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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/08/12  
 LAST UPDATED 02/13/12    HB 278/aHBIC

SPONSOR Larrañaga

SHORT TITLE Procurement Business Suspensions    SB \_\_\_\_\_

ANALYST Hanika-Ortiz

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI				

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Attorney General (AGO)

Administrative Office of the Courts (AOC)

General Services Department (GSD)

### SUMMARY

#### Synopsis of HBIC Amendment

The House Business and Industry Committee amendment to House Bill 278 clarifies that the state purchasing or a central purchasing office *shall*, as opposed to *may*, have the authority to immediately suspend a business for up to ninety days for cause. The amendment deletes the term “making false statements” and replaces it with the terms “fraud” and “perjury” when referring to convictions that may warrant cause for debarment or suspension.

### SIGNIFICANT ISSUE UNDER AMENDMENT

The bill may be unclear as to how to proceed if there is a conflict between a state agency or local public body’s authority to suspend or debar under paragraph A and the state purchasing agent or a central purchasing office’s authority to suspend or debar under paragraph B.

#### Synopsis of Original Bill

House Bill 278 (HB 278) amends Sections 13-1-177 -178 and adds a new section to the State’s Procurement Code relating to the process by which the state purchasing agent or central purchasing office would suspend or disbar a business from consideration for an award of contract, other than for a contract for professional services. The bill further:

- defines *bidder*, *offeror*, and *contractor* to mean a person with primary management or supervisory responsibilities;

- increases the period for a potential suspension from three months to one year;
- allows a business to be suspended for up to 90 days if there is reasonable suspicion of conduct that would warrant suspension for cause, provided the business receives written notice which includes the reasons for suspension, the date and time of a review hearing which must be within 30 days, a statement the State may issue a cease and desist order, and it's right to an appeal;
- allows the state purchasing agent or central purchasing office to immediately suspend a business if a criminal complaint is filed against the business;
- adds new offenses to the list of causes for debarment or suspension including a civil or criminal judgment against a contractor or principal indicating lack of business integrity that seriously and directly affects the contractors responsibility, including making false statements, tax evasion, violating federal or state criminal tax laws, and unfair trade practices; and
- allows for an agency to continue contracts in existence at the time a contractor is debarred or suspended under certain conditions provided justification is compelling, documented and approved by governing authorities.

## **FISCAL IMPLICATIONS**

The state purchasing agent and central purchasing offices will be required to absorb costs related to implementing the provisions in the bill.

The AOC notes that any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions including appeals from the final decision of a review hearing. 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.

## **SIGNIFICANT ISSUES**

The bill was drafted with input and support from the Governor's Procurement Reform Taskforce.

The bill amends the State's Procurement Code to provide for the immediate suspension of a contractor to the state if they engage in certain activities. The amended language provides for up to a 90 day suspension if there is reasonable suspicion of conduct by a business relating to the prohibited activities. Contractors may also be debarred from bidding on contracts for up to 3 years if they are found to have committed any of the prohibited activities.

The bill will allow state agencies to continue contracts in existence at the time a contractor is debarred or suspended under certain conditions.

The bill includes immediate suspension based on activities of any principal of the company including officers, directors, owners or certain managers. The bill provides for due process procedure of notice and fair hearing for a contractor that is suspended or disbarred.

## **ADMINISTRATIVE IMPLICATIONS**

The state purchasing agent will need to develop procedures and oversee the process to suspend and debar contractors and will need to work with state agencies and local public bodies

to prevent new contracts, terminate existing contracts or allow continuance of a contract with a suspended or debarred contractor. The state purchasing agent will need to notify state agencies and local public bodies of suspended or debarred contractors and maintain that list.

### **TECHNICAL ISSUES**

The proposed amendment to 13-2-1-178(A)(1) states “...the causes for debarment or suspension occurring within three years of a procurement include but are not limited to the following:

- (1) conviction of *or civil judgment against* a bidder, offeror or contractor for commission of a criminal offense related to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract”.

The AGO notes that this section appears to allow debarment or suspension if a contractor receives a civil judgment based on the commission of a criminal offense. However, it is unclear if this section allows disbarment or suspension when the bidder is not convicted of a criminal offense but still receives a civil judgment based on the same activity. If the section is meant to allow for disbarment based on either a civil judgment or a criminal offense, the intent may be clearer if the two circumstances are separated.

### **OTHER SUBSTANTIVE ISSUES**

The AGO further notes that debarment and suspension statutes exist to protect the integrity of government programs by ensuring that honest, ethical and responsible persons contract for government work. The federal government has extensive statutory provisions that allow for disbarment and suspension of contractors. 49 C.F.R. Part 29

The bill may contain vague language that will presumably be supplemented by rule and regulation. For example, §13-1-178 (A)(2) states that “disbarment or suspension of contractor may occur when they are convicted under state statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, *making false statements...*(emphasis added)”. No definition is contained in the bill as to what type of false statements may make a contractor susceptible to debarment. However, the federal statutes provide some guidance by defining false claims/statements in 31 U.S.C. 3729.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

There will be no immediate suspension provisions under the State’s Procurement Code for contractors engaged in dishonest or unethical business practices.

### **QUESTIONS?**

To what extent are central purchasing offices under the control of or subject to the direction of the state purchasing agent?

AHO/svb