



STATE OF NEW MEXICO
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF THE SECRETARY

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BILL RICHARDSON
GOVERNOR

KATHERINE B. MILLER
CABINET SECRETARY

MEMORANDUM

To: Cabinet Secretaries; Agency Heads; Board and Commission Chairs
Cc: Local Governments
From: Katherine B. Miller, Cabinet Secretary *KBM*
Department of Finance and Administration
Date: November 9, 2007
Re: Limited Use of Joint Powers Agreements

This concerns the overuse of joint powers agreements, which require my approval, when other forms of agreements that do not would be both legitimate and more appropriate. Please be advised that, **beginning January 1, 2008**, the Department of Finance and Administration (DFA) will no longer process agreements that are not truly joint powers agreements. This policy is consistent with and supplements DFA's current Joint Powers Agreements Policy and Procedures Memorandum, posted on the DFA website at

<http://sec.nmdfa.state.nm.us/cms/kunde/rts/secnmdfastatenmus/docs/202707833-06-26-2006-14-37-48.pdf>, dated February 20, 2003 and attached hereto. Beginning January 2, 2008, DFA will no longer process these types of agreements as "joint powers agreements". Instead, such agreements will be returned to the submitting agency unsigned, so that the agency can restyle the agreement and remove all references to the Joint Powers Agreement Act, Chapter 11, Article 1 NMSA 1978.

Not every agreement between public entities should be called a joint powers agreement. Rather, an agreement is properly considered a joint powers agreement if and only if it involves the joint exercise of a common power. See, Section 11-1-3 NMSA 1978 which provides that "two or more public agencies by agreement may jointly exercise any power common to the contracting parties". For example, the joint exercise of a common power may include a situation where two public entities come together to jointly build, own, and operate a utility, as long as they both separately have the power to build, own and operate the utility. Another example may be where two public entities desire to establish a separate, regional board -- a JPA entity -- to oversee a joint watershed, as long as they both separately have the power to oversee the watershed.

In contrast, contracts which just happen to be between two public entities are **not** always joint powers agreements.¹ This has consistently been DFA's policy as stated in the attached DFA's JPA Policy and Procedures Memorandum which specifically states:

¹ Many statutes specifically require certain types of agreements to be joint powers agreements, such as agreements between the State Treasurer and Indian governments

“Transferring funds or programs, without the joint exercise of a common power, from one public agency to another does not constitute the joint exercise of a common power.”

Examples of agreements that are commonly but inappropriately labeled joint powers agreements include:

- Grant Agreements. Voluntary, non-exchange transactions, where one public entity grants funds or resources to another public entity to accomplish a project or goal that does not directly benefit the provider of the resources or funds. Examples include agreements whereby an agency makes a State capital appropriation or portion of a federal grant available to a local government or other governmental entity.
- Intergovernmental Service Agreements. Some agreements involve one public entity providing services for another public entity and are entered into pursuant to the New Mexico Procurement Code, Section 13-1-98 A. NMSA 1978 and would be exempt from the provisions of the New Mexico Procurement Code. These agreements should be called intergovernmental services agreement or given other appropriate title.
- Lease Agreements. The lease of property by one public entity from another.
- Agreements Documenting Mutual Understandings. Agreements that merely document mutual understandings of the public entities, such as a shared interpretation of an ambiguous statute that both parties have an interest in or an agreement between the public entities to meet regarding an issue.
- Agreements Transferring an Appropriation from One Agency to Another. As stated previously, a public entity may transfer appropriations or portions of them to another that is better suited to implement the appropriation and as long as the other public entity has the requisite statutory authority to do so. Such transfers could be documented via memoranda of understanding or other simple agreements.

As stated above, beginning January 2, 2008, DFA will no longer process these types of agreements as “joint powers agreements”. Please note, however, for state agencies, DFA’s Financial Control Division, pursuant to Sections 6-5-1 etseq. NMSA 1978 and DFA’s Budget Division, pursuant to Sections 6-3-1 etseq. NMSA 1978, have the authority to review these other types of agreements when they involve the expenditure of public funds for the propriety of the expenditure and for budgetary sufficiency.

