

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 385

50th Legislature, 1st Session, 2011

Tracking Number: .184015.2SA

Short Title: No State Contracts with Certain Companies

Sponsor(s): Representative Thomas C. Taylor and Others

Analyst: Kevin Force

Date: March 15, 2011

Bill Summary:

Among its provisions, HB 385:

- prohibits state agencies and local bodies from entering into a contractual relationship with any individual or entity if the individual entity or a key employee, within the last 10 years, has been “convicted of, administratively or civilly found to be in violation of, or determined to be civilly liable for a violation of a law that regulates the relationship between an individual or entity and the government;”
- defines “key employee “to include:
 - an officer of the entity whose annual compensation exceeds \$130,000;
 - an employee, or spouse, parent, child, grandchild, or sibling, who owns more than 5.0 percent of the entity;
 - an employee, or spouse, parent, child, grandchild, or sibling who owns more than 1.0 percent of the entity, and the employee’s compensation exceeds \$150,000; and
 - a senior executive or manager who is considered to be managing operations of the entity; and
- defines “a law that regulates the relationship between an individual and the government” to include any of the following, or any provision of the following for which civil or criminal penalties may be imposed for violation:
 - the *Election Code*;
 - the *Campaign Reporting Act*;
 - the *Lobbyist Regulation Act*;
 - the *Government Conduct Act*;
 - the *Financial Disclosure Act*;
 - the *Gift Act*;
 - the *Procurement Code*;
 - the *NM Uniform Securities Act*;
 - the *1999 Public Accounting Act*;
 - fraud;
 - embezzlement;
 - forgery;

- misconduct by officials;
- bribery;
- perjury or false affirmation;
- tampering with public records;
- the provisions of HB 385; and
- any attempts to commit a felony or conspiracy to commit a felony of the above listed items.

Finally, HB 385:

- includes, in the definition of “local public body,” two-year postsecondary educational institutions, school districts, and local school boards;
- applies to both contractual relationships that are subject to, and exempt from, the *Procurement Code*;
- requires, as part of the procurement process, a state agency or public body to specifically request information from a prospective contractor that shall:
 - ask whether the prospective contractor has, within the last 10 years, been found to be in violation of any of the above laws;
 - be maintained in the agency’s or public body’s files; and
 - determine compliance with this proposed law;
- imposes a fine of \$5,000 for each instance of knowingly providing false information;
- permits the Attorney General or district attorney to bring a civil enforcement action;
- directs penalties collected pursuant to this bill to go to the general fund of the agency or public body for whom an enforcement action was brought; and
- states that anyone who knowingly provides false information is guilty of a misdemeanor and is to be sentenced accordingly.

Fiscal Impact:

This bill does not contain an appropriation.

Fiscal Issues:

According to the Administrative Office of the District Attorney (AODA):

- some minimal fiscal impact would result from:
 - the specialized training for prosecutors regarding civil law and procedure that would necessitate funding; and
 - the creation of a new crime that would require an increase in resources for the criminal justice system; and
- placing any responsibility for filing and maintaining civil actions for the collection of fines on the district attorney would necessitate additional legal and support staff.

According to the New Mexico Corrections Department (NMCD), this bill would require additional work for state agencies, including NMCD, when entering into contracts with private entities, but any such administrative burden should be easily absorbed with existing staff.

Substantive Issues:

- The AODA's analysis indicates that:
 - if the Legislature passes a *State Ethics Commission Act*, as proposed in Senate bills 164, 172, 293, and 420, or House bills 195 and 408, that act should be added to this subsection; and
 - HB 385 wrongfully places the responsibility for filing civil actions to collect fines on district attorneys, which would be problematic, because:
 - ✓ district attorneys' offices, unlike those of attorneys general, do not have a civil division;
 - ✓ additional staff would be needed;
 - ✓ the practice of civil law is substantially different from that of criminal law, and this responsibility would require additional time and training for prosecutors; and
 - ✓ when faced with a decision about prosecuting a criminal matter, such as domestic violence or DWI, over enforcing the civil requirements of this proposed bill, criminal matters will always be given priority.
- It should be noted that HB 385 permits either the District Attorney or the Attorney General to bring a civil enforcement action against parties in violation of its provisions, but requires neither to do so.
- Presumably, the Attorney General, with staff trained in civil law and procedure, would be better equipped to bring any civil enforcement actions, and may more easily absorb any attendant additional costs.

Background:

The issue of government contracts being awarded to persons convicted of, or admittedly involved in, criminal activity, particularly crimes that violate fiduciary relationships and responsibilities, has been garnering more attention in recent years, both at the state and federal level. For example:

- in New Orleans, AME Services, Inc., ranked number one in a list of potential contractors, was awarded contracts to construct rental units for low-income families under the *Louisiana Recovery Act*, despite its founder having pled guilty to helping a local school board member obtain \$40,000 in kickbacks from a school board contract, just two years previously;¹ and
- in Boston, FM Generator had contracts with security-sensitive state agencies such as the Massachusetts State Police and Corrections Department, despite its majority owner having pled guilty to fraud in a 2007 kickback scheme to obtain contracts for the company.²

¹ *Why are criminals beating out others for lucrative state contracts?*, by Bigad Shaban, WWLTV.com Eyewitness News, May 10, 2010. (<http://www.wwltv.com/news/Bills-in-House-look-to-stop-criminals-from-getting-contracts-with-state-92476579.html>)

² *Convicted felon awarded state contracts*, by Mike Beaudet, Fox Undercover, September 28, 2009. (http://www.myfoxboston.com/dpp/news/undercover/fox_ndercover_convicted_felon_awarded_state_contracts_092809)

Related Bills:

HB 195 *State Ethics Commission Act*
HB 408 *State Ethics Commission Act*
CS/SB 19a *In-State Business Procurement Advantage*
CS/SB 164 *State Ethics Commission Act*
SB 172 *State Ethics Commission Act*
SB 293 *Enact "State Ethics Commission Act"*
SB 420 *State Ethics Commission Act*