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FISCAL IMPACT REPORT

ORIGINAL DATE 1/29/2007

SPONSOR Larranaga LAST UPDATED 3/8/2007 HB 303/aHLC/aHBIC/aSEC

SHORT TITLE Education Construction At Risk Contracts SB _____

ANALYST Aguilar

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
NFI			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB-415

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public School Facilities Authority (PSFA)
 Department of Finance and Administration (DFA)
 Construction Industries Division (CID)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of SEC Amendment

The Senate Education Committee amendment to House Bill 303 strikes all previous amendments, makes technical corrections to language, removes the advisory committee to have been appointed to provide assistance in the development of rules, provides that the construction manager at risk is financially responsible for the maximum guaranteed price, and provides that the two-step procedure detailed in the bill may be used when the total amount of money available for a project is less than \$500 thousand. The amendment also provides that the request for qualifications contain the maximum allowable construction cost and a proposal bond as required by statute.

The amendment also provides that a contract may be awarded after interviews with the highest ranked offeror. The amendment also provides for a process of negotiating with subsequent qualified offerors or terminating the procurement process in the event the governing body is

unable to negotiate a satisfactory contract with the offeror considered to be most qualified.

The amendment also provides for bid security if the estimated price is greater than \$25,000.

Synopsis of HBIC Amendment

The House Business and Industry Committee amendment to House Bill 303 as amended removes the House Labor and Human Resources Committee amendment.

HB303/aHBIC removes the advisory committee to have been appointed to provide assistance in the development of rules, provides that the construction at risk is financially responsible for the maximum guaranteed price.

The HBIC amendment further provides the two-step procedure detailed in the bill may be used when the total amount of money available for a project is less than \$500 thousand. The amendment also provides that the request for qualifications contain the maximum allowable construction cost.

HB303/aHBIC makes technical changes to language and provides that a contract may be awarded after interviews with the highest ranked persons or in the event the selection committee rejects the recommendation the second most qualified applicant.

The amendment finally provides that the committee make the names of all proposers and the names of all proposers offered an interview available after the contract is awarded.

Synopsis of HLC Amendment

The House Labor and Human Resources Committee amendment to House Bill 303 provides that a committee appointed to develop rules for the implementation of competitive sealed bids will focus only on contracts for construction and facility maintenance. It is unclear how this will impact the competitive sealed bid proposal process.

Synopsis of Original Bill

House Bill 303 provides for construction manager at risk contracts in the construction of educational facilities, enacts the Construction Manager at Risk ACT and establishes procedures for selecting a construction manager at risk.

HB-303 declares an emergency.

SIGNIFICANT ISSUES

Provision contained in the bill allows the Public School Facilities Authority, local school districts, and state educational institutions to use the “construction manager at risk” method of procuring design and construction services for their facilities.

Construction manager at risk is defined by the bill as a construction method for an educational facility where a construction manager provides a range of pre-construction services and construction management, including cost estimation and consultation regarding the design of the

building project, preparation and coordination of bid packages, scheduling, cost control, value engineering and, while acting as the general contractor during construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, pre-qualifying and evaluating trade contractors and subcontractors and providing management and construction services, all at a guaranteed maximum price.

At present, construction managers are only allowed to serve “not-at-risk” and therefore not responsible to the owner for claims for project delays and extended overhead from nonperformance of one or multiple prime contractors. Under this scenario, the governing body enters into contracts with sub-contractors directly and assumes all risk, including any price escalation that may occur. This methodology has had mixed results in New Mexico and have in some cases resulted in higher construction costs than traditional methods. It appears that an educational facility construction manager at risk may reduce the risks assumed by public owners through the guaranteed maximum price and delivery schedule. Also, having an educational facilities manager at risk involved during the design process will also add “constructability” to the project and reduce expensive change orders.

The bill exempts construction manager at risk contracts from the competitive sealed bid provision of the Procurement Code, but provides that the competitive sealed proposals "may also be used" for a "three Step Procedure" if certain requirements are met. HB-303 provides for the procedures of a "multiphase selection". The governing body is required to form a selection committee with a minimum of three members with at least one member being an architect or engineer. It is the selection committee's responsibility to establish an evaluation process including identifying the procedure as a two- or three- step process. A description of the two process are:

- The “two-step” procedure requires a request for qualifications and an interview. If the selection committee (formed by the governing body) uses a “two-step procedure”, it must publish a request for qualifications, rank the qualifying persons, and interview up to three of the highest ranking proposers. The committee must consider experience, the management plan, and other qualifications. The selection committee makes its recommendations to the governing body which may award the contract to the person recommended, reject the recommendation and order the selection committee to repeat the process, or reject the recommendation and appoint a new selection committee to repeat the process.
- A “three-step” procedure requires a request for qualifications, a request for proposals, and an interview. The request for proposals is only sent to those persons deemed qualified by the selection committee. The selection committee evaluates the proposals and makes its recommendation to the governing body. Presumably the governing body has the same authority to reject the recommendation as with the two-step process, but see “significant issues” below.

TECHNICAL ISSUES

An analysis from the Attorney General's Office notes the following issues for consideration:

New material (Page 9) Section 13-1-124.4E(3) states “pursuant to Subsection F of this section, the contract award shall be made after the interviews.” However, Subsection F allows the

governing body to reject the recommendation of the selection committee and order a new selection process. It is unclear whether the quoted language is intended to require the governing body to award the contract to the person recommended by the selection committee.

The bill does not appear to allow the governing body to reject the primary recommendation of the selection committee and award the contract to another qualifying contractor. Requiring an entirely new selection process could delay the project. Also, the bill does not appear to address the circumstance in which a governing body cannot reach agreement with the recommended contractor. It appears that the only option in that case is to repeat the entire selection process.

The bill does not appear to require a statement of maximum cost during the two-step procedure. It is uncertain where and when in that process a qualifying contractor is required to submit their proposed maximum cost proposal. This could conceivably allow a governing body to award a contract based upon qualifications and the interview, without requiring the successful contractor to commit to a maximum cost before the award. In the three-step procedure, presumably the maximum cost could be submitted as part of the proposal.

The bill contains a provision requiring public disclosure of names of all proposes; the names of those selected for interview; and the selections committee's final ranking and evaluation scores. However, the bill does not state when such disclosure must be made. Unless interpreted to prohibit disclosure until a contract is actually awarded, this section could conflict with NMSA Section 13-1-116 prohibiting disclosure of the contents of any proposal until after "the negotiation process".

PA/nt