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FISCAL IMPACT REPORT

ORIGINAL DATE 03/010/11

SPONSOR HBIC LAST UPDATED _____ HB 186/HBICS

SHORT TITLE Procurement Evaluations Public Records SB _____

ANALYST Archuleta

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

General Services Department (GSD)
 Human Services Department (HSD)
 Department of Health (DOH)
 Children, Youth and Families Department (CYFD)

SUMMARY

Synopsis of Bill

House Business & Industry Committee Substitute for House Bill 186 amends the Procurement Code by requiring any documents used to score a bid or proposal for contracts over \$50,000 issued pursuant to the Procurement Code or any other public works project to be signed by the evaluators on the selection committee and retained as public record for the length of the contract.

SIGNIFICANT ISSUES

HSD previously cited the following concerns:

Pursuant to the Procurement rules, Section 1.4.1.38(B) NMAC, an agency shall appoint a committee to evaluate proposals responsive to a Request for Proposal (RFP). Each individual evaluator receives a copy of the proposals and any additional relevant documentation, and then conducts an independent individual evaluation. Notes may be taken and kept by the evaluators throughout this process and an evaluation form may be used to assist the evaluators in evaluating the proposals. Following the independent evaluations the Committee makes a decision based on the factors enumerated in the RFP.

Many notes may be taken at this time, either by individuals or by the Committee leader to help arrive at a consensus.

HB 186 presents two concerns. First, HB 186, as written, is vague. The bill states that any documents used...to evaluate bids...” This may apply only to documents actually created by each individual evaluator and created collectively by the Committee, or it could be interpreted as applying to each and every document referenced, even if briefly and circuitously, by an individual evaluator. And it may not be clear whether each individual evaluator must sign each and every document used by any of the evaluators, or just the ones used by that particular evaluator. It may require each evaluator to sign the actual physical proposal used by that evaluator to be maintained by the procuring agency for the life of the contract.

The second concern is that HB 186 may conflict with the Inspection of Public Records Act (IPRA), NMSA 1978, § 14-2-6(E). IPRA defines a “public record” as “any document, tape or other material, regardless of form, that is used, created, received, maintained or held by or on behalf of a public body, and is related to public business.” The Office of Attorney General’s *Inspection of Public Records Act Compliance Guide* exempts preliminary materials used and created by public employees because they do not have the degree of finality suggested by the definition of “public records.” In a similar vein as the Countervailing Public Policy disclosure exemption, requiring these documents to become public record would create a chilling effect among the individual evaluators. The work required to adequately evaluate proposals may be hampered by the thought of personal notes being handed over to individuals and organizations in compliance with the IPRA. Furthermore, these documents that may be required to be signed and kept as public records may implicate the Attorney-Client Privilege. The Procurement rules, § 1.4.1.9 NMAC, state that, “to the extent that any provision of this rule conflicts with the Inspection of Public Records Act, as interpreted by the courts of this state, that act shall control.”

DOH previously cited the following concerns:

HB186 would require that individual members of committees that evaluate responses to RFPs sign “any document used... to evaluate” them. Documents used to evaluate RFPs could be interpreted to include any number of materials, including the individual contractors’ proposals; thus, HB186 would require that evaluators sign documents not created by the evaluators themselves. It is difficult to determine the complete scope of materials that would be subject to its requirements, which could generate confusion for state agencies regarding what materials must be retained. This could potentially result in litigation if an agency fails to retain materials that could be described as having been “used” in some manner to evaluate a proposal. It is also unclear what “evaluation” an agency would conduct of its own RFPs, beyond evaluating bids and proposals submitted in response to them.

In terms of the impact to the Department of Health and other State agencies, HB186 would require that these agencies (as well as local governmental bodies) retain RFPs and proposals submitted in response to RFPs, as well as any other documents “used to evaluate” them, for the length of the contract underlying the RFP.

Under the existing general records retention regulations at 1.15.4 NMAC, contracts that

are bid through the Purchasing Division of the General Services Department must be retained for six (6) years; RFPs must be retained for three (3) years after the close of the fiscal year in which the RFP is proposed; and quotes and bids made in response to RFPs must be retained for three (3) years. By contrast, HB186 would base the length of retention of these various records on the length of the underlying contract. Depending on a given RFP, the contract that is ultimately executed could have a term of either more or less than the 3 years identified in existing retention schedules.

GSD is also concerned that the bill proposes to require any documents used in the evaluation of bids, formal requests for proposals or competitive sealed proposal over \$50,000 to be kept by the selection committee for the duration of the contract, and would fall under the Inspection of Public Records Act as a public record. This would have significant legal implications regarding the definition of a public record. If a bid, proposal, etc. required a company to produce financial records, they may be hesitant to produce such records if there is a possibility of making such records available under IPRA. Also, persons reviewing bids, proposals, would be hesitant to make certain recommendations or would be hesitant to be completely honest in their evaluations and would not sign off on the evaluations if they knew that such evaluations would be made public. At this time evaluations are not considered public record.

ADMINISTRATIVE IMPLICATIONS

CYFD previously indicated that in light of what it views as the absence of an express exception to the Inspection of Public Records Act, CYFD has traditionally treated those types of records subject of this bill as being subject to inspection by the public under the act. Consequently, CYFD's practice is generally consistent with the requirement established by the bill and in conformance with the requirements to Section 1.4.1.45 NMAC.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

A new section in the State's Procurement Code to require that a document used to score a bid or proposal for contracts over \$50,000 issued pursuant to the Procurement Code or any other public works project" shall be signed by the evaluators on the selection committee and retained as public record for the length of the underlying contract would not be added.

DA/mew