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SENATE BILL 10

52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2016

INTRODUCED BY

Michael Padilla

AN ACT

RELATING TO PROCUREMENT; ENACTING THE RESIDENT BUSINESS SET-
ASIDE ACT; REQUIRING THAT THIRTY-THREE PERCENT OF CERTAIN
CONTRACTS BE AWARDED TO RESIDENT BUSINESSES; PROVIDING FOR
CERTIFICATION OF RESIDENT BUSINESSES AND RESIDENT CONTRACTORS;
REQUIRING REPORTING; PROVIDING PENALTIES.

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

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Resident Business Set-Aside Act".

SECTION 2. [NEW MATERIAL] PURPOSE.--The purpose of the
Resident Business Set-Aside Act is to encourage the health of
the state's economy, which is directly related to the
competitive strength and well-being of the state's businesses,
by providing an opportunity for businesses to freely enter into
business and to grow and expand and by ensuring that a fair

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1 proportion of the state's total contracts for construction,
2 property and services is placed with resident businesses.

3 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
4 Resident Business Set-Aside Act:

5 A. "contracting agency" means a department,
6 commission, council, board, committee, institution, legislative
7 body, agency, government corporation or official of the
8 executive, legislative or judicial branch of the government of
9 the state;

10 B. "department" means the general services
11 department;

12 C. "Indian nation, tribe or pueblo" means a
13 federally recognized Indian nation, tribe or pueblo located
14 wholly or partially in New Mexico, including:

15 (1) a political subdivision, agency or
16 department of an Indian nation, tribe or pueblo;

17 (2) an incorporated or unincorporated
18 enterprise of an Indian nation, tribe or pueblo or of a
19 political subdivision of an Indian nation, tribe or pueblo; or

20 (3) a corporation considered to be an Indian
21 nation, tribe or pueblo by the federal government or the state;

22 D. "legacy contractor" means a construction
23 business that has been licensed in this state for ten
24 consecutive years;

25 E. "new business" means a business that has been in

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1 existence for less than three years;

2 F. "new contractor" means a business that has been
3 in existence for less than five years;

4 G. "relocated business" means a business that moved
5 eighty percent of its total domestic personnel from another
6 state to New Mexico in the past five years;

7 H. "resident business" means a business or
8 contractor that has a valid resident business or resident
9 contractor certificate issued by the taxation and revenue
10 department pursuant to Section 5 of the Resident Business Set-
11 Aside Act;

12 I. "set-aside contract" means:

13 (1) a contract for items of tangible personal
14 property, equipment, construction, services or professional
15 services that is designated as a contract with respect to which
16 bids or proposals are solicited only from a resident business;
17 or

18 (2) a portion of a contract when that portion
19 has been designated as a portion with respect to which bids or
20 proposals are solicited and accepted only from a resident
21 business; and

22 J. "tangible personal property" means tangible
23 property other than real property that has a physical
24 existence, including supplies, equipment, materials and printed
25 materials.

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1 SECTION 4. [NEW MATERIAL] CONTRACTING AGENCIES--

2 REQUIREMENTS--DESIGNATION OF SET-ASIDE CONTRACTS.--

3 A. Every contracting agency shall award at least
4 thirty-three percent of the total number of its contracts to
5 resident businesses. A contract pursuant to the State Use Act
6 that is awarded to a resident business shall be included in the
7 contracting agency's calculation pursuant to this subsection.

8 B. Every contracting agency shall, in consultation
9 with the department, develop an annual plan for how it will
10 achieve the purpose and requirements of the Resident Business
11 Set-Aside Act.

12 C. Contracting agencies, in consultation with the
13 department, may designate a contract, or a portion thereof, as
14 a resident business set-aside contract pursuant to the Resident
15 Business Set-Aside Act if there is a reasonable expectation
16 that bids or proposals may be obtained from at least three
17 qualified resident businesses that are capable of furnishing
18 the desired items of tangible personal property, equipment,
19 construction, services or professional services at a fair and
20 reasonable price. The designation of the contract shall be
21 made before the contracting agency solicits bids or proposals.

22 D. If the department and a contracting agency
23 disagree as to the designation of a resident business set-aside
24 contract or the requirement that a resident business
25 subcontractor perform work on a portion of a contract, the

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1 dispute shall be submitted to the state auditor for a final
2 determination within twenty-one days of receipt of written
3 notice of the disagreement.

