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## FISCAL IMPACT REPORT

**SPONSOR** HBIC                      **DATE TYPED** 3/18/05                      **HB** 1061/HBICS

**SHORT TITLE** Protection of Certain Small Businesses                      **SB** \_\_\_\_\_

**ANALYST** Ford

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$0.1 See Narrative		Various

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 1060/aSPAC

### SOURCES OF INFORMATION

LFC Files

### SUMMARY

#### Synopsis of Bill

The House Business and Industry Committee substitute for House Bill 1061 creates new preferences in the state's bidding process for small businesses and disadvantaged small businesses.

Small business is defined as a resident business that employs 20 or fewer employees. The preference provides that the small business shall be awarded a contract when its price is the lowest bid when multiplied by a factor of .90. The total maximum preference awarded may not exceed 10%, even if combined with other preferences.

Disadvantaged small business is defined as a resident business, at least 51% of which is owned by a woman, a military veteran who was not dishonorably discharged or any other minority person (as defined by the minority business development agency of the U.S. department of commerce). The preference provides that a disadvantaged small business shall be awarded a contract when its price is the lowest bid when multiplied by a factor of .85. The total preference shall not exceed 15%. The definition does not limit the size of the business.

In order to receive a preference, small businesses and disadvantaged small businesses must qualify with the state purchasing agent and receive a certificate number.

The bill specifies that this section, which includes bid preferences for resident businesses, resident manufacturers, small businesses and disadvantaged small businesses, shall not apply to construction, construction services, construction maintenance contracts or construction contracts based on unit price, nor shall it apply to construction materials to be used in any of those contracts.

Finally, the bill deletes references to a New York state business enterprise and removes provisions of existing law that deem certain New York businesses as New Mexico businesses. These provisions were originally included in the law because New York has a bidding preference reciprocity rule which would have disadvantaged New Mexico businesses bidding for New York contracts. These provisions protected a particular business that had contracts with New York but this business is no longer in existence.

### Significant Issues

The committee substitute for House Bill 1061 establishes a preference for small businesses and disadvantaged small businesses that would trump the preferences established for resident businesses and manufacturers.

While the bill refers to “disadvantaged small business,” the definition does not actually limit the size of the business. Thus, a large corporation that is owned by a woman, veteran or minority could qualify as a disadvantaged small business and receive a higher bid preference than qualifying small businesses or resident businesses.

Writing on the previous version of the bill, the attorney general’s office (AGO) noted that procurement preferences have been subject to court challenge:

“Race and gender based preferences have been challenged in the courts as violating federal and state constitutional equal protection and privileges and immunities clauses. In *City of Richmond v. J. A. Croson Co.* 488 U.S. 469 (1989), the United States Supreme Court invalidated a city ordinance requiring contractors to award at least 30% of the price of the contract to “minority business enterprises”. The Supreme Court held that the city failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. The Supreme Court applied the “strict scrutiny test” and held that a government seeking to defend an affirmative action program from attack must prove that the program: 1) serves the compelling governmental interest of remedying identified discrimination and 2) is narrowly tailored to remedying only the discrimination found, with minimal benefit to those who had not in fact suffered from discrimination and minimal harm to innocent third parties. This analysis was confirmed by the Supreme Court in *Adarand Constructors v. Peña* (93-1841), 515 U.S. 200 (1995) with regard to a similar federal program. This bill may be challenged under those principles.”

The bill does not make findings regarding the compelling governmental interest for establishing race and gender based preferences. It is unclear whether this bill would meet the strict scrutiny test established by the Supreme Court.

In its analysis of the previous bill, the general services department (GSD) noted that at least 25 states have reciprocal preference laws that would penalize New Mexico companies bidding in those states because of the New Mexico preferences. If the penalty in other states is based on the

size of the preference in New Mexico, a 15 percent New Mexico preference could significantly burden any New Mexico business wanting to bid on contracts in another state. This could have the effect of harming innocent third parties. These businesses may not be able to take advantage of the significant bidding preference in New Mexico, and yet would still be disadvantaged in their bids with other states.

### **FISCAL IMPLICATIONS**

The bill will result in cost increases to state agencies as they will be required to award contracts to higher bidders. The bill may also result in costs to the state purchasing agent to certify small businesses and disadvantaged small businesses.

### **TECHNICAL ISSUES**

The definition of disadvantaged small business does not limit the size of the business.

### **POSSIBLE QUESTIONS**

Does the preference established in this bill meet the Supreme Court's test for race and gender based preferences?

Would the new preferences created in this bill have the unintended consequence of dampening economic development by disadvantaging New Mexico businesses bidding for contracts in other states?

Should the definition of "disadvantaged small business" include a limitation on the size of the business?

Will the existence of relatively large preference discourage other resident businesses or small businesses from submitting bids?

**EF/lg**