

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/19/15
LAST UPDATED 03/14/15 **HB** _____
SPONSOR Padilla

SHORT TITLE Resident Business Set-Aside Act **SB** 69/aSCORC/aSJC
ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General and Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

General Services Department (GSD)
 Office of the State Auditor (OSA)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Department of Finance & Administration (DFA)
 Taxation & Revenue Department (TRD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 69 strikes all of the SCORC amendments, and adds language clarifying that the Act applies to the solicitation of both bids and proposals for items of tangible personal property (which term is defined in the amendment) and professional services as well as equipment, construction and services. It expands the period of time in which OSA must resolve disputes between GSD and a contracting agency from seven to 21 days of receipt of written notice of a disagreement, and makes other minor technical changes that do not change the intent or substance of the bill.

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment to Senate Bill 69 clarifies that the Resident Business Set-Aside Act applies to the solicitation of both bids and proposals by contracting agencies for items of tangible personal property (which term is defined in the

amendment), equipment, construction, services and professional services. It expands the period of time in which OSA must resolve disputes between GSD and a contracting agency from seven to 21 days.

The amendment also adds language requiring the non-prevailing party in such a dispute to pay all fees charged by OSA to resolve that dispute. This provision may not be enforceable if that party does not have sufficient appropriations to cover those costs. Further, it is unclear if this language is sufficient to give OSA authority to impose fees for these dispute resolution services.

Synopsis of Original Bill

Senate Bill 69 enacts the Resident Business Set-Aside Act, which requires that thirty-three per cent of the total number of contracts (or portions of contracts) entered into by every executive, legislative and judicial agency and official of the State (“contracting agencies”) be awarded to entities that qualify as a “resident business” in New Mexico.

A contracting agency must develop, in consultation with GSD, an annual plan to achieve the required set-aside. An agency may designate prior to solicitation of bids or proposals an entire or a portion of a contract as a resident business set-aside if it reasonably expects it will receive bids from at least three qualified businesses capable of performing at a fair and reasonable price. In the event GSD and the agency disagree on a designation, the OSA shall make a final determination within seven days. Each agency must submit an annual report to GSD reflecting compliance or efforts to comply with this Act. Beginning in 2016, GSD must submit an annual report compiling this data from agencies to the governor and the Legislature.

If receipt of federal funds or other benefits would be jeopardized by such a designation, an agency, in consultation with GSD, may withdraw affected contracts from consideration or calculation of the agency’s resident business contract awards.

The requirements for certification by TRD as a “resident business” for a business or contractor include: 1) being licensed to do business in the state, 2) payment (by the business or in the event of a new business by the owner or owners of that business) of property taxes or rent and at least one other state-administered tax in each of the last three years, or 3) if a business has relocated 80 per cent of its employees to the state in the past five years, certain evidence of the leasing or acquisition of real property within the state. In addition to satisfying these criteria, to be certified as a resident contractor, the contractor must: a) have registered at least one vehicle with the state and b) unless the contractor is a construction business that has been licensed in this state for ten consecutive years, have paid unemployment insurance on at least three employees in each of those years.

TRD may assess a reasonable fee for its duties under SB 69, must provide a business or contractor an opportunity to be heard in the event it is denied certification. If a business or contractor provides false information or does not perform work it was required to perform pursuant to a contract awarded based on the resident business preference, it is subject to a five year disqualification period and administrative penalties up to \$50 thousand per violation. Any actions taken by TRD are subject to judicial review.

The effective date of this Act is July 1, 2015.

FISCAL IMPLICATIONS

An underlying premise of the Procurement Code is that the State can benefit from increased competition to obtain lower prices for goods and services. As both GSD and DFA warn, this bill could result in restricting competition for 33 percent of all State contracts to a certain class of vendors which, in turn, could lead to increased prices. This potential pricing impact on contracting agencies might be somewhat off-set on a state-wide level by an increase in gross receipts tax returns for contracts; however, the net impact cannot be quantified.

Additionally, OSA anticipates a fiscal impact on its budget due to its obligation to resolve disputes between agencies and GSD, which impact cannot yet be estimated. As both AGO and AOC anticipate, additional staff time will be needed for every contracting agency to develop its annual plan and otherwise implement the set-aside requirements of this bill. AOC believes those activities would require an additional FTE.

SIGNIFICANT ISSUES

OSA is supportive of efforts to ensure resident businesses are able to secure a fair proportion of the state's contracts for construction, property and services. On the other hand, responding agencies warn that limiting competition as proposed in SB 69 could affect pricing, potentially leading to generally more expensive goods or services.

In addition, SB 69 may not achieve the underlying intent. As DFA notes, the certification language and process appear to closely track the language that is currently in statute in order to qualify for the resident business preference. See Section 13-1-22(B) and (D), NMSA 1978. It questions whether this language actually limits such certifications to what most would consider "resident" businesses, citing as an example the requirements for a resident business under the proposed bill: a) an affidavit from a CPA, attorney or enrolled agent authorized to practice before the IRS stating that the business is licensed to do business in New Mexico; b) its payment of property taxes or rent on real property in the State; and c) its payment of one other tax administered by the State in each of the three prior years. It appears that a business such as a national, big-box store would be able to be declared a resident business under these criteria. Such a business would likely have or be able to obtain a license to do business in the State, would likely rent property or pay property taxes and would likely pay certain gross receipts taxes, for example. Designating such a business as a resident business may not achieve the goal intended.

Similarly, TRD notes that failing to narrowly tailor the definition of resident business or contractors to assure each is truly a New Mexico business leaves the door open for large national companies to acquire preferences meant for New Mexico businesses. TRD suggests that the definition of resident business include a requirement that the applicant's corporate headquarters or principal place of business be located in New Mexico.

