the expenditure of program income funds must meet the same standards of allowability, reasonableness, and allocability which are applicable to Federal grant funds pursuant to 2 CFR § 200.403, 200.404, and 200.405. Section 19 (a) (2) of the Rehabilitation Act allows program income to remain available for obligation and expenditure in the year following the year in which the program income was earned. In the event that the Commission receives program income at the end of a fiscal year and is unable to disburse the program income prior to the end of that year, the Commission may carry over that program income for use in the following Fiscal Year. Consequently, program income funds can be available for disbursement in the year of receipt of the program income funds or disbursed in the subsequent Federal Fiscal Year (two-year period of performance) as long as requirements for carry forward have been met and also 34 CFR § 361.63 have been met regarding disbursement before additional cash draw down. The Commission must disburse program income for Supported Employment prior to requesting any additional Federal Supported Employment grant funds. Social Security Reimbursement funds are the only sources of program income which the Commission can transfer to other eligible programs. The transfer is restricted to the grant award year that corresponds to the fiscal year in which it was earned in the VR program. For example, Social Security program income earned in the vocational rehabilitation program in Federal Fiscal Year 2023 may be transferred to the Federal Fiscal Year 2023 Supported Employment program at any time during the period of performance of the Federal Fiscal Year 2023 award. The Commission is prohibited from transferring Social Security program income earned in Federal Fiscal Year 2023 to the Federal Fiscal Year 2024 Supported Employment program.

J. Final Financial Report

1. The final financial report must be submitted within 120 days after the end of the period of performance, which is January 29. If matched unobligated Federal funds are carried over for obligation in the succeeding Federal Fiscal Year, the Commission must submit the final financial report within 120 days of the end of the carryover year (January 29). If the timing of liquidating obligations precludes submission of the final financial report within 120 days following the period of performance, the Commission must submit a late liquidation request in accordance with the Department of Education’s Policy Memorandum regarding extension of liquidation periods. If the late liquidation request is approved, the State VR agency must submit the final financial report after the funds have been liquidated, but no later than 120 days after the end of the extension period.

V. Agency Purchases, Contracts, and Procurements

A. All Commission procurements shall be made pursuant to the New Mexico Procurement Code, 13-1-1 through 13-1-199 NMSA 1978. This includes purchases made pursuant to 13-1-98 AA NMSA 1978, which grants an exception to the Procurement Code for “purchases of products or services for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973.” This exception is set forth in Commission for the Blind Guidance Determination 01-16, Determination of Applicability of Exemption from the Procurement Code at 13-1-98 AA, which was formally approved by the Commission for the Blind on April 28, 2016 and incorporated herein under Section XVII Appendix. It also includes purchases made pursuant to the State Use Act, 13-1C-1 through Section 13-1C-7 NMSA 1978, and as exempted from the Procurement Code by 13-1-98(z) NMSA 1978.

B. All Commission procurements shall comply with 13-1-191.1 NMSA 1978, which requires disclosures of campaign contributions made to applicable public officials. For the Commission, the applicable public officials are the Governor and Lieutenant Governor of the State of New Mexico. For any contracts signed by an attorney assigned to the Commission by the New Mexico Office of the Attorney General, applicable public official shall also include the Attorney General of the State of New Mexico. For any contract with the Office of the State Auditor, applicable public official shall include the State Auditor.

C. All Commission procurements shall be made pursuant to the Governmental Conduct Act, Sections 10-16-1 through 10-16-8 NMSA 1978.

Pursuant to 10-16-6, no public officer or employee shall use or disclose confidential information acquired by virtue of the public officer's or employee's state employment or office for the public officer's, employee’s, or another's private gain.

Pursuant to 10-16-7, a state agency shall not enter into a contract for services, construction or items of tangible personal property with a public officer or employee of the state, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest unless the public officer or employee has disclosed the public officer's or employee's substantial interest and unless the contract is awarded pursuant to the Procurement Code [13-1-28 NMSA 1978], except that the potential contractor shall not be eligible for a sole source or small purchase contract; provided that this section does not apply to a contract of official employment with the state or to contracts made pursuant to the provisions of the University Research Park and Economic Development Act [21-28-1 NMSA 1978] or the New Mexico Research Applications Act [53-7B-1 NMSA 1978J. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this section.

D. The Commission has procedures in place to ensure that it complies with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The Commission shall comply with Section 6002, including procuring only items designated in guidelines of the Environmental Protection Agency (EPA).

E. The Commission also has procedures in place to ensure that it meets the federal requirements in Appendix II to 2 CFR Part 200 (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards). These procedures include a review of all contracts by the Chief Financial Officer (or his or her designee) to ensure that contracts are in compliance with the requirements of Appendix II to 2 CFR Part 200. This review includes the use of a contract checklist, which is included in Appendix XVII of this Allowable Cost Policy and Procedure.

F. Appendix II of 2 CFR Part 200 includes the debarment and suspension requirements of the OMB guidelines at 2 CFR § 180. The Commission is also subject to the suspension and debarment requirements of 2 CFR § 200.214. Accordingly, the Commission does not enter into contracts with entities listed on the government-wide Excluded Parties List in the System for Award Management (SAM). Commission contracts shall include language requiring the contractor to affirm that the contractor is not listed on the SAM, and to agree to immediately notify the Commission should the contractor be listed on the SAM at any time during the term of the contract. The Commission shall also monitor the SAM, and contracts shall be terminated immediately should the contractor be listed on the SAM. In addition, pursuant to Sections 13-1-177 and 13-1-178 NMSA 1978, the State Purchasing Agent or central purchasing office, may “suspend a person from consideration for award of contracts if the state purchasing agent or central purchasing office, after reasonable investigation, finds that a person has engaged in conduct that constitutes cause for debarment pursuant to Section 13-1-178 NMSA 1978.”

G. Appendix II also requires that the Commission be in compliance with 2 CFR § 200.216, which imposes a prohibition on certain telecommunications and video surveillance services or equipment pursuant to Public Law 115-232, Section 889. Commission contracts shall require the contractor to certify and warrant that no part of the Contract uses covered telecommunications equipment or services as a substantial or essential component of the contract, or as critical technology as part of the contractor’s business. As described in Public Law 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

H. The Uniform Guidance at 2 CFR § 200.300(b) requires that whistleblower protection language be included in contracts involving federal funds. Commission contracts shall include a provision stating that no employee of the contractor may be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a federal or state agency information that the employee reasonably believes is evidence of mismanagement of a federal contract or grant, a waste of state or federal funds, an abuse of authority relating to a federal contract or grant, a danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract or grant.

I. Appendix II of 2 CFR Part 200 also requires that covered contracts include “administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms,” and all covered Commission contracts shall include this language. All Commission contracts in excess of $10,000 shall also include language to “address termination for cause and for convenience.” The Commission shall otherwise comply with all applicable provisions of Appendix II to 2 CFR Part 200.

J. When procuring property and services under a Federal award, the Commission follows the same policies and procedures it uses for procurements from its Non-Federal funds. This is in compliance with federal regulations at 2 CFR § 200.317 (General Procurement Standards), and 2 CFR § 200.407 (Prior Written Approval).

K. The language in each Commission contract shall include clear and consistent language, the programmatic requirements of each service to be delivered, the fiscal requirements for payment, and requirements for details sufficient to meet reporting requirements on all federal reports, including the SF-425, RSA-17, and RSA-911. The contract language shall also require the reporting of expenditures per service per individual. The Uniform Guidance at 2 C.F.R. § 200.303(c) also requires The Commission to implement internal controls sufficient to ensure that the agency evaluates and monitors contracts. The Commission shall, prior to payment, review all invoices to ensure that each invoice is sufficiently detailed and accurately describes the services delivered, and is consistent with the terms and provisions of the contract. This review shall be conducted either by the VR Program Manager or by a person designated by the Executive Director.

