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FISCAL IMPACT REPORT



SPONSOR: Ingle DATE TYPED: 02/10/02 HB _____

SHORT TITLE: Execution of Contracts Clarification SB 173

ANALYST: Carrillo

APPROPRIATION

| Appropriation Contained | | Estimated Additional Impact | | Recurring or Non-Rec | Fund Affected |
|-------------------------|------|-----------------------------|------|----------------------|---------------------------|
| FY02 | FY03 | FY02 | FY03 | | |
| | | \$0.1 Indeterminate | | Recurring | OSF/Public Liability Fund |
| | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

General Services Department
Department of Health
Department of Public Safety
Office of the Attorney General

SUMMARY

Synopsis of Bill

Senate Bill 173 amends two sections of the Procurement Code to clarify that a contract award is not complete until the document is signed by all the required approval authorities.

Significant Issue

General Services Department (GSD) staff explains recent litigation (Renaissance Office, LLC and Michael Branch v. State of New Mexico, General Services Department, Property Control Division, 2001-NMCA-066 Bar Bulletin Vol. 40, No. 37, Sept. 13, 2001) highlighted the lack of clear definition of when a contract award is accomplished. This change will help protect the state from lawsuits arising when a contract is questioned during the approval process and some, but not all, of the

approval signature have been obtained. If the recent court decision is not countered by statutory clarification, the state will be more vulnerable to similar suits in the future. It might also encourage contractors to get started before the contract is fully executed in anticipation of receiving compensation for that work if the contract is rejected during the approval process.

Further, GSD staff notes Sections 13-1-181 and 182 NMSA 1978 deal with remedies when a determination is made that a contract or proposed contract, or the procurement process to obtain a contract, is not legal. This amendment clarifies when the remedy provided for in Section 13-1-181 NMSA 1978 applies and when the remedy provided for in Section 13-1-182 NMSA 1978 applies.

Department of Health (DOH) staff comments the concept of a “valid written contract” is derived from Section 37-1-23(A) NMSA 1978, which grants governmental entities immunity from actions based on contract, except actions based on a valid written contract. In Montoya and Associates v. State of New Mexico, et. al., 103 N.M.224 (1985), the NM Supreme Court ruled that a state contract is not a valid written contract until the Department of Finance and Administration has given it written approval.

The Office of the Attorney General (AG) staff notes the first part of the bill regarding Section 13-1-181 NMSA 1978 would require cancellation of any solicitation when an agency finds that contract of such solicitation would be in violation of law. Current law requires cancellation only up to the time an award is made. It is unclear whether this section is necessary with additional language now in section 182, which allows (but does not necessarily require) cancellation after a validly written contract is in place. Section 13-1-181 NMSA 1978 could have been left in the Act in order to disallow remedies, such as costs and profits to a contractor when contract would be in violation of law and is found to be so prior to the written contract being in place. Section 13-1-182 NMSA 1978, of the bill would change the emphasis of law to broaden it by allowing a state agency to cancel bids/solicitation if it finds that the contract (validly written, signed and proved) is in violation of the law. This section (as it stands currently) was at issue in *Renaissance vs. State of New Mexico, GSD*, 2001-NMCA-066 (Bar Bulletin Vol. 40, No. 37, Sept. 13, 2001). The Court in that case allowed for costs and reasonable profits to be awarded to contractor after an award but before the contract has been finalized. That case, however, is limited in its application because facts of that case indicate that GSD specifically asked the contractor to begin performance of contract at the time of the award. The contractor, relying on this directive, began performance of the contract. GSD later nullified the award. By specifying that the contract must be completed, this proposed amendment of the current Act would most likely limit the state’s liability in such a circumstance.

FISCAL IMPLICATIONS

SB173 amendments provide the potential to save lawsuit settlements and related costs.

TECHNICAL ISSUES

DOH staff suggests adding a definition of “award” to the Procurement Code.

WJC/njw