4 E. If the implementation of the purpose or
5 provisions of the Resident Business Set-Aside Act would
6 jeopardize the state's participation in a program from which
7 the state receives federal funds or other benefits, a
8 contracting agency may, in consultation with the department,
9 withdraw the affected contracts from consideration or
10 calculation of a contracting agency's resident business
11 contract awards.

12 SECTION 5. [NEW MATERIAL] RESIDENT BUSINESS AND RESIDENT
13 CONTRACTOR--CERTIFICATION.--

14 A. To be certified as a resident business, a
15 business shall submit an application to the taxation and
16 revenue department. The application shall include an affidavit
17 from a certified public accountant, licensed attorney or
18 enrolled agent authorized to practice before the internal
19 revenue service setting forth that the business is licensed to
20 do business in this state and:

21 (1) that the business has paid property taxes
22 or rent on real property in the state and has paid at least one
23 other tax administered by the state in each of the three years
24 immediately preceding the submission of the affidavit;

25 (2) if the business is a new business, that

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1 the owner or majority of owners has paid property taxes or rent
2 on real property in the state and has paid at least one other
3 tax administered by the state in each of the three years
4 immediately preceding the submission of the affidavit and has
5 not applied for a resident business or resident contractor
6 certificate pursuant to this section during that time period;

7 (3) if the business is a relocated business,
8 that at least eighty percent of the total personnel of the
9 business in each of the years immediately preceding the
10 submission of the affidavit were residents of the state and
11 that, prior to the submission of the affidavit, the business
12 either leased real property for ten years or purchased real
13 property greater than one hundred thousand dollars (\$100,000)
14 in value in the state;

15 (4) if the business was previously certified
16 pursuant to this subsection and the business has reorganized
17 into one or more different legal entities, was purchased by
18 another legal entity but operates in the state as substantially
19 the same commercial enterprise or has merged with a different
20 legal entity but operates in the state as substantially the
21 same commercial enterprise and the business has obtained a new
22 tax identification number, that the business meets the
23 requirements provided in Paragraph (1) of this subsection; or

24 (5) if the business is owned by an Indian
25 nation, tribe or pueblo, that the principal place of business

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1 is in the state and that at least eighty percent of the total
2 personnel of the business in each of the years immediately
3 preceding the submission of the affidavit were residents of the
4 state.

5 B. To be certified as a resident contractor, a
6 contractor shall submit an application to the taxation and
7 revenue department. The application shall include an affidavit
8 from a certified public accountant, licensed attorney or
9 enrolled agent authorized to practice before the internal
10 revenue service setting forth that the contractor is currently
11 licensed as a contractor in this state and:

12 (1) that the contractor has:

13 (a) registered with the state at least
14 one vehicle; and

15 (b) in each of the five years
16 immediately preceding the submission of the affidavit: 1) paid
17 property taxes or rent on real property in the state and paid
18 at least one other tax administered by the state; and 2) paid
19 unemployment insurance on at least three full-time employees
20 who are residents of the state; provided that if a contractor
21 is a legacy contractor, the requirement of at least three
22 full-time employees who are residents of the state is waived;

23 (2) if the contractor is a new contractor,
24 that the owner or majority of owners has paid property taxes or
25 rent on real property in the state and has paid at least one

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1 other tax administered by the state in each of the five years
2 immediately preceding the submission of the affidavit and has
3 not applied for a resident business or resident contractor
4 certificate pursuant to this section during that time period;

5 (3) if the contractor is a relocated business,
6 that at least eighty percent of the total personnel of the
7 business in each of the years immediately preceding the
8 submission of the affidavit were residents of the state and
9 that, prior to the submission of the affidavit, the contractor
10 either leased real property for ten years or purchased real
11 property greater than one hundred thousand dollars (\$100,000)
12 in value in the state;

13 (4) if the contractor was previously certified
14 pursuant to this subsection and the contractor has reorganized
15 into one or more different legal entities, was purchased by
16 another legal entity but operates in the state as substantially
17 the same enterprise or has merged with a different legal entity
18 but operates in the state as substantially the same commercial
19 enterprise and the contractor has obtained a new tax
20 identification number, that the contractor meets the
21 requirements provided in Paragraph (1) of this subsection; or

22 (5) if the contractor is a business owned by
23 an Indian nation, tribe or pueblo, that the principal place of
24 business is in the state and that at least eighty percent of
25 the total personnel of the business in each of the years

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1 immediately preceding the submission of the affidavit were
2 residents of the state.