# VI. Prior Written Approval

A. The Commission has procedures and policies in place which address all procurements covered by federal regulations at 2 CFR § 200.407 (Prior Written Approval), and subject to Technical Assistance Circular 18-02 issued by the Rehabilitation Services Administration (RSA-TAC-18-02). The Commission shall obtain approval from the appropriate cognizant federal agency prior to making purchases covered by 2 CFR Part 200.407 or shall obtain aggregate prior approval as set forth in RSA-TAC-18-02. The request shall set forth the specific funding source, shall describe the intended usage consistent with the funding source, shall describe why the purchase is necessary, and shall describe why the purchase is reasonable.

B. To ensure compliance with 2 CFR § 200.407, all contemplated equipment purchases that have a per unit cost of $5,000 or more must first be reviewed to confirm that the required prior approval has been requested and received. This review must be conducted by the Executive Director, or by his or her designee. Before any participant support costs can be incurred that may require prior approval, the Executive Director or his or her designee shall determine that required prior approval has been requested and received. A final layer of review shall be conducted by the Executive Director or his or her designee as a part of all purchases made pursuant to NMSA 1978, Section 13-1-98 AA, wherein all participant support costs, and all per unit equipment purchases that are $5,000 and over must be confirmed to have the required prior approval before the purchase can proceed. A written confirmation of prior approval shall be associated with each such purchase.

# VII. Allowable Costs

A. All Commission costs must be allowable. Allowable costs are expenditures that fall under the scope of work for a particular federal grant, and which meet the requirements of 2 CFR § 200.403. These costs are subject to applicable program and fiscal rules contained in federal statutes and regulations. They must meet two main criteria under their respective grants. The first, is whether or not the cost is reasonable. This is defined under 2CFR § 200.404, which states:

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the Non-Federal entity is predominantly federally funded. In determining reasonableness of a given cost, consideration must be given to:

1. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the Non-Federal entity or the proper and efficient performance of the Federal award.

2. The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; federal, state, local, tribal, and other laws, and regulations; and terms and conditions of the Federal award.

3. Market prices for comparable goods or services for the geographic area.

4. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the Non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government.

5. Whether the Non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award's cost.

The second, is whether the cost is allocable under the grant and answers the question, “Is it necessary?” This criterion is found under 2CFR §200.405:

1. A cost is allocable to a particular Federal award or other cost objective if the goods or services involved are chargeable or assignable to that Federal award or cost objective in accordance with relative benefits received. This standard is met if the cost:

a. Is incurred specifically for the Federal award;

b. Benefits both the Federal award and other work of the Non-Federal entity and can be distributed in proportions that may be approximated using reasonable methods; and

c. Is necessary to the overall operation of the Non-Federal entity and is assignable in part to the Federal award in accordance with the principles in this subpart.

2. All activities which benefit from the Non-Federal entity's indirect cost, including unallowable activities and donated services by the Non-Federal entity or third parties, will receive an appropriate allocation of indirect costs.

3. Any cost allocable to a particular Federal award under the principles provided for in this part may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by federal statutes, regulations, or terms and conditions of the Federal awards, or for other reasons. However, this prohibition would not preclude the Non-Federal entity from shifting costs that are allowable under two or more Federal awards in accordance with existing federal statutes, regulations, or the terms and conditions of the Federal awards.

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# VIII. Travel

A. To be reimbursable, travel expenses must be associated with conducting Commission business. The employee must obtain authorization to travel, the employee should not incur any more cost than reasonably necessary, and the employee should seek out the best obtainable value. All travel shall be reimbursed pursuant to the Per Diem and Mileage Act, 10-8-1 through 10-8-7 NMSA 1978, and NMAC 2.42.2.

B. The Commission shall engage in out-of-state travel only when it is reasonable and necessary for the particular grant or program funding the travel. The Commission shall also comply with 2 CFR § 200.475, which pertains to commercial air travel. When the Commission purchases airline tickets, the Commission shall use the basic least expensive unrestricted accommodations class offered by commercial airlines except when such accommodations would:

1. Require circuitous routing;

2. Require travel during unreasonable hours;

3. Excessively prolong travel;

4. Result in additional costs that would offset the transportation savings; or

5. Offer accommodations not reasonably adequate for the traveler’s medical needs.

C. In purchasing the basic least expensive unrestricted accommodations, the Commission shall purchase refundable tickets when there exists a reasonable possibility that the individual traveling might be unable to travel as planned, when the refundable tickets are not substantially more expensive than the non-refundable tickets, when the person traveling would be unable or otherwise have difficulty refunding the agency the cost of the ticket, or when the person traveling would be unlikely to need to use the unrefunded ticket balance for subsequent travel. In such cases, purchasing refundable tickets is consistent with 2 CFR § 200.475, and also with 34 CFR § 361.12.

D. The Commission shall comply with the Per Diem and Mileage Act at 10-8-5(H) NMSA 1978. This provision is applicable to the Executive Director, the Commissioners, and the State Rehabilitation Council members, and states:

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

E. The Commission shall only reimburse State Rehabilitation Council members who are in valid positions as set forth under 34 CFR § 361.17(e) and 361.17(f), and for meetings held pursuant to 34 CFR § 361.17(j). Council members shall be compensated as set forth under the Per Diem and Mileage Act, and pursuant to 34 CFR § 361.17(k) and section 105(g) of the Act.

F. Pursuant to 10-8-7 NMSA 1978, any Commissioner, Council member, or employee covered by the Per Diem and Mileage Act who knowingly authorizes or who knowingly accepts payment in excess of the amount allowed is liable to the state in an amount that is twice the excess payment.

# IX. Internal Controls

A. The internal controls of the Commission are designed to be in compliance with 2 CFR § 200.1 and 2 CFR § 200.303. Internal controls mean a process, implemented by a Non-Federal entity, designed to provide reasonable assurance regarding the achievement of objectives in the categories of effectiveness and efficiency of operations, reliability of reporting for internal and external use, and compliance with applicable laws and regulations. They create safeguards against errors, fraud, waste, loss, unauthorized use, and misappropriation. The Commission maintains consistent reviews, segregation of duties, and signature authorization to deter any non-compliance with statutes and regulations. Internal controls are standardized through Best Practices statewide and to the “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States. Program managers are required to review and authorize (by signature or e-signature) all allowable costs charged to a grant. The internal controls developed and implemented by the Commission provide reasonable assurance that:

\* Resources are utilized efficiently, effectively, and in compliance with conditions and terms of the Federal award, and with applicable law and regulation;

\* Obligations and costs are in compliance with conditions and terms of the Federal award, and with applicable law and regulation;

\* Funds, property, and other assets and resources are safeguarded against waste, loss, unauthorized use, and misappropriation;

\* Revenues, expenditures, and transfer of assets, resources, or funds applicable to operations are properly recorded and accounted for to permit the preparation of accounts and reliable financial and statistical reports, and to maintain accountability over all resources; and

\* Funds are managed, used, and obtained in strict accordance with the terms of their enabling authorities and that no unauthorized funds exist.

\* Safeguards have been implemented which protect both personal and sensitive information. The information designated as personal and sensitive is consistent with applicable federal and state laws regarding privacy and confidentiality.

\* Prompt action is taken when instances of noncompliance are identified in audit or monitoring findings.

# X. Reports and Internal Control over Compliance Requirements for Federal Awards

A. The purpose of this section is to implement 2 CFR § 200.1, internal control over compliance requirements for Federal awards. The intent is for the Commission to adopt a procedure that will ensure that all "Transactions are properly recorded and accounted for, in order to permit the preparation of reliable financial statements and Federal reports." In addition, since 2 CFR § 200.328 and § 200.329 do not allow for the cognizant federal agency to grant time extensions for submission of fiscal reports, it is essential that the Commission be able to submit fiscal reports that are both accurate and timely. The following procedures on internal control over compliance requirements for Federal awards were first adopted by the Commission for the Blind in a meeting held on April 25, 2017. The process was incorporated into this Allowable Cost Policy and Procedure on April 29, 2019.

B. For each federal report that is to be submitted, the Commission shall designate one employee to be responsible to prepare and submit the report. This employee shall be given access to either the G5 and/or the PMS system, whichever may be appropriate for the assigned federal report. For each such federal report that is to be submitted, the Commission shall designate a second and different employee to review the report for accuracy and completeness. This review shall take place prior to submission and shall take place sufficiently in advance to allow for necessary changes.