Further, both DFA and GSD report that many states have reciprocity statutes in regard to resident business preferences, oftentimes applying as a penalty in their states the benefit received in a vendor's own state. This may result in New Mexico vendors being disqualified from participating in procurements in those states.

Application of the set aside also may lead to practical difficulties. As DFA suggests, it may be

challenging for contracting agencies to track and meet the 33 per cent of all contracts threshold since they may not be able to foresee necessary contracts and would not, therefore, be including such unforeseen contracts in the annual plan mandated by the legislation. Further, it is unclear how the proposed legislation intersects with current law regarding resident and resident veteran preferences. The bill makes no mention of these existing preferences, which may mean that after the 33 per cent set-aside is reached, the other 67 per cent of contracts would still be subject to these preferences.

GSD questions the interface of this bill with the existing State Use Act (SUA), governing procurement of services provided by persons with disabilities, and the first right to provide services set forth therein. See Sections 13-1C-1-7, NMSA 1978. Additional problems arise when services are pre-determined to be set-aside under this bill because there is no SUA contractor to provide those services, and then one becomes available prior to contracting with a resident business—which law governs? Similarly, it wonders how this bill may impact statewide pricing agreements that GSD negotiates for local public bodies (to achieve reduced pricing due to the larger volume being procured), which are then available to state agencies.

OSA comments that thousands of state contracts are awarded each year by contracting agencies, and it is unknown how many of these will result in disputes requiring resolution by that office as required by this bill. It advises that with its existing resources, it will need more than the 7 days provided in Section 4(D) to adequately evaluate and make a final determination regarding a dispute.

Similarly, TRD calls attention to the tight timelines in Section 5(E) concerning TRD's denial of an application for certification as a resident business or resident contractor. The business or contractor whose certificate has been denied has fifteen days to file an objection (with no indication if those are calendar or business days). The business or contractor may also request a hearing on the denied application; however, TRD is required to issue a decision within 15 days of the filing of the objection. TRD advises the ability to hold a hearing within this statutory time period appears impossible.

Further, TRD points out although the power to revoke certificates for the reasons stated in Section 5(F) is implied, that section does not expressly authorize TRD to revoke certificates. Additionally, Section 5(G) appears to conflict with Section 5(E) because (G) gives an applicant the ability to immediately seek judicial review of the department's denial under (D) without filing the objection first as required by (E).

In addition, while Section 5(H) allows TRD to assess a reasonable fee, TRD notes the bill does not appropriate the monies collected to TRD for administering the issuance (and presumably revocation) of certificates.

Finally, as both DFA and GSD point out, the bill does not address what happens if a contracting agency fails to meet the 33 per cent set-aside. It is unclear if the penalty provisions for violation of the Procurement Code would apply to such a failure. See Section 13-1-199, NMSA 1978.

TECHNICAL ISSUES

The language of the bill refers to "bids" in some places and "bids and proposals" in others. Bids and proposals are two distinct concepts and it is unclear if the bill's intent is to include both, or

only one or the other, of these methods of procurement.

Additionally, it is unclear if the term “institution” in Section 3(A) includes state educational institutions.

OTHER SUBSTANTIVE ISSUES

As to the underlying concept of local business preferences in state procurement laws, AOC advises that such preferences have been challenged in the courts under the commerce clause of the U.S. constitution (Article 1, §8), as well as the equal protection and due process clauses of the Fourteenth Amendment. However, these challenges have by and large been unsuccessful so long as there is an articulable local interest in the preference. Stimulation of local economies has routinely been held to be sufficient justification. A similar provision that allows a five per cent preference for local businesses already exists under state law, and has not been successfully challenged.

ALTERNATIVES

GSD suggests that to address the purpose of this bill, maintain competition, and attempt to place more state procured business with New Mexico”resident” vendors, both statewide and locally, its State Purchasing Division (SPD) could incorporate into procurement requirements on RFPs a separate evaluation factor for the amount of in-state subcontracting being proposed without enumerating a set percentage of the amount of such subcontracting. Such a factor could require a showing of the fiscal impact on the state and local community where the procurement purchase is being done or performed. The greater the state or local impact by use of local businesses, the greater number of points would be given within the category involved, and thus the greater the likelihood that through this type of non-restricted competitive process the state receives the “best value” for its procurement selection.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Current resident and veteran preference laws, which provide bidding or proposal advantage at selection but do not exclude participation in a procurement, would be the only limit on competition in procurements.

AMENDMENTS

OSA suggests increasing from 7 to 21 days the deadline in Section 4(D) to resolve a dispute.

In Section 5(A) (3) and (B) (3):

- 1) the phrase “leased property for ten years” may be ambiguous and cause confusion in light of the definition in Section 3(F) of a “relocated business” as one that has moved 80 per cent of its domestic personnel from another state to New Mexico in the past five years. Language like “has entered into a lease for at least ten years” may provide more clarity; and
- 2) the phrase “in each of the years immediately preceding the submission of the affidavit” does not indicate how many years 80 per cent of the relocated business’ or

contractor’s personnel are required to have resided within the state (as compared, for example, to the requirement of paying property “in each of the three years immediately preceding the submission of the affidavit” in Section 5(A) (2)).

TRD suggests Section 5(G) be amended to remove the reference to subsection (D) in order to allow the provisions of (E) and (F) to take place before judicial review is sought.

POSSIBLE QUESTIONS

How do emergency and sole-source procurements figure into an agency’s annual plan?

MD/bb