Beyond fidelity to the law, there are additional good reasons to strictly adhere to the limited meaning of joint powers agreements in the statute. Seeking DFA’s approval, when it is not necessary, adds a needless layer of approval, which may delay implementation of your project. Moreover, needlessly submitting agreements to DFA for approval is a misallocation of DFA’s resources.

concerning investment in the Local Government Investment Pool, see, Section 6-10-10.1(J) NMSA 1978. Any such statute would obviously control.

If you are in doubt about whether an agreement should be a joint powers agreement, please contact Judith E. Amer, DFA's General Counsel, at 827-4632. She can clear up any questions before you go through the signature process.

DFA looks forward to working with you to implement this Memorandum and DFA's previously issued Joint Powers Agreement Policy and Procedures Memorandum, which should streamline all of our processes.

**DEPARTMENT OF FINANCE AND ADMINISTRATION
ADMINISTRATIVE SERVICES DIVISION
POLICY AND PROCEDURES**

JOINT POWERS AGREEMENTS

POLICY

All Joint Powers Agreements (JPA) as defined by Section 11-1-2 (B) NMSA 1978 are required to be approved by the Department of Finance and Administration Cabinet Secretary (DFA) pursuant to the Joint Powers Agreement Act Section 11-1-3 NMSA 1978. The following procedures shall be adhered to by all public agencies, as defined by section 11-1-2 (A) NMSA 1978 in order to receive approval by DFA of every JPA and amendment to an existing JPA.

PROCEDURES

- I. Submittal of JPAs to the Department of Finance and Administration, Office of the Secretary:
 - A. Effective February 20, 2003, all JPAs and JPA amendments must be accompanied by:
 1. A completed JPA cover brief as revised on February 15, 2003 and updated with the new address and telephone number (attached). Please read the JPA cover brief. Do not simply check off the Requirements without researching. Remember that the agency is certifying that the answers are true and correct when it checks off a particular item, and
 2. An original plus two copies of the original JPA and one copy of any prior amendments. Those JPAs and JPA amendments which do not contain the specified attachments will be returned to the public agency.
 - B. All JPAs that expire on June 30 (end of the state fiscal year) or September 30 (end of the federal fiscal year) for which a public agency desires to seek an extension by way of a new agreement or an amendment, must be received by May 30 or August 31, respectively, in order to assure approval by June 30 or September 30.
- II. Statutory Requirements for each JPA pursuant to the Joint Powers Agreements Act, Sections 11-1-1 through 11-1-7 NMSA 1978, as amended:

A JPA is required to be entered into when two public agencies desire to "jointly exercise any power common to the contracting parties." Therefore, all JPAs shall clearly enunciate the joint exercise of any power common to the contracting parties. See Sections 11-1-3 NMSA 1978. Additionally, certain statutes specifically require two or more parties to enter into a JPA in order to fulfill the statute's purpose. Remember, the JPA Act allows agencies with certain powers in common to exercise them in tandem. Express the individual and common powers even if it

appears obvious.

- A. All JPAs shall contain at least one RECITAL of the statute or statutes or other authority (such as ordinance or executive order) that enables or authorizes each public agency to perform the stated work and purpose of the JPA.
- B. Next, all JPAs shall contain an additional RECITAL expressly explaining how the two agencies are “jointly exercising any power common to the contracting parties”. See Section 11-1-3 NMSA 1978.

Example of the RECITALS:

WHEREAS: Public agency A is empowered or authorized by Section ____ NMSA 1978 to do the following ____ OR perhaps has received a grant or an appropriation to do the following _____.

WHEREAS: Public agency B is empowered or authorized by Section ____ NMSA 1978 to do the following _____ (it should overlap public agency A’s power described above).

WHEREAS: Pursuant to the JPA Act, Sections 11-1-1 through 11-1-7 NMSA 1978, public agency A and B desire to enter into this JPA to exercise their common power to do the following _____ as follows: (then describe how A and B will do what they desire to do).

CAVEAT:

Transferring funds or programs, without the joint exercise of a common power, from one public agency to another does not constitute the joint exercise of a common power.

