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FISCAL IMPACT REPORT

ORIGINAL DATE 02/22/13
 SPONSOR Cervantes LAST UPDATED 03/15/13 HB _____
 SHORT TITLE Procurement Debaring & Suspension SB 448/aSJC/aHJC
 ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Municipal League (NMML)
 General Services Department (GSD)
 Department of Transportation (DOT)
 Attorney General’s Office (AGO)
 New Mexico Corrections Department (NMCD)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee Amendment clarifies that the causes for debarment or suspension must occur within 3 years of the *date* as opposed to *time* of final action on a procurement; references criminal convictions and civil judgments related to obtaining unlawfully a contract or related to honesty, integrity or business ethics separately in the bill; and eliminates time references that may be contrary to the three year time limit.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment clarifies that the causes for debarment or suspension includes a civil violation related to obtaining *unlawfully* or *unlawful* performance of a public or private contract or subcontract.

Synopsis of Original Bill

Senate Bill 448 amends several sections and enacts a new section of the Procurement Code (Code) regarding the suspension and debarment process.

More specifically,

Section 1 adds a definition of “person” to include various legal and commercial entities.

Section 2 amends Section 13-1-177 and adds language that the state purchasing agent (SPA) or central purchasing office (CPO), after consultation with the using agency, may suspend a person from consideration for a contract up to 3 months if after reasonable investigation, it finds that a person has engaged in certain conduct. The suspension remains in effect until the criminal charge is resolved, the person is debarred or the reason for suspension no longer exists.

Section 3 amends Section 13-1-178 and provides additional reasons for debarment including: criminal convictions or civil judgments relating to public or private contracting or subcontracting; convictions related to fraud, making false statements or violation of federal or state tax laws; criminal conviction or civil judgments for any other offense related to honesty, integrity or business ethics; and civil judgments pursuant to the Unfair Practices Act.

Section 4 amends Section 13-1-180 to require notices of determination to be mailed by first class mail or transmitted electronically within three business days.

Section 5 enacts a new section and provides that even if a person has been suspended or debarred or if suspension or debarment is proposed, the SPA or CPO may continue contracts or subcontracts in existence at the time unless its governance directs otherwise. But if a person is suspended or debarred or suspension is proposed the SPA or CPO shall not, unless a compelling reason is shown, extend the duration of any existing contract or enter into a subcontract.

FISCAL IMPLICATIONS

Section 13-1-196 provides that a person that knowingly violates the Code is subject to a civil penalty of up to \$1,000 for each violation. The attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of the Code. Any penalty collected is credited to the general fund of the political subdivision in which the violation occurred. The Administrative Office of the District Attorneys (AODA) noted that most of its offices do not have a civil division, so it will be up to the Attorney General’s Office (AGO) to enforce the new provisions in the bill.

SIGNIFICANT ISSUES

The General Services Department (GSD) reported that its State Purchasing Division is in support of the bill because it adds new abilities for the SPA or CPO to quickly suspend a vendor from consideration of award of contracts, including for civil violations as cause for debarment or suspension. The bill also provides options for continuing contracts and subcontracts with debarred or suspended parties under certain circumstances. Finally, awarded vendors are prohibited to subcontract with vendors that have been debarred absent compelling reasons.

PERFORMANCE IMPLICATIONS

The bill appears to allow suspension without prior notice or a hearing and expands the conduct giving rise to a suspension to include being charged with a criminal offense.

The bill expands the grounds for debarment to include civil judgments for offenses related to *honesty, integrity* or *business ethics*. The bill defines bidders, offerors and contractors to include principals, officers, directors, owners, partners and managers of the contracting entity.

The Department of Transportation (DOT) noted the changes could suspend a contractor where the entity's former officers were convicted of offenses giving rise to debarment, but where the entity is only subject to a deferred prosecution agreement, e.g. not convicted of the underlying charges.

The AGO noted the bill does not require a standard of proof that must be met before a suspension occurs.

ADMINISTRATIVE IMPLICATIONS

State entities will be required to maintain documentation regarding decisions to allow a debarred or suspended person or a person proposed for debarment to extend the contract's terms.

OTHER SUBSTANTIVE ISSUES

The bill defines the class of individuals subject to scrutiny for debarable activities, to be consistent the Federal Acquisition Regulations (FAR). The FAR are regulations issued by federal agencies to govern the process through which the government purchases goods and services.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to follow Code provisions relating to suspension and debarment.

AHO/blm:svb