3 C. The taxation and revenue department shall
4 prescribe the form and content of an application for
5 certification as a resident business or resident contractor and
6 of the required affidavit.

7 D. The taxation and revenue department shall
8 examine applications and affidavits submitted pursuant to this
9 section and, if necessary, may seek additional information to
10 ensure that the business or contractor is eligible to receive a
11 certificate pursuant to the provisions of this section. If the
12 taxation and revenue department determines that an applicant is
13 eligible, it shall issue a certificate. If the taxation and
14 revenue department determines that the applicant is not
15 eligible, it shall issue notification within thirty days. If
16 no notification is provided by the taxation and revenue
17 department, the certificate is deemed approved. A certificate
18 is valid for three years from the date of its issuance;
19 provided that if there is a change of ownership of more than
20 fifty percent, a resident business or resident contractor shall
21 reapply for a certificate.

22 E. A business or contractor whose application for a
23 certificate is denied has fifteen days from the date of the
24 taxation and revenue department's decision to file an objection
25 with the taxation and revenue department. The person filing

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1 the objection shall submit evidence to support the objection
2 and may request a hearing. The taxation and revenue department
3 shall review the evidence and issue a decision within fifteen
4 days of the filing of the objection.

5 F. If, following a hearing and an opportunity to be
6 heard, the taxation and revenue department finds that a
7 business or contractor provided false information to the
8 taxation and revenue department in order to obtain a
9 certificate or that a business or contractor used a certificate
10 to obtain a resident business set-aside contract and the
11 resident business or contractor did not perform work pursuant
12 to the contract that was required to be performed by a resident
13 business or contractor, the business or contractor:

14 (1) is not eligible to receive a certificate
15 pursuant to this section for a period of five years from the
16 date on which the taxation and revenue department became aware
17 of the submission of the false information or the failure to
18 perform the contract as required; and

19 (2) is subject to an administrative penalty of
20 up to fifty thousand dollars (\$50,000) for each violation.

21 G. In a decision issued pursuant to Subsection D, E
22 or F of this section, the taxation and revenue department shall
23 state the reasons for the action taken and inform an aggrieved
24 business or contractor of the right to judicial review of the
25 determination pursuant to the provisions of Section 39-3-1.1

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1 NMSA 1978.

2 H. The taxation and revenue department may assess a
3 reasonable fee for the issuance of a certificate not to exceed
4 the actual cost of administering the taxation and revenue
5 department's duties pursuant to this section.

6 I. The state auditor may audit or review the
7 issuance or validity of certificates.

8 SECTION 6. [NEW MATERIAL] ANNUAL REPORT.--

9 A. Every contracting agency shall submit an annual
10 report to the department on or before the deadline established
11 by the department. An annual report shall include:

12 (1) the total number of contracts that the
13 contracting agency awarded to a resident business, and the
14 total dollar value of those contracts;

15 (2) the total number of contracts for which a
16 portion of the contract work was performed by a resident
17 business, and the total dollar value of the work performed
18 pursuant to those contracts;

19 (3) the total number of resident business set-
20 aside contracts designated and awarded, and the total dollar
21 value of those contracts;

22 (4) the percentage of the contracting agency's
23 total procurement that was awarded to a resident business; and

24 (5) the efforts made by the contracting agency
25 to publicize and promote procurement pursuant to the Resident

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1 Business Set-Aside Act.

2 B. The department shall receive and analyze reports
3 submitted pursuant to this section and, using the report data,
4 shall prepare and submit an annual report to the governor and
5 to the legislature and for publication on the sunshine portal
6 by November 1 of each year, beginning in 2017, to show whether
7 the purpose and the directives of the Resident Business Set-
8 Aside Act were met during the preceding fiscal year.

9 SECTION 7. [NEW MATERIAL] CONSULTATION WITH INDUSTRY.--
10 The department shall consult at least every six months with
11 representatives from industries affected by the Resident
12 Business Set-Aside Act to ensure effective implementation of
13 that act.

14 SECTION 8. [NEW MATERIAL] RULES.--The department shall
15 promulgate rules necessary to implement the provisions of the
16 Resident Business Set-Aside Act.

17 SECTION 9. EFFECTIVE DATE.--The effective date of the
18 provisions of this act is July 1, 2016.