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FISCAL IMPACT REPORT

SPONSOR Rue **ORIGINAL DATE** 01/22/18
LAST UPDATED 02/04/18 **HB** _____

SHORT TITLE Create Governor’s Contingency Fund **SB** 52/aSFC

ANALYST Sánchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY18	FY19		
	See Fiscal Implications	Recurring	General Fund/Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received

Office of the State Auditor (OSA)

SUMMARY

Synopsis of SFC Amendment

Senate Finance Committee Amendment to Senate Bill 52 adds language requiring any unexpended or unencumbered balances remaining in the “Governor’s Contingency Fund “at the end of fiscal year shall revert to the general fund. The bill also adds a new sections clarifying that the initial audit will be for expenditures on or after January 2019.

The effective date of the bill is January 1, 2019.

Synopsis of Original Bill

Senate Bill 52 creates a new fund in the state treasury to be administered by the governor’s office to pay for expenses directly related to the obligations of the governor’s office. The bill makes the fund subject to the provisions of the State Audit Act (Section 12-6-1 through 12-6-14 NMSA 1978) and the Procurement Code (Section 13-1-28 through 13-1-199 NMSA 1978).

The bill eliminates subsection C of Section 10-8-5, NMSA 1978 related to contingent and other expenses, specifically “*Money expended by the governor from the appropriations made for his office and contingent and other expenses are not subject to any of the foregoing provisions of this section and are not subject to audit; provided that the governor shall only use contingent and other expenses for purposes connected with obligations of the office. An expenditure report on the use of the governor's contingent and other expenses shall be submitted annually to the department of finance and administration*”.

FISCAL IMPLICATIONS

This bill creates a new fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

The FY19 LFC recommendation for the Governor’s Office includes the decrease to the governor’s expense account as requested by the governor’s office, the expense is shown in the other category.

SIGNIFICANT ISSUES

Allowing the governor’s office to keep encumbered funds, as does the SFC amendment, the governor’s office can encumber all available funds before the end of the fiscal year to get around reverting unused funds to the general fund. If the intent is to have unused amount revert to the general fund and not keep the money year over year, then the governor’s office cannot be allowed to keep encumbered funds.

The misreading, by some, of subsection C of Section 10-8-5 NMSA 1978 related to the “contingent and other expenses” has led to a belief that there is a fund at the governor’s office when in fact it is simply an expense in the budget.

Going as far back as Laws 1923 Chapter 48 Section 6, if not farther, the language in question, or very similar language, has existed, except for a brief period in the 1950s. The particular law, now part of the Per Diem and Mileage Act; however, cannot be looked at without also considering the contents of the appropriation’s law, now the General Appropriation Act.

Research from 1923 through at least 1986 shows that the law making appropriations and authorizing expenditures (General Appropriation Act) had an appropriation item entitled either a “contingent expense” or “contingent expenses”, making the Per Diem and Mileage Act and the General Appropriation Act (GAA) appropriation to the Governor’s Office aligned. However, through the years the appropriations to the Governor’s Office went through several changes but the associated language in the Per Diem and Mileage Act did not change. For example, in 1986, the appropriations to the governor were split into two categories: Governor’s Office and Special Activities. The Special Activities category included “*contingent expenses*.” Moving forward to 1996, the General Appropriation Act had 11 categories none of which were a “*contingent expense*”. At this point the Per Diem and Mileage Act and the General Appropriation Act were no longer in sync. The GAA was aligned with current accounting practice but the antiquated language in the Per Diem and Mileage Act has not kept up with either the GAA or accounting practice.

The act of making appropriations to agencies of a nascent state contain provisions for a contingent expense because it sought to address unforeseen expenses. Historically, a contingent expense was used in times of war or when a state was newly created. The language to describe a contingent expense was an *“unforeseen expenditure (that) often has to be incurred urgently, and it would sometimes be very inconvenient to postpone such expenditure.”*

After 100 years of statehood, the state has the experience to understand its needs and appropriate and budget accordingly and not have to use an antiquated idea of a contingent expense for discretionary purposes.

A review of an expenditure report for the governor’s “contingent expense” clearly shows that the use of the appropriations for that purpose easily fit into one of the sub-categories of the “other expense” category in the office’s operating budget.

ADMINISTRATIVE IMPLICATIONS

The Office of the State Auditor (OSA), in its response to the 2017 Senate Bill 27 (identical to SB52), cites the FY15 audit for the Office of the Governor (Office), which included a finding regarding the Office’s failure to revert the unexpended balance of the contingency fund (sic) at the end of the fiscal year. The Office of the Governor reverted funds for FY16 but stated that it was not required to do so. The legislation does not directly address the reversion issue.

Each year’s GAA, section 3 subsection D, provides for the reversion of unexpended balances in agency accounts remaining at the end of the fiscal year unless “otherwise indicated by the General Appropriation Act...or otherwise provided by law.” General fund appropriations to the Governor’s Office are not excluded from reversion.

The OSA in its 2017 response, opined that the public will remain uninformed regarding the detailed nature of contingency fund expenditures and whether they are being handled in accordance with relevant laws and regulations. Without adequate review and proper accounting, it cannot be determined whether the spending is in compliance with relevant statutes and regulations. Ultimately these tax dollars are allocated (sic) by the Legislature for a public purpose and can only be spent in accordance with applicable laws and regulations. Without standard testing through the audit process, it is not possible to verify that this compliance is occurring.

In the 2017 State of the State address, the governor stated that New Mexicans want to be engaged. They want to know what is going on here. Through transparency, better decisions are made. This bill may address both the governor’s vision of transparency and OSA’s concerns.

TECHNICAL ISSUES

This bill creates a fund which is considered an appropriation. The title needs to be amended by adding “MAKING AN APPROPRIATION” at the end of line 14, page 1.

OTHER SUBSTANTIVE ISSUES

The OSA in its 2017 response to SB27 stated that the legislation includes important clarifying language stating that “The fund is subject to the provisions of the Audit Act and the Procurement

Code.” However, one could read this wording to imply that the exclusive listing of these laws means that other laws, such as IPRA and public records retention requirements, are not included.

ALTERNATIVES

The OSA in its 2017 response to SB27 suggests amending this language to read as follows: “The fund is subject to the provisions of the Audit Act, Procurement Code, Inspection of Public Records Act and other applicable laws and regulations.”

An alternative is to eliminate subsection C of section 10-8-5, NMSA 1978 and require the Governor’s Office to comply with all laws similar to other executive, legislative and judicial branch agencies. The Governor’s Office can quickly procure goods and services using the Procurement Card (P-Card) it is assigned so long as the goods and services are included in General Services Department approved price agreements or are for eligible purchases under a declared emergency.

ABS/jle/al