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SENATE BILL 18

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

Michael Padilla and Sarah Maestas Barnes

AN ACT

RELATING TO PROCUREMENT; ENACTING THE RESIDENT BUSINESS SET-
ASIDE ACT; REQUIRING THAT THIRTY-THREE PERCENT OF A CONTRACTING
AGENCY'S CONTRACTS BE AWARDED TO RESIDENT BUSINESSES; PROVIDING
FOR CERTIFICATION OF RESIDENT BUSINESSES AND RESIDENT
CONTRACTORS; REQUIRING REPORTING; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Resident Business Set-Aside Act".

SECTION 2. [NEW MATERIAL] PURPOSE.--The purpose of the
Resident Business Set-Aside Act is to encourage the health of
the state's economy, which is directly related to the
competitive strength and well-being of the state's businesses,
by providing an opportunity for businesses to freely enter into
business and to grow and expand and by ensuring that a fair

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1 proportion of the state's total contracts for construction,
2 property and services is placed with resident businesses.

3 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
4 Resident Business Set-Aside Act:

5 A. "contracting agency" means a department,
6 commission, council, board, committee, institution, legislative
7 body, agency, government corporation or official of the
8 executive, legislative or judicial branch of the government of
9 the state;

10 B. "department" means the general services
11 department;

12 C. "Indian nation, tribe or pueblo" means a
13 federally recognized Indian nation, tribe or pueblo located
14 wholly or partially in New Mexico, including:

15 (1) a political subdivision, agency or
16 department of an Indian nation, tribe or pueblo;

17 (2) an incorporated or unincorporated
18 enterprise of an Indian nation, tribe or pueblo or of a
19 political subdivision of an Indian nation, tribe or pueblo; or

20 (3) a corporation considered to be an Indian
21 nation, tribe or pueblo by the federal government or the state;

22 D. "legacy contractor" means a construction
23 business that has been licensed in this state for ten
24 consecutive years;

25 E. "new business" means a business that has been in

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1 existence for less than three years;

2 F. "new contractor" means a business that has been
3 in existence for less than five years;

4 G. "relocated business" means a business that moved
5 eighty percent of its total domestic personnel from another
6 state to New Mexico in the past five years;

7 H. "resident business" means a business or
8 contractor that has a valid resident business or resident
9 contractor certificate issued by the taxation and revenue
10 department pursuant to Section 5 of the Resident Business Set-
11 Aside Act;

12 I. "set-aside contract" means:

13 (1) a contract for items of tangible personal
14 property, equipment, construction, services or professional
15 services that is designated as a contract with respect to which
16 bids or proposals are solicited only from a resident business;

17 or

18 (2) a portion of a contract when that portion
19 has been designated as a portion with respect to which bids or
20 proposals are solicited and accepted only from a resident
21 business; and

22 J. "tangible personal property" means tangible
23 property other than real property that has a physical
24 existence, including supplies, equipment, materials and printed
25 materials.

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1 SECTION 4. [NEW MATERIAL] CONTRACTING AGENCIES--

2 REQUIREMENTS--DESIGNATION OF SET-ASIDE CONTRACTS.--

3 A. Every contracting agency shall award at least
4 thirty-three percent of the total number of its contracts,
5 regardless of whether those contracts were awarded pursuant to
6 a competitive process, to resident businesses. A contract
7 pursuant to the State Use Act that is awarded to a resident
8 business shall be included in the contracting agency's
9 calculation pursuant to this subsection.

10 B. Every contracting agency shall, in consultation
11 with the department, develop an annual plan for how it will
12 achieve the purpose and requirements of the Resident Business
13 Set-Aside Act.

14 C. Contracting agencies, in consultation with the
15 department, may designate a contract, or a portion thereof, as
16 a resident business set-aside contract pursuant to the Resident
17 Business Set-Aside Act if there is a reasonable expectation
18 that bids or proposals may be obtained from at least three
19 qualified resident businesses that are capable of furnishing
20 the desired items of tangible personal property, equipment,
21 construction, services or professional services at a fair and
22 reasonable price. The designation of the contract shall be
23 made before the contracting agency solicits bids or proposals.

24 D. If the department and a contracting agency
25 disagree as to the designation of a resident business set-aside

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1 contract or the requirement that a resident business
2 subcontractor perform work on a portion of a contract, the
3 dispute shall be submitted to the state auditor for a final
4 determination within twenty-one days of receipt of written
5 notice of the disagreement.

