



Significant Issues

Current law provides a bidding preference for resident businesses, resident manufacturers and resident contractors. Contracts are awarded when their bids are made lower than the lowest non-resident bid when multiplied by a factor of .95.

Section 13-1-22 NMSA 1978 requires resident businesses or resident manufacturers to receive a certificate from the state purchase agent. This section allows the purchasing agent to verify the claims of the businesses. Section 13-4-2 NMSA 1978 provides a similar process for resident contractors.

Senate Bill 1060 establishes a preference for disadvantaged small businesses that would trump the preferences established for resident businesses and manufacturers. The bill provides that a contract shall be awarded to a disadvantaged small business when it is made lower than the lowest non-resident or resident business bid when multiplied by a factor of .80. This is significantly higher than the preference provided to resident businesses and resident manufacturers.

The bill does not require a disadvantaged small business to receive prior certification before receiving preference in the bidding process. Thus, it may be difficult for agencies to be certain that the claims of the business are true.

The bill also does not define "owned" in the definition of a disadvantaged small business, creating the possibility that a woman, military veteran or minority could own a very small portion of a business and qualify as a disadvantaged small business. This may open the door for manipulation by businesses that could grant fractional ownership to someone for the sole purpose of gaining the sizeable bidding preference.

The AGO notes that the bill is unclear as to the preference because it does not amend Section 13-1-22 (See "Technical Issues.").

The bill does not specify how bids of disadvantaged small businesses are to be compared to the bids of resident businesses and resident manufacturers. Would the contracting agency compare the bids after all bids have been reduced by the applicable preference factor? Or is the lowered bid of the disadvantaged small business to be compared to the actual bid of the resident business?

The AGO notes that procurement preferences have been subject to court challenge, writing:

"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. Pena* (93-

1841), 515 U.S. 200 (1995) with regard to a similar federal program. This bill may be challenged under those principles.”

The bill makes no findings as to the compelling governmental interest that justifies race and gender based preferences.

### **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 cost increases as agencies may have to verify the status of the business claiming preference.

### **ADMINISTRATIVE IMPLICATIONS**

State agencies will have to amend their procurement processes to accommodate the new bidding preference, which may include establishing a verification process for businesses claiming to be disadvantaged small businesses.

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

This bill duplicates House Bill 1061.

### **TECHNICAL ISSUES**

The AGO notes that the intent of this bill is not clear because the bill does not amend Section 13-1-22 NMSA 1978. The existing bidding preference is established by a combination of this section and Section 13-1-21 NMSA 1978.

The definition of disadvantaged small business is vague.

### **POSSIBLE QUESTIONS**

Should the definition of disadvantaged small business be clarified to prevent abuse of the bidding preference?

Should businesses wishing to claim a preference be required to obtain some kind of certification from the state purchasing agent?

**EF/lg:yr**