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FISCAL IMPACT REPORT

ORIGINAL DATE 2/5/10

SPONSOR Keller LAST UPDATED HB

SHORT TITLE Contributions by State Contractors SB 48

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	No Appropriation		

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB49, SB28, HB118, and HB172

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)
 Attorney General's Office (AGO)
 General Services Department (GSD)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

Senate Bill 48 adds a new section to the Campaign Reporting Act (1-19-25 NMSA) prohibiting a principal of a state contractor or prospective state contractor from making a campaign contribution to a candidate for state public office, candidate's campaign committee or political committee. It also prohibits those entities from soliciting or accepting such a contribution. Additionally, it requires language to this effect be included in each state contract.

In the case of a violation, that new section allows a state agency to void an existing contract and appears to require that no state agency or instrumentality amend, extend or award a contract to the offender for two (2) years after the associated election.

It amends the definitions section of the Campaign Reporting Act to add several new related entries, key amongst them are as follows:

1. "principal" (the contractor, member of the board, owner with at least 5% of the

shares, officer, employee with “managerial or discretionary responsibilities” over a state contract, spouse or dependent child or a political committee established by or on behalf of one of the preceding);

2. “prospective state contractor” (a person or entity responding to a solicitation for or seeking a state contract);
3. “state contract” (when valued at \$50,000 or more, alone or in aggregate, within a fiscal year) and
4. “state contractor” (one who enters into a state contract until the termination of the contract.)

SIGNIFICANT ISSUES

Listed below are issues DFA identified in this bill.

- While the prohibition against candidates or committees accepting prohibited donations is a good, it lacks enforcement i.e.; no penalty is stated for such action nor is there any room left for a mistaken acceptance.
- Second, the penalty for someone making such a prohibited contribution is reasonable, though making a current contract only voidable instead of void is, perhaps, letting the potential scofflaw off the hook (though one can envision the lightened penalty here is as much due to the agency contracting with the contributor which might well need to keep the contract going until a proper replacement could be found).
- Third, the bill does NOT prohibit contributions by contractors or potential contractors to political parties and it would seem a large loophole if money could be donated to a party which would then redirect it to a particular candidate with the contributor's "best wishes," so to speak.

An issue raised by the AGO is whether the bill presents First Amendment speech issues when it comes to prohibitions on contributions by certain individuals, such as employees, spouses and dependent children. For example, the US Supreme Court has already struck down wholesale bans on contributions by minors. McConnell v. FEC, 124 S.Ct 619 (2003). Although this bill bans contributions by a narrow group of minors (minors associated with a state contractor), still, this ban may raise constitutional problems in light of McConnell.

Should an employee who has managerial or discretionary responsibilities in a non-profit organization be required to waive First Amendment political speech and be prohibited from making campaign contributions—as well as be prohibited from soliciting contributions—as a condition of working for a non-profit that has a state contract?

Opinions from federal court and state Supreme Courts that have almost uniformly upheld bans similar to the bans proposed in this bill. Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (AK 1999); Blount v. S.E.C., 61 F.3d 938 (D.C. Cir. 1995); Green Party of Connecticut v. Garfield, 590 F.Supp.2d 288 (D.Conn. 2008). But so far, the US Supreme Court has only upheld bans on contributions to candidates by corporate entities.

Is the mixing of all state contractors into the same category legally proper and good policy? For example, should a contractor with one agency of the Executive (i.e., the Governor’s Office) be prohibited from giving to a candidate belonging to another separate and independent state agency (i.e., the State Treasurer)? Each executive agency is independent and does not influence the

award of contracts by another executive agency. So it may be argued that the proposed ban in this bill is too broad.

PERFORMANCE IMPLICATIONS

DFA points out that a new clause would have to be added to all contracts and agencies would be required to monitor the contributions of their contractors. One would expect at least due diligence would be required of them in such situations. What that due diligence would entail is an open question (getting a certification in writing from the contractor, checking the Secretary of State's website, etc.).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

BILL NUMBER	INTRODUCED BY	COMMENTS/SUMMARY OF BILL
SB 28	Dede Feldman	Changes Campaign Contribution Disclosure statutes; includes a database of contributors to be implemented and maintained by DFA.
SB 42	Sander Rue	Creates a public database containing information regarding just about everything state government does every day (budgets, expenditures, salaries, revenue, etc.) along with links to other websites (delinquent taxpayers, revoked licensees, delinquent child support payors, etc.)
SB 43	Linda Lopez & Bill O'Neill	Sets up an Ethics Commission to oversee violations of state law and ethical standards; sets up the Commission in an almost certain deadlock situation; provides no funding though it allows the Commission to hire personnel and contract for services.
SB 44	Tim Eichenberg	Enlarges Governmental Conduct Act to include local entity public officers and employees
SB 51	Eric Griego	Sets up a public financing methodology for all covered campaigns (all elected offices in state except PRC)
SB 68	Dede Feldman	Changes definitions in lobbying in the lobbying regulation act

OTHER SUBSTANTIVE ISSUES

Section 1-13-191.1 of the Procurement Code already bans contributions by prospective contractors during the pendency of the procurement process. And Section 10-16-13.3 of the Governmental Conduct Act bans contributions from “financial service contractors”.

ALTERNATIVES

DFA offers the following suggestions:

1. Add political party donations to the proscriptions.
2. Place more bite into the penalty for accepting prohibited contributions. Also, perhaps add

the word "knowingly" before the word "accept" in section 1.B.

3. Make the voidable contracts language more explicitly state that the contract is void unless the agency would be harmed by such voiding of the contract and that a written determination of same by agency would be required to make the contract merely voidable.

The AGO suggests to instead pass legislation which expands the Procurement Code's disclosure requirements for contractors and prospective contractors, as proposed by SB 28. Full disclosure requirements would have far less ramifications on First Amendment speech, especially in light of the recent US Supreme Court opinion in Citizens United v. FEC upholding campaign disclosure requirements.

EO/mew