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## FISCAL IMPACT REPORT

ORIGINAL DATE 3/2/09

SPONSOR Egolf LAST UPDATED \_\_\_\_\_ HB 878

SHORT TITLE State Contractor Registration & Info SB \_\_\_\_\_

ANALYST Wilson

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non- Rec	Fund Affected
<b>Total</b>		Indeterminate See Below	Indeterminate See Below		Recurring	GF

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 99, HB 151, HB 244, HB 252, HB 253, HB 272, HB 495, HB 535, HB 546, HB 550, HB 553, HB 614, HB 646, HB 686, HB 808, HB 850, HB 878, HB 883, HB 891, SB 49, SB 94, SB 116, SB 128, SB 139, SB 140, SB 163, SB 258, SB 262, SB 263, SB 269, SB 296, SB 346, SB 451, SB 521, SB 535, SB 555, SB 557 SB 606, SB 611, SB 613, SB 646, SB 652, SB 676, SB 678 & SB 693

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Attorney General's Office (AGO)  
 Corrections Department (CD)  
 Energy, Minerals & Natural Resources (EMNRD)  
 General Services Department (GSD)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

House Bill 878 requires all prospective state contractors to register with GSD and provide basic business information, including the disclosure of all campaign contributions to a state public officer made during the two years prior to the date the prospective contractor responds to a state agency solicitation if the aggregate total contributions exceed \$250 over the two year period.

The disclosure must include the date, amount and nature of the contributions, and the person receiving the contribution. Prospective state contractors are prohibited from making or soliciting campaign contributions for the benefit of a state public officer during the procurement process. Before entering or awarding a state contract, a state agency must review all of the information provided by the contractor, and then ultimately certify that no conflict of interest appears to exist and that no undue influence has been exerted regarding the award of the contract.

A state agency may cancel or terminate a proposed contract award and an executed contract if it is in the best interests of the state when a prospective contractor fails to submit a fully completed disclosure statement or makes or solicits a contribution during the procurement process.

The law does not automatically require the termination of a contract or the cancellation of a proposed contract award merely because the contractor made a political contribution.

### **FISCAL IMPLICATIONS**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase

CD states that if they need to terminate or not award some of its contracts pursuant to this law, it may incur minimal to moderate additional expenses in re-initiating a new procurement process for the goods or services in question. Further, if the goods or services are needed on an emergency basis, an emergency contract will need to be implemented. That contract will probably cost more or be more expensive to the CD than the contract would otherwise have been.

GSD states it is not clear that any of the capabilities of the SHARE system could be used to satisfy the requirements of this bill. As such, a stand-alone web based registration system will have to be developed and implemented. The associated cost is unknown.

### **SIGNIFICANT ISSUES**

The AGO provided the following:

In light of recent scandals over Pay to Play, this bill seeks to address problems affecting political campaign contributions by contractors and potential contractors with the state. The bill also introduces a novel idea for creating more transparency in the procurement process—a database with full disclosure by prospective contractors. And the bill closes a major loophole in the Procurement Code by changing “applicable public official” to a broadly defined “state public officer.”

However, the bill presents serious First Amendment speech issues when it comes to prohibitions on contributions by individuals, such as spouses and dependent children. The US Supreme Court has already struck down wholesale bans on contributions by minors. Although this bill bans contributions by a narrow group of minors, still, this ban may raise constitutional problems in light.

Likewise, can an employee who has managerial or discretionary responsibilities in a non-profit organization be required to waive First Amendment political speech and be prohibited from making campaign contributions—as well as be prohibited from soliciting contributions--as a condition of working for a non-profit that has a state contract?

In fairness to the bill, there are federal district court opinions and opinions from other state Supreme Courts which have upheld similar bans; but so far, the US Supreme Court

has only upheld bans on contributions by corporate entities. And in fairness to the bill, the US Supreme Court has repeatedly stated that campaign contributions deserve less protection than campaign expenditures since expenditures are closer to core speech.

The bill may also raise issues by mixing all state contractors into the same category. For example, should a contractor with one agency of the executive be prohibited from giving to a candidate belonging to another separate and independent state agency? Each executive agency is independent and does not influence the award of contracts by another executive agency.

As a final point, by repealing Section 13-1-191.1 of the Procurement Code, this bill inadvertently abolishes the contractor-campaign disclosure requirements that apply to the procurement process by local public bodies. This bill only applies to state agencies and institutions and instrumentalities of the state.

Failure to address Pay to Play activity will reinforce this appearance of impropriety in the public's mind, thereby undermining public trust in government.

CD asks who determines if the termination of the contract is in the best interests of the state—the state agency? Some state public officers will attempt to keep the state agencies from terminating a contract with a contractor who made political contributions to them even if the agency believes it should terminate the contract in the best interests of the state. The bill does not prevent this sort of influence by legislators and other politicians.

EMERD provided the following:

HB 878 requires potential state contractors to register with GSD, fill out a campaign disclosure form, and provide information about the bidder. This legislation replaces the current system that requires the campaign disclosure form for professional service contracts and bidders for construction projects. Since construction projects are awarded based on the cost of the project, it is unlikely that “undue influence” could be placed on the contracting state agency or state purchasing. The biggest hurdle will be to get the bidders registered before placing a bid. The EMNRD has seen incidents where contractors have failed to register with the Department of Workforce Solutions prior to the bid and has had to move to the third or fourth lowest bid because those contractors have been disqualified.

