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## FISCAL IMPACT REPORT

**SPONSOR**     Martinez    
**ORIGINAL DATE**     2/13/2007      
**LAST UPDATED**     2/24/2007    
**HB** \_\_\_\_\_  
**SHORT TITLE**     Protection for Small Businesses    
**SB**     698/a SFC      
**ANALYST**     Schuss    

### REVENUE (dollars in thousands)

| Estimated Revenue |       |       | Recurring<br>or Non-Rec | Fund<br>Affected |
|-------------------|-------|-------|-------------------------|------------------|
| FY07              | FY08  | FY09  |                         |                  |
|                   | \$0.1 | \$0.1 | Recurring               | General Fund     |
|                   |       |       |                         |                  |

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

|              | FY07 | FY08  | FY09  | 3 Year<br>Total Cost | Recurring<br>or Non-Rec | Fund<br>Affected |
|--------------|------|-------|-------|----------------------|-------------------------|------------------|
| <b>Total</b> |      | \$0.1 | \$0.1 | \$0.1                | Recurring               | General<br>Fund  |

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Finance and Administration (DFA)  
 New Mexico Department of Transportation (NMDOT)  
 Energy, Mineral and Natural Resources Department (EMNRD)  
 Economic Development Department (EDD)  
 Attorney General's Office (AGO)

### SUMMARY

#### Synopsis of SFC Amendment

The amendment proposed by the Senate Finance Committee reinstates all language pertaining to New Mexico resident businesses or a New York State business enterprise and removes Section 2

in its entirety which amended Section 13-1-21.2 NMSA 1978 – Equal Procurement Access for New York Businesses.

The amendment also enacts a new section of the Procurement Code to provide for separate pricing of certain components in certain circumstances. The new section reads:

*SPECIFICATION OF CERTAIN COMPONENTS--SEPARATE PRICING REQUIRED.--  
Prior to submitting a bid or proposal for a state public works project or a local public works project, if the state purchasing agent, the central purchasing office or a responsible bidder or responsible offeror determines that there is only one source for a specific service, construction or item of tangible personal property that is required in the specifications, the state purchasing agent, central purchasing office, responsible bidder or responsible offeror may require any bid or offer submitted by a subcontractor or supplier to separately price the specific service, construction or item of tangible personal property.*

In a recently received analysis from AGO on the original bill, the following issues have been listed:

This bill appears intended to address the perception of disparity in the award of certain government contracts considering business size and ownership by women, members of minorities, and veterans. However, the bill must be considered in light of the United States Supreme Court holding in *City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989). In that case, The City of Richmond adopted a plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises". Although the plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. After the plaintiff construction company was denied a waiver and lost its contract, it brought suit under 42 U.S.C. 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Court struck down the plan, holding "*none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group.*

Therefore, any preferences must be narrowly tailored to remedy identified discrimination, which must also be supported by evidence that the groups given the preferences have been systematically excluded from government contracting.

Furthermore, Article II Section 18 of the New Mexico Constitution provides in part "*Equality of rights under law shall not be denied on account of the sex of any person.*" This bill would grant preferential treatment to prospective contractors based upon the gender of their owners, and might therefore violate that provision.

### Synopsis of Original Bill

Senate Bill 698 proposes changes in the Procurement Code (NMSA Section 13-1-21 et. seq.) in order to afford more opportunities for resident, small, and disadvantaged small business and resident manufacturers to get contracts with state and local government entities. The existing 5%

price preference for resident businesses and manufacturers is expanded in two ways: first, the bill creates a 10% price preference for resident small businesses and second, a 15% price preference for resident disadvantaged small businesses.

A disadvantage small business is one majority-owned by a woman, member of a recognized minority group (including African American, Hispanic, American Indian or Alaska native).

The bill also cleans up language regarding New York businesses and manufacturers, eliminating redundancies and simply placing New York businesses and manufacturers on an equal plain with New Mexico resident business and manufacturers.

