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SENATE BILL 741

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

H. Diane Snyder

AN ACT

RELATING TO GOVERNMENT FUNCTIONS; PROVIDING A PROCESS FOR IDENTIFYING THE FUNCTIONS OF STATE GOVERNMENT THAT ARE NOT INHERENTLY GOVERNMENTAL FUNCTIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. PURPOSE. --The purpose of this act is to provide a process for identifying the functions of the state government that are not inherently governmental functions.

Section 2. DEFINITIONS. --As used in this act:

A. "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by state government employees, including activities that require either the exercise of discretion in applying state government authority or the making of value judgments in making decisions for the state

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1 government, including judgments relating to monetary
2 transactions and entitlements, and:

3 (1) an "inherently governmental function"
4 includes, among other things, the interpretation and execution
5 of the laws of New Mexico so as to:

6 (a) bind New Mexico to take or not to
7 take some action by contract, policy, regulation,
8 authorization, order or otherwise;

9 (b) determine, protect and advance New
10 Mexico economic, political, territorial, property or other
11 interests by civil or criminal judicial proceedings or contract
12 management, or otherwise;

13 (c) significantly affect the life,
14 liberty or property of private persons;

15 (d) commission, appoint, direct or
16 control officers or employees of New Mexico; or

17 (e) exert ultimate control over the
18 acquisition, use or disposition of the property, real or
19 personal, tangible or intangible, of New Mexico, including the
20 collection, control or disbursement of appropriated and other
21 state funds; and

22 (2) "an inherently governmental function" does
23 not normally include:

24 (a) the function of gathering
25 information for or providing advice, opinions, recommendations

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1 or ideas to state government officials; or

2 (b) a function that is primarily
3 ministerial and internal in nature, such as building security,
4 mail operations, operation of cafeterias, housekeeping,
5 facilities operations and maintenance, warehouse operations,
6 motor vehicle fleet management operations or other routine
7 electrical or mechanical services; and

8 B. "state government source", with respect to
9 performance of an activity, means an organization within an
10 executive agency that uses state government employees to
11 perform the activity.

12 Section 3. LISTS REQUIRED. --

13 A. Not later than the end of the third quarter of
14 each fiscal year, the head of each executive agency shall
15 submit to the secretary of finance and administration a list of
16 activities performed by state government sources for the
17 executive agency concerned that, in the judgment of the head of
18 the executive agency, are not inherently governmental
19 functions. The entry for an activity on the list shall include:

20 (1) the fiscal year for which the activity
21 first appeared on a list prepared under this section;

22 (2) the number of full-time employees, or
23 equivalents, necessary for the performance of the activity by a
24 state government source; and

25 (3) the name of a state government employee

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1 responsible for the activity and from whom additional
2 information about the activity may be obtained.

3 B. The secretary of finance and administration
4 shall review each executive agency's list for a fiscal year and
5 consult with the head of each executive agency regarding the
6 content of the final list for that fiscal year.

7 C. Lists shall be made available to the public,
8 and:

9 (1) upon the completion of the review and
10 consultation regarding a list of each executive agency:

11 (a) the head of each executive agency
12 shall promptly transmit a copy of the list to the legislature
13 and make the list available to the public; and

14 (b) the secretary of finance and
15 administration shall promptly publish in the *New Mexico*
16 *Register* a notice that the list is available to the public; and

17 (2) if the list changes after the publication
18 of the notice as a result of the resolution of a challenge
19 pursuant to Section 4 of this act, the head of each executive
20 agency concerned shall promptly:

21 (a) make each such change available to
22 the public and transmit a copy of the change to the
23 legislature; and

24 (b) publish in the *New Mexico Register* a
25 notice that the change is available to the public.

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1 D. Within a reasonable time after the date on which
2 a notice of the public availability of a list is published
3 pursuant to Subsection C of this section, the head of the
4 executive agency concerned shall review the activities on the
5 list. Each time the head of the executive agency concerned
6 considers contracting with a private sector source for the
7 performance of such an activity, the head of the executive
8 agency shall use a competitive process to select the source
9 pursuant to the Procurement Code.

10 Section 4. CHALLENGES TO THE LIST. --

11 A. An interested party may submit to any executive
12 agency a challenge of an omission of a particular activity
13 from, or an inclusion of a particular activity on, a list for
14 which a notice of public availability has been published
15 pursuant to Section 3 of this act.

16 B. For the purposes of this section, "interested
17 party", with respect to an activity referred to in Subsection A
18 of this section, means:

19 (1) a private sector source that:

20 (a) is an actual or prospective offeror
21 for any contract, or other form of agreement, to perform the
22 activity; and

23 (b) has a direct economic interest in
24 performing the activity that would be adversely affected by a
25 determination not to procure the performance of the activity

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1 from a private sector source;

2 (2) a representative of any business or
3 professional association that includes within its membership
4 private sector sources referred to in Paragraph (1) of this
5 subsection;

6 (3) an officer or employee of an organization
7 within an executive agency that is an actual or prospective
8 offeror to perform the activity; and

9 (4) the head of any labor organization that
10 includes within its membership officers or employees of an
11 organization referred to in Paragraph (3) of this subsection.

12 C. A challenge to a list shall be submitted to the
13 executive agency concerned within thirty days after the
14 publication of the notice of the public availability of the
15 list pursuant to Section 3 of this act.

16 D. Within twenty-eight days after an executive
17 agency receives a challenge, an official designated by the head
18 of the executive agency shall:

19 (1) decide the challenge; and

20 (2) transmit to the party submitting the
21 challenge a written notification of the decision together with
22 a discussion of the rationale for the decision and an
23 explanation of the party's right to appeal pursuant to
24 Subsection E of this section.

25 E. Initial decisions may be appealed.

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(1) An interested party may appeal an adverse decision of the official to the head of the executive agency concerned within ten days after receiving a notification of the decision pursuant to Subsection D of this section.

(2) Within ten days after the head of the executive agency concerned receives an appeal of a decision pursuant to Paragraph (1) of this subsection, the head of the executive agency shall decide the appeal and transmit to the party submitting the appeal a written notification of the decision and the rationale for the decision.

Section 5. APPLICABILITY.--This act applies to all executive agencies.

Section 6. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2003.