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FISCAL IMPACT REPORT

SPONSOR Maestas Barnes/Padilla **ORIGINAL DATE** 1/22/17
LAST UPDATED _____ **HB** 25
SHORT TITLE Resident Business Set-Aside Act **SB** _____
ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			Indeterminate	Indeterminate	Recurring	General Fund/Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB18

SOURCES OF INFORMATION

LFC Files

Responses Received

General Services Department (GSD)
Office of the State Auditor (OSA)

2016 Responses Received From

Taxation and Revenue Department (TRD)
Department of Information Technology (DoIT)
Energy Minerals and Natural Resources Department (EMNRD)
Indian Affairs Department (IAD)
State Land Office (SLO)
Administrative Office of the Courts (AOC)
Economic Development Department (EDD)

SUMMARY

Synopsis of Bill

House Bill 25 proposes to create a new section in the Procurement Code, NMSA 1978 Article 13 requiring state contracting agencies to set-aside 33 percent of its contracts for resident businesses as an incentive to encourage businesses to grow and expand the state's economy.

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Contracts included in the State Use Act awarded to resident businesses are included in the agency's 33 percent set-aside. Contracting agencies are required to submit an annual report to the General Services Department (GSD) reporting outcomes of the proposed legislation and GSD is required to analyze those reports and use the data to report to the governor and the legislature and to publish results on the sunshine portal.

State contracting agencies would be required to consult with the GSD to designate a portion of a contract as a resident business set-aside and to develop an annual plan on how to achieve the purpose of this proposed legislation. Any disagreement between the GSD and the contracting agency as to the designation of a resident business set-aside is to be sent to the State Auditor for final determination.

Businesses or contractors desiring to be certified as a resident business must submit an application and affidavit to the Taxation and Revenue Department (TRD) acknowledging that it meets the requirements proposed under this legislation. The TRD may assess a reasonable fee to issue the certificate which must not exceed the actual cost to the carry out its duties. The certification is valid for three years from the date of issuance. If the TRD denies the certification, the business has 15 days to file an objection with supporting documentation and may request a hearing. The TRD is required to review the documentation and issue a decision within 15 days of the objection being filed. Filing false information bars a business or contractor from receiving a certificate for five years and is subject to a \$50 thousand administrative penalty. The proposed legislation allows a business or contractor the right to judicial review the decision of TRD.

The GSD is required to consult with industry representative every six months and promulgate rules necessary to implement the provisions of this legislation.

The effective date of this bill is July 1, 2017.

FISCAL IMPLICATIONS

GSD considers the effects of this bill an unfunded mandate since it does not have an appropriation.

The Office of the State Auditor (OSA) opines that it might require additional resources to adequately evaluate and make a final determination regarding disputes, and auditor review issuance or the validity of resident contractor certificates.

The Department of Information Technology's (DoIT) 2016 response stated that additions or changes to the Sunshine Portal will require development which would cost about \$10,000.

The State Land Office (SLO) in 2016 supported efforts to ensure resident businesses and resident contractors to compete for contracts; however, this bill could potentially result in restricting competition for 33 percent of all its contracts which, in turn, could lead to increased prices for goods and services. These increased costs could potentially increase SLO's budgetary needs and therefore negatively impact the distributions to beneficiaries.

The Economic Development Department (EDD) reported in 2016 that it would not be able to absorb the additional workload and would require a part-time FTE.

SIGNIFICANT ISSUES

GSD reports in its response that this bill would restrict competition by requiring 33 percent of all state contracts to be awarded to a defined and limited class of vendors (resident businesses); this action could result in those state contracts being awarded with higher pricing than if competition were for any and all vendors that wish to compete. Whether the pricing would be offset by increased revenue to the state is unknown, and would require more analysis.

The Administrative Office of the Courts (AOC) reported that the consensus is that set-asides addressing a legitimate local interest such as business development, and that do not set aside too high of a percentage of public money exclusively for local businesses, are constitutional. There appears to be no binding legal authority for or prohibition against the 33 percent set-aside the bill would create. The constitutionality of the system would thus have to be definitively resolved by the courts.

The Bill does not require agencies to report residency information to DoIT so it is possible that system development contracts may be excluded from the requirements of this bill. If the presumption is to include system development contracts, coordination among DoIT, GSD and TRD will be necessary to determine the residency requirement.