Additionally, the legislation requires the contracting agency to determine that “no conflict of interest and no undue influence have been exerted regarding award of the contract”. How should an agency interpret the phrase “no conflict of interest”? If a construction contractor gives a contribution to a legislator or the executive before the beginning of the procurement process, is that a conflict of interest? Does it have to exceed a certain amount to be interpreted as a conflict of interest? Finally, construction contracts and price agreements are based on the lowest price to the state. It is unclear how having campaign disclosure forms on file will affect the bidding process aside from the potential of having the lowest bidder thrown out due to not being registered with GSD prior to the bid opening.

Without guidelines as to the level, type, amount or recipient of a contribution constituting a conflict of interest or undue influence it becomes a pure conjecture on the part of the state as to whether a disqualifying problem exists. It is difficult to see how this improves the existing system.

### **ADMINISTRATIVE IMPLICATIONS**

The bill will impose a certifying role onto the central purchasing staff of the judiciary to determine whether or not the prospective contractor has fully disclosed and whether there is a conflict of interest. The former determination is a factual one that may require some investigation. The latter determination will require the central purchasing office to decide the legal and factual issue of whether a conflict exists. These will be unique duties that may require some trial and error over time.

GSD claims attention to, and management of, this reporting system will divert GSD resources and this could impact other activities.

Reporting could be required strictly via paper form that could be downloaded from the GSD web site and submitted to GSD. Filing and maintenance of the forms might be a more significant burden than the proposed system. However, development of an online registration system will not be required.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill is similar to SB 263, Contractor Disclosure of Contributions and SB 296, State Contractor Contribution Disclosure which both amend the Procurement Code to expand the disclosure requirements in Section 13-1-191.1.

In addition, HB 546, State Contractor & Contract Database specifies that the GSD create an online database searchable by contractor name, subject matter, data, and other categories of information.

In addition, HB 244, Prohibit Contractor Contribution Solicitation and SB 258, Contribution from State Contractors ban contributions by all contractors and prospective contractors and SB 611 Investment Contractor Contributions bans contributions by a principal of an investment services contractor to statewide elected candidates and PRC candidates.

HB 878 relates to other ethics bills as follows:

- HB 99, Prohibit Former Legislators as Lobbyists
- HB 151, State Ethics Commission Act
- HB 252, Political Contributions to Candidates
- HB 253, Quarterly Filing of Certain Campaign Reports
- HB 272, Quarterly Campaign Report Filing
- HB 495, Political Candidate & Committee Donations
- HB 535, Lobbyist Identification Badges
- HB 550, Local School Board Governmental Conduct
- HB 553, Disclosure of Lobbyist Expenses
- HB 614, State Ethics Commission Act

HB 646, School Board Candidate Contribution Info  
HB 686, AG Prosecution of State Officer Crimes  
HB 808, Tax-Exempt Election Contributions & Reporting  
HB 891, Election Communication Contribution Reporting  
HB 850, Governmental Conduct Act for All Employees  
HB 878, State Contractor Registration & Info  
HB 883, Clean Government Contracting Act  
SB 49, Governmental Conduct Act For Public Officers  
SB 94, Prohibit Former Legislators as Lobbyists  
SB 116, Limit Contributions to Candidates & PACs  
SB 128, Require Biannual Campaign Reports  
SB 139, State Ethics Commission Act  
SB 140, State Ethics Commission Act  
SB 163, Prohibit Former Legislators as Lobbyists  
SB 262, Political Contributions to Candidates  
SB 269, State Bipartisan Ethics Commission Act  
SB 346, Political Contributions to Candidates  
SB 451, Contributions to PERA Board Candidates  
SB 521, Campaign Contributions in Certain Elections  
SB 535, Election Definition of Political Committee  
SB 555, Public Employee & Officer Conduct  
SB 557, State Ethics Commissions Act  
SB 606, Expand Definition of Lobbyist  
SB 613, Campaign Finance Changes  
SB 646, Judicial Candidate Campaign Contributions  
SB 652, Campaign Reporting Private Cause of Action  
SB 676, School Board Candidate Contributions  
SB 678, School Board Candidate Contributions  
SB 693, Prohibit Certain Contributions to Candidates

## TECHNICAL ISSUES

AGO provided the following:

Section 1E of the bill bans contributions by a “principal of a state contractor...during the pendency of the procurement process.” The bill most likely intended to ban contributions by a “principal of a prospective state contractor” because the bill refers to “prospective” contractors throughout the entire bill, and the bill even defines “principal of a prospective contractor” which appears nowhere else throughout the bill, but does not define “principal of a state contractor.”

This section as written will apply only to a narrow group: current state contractors who are applying for either another state contract or a renewal. As currently written, this will essentially eliminate subsection E of Section 13-1-191.1 of the Procurement Code which currently prohibits contributions and gifts from prospective contractors during the pendency of the Procurement process.

Lastly, Section 1-13-191.1 of the Procurement Code bans contributions by prospective contractors. And Section 10-16-13.3 of the Governmental Conduct Act prohibits

contributions from “financial service contractors” and Section 10-16B-3 of the Gift Act has a narrow ban on soliciting donations for charities by employees who regulate business.

DW/mc