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FISCAL IMPACT REPORT

SPONSOR Rue ORIGINAL DATE 2/13/19
 LAST UPDATED 2/19/19 HB _____

SHORT TITLE Public Contracts Ethics Act SB 372/aSPAC

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate/ See Fiscal Implications	Indeterminate/ See Fiscal Implications		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Information Technology (DOIT)
 New Mexico Attorney General (NMAG)

Responses Not Received From

General Services Department (GSD)

SUMMARY

Synopsis of SPAC Amendments

The Senate Public Affairs Committee amendments to Senate Bill 372 add definitions of “financial interest” and “substantial financial interest” for purposes of the PCE Act, remove the bill’s provisions creating a public contracts ethics advisory opinion committee, and make corresponding changes to the title of the bill.

Synopsis of Original Bill

Senate Bill 372 enacts a new Public Contracts Ethics Act (“PCE Act”). The bill consolidates into the Act existing provisions of the Governmental Conduct Act and Procurement Code addressing conflicts of interest arising from the public procurement process. Those provisions:

- prohibit public officers and employees from using confidential information for personal gain;
- prohibit a state agency or local public body from entering into a contract with an employee, the employee’s family, or a business in which the employee or employee’s family has a substantial

interest, unless there is public notice of the employee’s interest and the contract is awarded in a competitive process. The bill provides that the obligation to give public notice is satisfied by posting the disclosure on the web page of the state purchasing agent (existing law is silent regarding what constitutes sufficient public notice);

- prohibit state agencies and local public bodies from entering into contracts with a person or business that is assisted by a former public employee who, while in public employment, took official action regarding the contract, as described in the bill. The prohibition no longer applies two years after the former public employee leaves public employment (existing law has no time limit on the applicability of the prohibition);

- prohibit a state agency from entering into contracts with a legislator, legislator’s family or a business in which the legislator or family has a substantial interest, unless the interest is disclosed and the contract is awarded in accordance with the Procurement Code and PCE Act;

- prohibit, with certain exceptions, legislators from appearing for or assisting another person before a state agency, unless without compensation or for the benefit of a constituent;

- prohibit a business from knowingly making, and a state agency or local public body from receiving, a contribution of anything of value if the business contracts with the state agency or local public body to provide financial services involving the investment of public money or issuance of bonds for public projects;

- require prospective contractors to disclose campaign contributions to public officers and prohibit campaign contributions while a procurement is pending;

- prohibit public employees from participating directly or indirectly in a procurement when the employees have a financial interest in the business seeking or obtaining a contract;

- prohibit a person or business to be retained under an agreement or understanding that the compensation is contingent upon the award of the contract;

- prohibit a public employee who is participating in the procurement process to be employed by a person or business contracting with the governmental body that employs the public employee; and

- permit a state agency or local public body to grant a waiver from the PEC Act’s prohibitions against unlawful employee participation and contemporaneous employment under specified conditions.

SB 372 creates the “public contracts ethics advisory opinion committee” within the office of the attorney general. The committee consists of three members appointed by the attorney general and two members appointed by the governor. The committee may issue advisory opinions to public officers and employees in accordance with the PCE Act. NMAG is required to advise and educate persons required to perform duties under the Act.

The bill provides that complaints concerning an alleged violation of the PCE Act shall be filed with the involved state agency or local public body and forwarded to the office of the attorney general or the state ethics commission for review, investigation and appropriate action. A person who violates the Act may be subject to civil penalties. A knowing and willful violation of the Act is punishable as a fourth degree felony.

The effective date of SB 372 is July 1, 2019, except Section 15. Section 15 of the bill, which provides for review and investigation of complaints alleging violations of the PCE Act by the state ethics commission, is effective on the effective date of enabling legislation enacted to implement the provisions of Article V, Section 17 of the state constitution establishing the state ethics commission.

FISCAL IMPLICATIONS

SB 372 establishes the public contracts ethics advisory opinion committee within NMAG. The bill does not include an appropriation for the committee, or otherwise address funding for the committee's operations.