ADMINISTRATIVE IMPLICATIONS

GSD questions how agencies are to report the 33 percent set-aside annually as required by the bill if agencies have no money in their budgets to comply.

According to SLO, the additional requirements of this bill could delay the contract issuance timeframe which could hinder its ability to generate revenue or protect trust assets in a timely manner.

The Energy, Minerals and Natural Resources Department (EMNRD) reported that it may have to designate staff to track compliance and reporting of this bill and may require development of a computer application to properly account its progress in awarding contracts with resident set-asides.

A cautionary note for public entities should the bill be enacted is to examine contracting entities identifying themselves as resident contractors to ensure that the entity's staff, geographical source of revenue, and location of work performed is mostly in the state.

The effective date of the bill may not allow sufficient time to promulgate rules for implementation, which can be up to six months. Drafting the rules can take at least 60 days. Those must then be posted for 30 days to allow for public comment. All comments must be given due consideration and if accepted included in a subsequent draft. GSD must then work closely with the Commission on Public Records to fulfill all publication requirements before the rules can be published in the New Mexico Register.

TECHNICAL ISSUES

According to GSD, many other states do not limit competition by having resident preferences. Such states have reciprocity statutes that apply as a penalty to vendors from another state that has such a preference. Such reciprocity laws could result in New Mexico vendors enjoying a preference in New Mexico state contracting, but being penalized in procurements in other states.

There may be a conflict of interest with the OSA being required to resolve disputes and then later having to audit the contract. The Yellow Book (Generally Accepted Governmental Auditing Standards) requires auditors to be independent in mind and appearance in all matters relating to the audit work.

GSD further points out that “equipment” and “resident business subcontractor” are not defined.

According to the Indian Affairs Department (IAD), Section 3 (C) of the bill broadens the definition of “Indian nation, tribe or pueblo” from that in the State-Tribal Collaboration Act (Section 11-18-1 NMSA1978) to include: (1) a political subdivision, agency or department of an Indian nation, tribe or pueblo; (2) an incorporated or unincorporated enterprise; or, (3) a corporation considered to be an Indian nation, tribe or pueblo by the federal government or the state.

According to GSD’s response, the set-aside contract is designated as a contract with respect to which *bids or proposals* are solicited, which suggests to them that other contracts (i.e. sole source, emergency) or agreements (i.e. Intergovernmental Agreements) are not affected by the bill. It suggests that more clarity in the definition section (Section 3) regarding *bids or proposals* (e.g. within the statewide procurement system overseen by GSD) may be useful.

The OSA suggests inserting the following language on page 5, line 5, after the period, “The non-prevailing party, as between the department and a contracting agency, shall pay all reasonable fees charged by the state auditor to resolve the dispute.”

OTHER SUBSTANTIVE ISSUES

HB25 does not set forth penalties for agencies who do not meet either the contracting or reporting requirements.

ALTERNATIVES

GSD suggests incorporating into procurement requirements on RFPs the inclusion of a separate rated evaluation factor for the amount of in-state subcontracting being proposed without enumerating a set percentage of the amount of such subcontracting 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. 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 the points being given within the category involved, and the greater the likelihood that through this type of non-restricted competitive process the state receives the “best value” for its procurement selection.

POSSIBLE QUESTIONS

GSD posed the following questions:

- (1) While the state auditor is given authority to audit or review the issuance or validity of a Resident Business or Resident Contractor certificate, what action may be taken by that office as follow up to such audit or review? Is such action appealable?
- (2) What effect does limiting competition have on price and/or quality of items being procured under such set-asides? What impact does such pricing and quality have on the budgets of the agencies involved?
- (3) State Purchasing is required to perform procurements for Local Public Bodies (LPB) when requested (to reduce prices by having a larger amount of spend being offered thus having greater competition), and those agreements become statewide price agreements accessed by state agencies. How are those procurements to be treated under this bill? Will a state agency be required to forsake an in place procurement to do a set-aside, resulting potentially in a higher price being paid for the procurement? Conversely, if a state agency does a procurement for a statewide application accessed by a LPB, and pays a higher price as a result of such limited competition because it is done as a set-aside, how does that price affect the budgets of those LPBs that access that agreement?
- (4) How does this legislation interact with the current preference laws administered by TRD?
- (5) Is this Act to be a new section or sections of the Procurement Code? How are the two Acts to be read together?
- (6) How do emergency and sole-source procurements figure into agency annual plans?

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