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FISCAL IMPACT REPORT

SPONSOR Tallman LAST UPDATED 2/15/2023
ORIGINAL DATE 1/20/2023
SHORT TITLE Procurement Code Changes BILL NUMBER Senate Bill 76
ANALYST Fischer

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

| | FY23 | FY24 | FY25 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------------------|------------------|------------------|-------------------|---------------------------|---------------|
| | No fiscal impact | No fiscal impact | No fiscal impact | | | |
| Total | | | | | | |

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Relates to Senate Bill 20, House Bill 189, and Senate Bill 206

Responses Received From

Tourism Department (NMTD)

General Services Department (GSD)

Ethics Commission (NMEC)

Office of the State Auditor (OSA)

Department of Transportation (DOT)

Department of Information Technology (DoIT)

Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 76

Senate Bill 76 is a Legislative Finance Committee-endorsed bill that makes a number of changes to the procurement code as recommended by past LFC program evaluations. Specifically, Sections 1, 6, and 13 remove Procurement Code exemptions for large healthcare procurements and all marketing and caps procurement code exemptions for advertisement at \$10 thousand. Section 6 also clarifies paralegals are included in the exemption for “litigation expenses in connection with proceedings before administrative agencies or state or federal courts.” Sections 2 and 3 add new Procurement Code definitions for advertising and marketing. Section 4 clarifies the definition of “chief procurement officer” to include state agency procurement officers.

Section 5 adds more direct language requiring state agencies and local public bodies to register chief procurement officers (CPO) on the State Purchasing Division website. Section 5 also requires State Purchasing to review the procurement officer list and notify the agency or local public body, the Ethics Commission, and the State Auditor if an agency or local public body does not have a registered CPO.

Section 7 gives the State Purchasing Agent authority to review and approve sole-source procurements and limits sole-source procurements to one year. Section 8 also limits emergency procurements to one year.

Section 9 requires state agencies and local public bodies to develop a contract with a defined scope of work before procuring services over certain price points with a business under a statewide price agreement. The price points are over \$60 thousand for construction or general services and over \$5,000 for professional services. The section also newly requires state agencies to gather and document three quotes before proceeding with a price agreement purchase between \$10 thousand and \$60 thousand for a purchase of a general service or tangible property.

Section 10 limits the period of extension or renewal for contracts to five years and limits increases for contract costs to that of the cost of the original contract plus inflation over the extended time.

Section 11 clarifies that price agreements for construction are subject to spending caps outlined in Section 13-1-154.1(B) whether the price agreements were procured under a request-for-proposal or invitation-to-bid process. The current caps are only being applied to price agreements produced under a request for proposals process.

Section 12 expressly prohibits kickbacks from contractors to public officials or public employees.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature if the bill is signed into law.

FISCAL IMPLICATIONS

This bill has no fiscal impact.

SIGNIFICANT ISSUES

Since 2016, LFC staff has completed two evaluations and one progress report on the state's procurement systems, highlighting deficiencies in the state's purchasing practices. Some important recommendations of those evaluations remain unaddressed, including repealing some widely used purchasing exemptions that circumvent competition and adding guardrails to the use of statewide price agreements. This bill addresses many of the evaluation's statutory recommendations and should result in state savings through increased competitive sourcing.

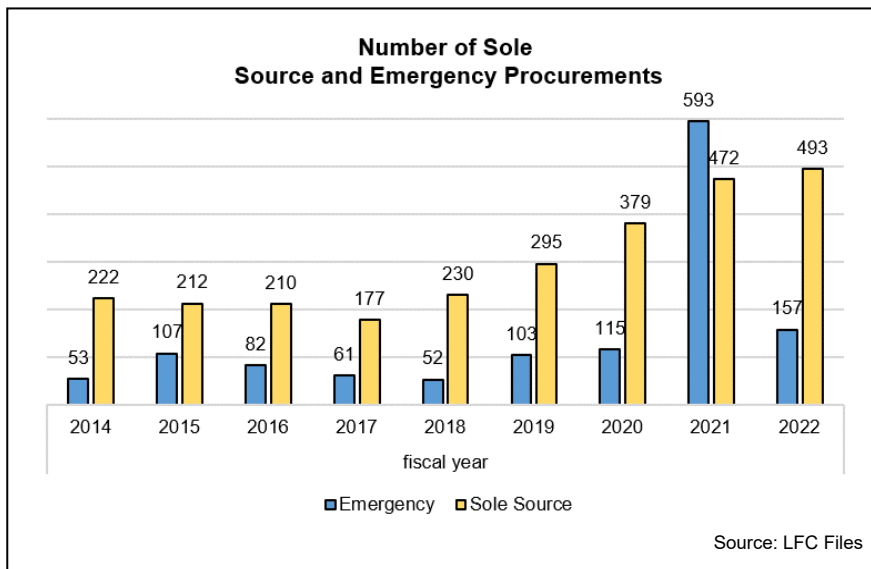
The Office of the State Auditor noted that changes and additions in SB76 will strengthen the procurement code and are supported by the office.