- C. Pursuant to Sections 11-1-2 and 11-1-3 NMSA 1978, only “public agencies” may enter into JPAs. It is the duty of the parties to expressly state how each fits within the definition of public agency. Public corporations must present proof of their status.
- D. Pursuant to Section 11-1-4 NMSA 1978 all JPAs shall:
 - 1. “clearly specify the purpose of the agreement or for any power which is to be exercised...”
 - 2. “...provide for the method by which the purpose will be accomplished and the manner in which any power will be exercised under such agreement...”,
 - 3. “...provide for the strict accountability of all receipts and disbursements...” (if no money is involved, then expressly state this fact and that this provision is therefore inapplicable);
 - 4. “...provide for the disposition, division or distribution of any property

acquired as a result of the joint exercise of powers..." (if there is no property involved, then expressly state this fact and that this provision is therefore inapplicable); and

5. "...provide that after the completion of the agreement's purpose any surplus money on hand shall be returned in proportion to the contributions made..." (if there is no surplus money, then expressly state this fact and explain why).

III. Constitutional Requirements of JPAs

- A. The New Mexico Constitution prohibits certain delegations of statutory authority. In order to assure that no unconstitutional delegation of authority exists, the JPA may designate one agency as the lead agency and expressly include a section that requires the secondary agency to report back to the lead agency. The lead agency must:
 1. Monitor the actions of the secondary agency; and
 2. Possess the ability to take corrective action, including terminating the JPA, if it believes the secondary agency is not performing its duties.

IV. JPA Template

Please examine your JPA template and ensure that it meets statutory, constitutional and DFA requirements. The following are NOT REQUIREMENTS, only guidance, for the form of a JPA:

A. OPTIONAL Liability Provision in Joint Powers Agreement

This Policy and Procedure supercedes DFA Memorandum dated May 13, 1998 and February 2, 1999 Memorandum which discussed liability provisions in Joint Powers Agreements. As stated previously, the Joint Powers Agreement Act *does not* require any provision discussing liability of the parties. Therefore, you may omit liability provisions altogether. However, DFA will now permit JPAs to discuss the allocation of responsibility between public agencies. If public agencies choose to allocate liability, you may use **either, or both**, of the following provisions or those containing similar language based upon your specific needs:

Neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act.

OR:

Each party shall be solely responsible for fiscal or other sanctions, penalties, or fines occasioned as a result of its own violation or alleged violation of requirements applicable to performance of this Agreement. Each party shall be liable for its acts or failure to act in accordance with this agreement, subject to the immunities and limitations of the New Mexico Tort Claims Act.

Please do not construe anything in this Policy and Procedure as authorizing "public agencies" to agree to indemnify or hold harmless third parties. **JPAs containing indemnification provisions will be rejected.** However, public agencies, including state agencies or political subdivisions of the

State of New Mexico, may agree to repay each other as reimbursement under the above stated liability provisions, subject to sufficient appropriation by the Legislature or sufficient funds being available to the local public body, as determined by the agency responsible for payment. Furthermore, DFA reserves the right to reject agreements containing language which may be construed as creating a contingent liability in violation of the debt provisions of the New Mexico Constitution. If you would like proposed language reviewed before you incorporated it in a JPA, please contact our General Counsel at 827-3639.

B. Suggested Framework of JPA

JOINT POWERS AGREEMENT

FOR (describe purpose)

BETWEEN

THE (agency 1 name)

AND

THE (agency 2 name)

THIS AGREEMENT is entered into by and between the (public agency name) and the (public agency name).

WHEREAS (RECITALS) and

WHEREAS (RECITALS) and

WHEREAS The parties are public agencies and are authorized by Sections 11-1-1 et seq. NMSA 1978 to enter into this Agreement;

NOW THEREFORE the parties hereby agree as follows:

1. Common Power: The common power to be exercised is (describe common power and specifically cite to the relevant statutes and or ordinances)

2. Scope of work:

A. (name of agency 1) will (describe duties)

B. (name of agency 2) will (describe duties)

3. Term: This Agreement will become effective upon approval by the Department of Finance and Administration. It shall terminate on (date). Upon termination all obligations incurred under this Agreement shall terminate.