C. For each federal report that is due, the Commission shall maintain a file that includes the most current set of instructions from the cognizant federal agency. The file shall also include any additional updates or issuances from the cognizant federal agency, as well as any internal correspondence within the Commission regarding any issues or concerns with the particular federal report. The designated employee or employees shall review this file prior to report submission.

D. The Commission shall monitor the data required for all federal reports throughout the fiscal year. This includes periodic reviews, reconciliation, and other functions deemed necessary by Commission staff to determine that accurate and timely information is being gathered and that such information is sufficient to submit an accurate and timely report.

E. To further ensure that reports are accurate, timely, and complete, the Commission's Chief Financial Officer and Account Manager shall sign up to receive fiscal and financial management updates from the Rehabilitation Services Administration, using the following URL, https://www2.ed.gov/about/offices/list/osers/rsa/email-updates.

F. The Commission shall maintain procedures pursuant to 34 CFR § 361.40 to ensure that all services provided to participants, including career services, are accurately coded, tracked, and reported at the time-of-service provision.

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# XI. Non-delegable Responsibilities

A. All Commission purchases must be made in compliance with 34 CFR § 361.13(c), which requires that certain functions be reserved solely to the staff of the Commission. Pursuant to 34 CFR § 361.13(c)(2), “these functions may not be delegated to any other agency or individual.” The non-delegable responsibilities relate to decisions affecting:

1. Eligibility, the nature and scope of services, and the provision of those services (34 CFR 361.13(c)(1)(i));

2. The determination that individuals have achieved employment outcomes (34 CFR 361.13(c)(1)(ii));

3. Policy formulation and implementation (34 CFR 361.13(c)(1)(iii));

4. The allocation and expenditure of VR funds (34 CFR 361.13(c)(1)(iv)); and

5. The participation of the Commission as a partner in the one-stop service delivery system established under Title 1 of the Workforce Innovation and Opportunity Act, in accordance with 20 CFR part 678.

# XII. Stevens Amendment Notices

A. The Commission shall comply with the Stevens Amendment, Public Law 115-141 (previously Public Law 101-166). Attachment 11 to the Vocational Rehabilitation (VR) program’s Grant Award Notice (GAN) is issued to all grantees of the U.S. Department of Education (Department) to implement the requirements of the Stevens Amendment. The Stevens Amendment specifies that when “issuing statements, press releases, requests for proposals, bid solicitations and other documents describing projects or programs funded in whole or in part with Federal money, all grantees receiving Federal funds, including but not limited to State and local governments, shall clearly state (1) the percentage of the total costs of the program or project which will be financed with Federal money, (2) the dollar amount of Federal funds for the project or program, and (3) percentage and dollar amount of the total costs of the project or program that will be financed by nongovernmental sources.” For Federal Fiscal Year 2022, the Commission has adopted the following notice:

Public Law 115-141 Notice: The Commission receives federal funds from the U.S. Department of Education and from the Health and Human Services Department. For Federal Fiscal Year 2022, the Commission will receive approximately $5,134,772 for Vocational Rehabilitation with a $1,389,716 state match; $55,500 for Supported Employment with a $3,083 state match; $225,000 for Older Blind with a $25,000 state match; and $60,969 for Independent Living with a $6,774 State match.

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# XIII. Conflict of Interest

A. The Commission shall take all appropriate steps to prevent, identify, disclose, and cure any real or potential conflict of interest, including as required by the Uniform Guidance, 2 CFR § 200.112. Pursuant to 2 CFR § 200.112, the Commission shall disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy. The Commission shall also take all appropriate steps to prevent, identify, disclose, and cure any real or potential conflict of interest as required by the New Mexico Governmental Conduct Act, 10-16-1 NMSA 1978, by the Gift Act, 10-16B-1 NMSA 1978, by the Procurement Code, Section 13-1-28 NMSA 1978, by the regulations implementing the Rehabilitation Act at 34 CFR § 361.17(g), and by any other applicable law or regulation.

B. Commission for the Blind Commissioners

All Commissioners of the Commission for the Blind shall comply with the Governmental Conduct Act. Any Commissioner who knowingly and willfully violates the Governmental Conduct Act is guilty of a fourth-degree felony and subject to being sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. The Commission for the Blind shall annually adopt a Governmental Conduct Act resolution affirming that the Commissioners will (1) use their public office only to advance the public interest and not to obtain personal benefit, (2) at all times maintain the integrity and discharge ethically the high responsibilities of public service, (3) fully disclose real or potential conflicts of interest, (4) review on a regular basis the terms and provisions of the Governmental Conduct Act, and (5) in every other way fully abide by the provisions of the Governmental Conduct Act. All Commissioners shall also comply with the Gift Act, 10-16B-1 NMSA 1978. A person who violates the provisions of the Gift Act is guilty of a petty misdemeanor and upon conviction shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978. To provide for maximum transparency and to ensure that the Commission is able to prevent, identify, disclose, and cure any real or potential conflict of interest, the Commissioners shall at all times comply with the Open Meetings Act, 10-15-1 to 10-15-4 NMSA 1978.

C. State Rehabilitation Council Members

All Commission for the Blind State Rehabilitation Council members shall comply with the Governmental Conduct Act. Any Council member who knowingly and willfully violates the Governmental Conduct Act is guilty of a fourth-degree felony and subject to being sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. Commission for the Blind State Rehabilitation Council members shall comply with the conflict-of-interest provisions of 34 CFR § 361.17(g). All Council members shall also comply with the Gift Act, 10-16B-1 NMSA 1978. A person who violates the provisions of the Gift Act is guilty of a petty misdemeanor and upon conviction shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978. To provide for maximum transparency and to ensure that the State Rehabilitation Council is able to prevent, identify, disclose, and cure any real or potential conflict of interest, the Council shall at all times comply with the Open Meetings Act, 10-15-1 to 10-15-4 NMSA 1978, and with the provisions of 34 CFR § 361.20(b).

D. Commission Employees

All Commission employees shall comply with the provisions of the Governmental Conduct Act. Any employee who knowingly and willfully violates the Governmental Conduct Act is guilty of a fourth-degree felony and subject to being sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. All Commission employees shall annually sign a Code of Conduct adopted pursuant to the Governmental Conduct Act. By signing the Code of Conduct, Commission employees “agree to adhere to its terms and understand that violation of those terms constitutes cause for dismissal, demotion, or suspension.” Pursuant to the Code of Conduct, employees shall familiarize themselves with and adhere to the requirements of the Governmental Conduct Act (Chapter 10, Article 16 NMSA 1978) and any other applicable rules or laws governing their conduct, including but not limited to the Financial Disclosure Act (Chapter 10, Article 16A NMSA 1978), the Gift Act (Chapter 10, Article 16B NMSA 1978), the Lobbyist Regulation Act (Chapter 2, Article 11 NMSA 1978), and the Procurement Code (Chapter 13, Article 1 NMSA 1978).

E. Disclosure of Outside Employment

All Commission employees shall disclose outside employment pursuant to Section 10-16-4.2 NMSA 1978, which requires that a public officer or employee shall disclose in writing to the supervisor of the officer or employee, or in the event there is no supervisor, to the Secretary of State, all employment engaged in by the officer or employee other than the employment with the state.

F. Commission Contracts

All Commission contracts must comply with this Allowable Cost Policy and Procedure. All Commission contracts must also comply with the Governmental Conduct Act, including Section 10-16-7 NMSA 1978. Any employee or Commissioner who knowingly and willfully enters into a contract that violates the Governmental Conduct Act is guilty of a fourth-degree felony and subject to being sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. Retaliation Prohibited

All Commissioners, Council members, and employees shall timely report any potential or actual conflict of interest to a supervisor or other appropriate agency official. Such reporting is encouraged as a matter of public policy and may be required by law. No person who reports a conflict of interest as set forth herein shall be subject to retaliation on account of such reporting, and the Commission shall not discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against an employee in the terms and conditions of employment because of the lawful acts of the employee on behalf of the employee or others in disclosing information to a government entity or law enforcement agency.

