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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12
 LAST UPDATED 02/14/12

SPONSOR Rue HB _____

SHORT TITLE Procurement Code Emergency Procurements SB 287/aSJC

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$6.0 - \$12.0			Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Department of Finance and Administration (DFA)
- Office of the Attorney General (AGO)
- Department of Information Technology (DoIT)
- Administrative Office of the Courts (AOC)
- General Services Department (GSD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment clarifies that prior to award of a sole source procurement, a central purchasing office in addition to the state purchasing agent, shall provide certain information for posting to the Sunshine Portal; within three days of awarding an emergency procurement contract, the awarding central purchasing office within a state agency as opposed to the state purchasing agent, shall provide certain information for posting to the Sunshine Portal; deletes a bidder's or offeror's right to protest certain solicitations or awards in writing; and deletes a proposed new requirement that certain records relating to a solicitation or award be available for public inspection.

SIGNIFICANT ISSUES

The state purchasing agent or a central purchasing office will be able to proceed with the sole source or emergency procurement despite a protest in writing by an aggrieved bidder or offeror. Under current law, a local public body or central purchasing office has the authority to issue regulations for handling certain protests, but does not have the authority to award money damages or attorneys' fees.

Synopsis of Original Bill

Senate Bill 287 amends the Sunshine Portal Transparency Act (10-16D-3) to include the posting of sole source and emergency procurements. The bill further amends the State's Procurement Code (13-1-126, 127, 128, 172, 199) and adds procedures for sole source and emergency procurements, restricts who may make emergency procurements, expands who may protest a procurement award, and increases the penalties for violations of the Procurement Code.

More specifically, with regards to sole source contracts:

- requires written justification;
- requires uniqueness;
- requires that other suppliers cannot meet purpose for the contract;
- requires due diligence instead of good faith
- prohibits pre-selection through narrowly tailored specifications; and
- requires the award of the contract be posted on the agency web page and Sunshine Portal prior to being awarded.

More specifically, with regards to emergency procurements:

- the Purchasing Agent and the Central Purchasing Office will no longer be able to delegate the responsibility of making a determination that an emergency exists;
- requires due diligence instead of good faith
- requires written justification; and
- within 3 business days, requires the award of the emergency contract be posted on the agency web page and Sunshine Portal.

The bill provides that a willful violation be treated as a misdemeanor if the transaction amount is \$250,000 or less, and be treated as a fourth degree felony, if the transaction amount is greater.

Finally, the bill adds new section of the Procurement Code to require a central purchasing office to retain records relating to competitive procurements for a minimum of three years.

FISCAL IMPLICATIONS

SB 287 increases penalties for violating the procurement code. The language calls for willful violation and then makes such violation either a misdemeanor or 4th degree felony, depending on the amount of money involved.

The DoIT estimates \$6,000 per year for its contractual obligations relating to the bill. It is assumed that GSD would see a similar impact.

The AOC stated that any additional fiscal impact on the judiciary will be proportional to the enforcement of this law, commenced prosecutions and any additional civil actions.

There is the potential for a successful offeror or bidder of an emergency procurement to lose the award, if protested. In that case, it is possible the state would have to pay for some of the first offeror's or bidder's expenses, in addition to the cost to fulfill the emergency procurement under a secondary offeror or bidder.

SIGNIFICANT ISSUES

SB 287 expands the potential protest of procurement awards. In the past, only awards made pursuant to a Request for Proposals (RFP) or Invitation to Bid (ITB) could be protested and then only by aggrieved offerors or bidders. The bill will allow a "qualified potential contractor" who was not awarded a sole source or emergency procurement to protest the award.

The AGO reports that the bill was drafted by the AGO at the request of the Legislative Finance Committee to address problems raised by the following LFC audit:

http://www.nmlegis.gov/lcs/lfc/lfcdocs/perfaudit/GSD%20Working%20Report_10.21.08.pdf

According to the report, “The State Purchasing Agent expressed that besides sole source purchases, emergency purchases are one of the highest procurement categories of abuse.” (pg 12)

To address these concerns, the bill imposes more transparency over the award of sole source contracts and emergency contracts. The bill also requires written documentation. And finally, as requested by the LFC audit, the bill creates more “definitive language” to limit the award of sole source contracts.

PERFORMANCE IMPLICATIONS

Because the Sunshine Portal already exists and agencies have websites, there should be no difficult performance issues in following those portions of the bill's strictures.

ADMINISTRATIVE IMPLICATIONS

DFA notes that if a protest of a sole source procurement is successful, the contract could be nullified and the procurement turned into an RFP or ITB (since, by definition, the successful protest would prove that more than one vendor could do the work and, therefore, there would be no sole source). However, the matter is not so clear-cut when it comes to emergencies. The nature of a true emergency is such that the work must be done immediately. In such a case, if another vendor can successfully protest an emergency procurement, what is their remedy? The work is done; there is no true recourse for the situation. Realizing this, vendors might feel that it is a waste of time to protest an emergency award.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Contract award data will continue to be posted on the Sunshine Portal without the distinction of whether sole source or emergency, and handling of emergency procurements would continue to go through DFA for approval and payment without posting or 3 day processing requirement.

AHO/svb:amm