

SB330 would require that state agencies use performance contracting for contracts for professional services, with contracts identifying the performance measures that will be used by the agency to evaluate the services, accountability reporting by the contractor, and evaluation of the contractor's performance.

The Department of Finance and Administration (DFA) would develop a phase-in schedule so that all agencies implement the Performance Contracting Act by the end of FY09.

DFA would be responsible for developing contract management guidelines to implement performance contracting, assisting agencies in developing and managing the contracts, preparing guidelines for cost-benefit analyses, participating in the development of major requests for proposals and performance contract awards of agencies for competitive procurement over \$20,000, and selectively monitoring the contracts.

The Performance Contracting Act would apply to any department, institution, board, bureau commission, district or committee of the state, except for:

1. litigation expenses in connection with proceedings before administrative agencies, state or federal courts (including experts, mediators, court reporters, process servers, and witness fees but not including attorney contracts).
2. hospital- and health-care-related service exempt from the procurement code pursuant to Section 13-1-98.1 NMSA 1978.
3. emergency procurements under statute
4. contracts exempted by rule of the DFA or order of the DFA secretary
5. contracts that would directly or indirectly impair a legally protected right

It would apply to the legislative and judiciary branches but those agencies could develop their own policies and guidelines, may provide their own exemptions, and would not be required to report or make submissions to DFA.

Significant Issues

According to the U.S. General Services Administration, performance contracting has been around for over 20 years. In October 1998, the Office of Management and Budget published a guide to best practices in performance-based service contracting. In 2001, the President set a goal of converting 50 percent of all federal service contracts to performance based contracts. Implementation of this program is well underway in the federal government.

LFC staff studies in 1999 and 2000 have shown that New Mexico state government's contract management and accountability system needs improvement. The 1999 study noted that the state's expenditures for contract services have grown by \$1.6 billion from FY95 to FY00. The 2000 study reviewed six state agencies' contract policies and procedures and found they are generally inadequate for financial accountability or quality control. A joint study by Governing magazine and Rutgers University study released in January 2001 noted that contracting in New Mexico is "very decentralized, leaving problems with the potential to fester unnoticed."

In Moving New Mexico Forward: Further Along, issued in August 2004, Governor Bill Richardson endorsed the use of performance contracting for the New Mexico Environment Department. That report provides a good example of the potential benefits of performance contract-

ing in its findings:

“The New Mexico Department of Environment makes payments...to contractors and storage tank owners based on criteria related only indirectly to the effectiveness of the cleanup conducted at the contaminated site. The department awards contracts based on a combination of low bid and the engineering design for the proposed work. Once the contracts are awarded, payments to the contractors are not related to the actual results achieved. The current NMED approach rewards firms that submit bids proposing systems that may be relatively inexpensive up-front but take a long time to complete. The current approach also unintentionally encourages contract change orders that often add incremental costs not approved at the outset. Change orders can cause the ultimate costs of the cleanup to be much higher than the original bid. Perhaps most important, the current approach does not verify whether the cleanup has been successful before payments are made... Fourteen states employ some form of PFP (pay-for-performance) contracting for their state clean up funds... NMED should adopt PFP contracting using contracts that require achievement of specific environmental results before the contractor receives payment.”

Some state agencies are already implementing performance-based contracting. For example, the 2004 General Appropriation Act already includes language requiring the Department of Health (DOH) to include performance measures in its outcome-based contracts to increase oversight and accountability. DOH indicates that their Contracts and Grants Bureau is implementing review of all contracts to ensure that the deliverables and performance measures support the strategic activities necessary to achieve the overall department strategic goals. Also, DOH is requiring a summary of contractor performance on a quarterly basis to be shared across the department.

DOH was uncertain on how to apply the cost-benefit analysis requirement in SB330 in those instances where a federal grant award is based on a work plan that says contracts will be awarded for certain services or programs, or whether these requirements apply at all to contracts awarded using federal funds. DOH also noted that SB330 would require a more rigorous pre-award process and therefore the post award processing may be simplified.

Some agencies were concerned that the requirements in SB330 would be burdensome or delay timely awards of contracts. The Corrections Department indicated that, depending on the actual requirements of the cost-benefit analyses, there may or may not be additional burden on the agency to redirect or request additional fiscal and human resources to perform such analyses. The Department of Education indicated that the additional requirements could impact the timely delivery of service and possible loss of federal funds (i.e., when short time frames are allowed for reallocated dollars). The Department of Finance and Administration was concerned that requesting that all contracts have a cost-benefit analysis would be cumbersome to all agencies and adds another layer of bureaucracy which will slow the process of obtaining contractual services. DFA was also concerned that additional staff might be required in that agency if it is to become actively involved in the development of major requests for proposals and contract awards.

PERFORMANCE IMPLICATIONS

Enactment of this bill would provide greater accountability for the use of taxpayer dollars to fund professional services contracts entered into by state agencies. Expanding the Department of Fi-

nance and Administration's role in the management of professional services contracts would potentially improve accountability in two areas: at the decision-making stage, by helping agencies to determine the benefits of contracting out, and in the ongoing management of contracts, by supporting agencies to use performance contracting. Nationally, agencies that have adopted performance contracting report significant savings and improved performance.

FISCAL IMPLICATIONS

The growing popularity of performance-based contracting reflects experiences in federal government and in many state governments that this is a cost-saving approach to achieving outcomes desired by agencies.

Agencies were divided on whether they could absorb the costs of implementing performance budgeting with existing staff. Some indicated there would be no additional costs or were uncertain about the need for additional staff, depending on how the legislation is implemented. Others, such as the Public Education Department DFA, indicated they would need increased staff to implement SB330.

ADMINISTRATIVE IMPLICATIONS

See fiscal implications.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Companion to HB283.

DH/sb:yr