# XIV. Mandatory Disclosures, Notifications, and Whistleblower Protection

A. Federal Disclosures Pursuant to 2 CFR Part 200

Pursuant to 2 CFR § 200.113, the Commission shall disclose to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity that potentially affect the Federal award. This disclosure shall be in writing and shall take place in a timely manner. For the Vocational Rehabilitation, Supported Employment, and Older Blind grants, the Federal awarding agency is the Rehabilitation Services Administration. The pass-through entity is the New Mexico Division of Vocational Rehabilitation for the Part B Independent Living Grant.

B. State Notifications Pursuant to Section 12-6-6 NMSA 1978

Pursuant to Section 12-6-6 NMSA 1978, the Commission shall notify the state auditor of any violation of a criminal statute in connection with financial affairs. This notification shall be in writing and shall take place immediately upon the discovery of the violation of the criminal statute.

C. State Notifications Pursuant to Section 44-9-3(A)(9) NMSA 1978

Pursuant to the Fraud Against Taxpayers Act, Sections 44-9-1 through 44-9-14 NMSA 1978, no Commission employee or officer who is a beneficiary of an inadvertent submission of a false claim and who having subsequently discovered the falsity of the claim, shall fail to disclose the false claim to the appropriate state or Commission employee within a reasonable time after discovery of the false claim.

D. Whistleblower Protection and Prohibition Against Retaliation

No person who reports fraud, bribery, or gratuity to the Rehabilitation Services Administration or to the Division of Vocational Rehabilitation in the case of the Part B independent living program, or who notifies the Office of the State Auditor of a violation of criminal law, shall be interfered with in regard to such report or notification, and the Commission shall not discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against an employee in the terms and conditions of employment because of the lawful acts of the employee on behalf of the employee or others in disclosing information to a state or federal government entity or law enforcement agency.

The Commission shall include language in contracts stating that no employee of the contractor may be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a federal or state agency information that the employee reasonably believes is evidence of mismanagement of a federal contract or grant, a waste of state or federal funds, an abuse of authority relating to a federal contract or grant, a danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract or grant.

Pursuant to the Fraud Against Taxpayers Act, 44-9-11(A) NMSA 1978, the Commission “shall not make, adopt or enforce a rule, regulation or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a fraud against taxpayers’ action, including investigating, initiating, testifying or assisting in an action filed or to be filed pursuant to the Fraud Against Taxpayers Act.” Pursuant to 44-9-11(B) NMSA 1978, The Commission “shall not discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against an employee in the terms and conditions of employment because of the lawful acts of the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a fraud against taxpayers action, including investigating, initiating, testifying or assisting in an action filed or to be filed pursuant to the Fraud Against Taxpayers Act.” Pursuant to 44-9-11(C) NMSA 1978, An employer that violates 44-9-11(B) “shall be liable to the employee for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay, compensation for any special damage sustained as a result of the violation and, if appropriate, punitive damages.”

XV. Required Cooperative Agreements

A. The Commission for the Blind is required by 34 CFR Part 361 to cooperate and coordinate with other entities, and to have written cooperative agreements with specified programs. These cooperative agreements are intended to maximize the effective use of financial resources, and to further the proper and efficient administration of the vocational rehabilitation program.

B. The Commission is required to have a formal interagency agreement with the state educational agency pursuant to 34 CFR § 361.22(b). The state educational agency is the New Mexico Public Education Department. On January 28, 2020, the Commission signed a formal interagency agreement with the New Mexico Public Education Department. This formal interagency agreement meets the requirements of 34 CFR § 361.22(b), including with respect to financial responsibilities and the provision of Pre-Employment Transition Services.

C. The Commission is required to have a formal interagency agreement with recipients of grants for services to American Indians pursuant to 34 CFR § 361.24(d). There are currently three programs in New Mexico that receive grants for services to American Indians. These are the Navajo Nation Department of Dine Education Office of Special Education and Rehabilitation Services, Laguna-Acoma Connections Vocational Rehabilitation Project, and Jemez Vocational Rehabilitation Project. The Commission has in place formal interagency agreements with all three of these American Indian vocational rehabilitation programs.

D. The Commission is required to establish reciprocal referral services with the Division of Vocational Rehabilitation (DVR) pursuant to 34 CFR § 361.24(e). According to 34 CFR § 361.24(e), the Commission and DVR must "establish reciprocal referral services, use each other’s services and facilities to the extent feasible, jointly plan activities to improve services in the State for individuals with multiple impairments, including visual impairments, and otherwise cooperate to provide more effective services." The Commission and DVR have in place a written cooperative agreement that meets all of the requirements of 34 CFR § 361.24(e).

E. Pursuant to 34 CFR § 361.24(f), the Commission must have a formal cooperative agreement with the State agency responsible for administering the State Medicaid plan under title XIX of the Social Security Act. The New Mexico Human Services Department is the state agency responsible for administering the State Medicaid plan. The Commission has a formal cooperative agreement with the Human Services Department that meets the requirements of 34 CFR § 361.24(f). The Commission is also required by 34 CFR § 361.24(f) to have a formal cooperative agreement with the State agency with primary responsibility for providing services and supports for individuals with intellectual disabilities and individuals with developmental disabilities. The New Mexico Department of Health is the agency in New Mexico with such responsibilities. The Commission has a formal cooperative agreement with the Department of Health that meets the requirements of 34 CFR § 361.24(f).

# XVI. Disaster Recovery and Operations During Times of Emergency

A. The Commission shall put in place and maintain policies and procedures designed to ensure proper and efficient administration of the vocational rehabilitation program during times of emergencies. Given the nature of operating during times of emergencies, these policies and procedures will need to be flexible, and may need to be revised or developed quickly to respond to unanticipated emergencies or developing circumstances.

B. The Coronavirus pandemic, the Russo-Ukraine War, the post-911 environment, the spate of ransomware attacks on governmental entities, and the recent post-election unrest have all demonstrated the crucial importance of maintaining preparedness for a wide range of disasters and threats. To mitigate the potential impact of these disasters and threats, the Commission has in place and maintains a disaster recovery plan that includes a backup of the information on the Commission's computer network that is maintained outside the Commission's physical office space. The Commission’s email and web activity are also protected from increasingly sophisticated threats of spear-phishing and ransomware attacks by a robust package of cybersecurity software. The State of New Mexico uses Mimecast Targeted Threat Protection software that screens emails for ransomware and other harmful content. The state also uses Sophos Endpoint Protection, which screens web pages for ransomware and other harmful content. The Commission will continue to monitor cybersecurity threats and risk levels, will continue to educate employees about the need to guard against harmful or malicious software, and will implement new procedures or otherwise modify the disaster recovery plan accordingly.

C. The Commission shall put in place and maintain written policies or procedures designed to document personnel expenses during times of emergencies, and that are in compliance with the requirements of 2 CFR § 200.430, 200.431, and 200.437. These policies or procedures shall be based on records that accurately reflect the work performed and shall be supported by a system of internal controls which provide reasonable assurance that the charges are accurate, allowable, and properly allocated. Should leave be authorized or required by any state or federal law due to an emergency, the Commission shall ensure that all such leave is taken in compliance with such federal law, is properly documented, and is in compliance with 2 CFR § 200.430 and § 200.431. The Commission may use electronic signatures or other electronic or email records to document such personnel activities and expenses, including those of employees who may be teleworking.

D. The agency shall put in place and maintain policies and procedures designed to ensure that the Commission is able to safely meet during times of emergencies, and that meetings are held in compliance with the Open Meetings Act, 10-15-1 NMSA 1978. These policies and procedures shall ensure that the Commission is able to safely conduct public meetings during times of emergency as required by 34 CFR § 361.20, and meetings that the State Rehabilitation Council may conduct as required by 34 CFR § 361.17(j). This may include meeting virtually, and the Commission has therefore revised its Open Meetings Act Resolution to allow for virtual meetings taking place in the “event that the Governor declares a state of emergency due to the spread of an infectious disease, due to the spread of chemical, biological, or radiological hazards, or due to some other comparable disaster or emergency.” The Commission has also developed procedures in consultation with the State Rehabilitation Council pursuant to 34 CFR § 361.20(b)(2) to allow for the conducting of public meetings during times of emergencies that meet the requirements of 34 CFR § 361.20.