4. Property: (describe disposition of property acquired as a result of this JPA)

Disposition of records generated by performance of this agreement shall be

decided by the parties upon termination.

5. Surplus Funds: After completion of the Agreement's purpose, any surplus money on hand shall be returned in proportion to the contributions made.

6. Strict Accountability of all Receipts and Disbursements: Each party shall be strictly accountable for all receipts and disbursements under this Agreement.

7. Amendment: This Agreement shall not be altered, changed, or amended except by instrument in writing executed by the parties and approved by the Department of Finance and Administration.

8. Appropriations: Performance under this Agreement is contingent upon sufficient authority and appropriations granted by the New Mexico State Legislature.

9. Governing Law: This Agreement shall be governed by the laws of the State of New Mexico.

IN WITNESS WHEREOF, the parties have executed this Agreement which becomes effective as of the date of approval by the Department of Finance and Administration.

(Public Agency 1)

By: _____

Date: _____

(Public Agency 2)

By: _____

Date: _____

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION

By: _____
Cabinet Secretary

Date: _____

EFFECTIVE DATE

JAMES C. JIMENEZ, CABINET SECRETARY

DFA Office of the Secretary
Bataan Memorial Bldg., Suite 180
Santa Fe, New Mexico 87501
(505) 827-4985

Agencies must complete and transmit this form along with all backup documentation to the DF A.

PRIMARY

PARTY: _____

SECONDARY
PARTY: _____

OTHER
PARTY: _____

CONTACT
NAME: _____

PHONE: _____

CONTACT
ADDRESS: _____

DOCUMENTS ENCLOSED:

AMOUNT:

<input type="checkbox"/>	JPA \$ _____	Federal Funds
<input type="checkbox"/>	JPA Amendment \$ _____	General Fund
<input type="checkbox"/>	Purchase Document	Other State Funds \$ _____
<input type="checkbox"/>	Written Justification \$ _____	Local Gov. Funds
<input type="checkbox"/>	Other _____ \$ _____	TOTAL

Purpose: _____

Term: _____

From: _____

To: _____

FOR AN AMENDMENT, LIST THE ORIGINAL JPA EXPIRATION DATE:

Statutory Requirements- Agencies must check each blank CERTIFYING to DFA that the JPA:

_____ jointly exercises a power common to the parties
_____ (Transferring funds from one agency to another does not
_____ constitute the joint exercise of power.);
_____ clearly specifies its purpose;
_____ establishes the method by which its purpose will be
_____ accomplished;
_____ establishes the manner in which the joint power will
_____ exercised;
_____ provides for strict accountability of all receipts and
_____ disbursement;
_____ addresses disposition, division, distribution and
_____ ownership of any property acquired as the result of the
_____ joint exercise of power; and
_____ specifies that any surplus money shall be returned in
_____ proportion to the contributions made.

Other Requirements Agencies must enter Y (Yes), N (No), or N/A (Not Applicable) to each of the following:

_____ Is one original and at least two copies of the JPA or
_____ amendment attached? (DFA will forward copies to the
_____ contact.)

_____ Does the JPA or amendment have original signatures
_____ executed by authorized officers, employees or other
_____ representatives empowered to bind their respective
_____ entities?

_____ Are all exhibits referred to in the JPA attached?

_____ Does the JPA provide for the expenditure or transfer of
_____ public funds by a state agency? (All public money must be
_____ budgeted.)

_____ Does the JPA provide for the transfer of local, state or
_____ federal funds to a state agency? If the answer is yes,
_____ cite or attach the legislative authority permitting the

receiving state agency to increase its budget from such a transfer.

If the JPA or amendment start date is prior to the date submitted to DFA or, if the original JPA has expired, is a justification letter requesting retroactive approval attached? *(A detailed, letter explaining the circumstances must be signed by the agency head of one of the parties.)*

Has the JPA or amendment been reviewed by legal counsel?

If yes, state Who _____

Agency Head Signature _____

Title _____