6 E. If the implementation of the purpose or
7 provisions of the Resident Business Set-Aside Act would
8 jeopardize the state's participation in a program from which
9 the state receives federal funds or other benefits, a
10 contracting agency may, in consultation with the department,
11 withdraw the affected contracts from consideration or
12 calculation of a contracting agency's resident business
13 contract awards.

14 SECTION 5. [NEW MATERIAL] RESIDENT BUSINESS AND RESIDENT
15 CONTRACTOR--CERTIFICATION.--

16 A. To be certified as a resident business, a
17 business shall submit an application to the taxation and
18 revenue department. The application shall include an affidavit
19 from a certified public accountant, licensed attorney or
20 enrolled agent authorized to practice before the internal
21 revenue service setting forth that the business is licensed to
22 do business in this state and:

23 (1) that the business has paid property taxes
24 or rent on real property in the state and has paid at least one
25 other tax administered by the state in each of the three years

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1 immediately preceding the submission of the affidavit;

2 (2) if the business is a new business, that
3 the owner or majority of owners has paid property taxes or rent
4 on real property in the state and has paid at least one other
5 tax administered by the state in each of the three years
6 immediately preceding the submission of the affidavit and has
7 not applied for a resident business or resident contractor
8 certificate pursuant to this section during that time period;

9 (3) if the business is a relocated business,
10 that at least eighty percent of the total personnel of the
11 business in each of the years immediately preceding the
12 submission of the affidavit were residents of the state and
13 that, prior to the submission of the affidavit, the business
14 either leased real property for ten years or purchased real
15 property greater than one hundred thousand dollars (\$100,000)
16 in value in the state;

17 (4) if the business was previously certified
18 pursuant to this subsection and the business has reorganized
19 into one or more different legal entities, was purchased by
20 another legal entity but operates in the state as substantially
21 the same commercial enterprise or has merged with a different
22 legal entity but operates in the state as substantially the
23 same commercial enterprise and the business has obtained a new
24 tax identification number, that the business meets the
25 requirements provided in Paragraph (1) of this subsection; or

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1 (5) if the business is owned by an Indian
2 nation, tribe or pueblo, that the principal place of business
3 is in the state and that at least eighty percent of the total
4 personnel of the business in each of the years immediately
5 preceding the submission of the affidavit were residents of the
6 state.

7 B. To be certified as a resident contractor, a
8 contractor shall submit an application to the taxation and
9 revenue department. The application shall include an affidavit
10 from a certified public accountant, licensed attorney or
11 enrolled agent authorized to practice before the internal
12 revenue service setting forth that the contractor is currently
13 licensed as a contractor in this state and:

14 (1) that the contractor has:

15 (a) registered with the state at least
16 one vehicle; and

17 (b) in each of the five years
18 immediately preceding the submission of the affidavit: 1) paid
19 property taxes or rent on real property in the state and paid
20 at least one other tax administered by the state; and 2) paid
21 unemployment insurance on at least three full-time employees
22 who are residents of the state; provided that if a contractor
23 is a legacy contractor, the requirement of at least three
24 full-time employees who are residents of the state is waived;

25 (2) if the contractor is a new contractor,

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1 that the owner or majority of owners has paid property taxes or
2 rent on real property in the state and has paid at least one
3 other tax administered by the state in each of the five years
4 immediately preceding the submission of the affidavit and has
5 not applied for a resident business or resident contractor
6 certificate pursuant to this section during that time period;

7 (3) if the contractor is a relocated business,
8 that at least eighty percent of the total personnel of the
9 business in each of the years immediately preceding the
10 submission of the affidavit were residents of the state and
11 that, prior to the submission of the affidavit, the contractor
12 either leased real property for ten years or purchased real
13 property greater than one hundred thousand dollars (\$100,000)
14 in value in the state;

15 (4) if the contractor was previously certified
16 pursuant to this subsection and the contractor has reorganized
17 into one or more different legal entities, was purchased by
18 another legal entity but operates in the state as substantially
19 the same enterprise or has merged with a different legal entity
20 but operates in the state as substantially the same commercial
21 enterprise and the contractor has obtained a new tax
22 identification number, that the contractor meets the
23 requirements provided in Paragraph (1) of this subsection; or

24 (5) if the contractor is a business owned by
25 an Indian nation, tribe or pueblo, that the principal place of

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1 business is in the state and that at least eighty percent of
2 the total personnel of the business in each of the years
3 immediately preceding the submission of the affidavit were
4 residents of the state.