E. The Commission shall put in place and maintain policies and procedures designed to safeguard the confidentiality of personal information during times of emergencies, and that are in compliance with 34 CFR § 361.38. These policies and procedures include the cybersecurity protections described in Paragraph B of this section, which serve to protect personal information contained in the SHARE case management system. In addition, the Commission shall maintain procedures designed to protect the confidentiality of personal information of consumers that is accessed by employees who are teleworking, including during times of emergencies. This includes providing access through Virtual Private Networks for vocational rehabilitation counselors and other employees who must use or access the personal information of consumers, as well as using passwords to protect files, phones, and computers. The following, or language substantially similar, shall be included in all email communications that contain the confidential personal information of consumers:

“This email may contain confidential or privileged information meant only for the intended recipient. Any use, distribution, copying, or disclosure by any other person is strictly prohibited. If you have received this email in error, please notify the sender immediately and delete all copies of this email and any accompanying attachments.”

F. The Commission shall follow all applicable public health orders during times of emergencies. The Commission shall also adopt policies or procedures that implement any applicable guidance that is issued by the Centers for Disease Control and Prevention, the New Mexico Department of Health, or any other state or federal agency that may have jurisdiction over a particular emergency.

G. The practice of electronically signing documents has gained increasing recognition with the development of software that contains safeguards that permits the accurate and reliable application of electronic signatures. Accordingly, The Commission may permit electronic signatures during times of emergencies, or when it is otherwise consistent with the proper and efficient administration of the vocational rehabilitation program. The Commission may use electronic signatures to sign policies, budgets, documents, contracts, agreements, reports, individualized plans for employment, independent living plans, or to sign such other documents as may be necessary for the proper and efficient administration of the vocational rehabilitation program.

The Foregoing Allowable Cost Policy and Procedure was Approved by the Commission for the Blind during a Duly Noticed Regular Meeting Held on the 22nd day of April 2022, and is hereby electronically signed by the following individuals:

Arthur A. Schreiber, Chairman

New Mexico Commission for the Blind

Greg D. Trapp, JD

Executive Director

New Mexico Commission for the Blind

Kevin C. Romero

Chief Financial Officer

New Mexico Commission for the Blind

# XVII. Appendix

# 1. Commission for the Blind Contract Checklist, Adopted May 24, 2021

# \*NOTE: CFTB DOES require that the Contract Checklist be prepared and included with the contract packet. The sole purpose of the checklist is to ensure proper contract preparation and language.

CONTRACT NAME/#:

Contract Total Compensation:

Contract Term:

Prior Approval Required: \_\_\_\_ Yes \_\_\_\_ No

If yes, date prior Approval obtained:

Reasonableness of Contract Price:

\_\_\_\_ Vendor is on Statewide Price List

\_\_\_\_ Vendor is a State Use Act Participant

\_\_\_\_ Agency has sought and obtained at least three bids or estimates and the vendor is the lowest price

\_\_\_\_ The vendor is not the lowest price but possesses special expertise or capacity (Explain)

Contract Performance Measures

\_\_\_\_\_\_\_\_ Contract contains performance measures that are quantifiable and measurable

Suspension and Debarment

\_\_\_\_Agency has checked the SAM and the vendor is not listed

Date of SAM Verification: \_\_\_\_\_\_\_\_\_\_\_

ORIGINAL CONTRACT

* Scope of Work (specify work to be performed)
* Compensation (specify compensation)
* Term (specify term of contract)
* 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The Non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

1. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
2. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
3. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
5. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
6. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (b) (1) through (5) of this section.

* 200.327 Contract provisions.

The Non-Federal entity's contracts must contain the applicable provisions described in Appendix II to this part.

* Appendix II to Part 200 - Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or Non-Federal entity, all contracts made by the Non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

* + (A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by [41 U.S.C. 1908](https://www.govinfo.gov/link/uscode/41/1908), must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
  + (B) All contracts in excess of $10,000 must address termination for cause and for convenience by the Non-Federal entity including the manner by which it will be affected and the basis for settlement. (Contained in Boiler Plate language Item 4 (A) Termination)
  + (C) Equal Employment Opportunity. Except as otherwise provided under [41 CFR Part 60](https://ecfr.federalregister.gov/on/2021-04-21/title-41/part-60), all contracts that meet the definition of “federally assisted construction contract” in [41 CFR Part 60-1.3](https://ecfr.federalregister.gov/on/2021-04-21/title-41/section-60-1.3) must include the equal opportunity clause provided under [41 CFR 60-1.4(b)](https://ecfr.federalregister.gov/on/2021-04-21/title-41/section-60-1.4#p-60-1.4(b)), in accordance with Executive Order 11246, “Equal Employment Opportunity” ([30 FR 12319](https://www.federalregister.gov/citation/30-FR-12319), 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at [41 CFR part 60](https://ecfr.federalregister.gov/on/2021-04-21/title-41/part-60), “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.” (Contained in Boiler Plate language Item 16 Equal Opportunity Compliance)
  + (D) Davis-Bacon Act, as amended ([40 U.S.C. 3141](https://www.govinfo.gov/link/uscode/40/3141)-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by Non-Federal entities must include a provision for compliance with the Davis-Bacon Act ([40 U.S.C. 3141](https://www.govinfo.gov/link/uscode/40/3141)-3144, and 3146-3148) as supplemented by Department of Labor regulations ([29 CFR Part 5](https://ecfr.federalregister.gov/on/2021-04-21/title-29/part-5), “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The Non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The Non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act ([40 U.S.C. 3145](https://www.govinfo.gov/link/uscode/40/3145)), as supplemented by Department of Labor regulations ([29 CFR Part 3](https://ecfr.federalregister.gov/on/2021-04-21/title-29/part-3), “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The Non-Federal entity must report all suspected or reported violations to the Federal awarding agency.
  + (E) Contract Work Hours and Safety Standards Act ([40 U.S.C. 3701](https://www.govinfo.gov/link/uscode/40/3701)-3708). Where applicable, all contracts awarded by the Non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with [40 U.S.C. 3702](https://www.govinfo.gov/link/uscode/40/3702) and 3704, as supplemented by Department of Labor regulations ([29 CFR Part 5](https://ecfr.federalregister.gov/on/2021-04-21/title-29/part-5)). Under [40 U.S.C. 3702](https://www.govinfo.gov/link/uscode/40/3702) of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of [40 U.S.C. 3704](https://www.govinfo.gov/link/uscode/40/3704) are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
  + (F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under [37 CFR § 401.2 (a)](https://ecfr.federalregister.gov/on/2021-04-21/title-37/section-401.2#p-401.2(a)) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of [37 CFR Part 401](https://ecfr.federalregister.gov/on/2021-04-21/title-37/part-401), “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency. (Contained in Boiler Plate language Item 11 Product of Service-Copyright)
  + (G) Clean Air Act ([42 U.S.C. 7401](https://www.govinfo.gov/link/uscode/42/7401)-7671q.) and the Federal Water Pollution Control Act ([33 U.S.C. 1251](https://www.govinfo.gov/link/uscode/33/1251)-1387), as amended - Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the Non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act ([42 U.S.C. 7401](https://www.govinfo.gov/link/uscode/42/7401)-7671q) and the Federal Water Pollution Control Act as amended ([33 U.S.C. 1251](https://www.govinfo.gov/link/uscode/33/1251)-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
  + (H) Debarment and Suspension (Executive Orders 12549 and 12689) - A contract award (see [2 CFR 180.220](https://ecfr.federalregister.gov/on/2021-04-21/title-2/section-180.220)) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at [2 CFR 180](https://ecfr.federalregister.gov/on/2021-04-21/title-2/part-180) that implement Executive Orders 12549 ([3 CFR part 1986](https://ecfr.federalregister.gov/on/2021-04-21/title-3/part-1986) Comp., p. 189) and 12689 ([3 CFR part 1989](https://ecfr.federalregister.gov/on/2021-04-21/title-3/part-1989) Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
  + (I) Byrd Anti-Lobbying Amendment ([31 U.S.C. 1352](https://www.govinfo.gov/link/uscode/31/1352)) - Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by [31 U.S.C. 1352](https://www.govinfo.gov/link/uscode/31/1352). Each tier must also disclose any lobbying with Non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the Non-Federal award.
  + (J) 200.323 Procurement of recovered materials. - A Non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at [40 CFR part 247](https://ecfr.federalregister.gov/on/2021-04-21/title-40/part-247) that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.
  + (K) 200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

1. Procure or obtain;
2. Extend or renew a contract to procure or obtain; or
3. Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in [Public Law 115-232](https://www.govinfo.gov/link/plaw/115/public/232), section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(i) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

(ii) Telecommunications or video surveillance services provided by such entities or using such equipment.

