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FISCAL IMPACT REPORT

ORIGINAL DATE 02/04/11
 SPONSOR Varela LAST UPDATED 03/09/11 HB 128/aHJC/aSPAC
 SHORT TITLE Procurement Code Exemptions & Requirements SB _____
 ANALYST Archuleta

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
*NMCD	\$0 – \$93.6/See Fiscal Impact	\$0 - \$93.6/See Fiscal Impact	\$0 - \$187.2/See Fiscal Impact	Recurring	General Fund/Other Transfers/Other Revenues
**GSD	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 General Services Department (GSD)
 Public Defender Department (PDD)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Corrections Department (NMCD)
 Department of Public Safety (DPS)
 Public Education Department (PED)
 Higher Education Department (HED)
 New Mexico Municipal League (NMML)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee Amendment to House Bill 128 changes the reporting of emergency procurements from 72 hours to 3 business days. The amendment also clarifies that bidders and offerors who are aggrieved in connection with a solicitation or award of a contract or “any qualified potential contractor who was not awarded the sole source or emergency procurement contract” the right to protest.

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 128 requires DFA to add records of sole source and emergency procurements pursuant to the Sunshine Portal. In addition, the amendment increases the threshold for committing a misdemeanor if the transaction is less than \$1 million and a fourth degree felony if the violation is more than \$1 million.

Synopsis of Original Bill

House Bill 128 amends section 13-1-98 of the Procurement Code, Chapter 65, Section 71, by adding a new a general catch-all provision, exempting from the procurement code procurements “as otherwise provided by law.”

- Section 2 of the bill amends section 13-1-126, sole source procurement, allowing contract awards without competitive sealed bids where there is only one source for the service, item or tangible property, by adding two additional requirements, 1) that the subject of the contract be unique, and 2) that other similar services cannot meet the contract’s intended purpose. It also adds two new sections, section (B) whereby the state purchasing agent is required to use ‘due diligence’ putting his determination as to sole source in writing and section (E) prohibiting the narrow drafting of specifications so that only one source would meet the listed specifications.
- Section 3 of HB 128 amends section 13-1-127, emergency procurement, adding two new sections. Section C specifically removes ‘the purchase or lease of heavy road equipment’ from this provision; section D adds a requirement for use of ‘due diligence’ in determining the basis for the emergency; the written determination must be in writing and placed in the file.
- Section 4 amends section 13-1-128 by adding mandatory requirements to publish specific information about awards of sole source contracts on the state agency web site and in the contract database. For emergency contracts, the posting must occur within 72 hours of the award.
- Section 5 amends section 13-1-172 to allow ‘anyone aggrieved’ by the award of a sole source or emergency contract the right to protest.
- Section 6 amends section 13-1-199 by increasing the penalties for violating the procurement code. The penalties range from a fourth degree felony if the transaction involves ten thousand dollars to second degree felony for a transaction involving over one hundred thousand dollars.
- Section 7 is a new section mandating a state purchasing office keep records of competitive sealed bid contract awards for a minimum of three years.

FISCAL IMPLICATIONS

*NMCD indicates the estimated three year operating budget impact assumes that three individuals are convicted of a third degree or higher level felony for violating the procurement code in the relevant three year period, and that those offenders serve prison time and do not get

probation. However, this is an estimate, and NMCD cannot accurately predict the exact number of new felony convictions arising out of the passage of this increased criminal penalty bill. It does not seem likely that the bill will result in a significant number of new felony convictions, but again NMCD cannot control the number of new felony convictions.

The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The cost to incarcerate a male inmate ranges from an average of \$49,347 per year in a state owned/ operated prison to \$31,239 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed). The cost to house a female inmate at a privately owned/operated facility is \$33,258 per year. Because the capacities of medium and higher custody state owned prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility.

The cost per client in Probation and Parole for a standard supervision program is \$1,521 per year. The cost per client in Intensive Supervision programs is \$3,445 per year. The cost per client in Community Corrections is \$3,475 per year. The cost per client per year for female residential Community Corrections programs is \$41,653 and for males is \$24,803. Some of the felony offenders convicted of procurement code violations could be placed on probation rather than sent to prison.

**GSD indicates that significant costs will result from the proposed modifications to the procurement code. They include 1) Posting the emergency procurements on the website and contracts database. Depending on the database (contracts database is updated yearly, or sunshine portal updated more frequently), significant cost to change the SHARE system to designate whether a contract/purchasing order is based on Sole Source or Emergency procurement; 2) Process changes will be required to accommodate the changes in handling the Sole Source and emergency procurements; 3) Additional protests will likely result from the addition of Sole Sources and Emergency procurements. Time and resources will be necessary to resolve the protests; 4) Increasing the liability of being a buyer and subject to increased penalties for procurement violations increases the risk to the buyers. Buyer compensation will be requested for covering the additional liability. Local Public Body central purchasing offices will have a similar need.

SIGNIFICANT ISSUES

NMCD cites concern regarding the bill's requirement to have the state purchasing agent or other state employee convicted of a felony if they inadvertently forget to comply with all of the posting requirements listed in this bill? This seems harsh, and may make it difficult to hire and keep staff responsible for posting the required information. The penalties imposed can be both civil and criminal pursuant to the proposed changes.

NMML is also concerned that about making a violation of the procurement code a felonious act without parameters such as willful/wanton or criminal intent could be onerous on purchasing agents and create situations where an honest mistake or interpretation of the act becomes a criminal matter punishable by imprisonment.

The AG's office notes that Section 4, adding the posting requirement to section 13-1-128 provides for public transparency. The new penalties for violating the code are very stiff, being

commensurate to the amounts of the transactions involved and might serve as a deterrent.

ADMINISTRATIVE IMPLICATIONS

NMCD indicates the bill places additional administrative duties on agency staff. NMCD should be able to absorb this administrative burden. NMCD already performs some of these administrative tasks (those regarding documenting in writing the need for a sole source contract). DPS indicates the bill have minimal impact if the proposed bill is implemented other than possible delayed processing and award times due to the additional requirements of the State Purchasing Agent in posting and forwarding award information.

PED indicates they would be required to develop and implement new internal procedures to ensure compliance with new procurement code regulations. The PED would be required to develop and maintain a website or webpage and contract database dedicated to meet the requirements of section 13-1-128.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Related to House Bill 138 – Raise Monetary Limit on Public Works Contracts

TECHNICAL ISSUES

NMCD suggests amending the bill to clarify whether mere mistakes in not posting the required information subjects staff to felony prosecutions and convictions. Amend the bill to delete paragraph FF from Section 1.

OTHER SUBSTANTIVE ISSUES

NMCD cites concerns that Paragraph FF in Section 1 is vague since procurements exempt from the procurement code are already enumerated in this section of the procurement code. Providing for exemptions in other portions of New Mexico Statutes will make it difficult to determine if certain purchases are exempt, and having to take the time to look for exemptions elsewhere in the Statutes could be a significant administrative burden. There may not be any such other exemptions, but this language makes it look like there are other exemptions.

EMNRD notes that depending on the nature and timing of an emergency procurement, there may be difficulties in meeting the 72 hour reporting requirement for emergency purchases

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies and entities would continue to comply with existing procurement code regulations.

DA/bym:mew