5 C. The taxation and revenue department shall
6 prescribe the form and content of an application for
7 certification as a resident business or resident contractor and
8 of the required affidavit.

9 D. The taxation and revenue department shall
10 examine applications and affidavits submitted pursuant to this
11 section and, if necessary, may seek additional information to
12 ensure that the business or contractor is eligible to receive a
13 certificate pursuant to the provisions of this section. If the
14 taxation and revenue department determines that an applicant is
15 eligible, it shall issue a certificate. If the taxation and
16 revenue department determines that the applicant is not
17 eligible, it shall issue notification within thirty days. If
18 no notification is provided by the taxation and revenue
19 department, the certificate is deemed approved. A certificate
20 is valid for three years from the date of its issuance;
21 provided that if there is a change of ownership of more than
22 fifty percent, a resident business or resident contractor shall
23 reapply for a certificate.

24 E. A business or contractor whose application for a
25 certificate is denied has fifteen days from the date of the

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1 taxation and revenue department's decision to file an objection
2 with the taxation and revenue department. The person filing
3 the objection shall submit evidence to support the objection
4 and may request a hearing. The taxation and revenue department
5 shall review the evidence and issue a decision within fifteen
6 days of the filing of the objection.

7 F. If, following a hearing and an opportunity to be
8 heard, the taxation and revenue department finds that a
9 business or contractor provided false information to the
10 taxation and revenue department in order to obtain a
11 certificate or that a business or contractor used a certificate
12 to obtain a resident business set-aside contract and the
13 resident business or contractor did not perform work pursuant
14 to the contract that was required to be performed by a resident
15 business or contractor, the business or contractor:

16 (1) is not eligible to receive a certificate
17 pursuant to this section for a period of five years from the
18 date on which the taxation and revenue department became aware
19 of the submission of the false information or the failure to
20 perform the contract as required; and

21 (2) is subject to an administrative penalty of
22 up to fifty thousand dollars (\$50,000) for each violation.

23 G. In a decision issued pursuant to Subsection D, E
24 or F of this section, the taxation and revenue department shall
25 state the reasons for the action taken and inform an aggrieved

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1 business or contractor of the right to judicial review of the
2 determination pursuant to the provisions of Section 39-3-1.1
3 NMSA 1978.

4 H. The taxation and revenue department may assess a
5 reasonable fee for the issuance of a certificate not to exceed
6 the actual cost of administering the taxation and revenue
7 department's duties pursuant to this section.

8 I. The state auditor may audit or review the
9 issuance or validity of certificates.

10 SECTION 6. [NEW MATERIAL] ANNUAL REPORT.--

11 A. Every contracting agency shall submit an annual
12 report to the department on or before the deadline established
13 by the department. An annual report shall include:

14 (1) the total number of contracts that the
15 contracting agency awarded to a resident business, and the
16 total dollar value of those contracts;

17 (2) the total number of contracts for which a
18 portion of the contract work was performed by a resident
19 business, and the total dollar value of the work performed
20 pursuant to those contracts;

21 (3) the total number of resident business set-
22 aside contracts designated and awarded, and the total dollar
23 value of those contracts;

24 (4) the percentage of the contracting agency's
25 total procurement that was awarded to a resident business; and

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1 (5) the efforts made by the contracting agency
2 to publicize and promote procurement pursuant to the Resident
3 Business Set-Aside Act.

4 B. The department shall receive and analyze reports
5 submitted pursuant to this section and, using the report data,
6 shall prepare and submit an annual report to the governor and
7 to the legislature and for publication on the sunshine portal
8 by November 1 of each year, beginning in 2018, to show whether
9 the purpose and the directives of the Resident Business Set-
10 Aside Act were met during the preceding fiscal year.

11 SECTION 7. [NEW MATERIAL] CONSULTATION WITH INDUSTRY.--
12 The department shall consult at least every six months with
13 representatives from industries affected by the Resident
14 Business Set-Aside Act to ensure effective implementation of
15 that act.

16 SECTION 8. [NEW MATERIAL] RULES.--The department shall
17 promulgate rules necessary to implement the provisions of the
18 Resident Business Set-Aside Act.

19 SECTION 9. EFFECTIVE DATE.--The effective date of the
20 provisions of this act is July 1, 2017.