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FISCAL IMPACT REPORT

SPONSOR Cervantes **ORIGINAL DATE** 2/08/07 823/aHHGAC/aSFI#1/
LAST UPDATED 3/17/07 **HB** aSFI#2

SHORT TITLE Prohibit Certain Acts by Public Officers **SB** _____

ANALYST Wilson/Baca

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY07 | FY08 | FY09 | 3 Year Total Cost | Recurring or Non-Rec | Fund Affected |
|--------------|------|-------|-------|----------------------|-------------------------|------------------|
| Total | | \$0.1 | \$0.1 | \$0.1 | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 818, HB 819, HB 820, HB 821, HB 822, HB 823 and SB 400.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Department of Finance & Administration (DFA)
 Office of the Attorney General (AOG)
 Public Defender Department (PDD)
 Public Education Department (PED)
 State Treasurer's Office (STO)

SUMMARY

Synopsis of SFI Amendment #2

Senate Floor Amendment #2 prohibits “only” persons “directly involved in the preparation of bid specifications from bidding on the proposal. This amendment strikes the word “indirectly” thus making such persons eligible to submit a bid.

Synopsis of SFI Amendment #1

Senate Floor Amendment #1 adds a new section of the Governmental Conduct Act to prohibit any business that contracts with the state to provide financial services involving the investment of public money or the issuance of public bonds shall not knowingly contribute anything of value to a public officer or employee of that agency who has authority over investment of public money or issuance of bonds, the revenue of which is to be used for public projects in the state. And Public officers and employees who have authority over the investment of public money or issuance of bonds shall not knowingly accept anything of value from a business that contract

with the state agency to provide financial services involvement the investment of public money or issuance of bonds.

The amendment defines “anything of value “ means money, property, service, loan or promise, but does not include food or refreshments with a value less than one hundred dollars (\$100) consumed in a day.

Contribution is defined as “a donation or transfer to a recipient for personal use of the recipient, without commensurate consideration.”

Succeeding sections are to be renumbered accordingly.

Synopsis of HHGAC Amendment

The House Health and Government Affairs Committee amendment for House Bill 823 removes judges from the exclusion in the definition of "public officer or employee".

Synopsis of Original Bill

House Bill 823 amends the Governmental Conduct Act (NMSA Sections 10-16-1 to 10-16-8). It expands the act’s provisions, clarifies terms and enacts new provisions as follows:

The bill amends the definition section to include an individual’s family and state agencies to be covered by the act.

Removes the provision allowing the Governor to make an exception for a public officer or employee to be disqualified from engaging in official acts directly affecting their interest.

Provides that legislators, public officers or employees shall not disclose confidential information acquired by virtue of their office for their gain or another’s gain.

Clarifies that state agencies shall not enter into contracts for services, construction, or tangible personal property with public offices or employees of the state, their families or with businesses in which they have a substantial interest, unless the contract is awarded pursuant to the procurement code. The act also provides that these contractors shall not be eligible for a sole source or small purchase contract.

Clarifies that state agencies or political subdivisions of the state shall not accept a bid or proposal from a person who participated in the preparation of specifications, qualifications, evaluation criteria on which the specific competitive bid or proposal was based.

Prohibits certain business sales from public officers or employees and their families or a business in which they have a substantial interest, to a state agency where they are employed.

Restricts public officers, employees and their families and businesses from conducting business with employees supervised by them, or when they have regulatory authority over the employee or another public officer.

Prohibits public officers or employees from receiving a commission from sales or transactions to persons when they have regulatory authority over the person.

Prohibits public officers and employees from accepting employment or an offer of contract from a person when they have regulatory authority over the person.

Prohibits public officers and employees from coercing state officers or employees to pay or contribute to a party, committee, organization, agency or person for a political purpose. It further prohibits threatening to deny a promotion or pay increase because of the person's vote, failure to make payment to a political fund, failure to buy tickets to political fundraisers or failure to participate in political activities.

Prohibits violating the officers or employees duty to not use or not allow use of state property.

Requires disclosure to the Secretary of State (SOS) of all outside employment engaged in by an officer or employee other than the employment with the state.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions and civil actions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

There will be an added burden on all state agencies in order to comply with the provisions of this bill, but they should be able to handle the requirements with existing resources.