The Ethics Commission noted that the addition of “marketing” and “advertising” are a helpful addition to the Procurement Code. However, the Tourism Department, DoIT, and DOH raised concerns that the \$10 thousand cap on advertisement exemptions would not allow them to continue to purchase airport and other advertisements, which are often purchased in advance and at price points well above the proposed \$10 thousand cap.

The Ethics Commission and General Services Department (GSD) have conflicting views about the changes in Section 6 of the bill, which proposes including paralegals in the Procurement Code exemption for “litigation expenses in connection with proceedings before administrative agencies or state or federal courts.” The Ethics Commission noted that the new exemption would be practical and reasonable because if a state agency or local public body confronts litigation proceedings, the state agency or local public body will likely require paralegal support, in addition to the other non-attorney needs which are addressed in the exemption, such as court reporters, process services and experts. However, GSD responded that adding paralegals to the exemption would be inconsistent with the current statutory scheme, as paralegals are generally full-time jobs and the other categories in the exemption at Section 13-1-98 (R) NMSA 1978 are generally discrete one-time jobs.

GSD noted that in Section 5, Subsections C and D; and Section 7, Subsection C of the bill, State Purchasing at GSD does not have authority over local public bodies. For Section 5, this may not be an issue as LFC analysts note that, no matter their authority, State Purchasing should be able to keep a list of government entities that need a chief procurement officer and alert the Ethics Commission and Office of the State Auditor when entities do not have an officer on the list. However, State Purchasing’s lack of authority over local public bodies may create a conflict with Section 7 Subsection C.

The rest of Section 7 Subsection C. simply codifies existing rules in the Department of Finance and Administration’s (DFA) model accounting practices, in which sole source contracts are to be for no more than 12 months unless a waiver is granted by the State Controller at DFA. A 2021 LFC evaluation found that DFA had provided exemptions to this rule for the state’s two largest, most recent sole source contracts for the Corrections Department and Human Services Department. In doing so, it had made it so the majority of sole source procurement dollars were actually authorized under this exemption, while only a smaller portion of the sole source procurements fell under the one-year rule. Senate Bill 76 would codify the one-year limit for sole source contracts into law.



Senate Bill 76 limits the time period for the state’s two most widely used noncompetitive procurement methods, sole source and emergency procurements, to one year and gives the State Purchasing Agent authority to review and approve sole-source procurements. Past LFC evaluations have found that these noncompetitive methods were overused,

resulting in excess costs to state agencies, and that use of emergency and sole source procurement methods had grown significantly since 2017, increasing the urgency for both the executive and Legislature to address these types of noncompetitive spending.

GSD and DOH raised concerns that the limitation of sole source procurements to one year in Section 7 may be problematic when dealing with proprietary goods or services. However, this would only be the case if a price advantage could be gained from a multi-year procurement of such proprietary goods or services.

GSD noted that the provisions of Section 9, Subsection A, subsection (d), line 20, requiring three quotes for goods and non-professional services between \$10 thousand and \$60 thousand is lower than the \$20 thousand limit for a small purchase of these goods and services. However, the requirement of quotes for purchases under \$60 thousand generally tracks the Model Account Practices (MAPs) issued by the Department of Finance and Administration (MAPs require two informal quotes for purchases between \$5,000 and \$20 thousand and three formal quotes for purchases between \$20 thousand and \$60 thousand).

Section 10 of Senate Bill 76 caps the term limit for general service contracts to five years instead of 10. DOH noted it has complex medical benefits contracts and having to negotiate those contracts every five years instead of every 10 years would impose a burden on the Department.