(iii) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

(b) In implementing the prohibition under [Public Law 115-232](https://www.govinfo.gov/link/plaw/115/public/232), section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See [Public Law 115-232](https://www.govinfo.gov/link/plaw/115/public/232), section 889 for additional information.

(d) See also § 200.471.

(Ensure appropriate langue included (if applicable)

“Contractor certifies and warrants that no part of contractor’s business uses covered telecommunications equipment or services as a substantial or essential component, or as critical technology as part of contractor’s business operations. As described in Public Law 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).”

* + (L) 200.322 Domestic preferences for procurements.

(a) As appropriate and to the extent consistent with law, the Non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) “Produced in the United States” means, for iron and steel products, that all

manufacturing processes, from the initial melting stage through the application of

coatings, occurred in the United States.

(2) “Manufactured products” means items and construction materials composed in

whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based

products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including

optical fiber; and lumber.

* Whistleblower protection – “An employee of the contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to the Commission or to a state or Federal agency information that the employee reasonably believes is evidence of mismanagement of a Federal contract or grant, a waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a danger to public health or safety, or a violation of law, rule, or regulation related to a state or Federal contract or grant (including the competition for or negotiation of a contract).”
* Notices (Specify who should be notified for Agency and Contractor)
  + Signatures (Enter appropriate information for signers)
  + CRS Tax ID Number Enter NMS GRS Tax ID – For out of State Vendor enter “Out of State Services”
  + Attachments (if applicable)
    - * Campaign Contribution Disclosure Form
      * Sole Source Request Form
      * Agency Certification Form
      * Determination of Services from State Purchasing Division (Good for 180 days)
      * Horizons of New Mexico declination Email or printed list
      * Copy of first page of Price Agreement and page stating amount allowed, hourly rate and/or tasks (IT) and ensure it has not expired
      * Form LLL – Certification Regarding Lobbying (if applicable)

Compliance of Contract with Appendix II of the Uniform Guidance

\_\_\_\_Agency has reviewed the contract to confirm compliance with Appendix II

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Person creating contract Date

## 2. Commission for the Blind Guidance Determination 01-16

## (Note: The following Commission for the Blind Guidance Determination contains citation to the old program regulations, which have since been replaced. The current program regulations are 34 CFR 361.48 (a) and 361.48 (b) (1 to 21).)

MEMORANDUM

TO Commission for the Blind Staff

FROM: Greg Trapp, Executive Director

DATE: January 20, 2016

Subject: Commission for the Blind Guidance Determination 01-16

Determination of Applicability of Exemption from the Procurement Code at 13-1-98 AA

This Memorandum and its accompanying Attachments constitutes an official guidance on the Exemption from the Procurement Code at 13-1-98 AA, “purchases of products or services for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973.” It is the determination of the Commission for the Blind that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.48, “scope of vocational rehabilitation for individuals with disabilities,” and that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.49,” scope of vocational rehabilitation services for groups of individuals with disabilities.”

The exemption at 13-1-98 AA was specifically intended to apply to vocational rehabilitation services. The exemption was adopted when the State Use Act was passed and was a result of coordination between the Commission and Division of Vocational Rehabilitation (DVR). The purpose of the exemption was to enable the Commission and DVR to comply with 34 CFR 361.52(b) (3) which requires that vocational rehabilitation agencies develop and implement “flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services.”

The exemption is also necessary for the Commission to comply with 34 CFR 361.13(c)(2) and RSA-TAC-12-03. These regulations and their interpreting guidance require that “certain functions be reserved solely to the staff” of the Commission as a vocational rehabilitation agency and that they “not be delegated to any other agency or individual.” The functions which may not be delegated include decisions affecting the “nature and scope of services” and the “provision of those services,” 34 CFR 361.13(c)(1)(i). They also include the “allocation and expenditure of vocational rehabilitation funds,” 34 CFR 361.13(c)(1)(iv). The exemption also enables the Commission to comply with 34 CFR 361.38, which imposes strict confidentiality requirements on vocational rehabilitation agencies.

The Rehabilitation Act has an expansive definition of “services,” which is set forth at 34 CFR 361.48(a) to 361.48(t). This includes “physical and mental restoration services” for persons at extreme medical risk, “transportation” services, “interpreter” services, “consultation” services, “reader” services, “and rehabilitation teaching” services. The definition also includes products such as “books, tools, and other training materials,” as well as “equipment, initial stocks, and Supplies.” Lastly, it includes “other goods and services determined necessary for the individual with a disability to achieve an employment outcome.” All of these products and services can come under the exemption at 13-1-98 AA.

The regulations at 34 CFR 361.49 pertain to provision of services to “groups of individuals.” This includes the Commission’s Newsline for the Blind and Business Enterprise Programs, which provide services to groups of persons who are blind. Because these are vocational rehabilitation services under 34 CFR 361.49, they also come under the exemption at 13-1-98 AA.

The exemption also enables the Commission to avoid an impermissible “centralization of functions” contrary to 34 CFR 361.13(c)(2) and RSA-TAC-12-03. According to RSA-TAC-12-03, while the state may “centralize contracting processing, decisions involving whether to contract for a service, the amount to be contracted, and the service to be procured, must be retained” by the Commission since those decisions “pertain to the allocation and expenditure of VR funds and the provision of VR services, both of which are non-delegable functions.”

USE OF EXEMPTION

The Commission shall use the exemption at 13-1-98 AA when it is determined that doing so is necessary to avoid a violation of an applicable federal regulation or applicable federal guidance, including 34 CFR 361.48, 34 CFR 361.49, 34 CFR 361.13(c)(2), and RSA-TAC-12-03.

To make use of the exemption, the purchase order shall include either a stamp or a letter that contains the following statement:

This purchase, number \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, has been determined by the Commission for the Blind to fall under 13-1-98 AA as set forth in Commission for the Blind Guidance Determination 01-16, and to be necessary to avoid a violation of applicable federal rules and regulations implementing the Rehabilitation Act of 1973, as Amended.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Greg Trapp, J.D.

Executive Director

Commission for the Blind

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Monica Maestas

Deputy Director for Budget and Finance

Chief Procurement Officer

Commission for the Blind

Attachments email from Jennifer Salazar dated January 12, 2016

Attachment: Email from Monica Maestas dated January 5, 2016.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

From: Salazar, Jennifer [mailto:jsalazar@nmag.gov]

Sent: Tuesday, January 12, 2016, 8:35 AM

To: Trapp, Greg, CFB

Subject: Re: FW: Request for Opinion on 13-1-98 AA

Dear Director Trapp:

I agree with your analysis and conclusion that the Commission's purchase of vocational rehabilitation goods and services made pursuant to 34 CFR 361.48 and 34 CFR 361.49 (the federal regulations that implement the federal Rehabilitation Act of 1973) are exempt from the requirements of the Procurement Code under NMSA 1978, Section 13-1-98(AA).

Sincerely,

Jennifer

Jennifer Salazar

Assistant Attorney General

Open Government Division

Office of the Attorney General

P.O. Drawer 1508

Santa Fe, NM 87504-1508

Phone: (505) 827-6990

Fax: (505) 827-6478

[jsalazar@nmag.gov](mailto:jsalazar@nmag.gov)

CONFIDENTIALITY NOTICE: The information in this e-mail and in any attachment may contain information that is legally privileged. It is intended only for the attention and use of the named recipient. If you are not the intended recipient, you are not authorized to retain, disclose, copy, or distribute the message and/or any of its attachments. If you received this e-mail in error, please notify sender at the New Mexico Attorney General's Office, and delete this message. Thank you.