SIGNIFICANT ISSUES

DFA notes that this bill raises several significant issues. While the language extending the original prohibitions of the statute to family members seems straightforward enough, there are four other major changes instituted by this legislation.

First, in the past, contracts could be awarded to employees, officers or legislators pursuant to the Procurement Code. Under this bill, sole sources and small purchase agreements are explicitly removed from the methods of award. Basically, this means such contracts can only be awarded via the request for proposals process, which is perhaps the fairest method of procurement under the Code. This addition to the law will presumably halt award of contracts to persons directly chosen and force a more balanced procurement process.

Second, persons covered by the legislation could not sell products or services to the agency for which they work or to any person over whom they exert any control (through supervision, etc.). This will presumably remove a sense of intimidation to employees feeling forced to purchase goods or services from a supervisor.

Third, the bill will stop supervisors from forcing employees to perform political activities on the job or to suffer job repercussions because of the way in which they vote or support political candidates. Although such matters are covered elsewhere as well, this, too, will presumably remove a sense of intimidation for employees and support their political freedom as guaranteed by the Constitution and elsewhere.

Fourth, this legislation will make it mandatory for all employees or officers to disclose in writing

to their supervisors or to the Secretary of State (if they have no direct supervisor) all outside employment (employment other than that which the person holds with the State). This section of the legislation will appear to be overreaching and a potential invasion of privacy upon employees' rights of free enterprise and, possibly, free expression. This language could better be rewritten to encompass only those situations which hold a potential conflict of interest for the employee given their particular employment with the State.

ADMINISTRATIVE IMPLICATIONS

State agencies will have added administrative responsibilities as a result of the provisions of this bill, but they should be able to handle the requirements with existing staff.

RELATIONSHIP

HB 823 is related to other bills that are part of an ethics reform initiative.

These bills include:

- HB 818, Public Financing of Statewide Campaigns
- HB 819, Gift Act
- HB 820, Legislative Campaign Funds for Office Duties
- HB 821, Campaign Reporting Requirements
- HB 822, State Ethics Commission Act
- HB 823, Prohibit Certain Acts Public Officers
- SB 400, Contributions to State Agents & Candidates

TECHNICAL ISSUES

PED provided the following:

- Page 2, lines 14 – 18, excluding judges from the definition of “public offer or employee”, will exempt judges from the scope of the amendments to the Governmental Conduct Act. But see the recent case of, *State v. Maestas*, 2007-NMSC-001 The Supreme Court reversed 5 convictions for official acts prohibited under the current version of the Governmental Conduct Act and 5 counts of criminal sexual penetration during the commission of official acts against a municipal judge because the Act currently excludes judges from the “public office or employee” definition.
- Page 2, lines 21 – 22, adds a definition of “state agency” which does not specifically include “departments” or “boards” and may, therefore, be considered vague. Under Section 41-4-3 of the Tort Claims Act, “state agency means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.” Compare with the definition of “state agency” found at Section 6-1-13(C) of State Board of Finance laws, “means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions other than state educational institutions designated by Article 12, Section 11 of the constitution of New Mexico.”
- The prohibitions contained in section 8 B, page 8, could be interpreted as prohibiting the children or spouses of children from selling school or school-related (booster club) fund-raising items such as candy bars and other items in state agencies; similarly, state agency bulletin boards that contain the casual sale of used cars, used items, timeshares, etc. might also be affected by this subsection’s prohibitions.

- Page 10, line 7's use of "other things of value" is ambiguous and does not give clear notice of what this means. Unless a dollar amount is specified, some might believe that something of low or minimal value to them is not within the scope of the subsection's restrictions.
- Page 11, lines 4 – 9, which requires written disclosure of all outside employment ,is burdensome and may have the unintended consequence of embarrassing and harassing low-paid government employees who have and perhaps must frequently change more than one outside employment, and who might choose not to disclose these jobs to their supervisors for personal reasons. It should be recalled that violation of the Governmental Conduct Act is a misdemeanor that carries with it a \$1,000 fine. Because outside employment is not currently a criminal act, this section will

POSSIBLE QUESTIONS

1. Why doesn't this bill apply to penalties to judges?
2. The bill imposes a duty of due diligence upon state agencies in awarding contracts contemplated under the legislation, but what is the penalty for a failure to perform this duty?
3. If a contract is mistakenly awarded that should have been prohibited under this legislation, what occurs when this is later discovered?

DW/mt