### **FISCAL IMPLICATIONS**

According to DFA, SB 698 is very likely to have major fiscal implications for all agencies. In bid situations, agencies may be awarding contracts to bidders whose bids are anywhere from 1%-15% higher than the low bid received. This clearly increases the cost of doing business for agencies across the board. (“Bid situations”, by regulation of the State Purchasing Department of the General Services Division, occur when the expected price for tangible personal property or non-professional services required will exceed \$20,000. Therefore, to begin with, these are higher priced procurements by definition.)

The fiscal effect in situations requiring proposals (generally, a Request for Proposals is used where the expected price will exceed \$30,000 for professional services) is somewhat muted in that, in most cases, price is only one weighted factor in the RFP evaluation process. Where price is the only or most heavily weighted factor in the evaluation, obviously this legislation would have a greater impact since, again, agencies could be spending between 1%-15% more than the lowest offered price.

SB 698 could generate some positive revenue for the general fund if an increase in tax revenue is associated with an additional cost.

### **SIGNIFICANT ISSUES**

DFA has listed the following issues in their analysis:

SB-698 protections involve discounting offered prices in bids and proposals for qualifying small business entities. The discounts vary in degree from 5% to 15% and would be applied in comparison to a low bid by an offeror not included among the bill's protected classes. Previously, construction and construction-related services and materials were eligible for the 5% resident preference. However, in this bill, construction and construction-related services and materials are explicitly excluded from all the discounts offered pursuant to this legislation.

The cost of doing business for state agencies would likely increase since in many higher dollar cases where bids and proposals are employed to choose goods or services, agencies will be required to accept bids or proposals which are anywhere from 1%-15% higher than the lowest price submitted by offerors in response to the Invitation to Bid or Request for Proposals.

A small business is defined as one with fewer than 20 employees. Assuming that typical

billings per employee are \$200,000 to \$250,000, then a small business could compete for procurements worth up to \$15 million, assuming that the contract would extend over three years.

There is very little procurement in the state that exceeds this ceiling, so all procurements for all agencies would potentially be affected by this proposal.

On the other hand, this legislation would benefit local small businesses (defined in the legislation as those New Mexico businesses with less than 20 employees) and disadvantaged small businesses (defined in the legislation as those resident businesses with a minimum of 51% ownership by a woman, veteran or other minority person) by allowing them a better chance to compete with bigger business offerors for State business. Such local businesses could bid prices from 1%-15% higher than non-resident offerors and still be awarded the contracts. By assisting local businesses in this manner, the State is presumably aided in terms of economic development through the employment of local workers and the payment of local taxes. However, every dollar that flows to a small business or disadvantaged small business is a dollar not flowing to a medium-sized business. However, a few more local small businesses or small disadvantaged businesses would receive contracts from the State and fewer State dollars would flow to out-of-state businesses.

## **TECHNICAL ISSUES**

According to NMDOT, this bill addresses bids and proposals within the same paragraph (Section 12-1-21 Q). Also, Section 13-1-21, Application of Preference, Section A(3) refers to “proposal” however, the cite referenced, Section 13-1-102 NMSA 1978, does not address proposals, only bids. Section 13-1-21 M clarifies the statute by excluding construction, dealt with elsewhere in Chapter 13. Section 13-1-21 P will require NMDOT to change its evaluation process to include resident business points.

## **OTHER SUBSTANTIVE ISSUES**

DFA reports that the definition of a resident business still includes businesses resident in New York and New York small or disadvantaged businesses would qualify for the same preferences as a small or disadvantaged New Mexico business.

## **ALTERNATIVES**

DFA suggests the following alternatives:

- removing the New York State nondiscrimination features of this legislation. These features are no longer needed.
- removing the New Mexico resident preference, since it might be held to be impermissible interference with Interstate commerce.
- decreasing the preference amounts. Perhaps a 3% preference for small businesses and a 6% preference for disadvantaged small businesses might be more appropriate than the 5%, 10%, 15% structure proposed in this bill.