On Tue, Jan 12, 2016, at 8:22 AM, Trapp, Greg, CFB <Greg.Trapp@state.nm.us> wrote:

Dear Ms. Salazar,

Would you please provide me with your opinion as to the application of the Procurement Code exemption at 13-1-98 AA to the Commission for the Blind? I am forwarding to you an email from Mr. Paul Kippert responding to an email that I sent setting forth my interpretation of 13-1-98 AA. Mr. Kippert is asking for an opinion from our attorney and from our Chief Procurement Officer (CPO). Our CPO is Monica Maestas, and she has issued her opinion confirming the application of 13-1-98 AA as set forth in my email to Mr. Kippert. I have attached the Technical Assistance Circular (RSA-TAC-12-03) referenced in my email to Mr. Kippert. Please let me know if you also concur with the application of 13-1-98 AA as set forth in my email to Mr. Kippert.

Please do not hesitate to contact me if you have any concerns or questions.

Sincerely,

Greg Trapp, J.D.

Executive Director

Commission for the Blind

2200 Yale Blvd. SE

Albuquerque, NM 87106

505-383-2231

www.cfb.state.nm.us

-----Original Message-----

From: Kippert, Paul, DFA

Sent: Monday, January 04, 2016, 5:00 PM

To: Trapp, Greg, CFB

Cc: Jackson, Rebecca, DFA; Spilman, Ronald, DFA; Maxwell, Lawrence, GSD

Subject: RE: Request for Opinion on 13-1-98 AA

Good afternoon, Greg.

I've reviewed your email and discussed the matter with Mr. Spilman and Ms. Jackson and can offer the following.

First of all, DFA would not issue an opinion in regard to the use of any specific exemption in the Procurement Code ("the Code"), as such. In our view, whether an exemption can be leveraged under any specific circumstances is a matter for an agency's internal staff to determine, specifically an agency Chief Procurement Officer ("CPO") and attorney. The only general oversight to such determinations would come from State Purchasing through their general statutory authority under the Code as well as their authority over CPOs. All that said, the Financial Control Division ("FCD") authority over purchase vouchers, payments, etc. is to ensure that an agency spends its funds in accordance with applicable statutes and regulations. In regard to this, DFA would not issue a general opinion that some particular type of purchase would come under any specific exemption; instead, FCD would simply require a certification by the agency that the agency has determined that the purchase does in fact come within the exemption being cited. This certification could be done through a memo or a stamp or some other form that would assure FCD that the agency has considered the matter and determined that the use of the specific exemption is authorized by statute. While this certification would generally serve as sufficient documentation for the agency's assertion of a procurement exemption, FCD would reserve the right to review other necessary information within its authority if warranted.

I hope this helps clarify the situation in regard to this matter.

Thank you for the inquiry.

Paul

Paul Kippert

Asst. General Counsel

Department of Finance and Administration

(505) 827-3639

-----Original Message-----

From: Trapp, Greg, CFB

Sent: Wednesday, December 30, 2015, 9:24 AM

To: Kippert, Paul, DFA

Subject: Request for Opinion on 13-1-98 AA

Paul

I met with Ron Spillman and his staff on December 15, and during that meeting it was suggested that I ask you for an opinion on the exemption from the Procurement Code at 13-1-98 AA, "purchases of products or services for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973." I am asking that you issue an opinion affirming that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.48, "scope of vocational rehabilitation for individuals with disabilities." I am also asking that you issue an opinion affirming that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.49, "scope of vocational rehabilitation services for groups of individuals with disabilities." I wrote the language of 13-1-98 AA, and the exemption was specifically intended to apply to these vocational rehabilitation services. The exemption was adopted when the State Use Act was passed, and since that time it has been interpreted to apply to 34 CFR 361.48 and 34 CFR 361.49. We are asking that you affirm that interpretation.

The purpose of the exemption is to enable the Commission to comply with 34 CFR 361.52(b) (3) which requires that vocational rehabilitation agencies develop and implement "flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services." Without the exemption, the state would also be out of compliance with 34 CFR 361.13(c)(2) and RSA-TAC-12-03. These regulations and their interpreting guidance require that "certain functions be reserved solely to the staff" of the Commission as a vocational rehabilitation agency and that they "not be delegated to any other agency or individual." The functions which may not be delegated include decisions affecting the "nature and scope of services" and the "provision of those services," 34 CFR 361.13(c)(1)(i). They also include the "allocation and expenditure of vocational rehabilitation funds," 34 CFR 361.13(c)(1)(iv). The exemption was also intended to help avoid violations of 34 CFR 361.38, which imposes strict confidentiality requirements on vocational rehabilitation agencies.

The Rehabilitation Act has an expansive definition of "services," which is set forth at 34 CFR 361.48(a) to 361.48(t). This includes "physical and mental restoration services" for persons at extreme medical risk, "transportation" services, "interpreter" services, "consultation" services, "reader" services, "and rehabilitation teaching" services. The definition also includes products such as "books, tools, and other training materials," as well as "equipment, initial stocks, and Supplies." Lastly, it includes "other goods and services determined necessary for the individual with a disability to achieve an employment outcome." All of these products and services were intended to fall under the exemption at 13-1-98 AA.

Without the exemption, the Commission would be unable to provide appropriate services to our vocational rehabilitation consumers. For instance, the Commission needs the exemption to enable consumers to purchase food and other items from local grocery stores. Such purchases are an essential part of the training that the Commission provides at the Orientation Center in Alamogordo, and during the Students in Transition to Employment Program in Albuquerque. The Orientation Center is a residential program where newly blinded persons receive intensive training over a 6 to 9 month period. Unfortunately, the products being sold by entities such as Shamrock and Granger are of a commercial nature, are limited in their variety, are designed to be sold in bulk, and may not otherwise be appropriate for use by persons who are blind. Therefore, requiring the Commission to purchase products from such sources Amounts to an impermissible "centralization of functions" contrary to 34 CFR 361.13(c)(2) and RSA-TAC-12-03. According to RSA-TAC-12-03, while the state may "centralize contracting processing, decisions involving whether to contract for a service, the amount to be contracted, and the service to be procured, must be retained" by the Commission since those decisions "pertain to the allocation and expenditure of VR funds and the provision of VR services, both of which are non-delegable functions."

The Orientation Center must provide appropriate training in cooking and meal preparation, must quickly respond to special dietary needs, and must also quickly respond to emergency or other unexpected situations that require immediate purchase of "goods or services." The students must also go to a typical grocery store to learn how to shop, they must purchase the types of items normally found at a typical grocery store, and they must also learn how to cook and prepare the food that they purchase at the grocery store. Without the ability to provide such training, the Commission would fail to meet its federally mandated obligation to provide appropriate training, the Orientation Center would lose its certification, and the Orientation Center would lose students and eventually cease to be a viable program.

Unlike the regulations at 34 CFR 361.48 which pertain to services to "individuals," the regulations at 34 CFR 361.49 pertain to provision of services to "groups of individuals." This includes the Commission's Newsline for the Blind and Business Enterprise Programs, which provide services to groups of persons who are blind. Because these are vocational rehabilitation services under 34 CFR 361.49, they should also fall under the exemption at 13-1-98 AA. However, the Commission proposes to only use the exemption for purchases under 34 CFR 361.49 when doing so is necessary to avoid a violation of an applicable federal regulation, including 34 CFR 361.13(c)(2).

Please do not hesitate to contact me if you require more information, or if you have any other concerns or questions.

Thanks,

Greg

Greg Trapp, J.D.

Executive Director

Commission for the Blind

2200 Yale Blvd SE

Albuquerque, NM 87106

505-383-2231

www.cfb.state.nm.us

-----Original Message-----

From: Maestas, Monica, CFB

Sent: Tuesday, January 05, 2016, 11:31 AM

To: Trapp, Greg, CFB

Cc: Stout, Amy, CFB

Subject: RE: Request for Opinion on 13-1-98 AA

Greg,

I hereby confirm as Chief Procurement Officer for this agency. Once we have obtained legal approval, I will develop a process for which to comply with the statements and conclusions contained in the body of this email.