DoIT recommended that broadband be an exception to Section 10 Subsection A of the bill, limiting the period of extension or renewal for contracts to five years. DoIT cited the common use of longer-term Indefeasible Right of Use (IRU) agreements in broadband projects. These IRUs are a type of telecommunications lease permanent contractual agreement between the owners of a communications system and a customer of that system in which the customer purchases the right to use a certain amount of the capacity of the system, for a specified number of years. DoIT notes that IRU contracts commonly last 20 to 30 years. However, section 10 of Senate Bill 76 caps the maximum time period for a goods or general services contract at 5 years, down from the existing cap in law of 10 years, which is already lower than DoIT cites as a need for the IRUs.

For Section 11, the Ethics Commission noted that in 2020, the Legislature amended the Procurement Code to provide that construction contracts awarded to a vendor on a statewide price agreement were to be capped at \$12.5 million over three years and any one purchase order under a contract could not exceed \$4 million. The current statutory language only applies these caps to statewide price agreements that were procured pursuant to a *request for proposals*. It is currently interpreted as not applying to statewide price agreements procured under an *invitation to bid (ITB)*. The result is that a state agency or local public body may procure construction from a single vendor who is a party to a price agreement, at no limit, so long as the price agreement resulted from an ITB.

The Ethics Commission noted that the change in Section 11 is a necessary fix to truly enforce the compensation caps determined by the Legislature. However, GSD noted that the addition of “or invitation to bid” would be problematic in that the current fluctuation in construction prices, as well as pricing increases caused by supply chain issues, makes the \$12.5 million limit too low. Similarly, DOT noted that including the caps for the ITB construction price agreement would significantly hamper its ability to spend money quickly on road maintenance. DOT reported spending \$122 million annually under the existing ITB construction price agreement, up to \$28

million annually with a single vendor on the agreement, and an average cost of \$13.5 million per project.

As a counterpoint, LFC evaluations have long warned of the risks associated with making multi-million-dollar purchases off price agreements which generally allow government agencies and entities to forgo the due diligence that a more traditional request for proposal would provide for these large, individual projects.

Finally, Section 13 of the bill repeals the hospital and healthcare exemption in the procurement code. Starting in 2016, the Human Services Department (HSD) determined that most of their contracts for healthcare services were exempt from the Procurement Code under the hospital and healthcare exemption, including all Medicaid managed care contracts and contracts for non-Medicaid behavioral health providers and the statewide behavioral health entity. For Medicaid managed care alone, HSD spent \$3.9 billion in FY21 and is projected to spend \$4.6 billion in FY23. While HSD did go through a competitive request for proposal process for its current Medicaid managed care contract (Centennial Care 2.0), and began the process to do the same for its upcoming managed care contract (Turquoise Care), it is not required to do so. Repealing the hospital and healthcare exemption in Senate Bill 76 would ensure that these billion-dollar contracts would be negotiated using a competitive process outlined in the Procurement Code.

DOH also noted it routinely uses the hospital and healthcare exemption repealed in Section 13.

TECHNICAL ISSUES

GSD suggested that Section 10, Subsection C, line 17, might be better placed in Section 13-1-171 NMSA 1978 “Price Adjustments.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 20 and House Bill 189 would exempt an Education Retirement Board IT project from the four-year time limit applicable to professional service contracts in Section 13-1-150 B. Senate Bill 76 does not change Section 13-1-150 B. so there is technically no conflict. However, as Senate Bill 76 was the result of two LFC staff evaluations of the state’s purchasing practices which recommended removing widely used exemptions that circumvent competitive bidding practices and placing guardrails around the use of sole source contracts and statewide price agreements. As a result, SB20 and HB189, though not directly in conflict with SB76, could be seen as in conflict by adding a new, specific exemption to the procurement code.

Similarly, Senate Bill 206 creates a new Procurement Code exemption for certain contracts with nongovernmental organizations entered into by the Healthy Forests Program, otherwise known as the State Forestry Division of the Energy, Minerals and Natural Resources Department.

ALTERNATIVES

DOT suggested an amendment to Section 11 B. to apply a different cap to public highway construction services of \$150 million total over five years and \$15 million for any one project.