NMAG notes that the bill requires NMAG to advise and seek to educate all persons required to perform duties under the PCE Act, including providing advice at least annually the Act's ethical principles. To fulfill this responsibility, in addition to NMAG's responsibilities under the bill to review and investigate complaints and enforce the Act, NMAG, anticipates that it would need to employ at least one lawyer and one legal assistant. The approximate cost would be:

- AG III - \$110,000 (salary of \$80,000, plus estimate of 36 percent employer costs)
- Experienced paralegal - \$82,000 (salary of \$60,000, plus estimate of 36 percent employer costs)

SIGNIFICANT ISSUES

SB 372 provides no details regarding the status of the public contracts ethics advisory opinion committee members, such as whether the members are employees of NMAG, serve without compensation, or are allowed to claim per diem and mileage.

Under SB 372, the sole function of the committee is to issue advisory opinions regarding the PCE Act to public officers and employees. As NMAG notes, SB 372 provides that complaints alleging violations of the PCE Act are handled by NMAG and the state ethics commission. Although authorized by the state constitution, a state ethics commission has yet to be established. Until the commission is established, NMAG will receive all complaints forwarded by state agencies and local public bodies. After the commission is created, state agencies and local public bodies will be able to file complaints with either NMAG or the state ethics commission. As drafted, the bill leaves the decision of where to file a complaint up to each agency or local public body. Without further guidance, this would likely result in an uneven distribution of complaints between NMAG and the commission.

An agency's decision about where to forward a complaint might be influenced by the different requirements for handling complaints the bill imposes on NMAG and the ethics commission. Section 15 of the bill provides that the commission may issue an advisory opinion regarding a complaint *or* refer it to NMAG for review and investigation. The bill does not give NMAG the option of issuing an advisory opinion, so all complaints initially forwarded to NMAG will be reviewed and investigated by NMAG for possible civil or criminal enforcement action.

NMAG and DOIT note that SB 372 does not provide confidentiality for complaints alleging violations of the PCE Act. Without express protection from disclosure, the complaints may be subject to public inspection under the Inspection of Public Records Act. DOIT states that, without confidentiality, some employees will be deterred from filing complaints.

Sections 3 and 6 of the bill are provisions that are currently part of the Governmental Conduct Act, *See* Sections 10-16-6 and 10-16-8 NMSA 1978. The current provisions apply to situations and transactions in addition to those related to public contracts and procurement. Moving the provisions to the PCE Act might have the unintended effect of restricting their application to procurement transactions, contrary to their original purpose.

TECHNICAL ISSUES

Sections 5 and 7 include restrictions on contracts with public employees and legislators or businesses in which they have a “substantial interest.” The bill does not define “substantial interest.” To avoid confusion regarding the meaning of the term, it would be advisable to include a definition, such as the definition of “substantial interest” in the Governmental Conduct Act. *See* Section 10-16-2(L).

Similarly, Section 9 precludes a public employee from participating in a procurement if the employee knows that the employee or employee’s family has a “financial interest” in the business seeking a contract. The bill does not define “financial interest.” To avoid confusion regarding the meaning of the term, it would be advisable to include a definition, such as the definition of “financial interest” in the Governmental Conduct Act. *See* Section 10-16-2(F).

The first sentence of Section 5(C) provides that the restrictions in Subsection (B) on contracts with employees do not apply to a contract of official employment with a local public body. The second sentence of Subsection (C) provides that a person negotiating or executing a contract on behalf of a public body “shall use due diligence to ensure compliance with the provisions of this section.” The second sentence would make more sense if it were moved to the end of Subsection (B) and the word “section” changed to “subsection.”

OTHER SUBSTANTIVE ISSUES

Section 5 of SB 372 prohibits state agencies and local public bodies from entering into contracts with an employee or the employee’s business unless the employee’s interest is disclosed through public notice. The bill provides that the public notice requirement is met by posting the required disclosure on the web page of the state purchasing agent. The bill does not define state purchasing agent, but the term is defined in the Procurement Code as “the director of the purchasing division of the general services department.” Section 13-1-92 NMSA 1978.

Although the bill’s effort to provide guidance regarding sufficient public notice is beneficial, having the disclosure posted on the state purchasing agent’s website may not be sufficient to provide notice to the general public. This would be particularly true for local public bodies since their procurement transactions are not subject to administration or regulation by the general services department. It might be better to allow each state agency or local public body to provide the required public notice in connection with the agency’s or local public body’s contracts with employees.