Monica F. Maestas

Deputy Director for Finance and Administration/CPO

NM Commission for the Blind

2905 Rodeo Park Drive East, Bld. 4 Suite 100 Santa Fe, NM 87505

(505) 476-4454

-----Original Message-----

From: Trapp, Greg, CFB

Sent: Tuesday, January 05, 2016, 10:37 AM

To: Maestas, Monica, CFB <MonicaF.Maestas@state.nm.us>

Cc: Stout, Amy, CFB <Amy.Stout@state.nm.us>

Subject: FW: Request for Opinion on 13-1-98 AA

Monica,

Please confirm your opinion as Chief Procurement Officer to the application of the exemption at 13-1-98 AA to the Commission for the Blind, and our purchases pursuant to 34 CFR 361.48 and 34 CFR 361.49. I have attached the Technical Assistance Circular referenced in the original email to Mr. Kippert. That original email is also contained in this email string, and it sets forth the rationale for the application of 13-1-98 AA to 34 CFR 361.48 and 34 CFR 361.49. Once we have legal approval, I am asking that you develop a process that will comply with the instructions contained in Mr. Kippert's email, and that this process confirm your continued approval as our Chief Procurement Officer for purchases made pursuant to the exemption.

Thanks,

Greg

Greg Trapp, J.D.

Executive Director

Commission for the Blind

2200 Yale Blvd. SE

Albuquerque, NM 87106

505-383-2231

www.cfb.state.nm.us

-----Original Message-----

From: Kippert, Paul, DFA

Sent: Monday, January 04, 2016, 5:00 PM

To: Trapp, Greg, CFB

Cc: Jackson, Rebecca, DFA; Spilman, Ronald, DFA; Maxwell, Lawrence, GSD

Subject: RE: Request for Opinion on 13-1-98 AA

Good afternoon, Greg.

I've reviewed your email and discussed the matter with Mr. Spilman and Ms. Jackson and can offer the following.

First of all, DFA would not issue an opinion in regard to the use of any specific exemption in the Procurement Code ("the Code"), as such. In our view, whether an exemption can be leveraged under any specific circumstances is a matter for an agency's internal staff to determine, specifically an agency Chief Procurement Officer ("CPO") and attorney. The only general oversight to such determinations would come from State Purchasing through their general statutory authority under the Code as well as their authority over CPOs. All that said, the Financial Control Division ("FCD") authority over purchase vouchers, payments, etc. is to ensure that an agency spends its funds in accordance with applicable statutes and regulations. In regard to this, DFA would not issue a general opinion that some particular type of purchase would come under any specific exemption; instead, FCD would simply require a certification by the agency that the agency has determined that the purchase does in fact come within the exemption being cited. This certification could be done through a memo or a stamp or some other form that would assure FCD that the agency has considered the matter and determined that the use of the specific exemption is authorized by statute. While this certification would generally serve as sufficient documentation for the agency's assertion of a procurement exemption, FCD would reserve the right to review other necessary information within its authority if warranted.

I hope this helps clarify the situation in regard to this matter.

Thank you for the inquiry.

Paul

Paul Kippert

Asst. General Counsel

Department of Finance and Administration

(505) 827-3639

-----Original Message-----

From: Trapp, Greg, CFB

Sent: Wednesday, December 30, 2015, 9:24 AM

To: Kippert, Paul, DFA

Subject: Request for Opinion on 13-1-98 AA

Paul

I met with Ron Spillman and his staff on December 15, and during that meeting it was suggested that I ask you for an opinion on the exemption from the Procurement Code at 13-1-98 AA, “purchases of products or services for eligible persons with disabilities pursuant to the federal Rehabilitation Act of 1973.” I am asking that you issue an opinion affirming that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.48, “scope of vocational rehabilitation for individuals with disabilities.” I am also asking that you issue an opinion affirming that 13-1-98 AA applies to purchases of vocational rehabilitation products and services made pursuant to 34 CFR 361.49,” scope of vocational rehabilitation services for groups of individuals with disabilities.” I wrote the language of 13-1-98 AA, and the exemption was specifically intended to apply to these vocational rehabilitation services. The exemption was adopted when the State Use Act was passed, and since that time it has been interpreted to apply to 34 CFR 361.48 and 34 CFR 361.49. We are asking that you affirm that interpretation.

The purpose of the exemption is to enable the Commission to comply with 34 CFR 361.52(b) (3) which requires that vocational rehabilitation agencies develop and implement “flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services.” Without the exemption, the state would also be out of compliance with 34 CFR 361.13(c)(2) and RSA-TAC-12-03. These regulations and their interpreting guidance require that “certain functions be reserved solely to the staff” of the Commission as a vocational rehabilitation agency and that they “not be delegated to any other agency or individual.” The functions which may not be delegated include decisions affecting the “nature and scope of services” and the “provision of those services,” 34 CFR 361.13(c)(1)(i). They also include the “allocation and expenditure of vocational rehabilitation funds,” 34 CFR 361.13(c)(1)(iv). The exemption was also intended to help avoid violations of 34 CFR 361.38, which imposes strict confidentiality requirements on vocational rehabilitation agencies.

The Rehabilitation Act has an expansive definition of “services,” which is set forth at 34 CFR 361.48(a) to 361.48(t). This includes “physical and mental restoration services” for persons at extreme medical risk, “transportation” services, “interpreter” services, “consultation” services, “reader” services, “and rehabilitation teaching” services. The definition also includes products such as “books, tools, and other training materials,” as well as “equipment, initial stocks, and supplies.” Lastly, it includes “other goods and services determined necessary for the individual with a disability to achieve an employment outcome.” All of these products and services were intended to fall under the exemption at 13-1-98 AA.

Without the exemption, the Commission would be unable to provide appropriate services to our vocational rehabilitation consumers. For instance, the Commission needs the exemption to enable consumers to purchase food and other items from local grocery stores. Such purchases are an essential part of the training that the Commission provides at the Orientation Center in Alamogordo, and during the Students in Transition to Employment Program in Albuquerque. The Orientation Center is a residential program where newly blinded persons receive intensive training over a 6 to 9 month period. Unfortunately, the products being sold by entities such as Shamrock and Granger are of a commercial nature, are limited in their variety, are designed to be sold in bulk, and may not otherwise be appropriate for use by persons who are blind. Therefore, requiring the Commission to purchase products from such sources amounts to an impermissible “centralization of functions” contrary to 34 CFR 361.13(c)(2) and RSA-TAC-12-03. According to RSA-TAC-12-03, while the state may “centralize contracting processing, decisions involving whether to contract for a service, the amount to be contracted, and the service to be procured, must be retained” by the Commission since those decisions “pertain to the allocation and expenditure of VR funds and the provision of VR services, both of which are non-delegable functions.”

The Orientation Center must provide appropriate training in cooking and meal preparation, must quickly respond to special dietary needs, and must also quickly respond to emergency or other unexpected situations that require immediate purchase of “goods or services.” The students must also go to a typical grocery store to learn how to shop, they must purchase the types of items normally found at a typical grocery store, and they must also learn how to cook and prepare the food that they purchase at the grocery store. Without the ability to provide such training, the Commission would fail to meet its federally mandated obligation to provide appropriate training, the Orientation Center would lose its certification, and the Orientation Center would lose students and eventually cease to be a viable program.

Unlike the regulations at 34 CFR 361.48 which pertain to services to “individuals,” the regulations at 34 CFR 361.49 pertain to provision of services to “groups of individuals.” This includes the Commission’s Newsline for the Blind and Business Enterprise Programs, which provide services to groups of persons who are blind. Because these are vocational rehabilitation services under 34 CFR 361.49, they should also fall under the exemption at 13-1-98 AA. However, the Commission proposes to only use the exemption for purchases under 34 CFR 361.49 when doing so is necessary to avoid a violation of an applicable federal regulation, including 34 CFR 361.13(c)(2).

Please do not hesitate to contact me if you require more information, or if you have any other concerns or questions.

Thanks,

Greg

Greg Trapp, J.D.

Executive Director

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