

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: SB 35

50th Legislature, 1st Session, 2011

Tracking Number: .182974.1

Short Title: Public Works Contract Subcontractor Bonds

Sponsor(s): Senator Vernon D. Asbill, Representative Larry A. Larrañaga, and Others

Analyst: Kevin Force

Date: January 28, 2011 (revised)

**FOR THE PUBLIC SCHOOL CAPITAL OUTLAY OVERSIGHT TASK FORCE
AND FOR THE LEGISLATIVE EDUCATION STUDY COMMITTEE**

Bill Summary:

Senate Bill 35 amends the *Procurement Code* to require a subcontractor on public works projects¹ to provide a performance and payment bond when the value of the contract \$250,000 or more.

Current law requires a performance and payment bond when the value of the contract for the work is \$125,000 or more (see Background).

Fiscal Impact:

Senate Bill 35 does not include an appropriation.

Substantive Issues:

According to the Public School Facilities Authority (PSFA) analysis:

- increased costs to projects vary depending upon the amount of work to be provided by subcontractors, and the capabilities and capacity of the general contractor;
- the total direct and indirect cost of the subcontractor bonding requirement is difficult to estimate, since
 - it is unknown how many contractors have not been able to bid public works projects due to inability to obtain bonding, and
 - the impact of a reduced number of bidders may have had on the cost competitiveness of public works bids;

¹ Public works projects are defined in the *Procurement Code* as projects that require professional services of architectural or engineering services costing \$50,000 or more; or landscape architectural or surveyors costing \$10,000 or more, excluding gross receipts tax.

- limited competition, especially in rural areas, appears to have contributed significantly to escalations in average square footage costs since bonding of subcontractors became mandatory in 2005;
- in a 2008 survey of more than 28,000 contractors and subcontractors in New Mexico, respondents listed subcontractor bonding as one of the most significant barriers to bidding public works, and as one of the primary reasons that many contractors either choose not to or are unable to bid public works projects;
- these performance and payment bonds are primarily intended to protect payment of all workers, subcontractors and material suppliers by:
 - providing a remedy for recovery of monies due for wages;
 - performing work; or
 - providing materials on a state or local construction project;
- the owner and taxpayers are also protected as a mechanism to guarantee delivery of the contracted work should the awarded contractor fail to perform; and
- this bill would have applied to approximately 50 percent of all school construction projects in FY 09 and FY 10.

According to the Public Education Department (PED) analysis:

- these bonding provisions apply to all state and local public works projects, including school construction projects;
- raising the threshold from \$125,000 to \$250,000 may:
 - help get the smaller projects finished in a more timely manner, although projects above the \$250,000 threshold may take longer;
 - increase the number of potential subcontractors able to provide bids to general contractors; and
 - decrease the additional bond costs that are passed on to public owners;
- the construction and bonding industry has reported that many small New Mexico contractors cannot obtain bonding and that those who can are paying a premium, which is passed on to the owner because, according to a March 3, 2006 New Mexico Business Weekly article:
 - recent hurricanes and other natural disasters in the U.S. have sapped insurance companies of funds so that many no longer offer construction bonds; and
 - the subcontractor bonding provision is hampering subcontractors in getting jobs.

Background:

- The statutory requirement for subcontractor bonding enacted by the 2005 Legislature originally required subcontractor bonding for public works projects of \$50,000, or more.
- In 2007, the minimum contract amount for subcontractor bonding was raised to \$125,000.

- PSFA states that the bonding of contractors and subcontractors is intended to protect payment of all workers, subcontractors, and material suppliers by providing a remedy for recovery of monies due for wages, performing work, or providing materials on a state or local construction project. The owner and taxpayers are also protected as a mechanism to guarantee delivery of the contracted work should the awarded contractor fail to perform.
- In 2009, Senate Joint Memorial 71 created a work group to study the effects of subcontractor bonding and report its findings to the Public School Capital Outlay Task Force, the Legislative Finance Committee, and the Legislative Education Study Committee. According to PSFA, this group:
 - worked over the two interims to review the costs and benefits of the program and explore alternatives, including prequalification of contractors and the various performance-based procurement methods for public works construction;
 - decided, due to the economic downturn and depressed construction market in New Mexico, that it was not the appropriate time to remove the subcontractor bond provisions entirely; and
 - agreed on raising the threshold while they continue to explore these issues.

Related Bills:

SB 287 *Methodology of Determination of Wage Rates* (Identical to HB 63)

HB 63 *Public Works Wage Rates Through Survey* (Identical to SB 287)

HB 139 *Raise Monetary Limit On Public Works Projects*