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FISCAL IMPACT REPORT

ORIGINAL DATE 01/27/17

SPONSOR Maestas/Youngblood LAST UPDATED 03/13/17 HB 198/aHBIC/aSCORC

SHORT TITLE Historically Underutilized Business SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		>\$90.0	>\$90.0	>\$180.0	Recurring	General Fund/Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB25, SB18 and HB217

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Economic Development Department (EDD)
 State Land Office (SLO)
 Indian Affairs Department (IAD)
 New Mexico Corrections Department (NMCD)
 Energy, Mineral and Natural Resources Department (ENMRD)
 Human Services Department (HSD)
 New Mexico Environment Department (NMED)
 Department of Finance and Administration (DFA)
 Department of Transportation (DOT)
 Department of Health (DOH)
 General Services Department (GSD)

2015 Responses Received From

Office of the State Auditor (OSA)

SUMMARY

Synopsis of SCORC Amendment

Senate Corporations and Transportation Committee amendment to House Business and Industry Committee amendment to House Bill 198 removes Section 2 (purpose of the Historically

Underutilized Business Opportunity Act) and paragraph 3 of subsection 3 which required the historically underutilized buildings to be 51 percent woman or minority owned, new material proposed in the original bill, and then renumbers the succeeding sections accordingly.

Synopsis of HBIC Amendment

House Business and Industry Committee Amendment to House Bill 198 strikes the requirement that the General Services Department review and approve each state agency's agency-specific goals for the utilization of historically underutilized businesses and changes the requirement that state agencies have respondents submit a plan to subcontract with at least one historically underutilized business to having state agencies encourage respondents to include at least one historically underutilized business.

Synopsis of Bill

House Bill 198 proposes to create the "Historically Underutilized Business Opportunity Act" to promote resident businesses certified by the Taxation and Revenue Department (TRD), which are owned at least 51 percent by women or a person who is a member of one of the following minorities: African American, Latino or Hispanic, Asian, Pacific Islander, Native American or Alaska Native and are underutilized by state agencies. The business must have average revenue of \$5 million or an average of not more than 50 employees for the preceding three fiscal years.

The bill requires the General Services Department (GSD) to establish procedures for the identification of qualified applicants for certification, approval of facilitating nonprofit agencies, precertification screening, certification of applicants, appeal of certification denials. It also requires GSD to produce an online, searchable database of historically underutilized certified businesses; conduct training or means of informing these businesses of how to do business with the state; approve agency-level goals for using these businesses; and produce an annual report at the end of each fiscal year.

State agencies under this bill would have to establish goals for using historically underutilized businesses.

FISCAL IMPLICATIONS

GSD, the New Mexico Environment Department (NMED) and the Department of Finance and Administration (DFA) consider the requirements in this bill an unfunded mandate as it does not contain an appropriation.

GSD is unable to estimate the amount of additional staff needed for GSD involvement that may require establishment of a new Division.

GSD expresses concern about the amount of effort this bill will require to develop procedures, create and maintain a website and database, handle the certification (application review, screening, denials, revocation, appeals), review and approve agency goals, conduct training sessions and seminars, make rules, monitor annual reporting and compare all agencies without the benefit of additional funding.

The State Land Office (SLO) believes that this bill would substantially increase the administrative burdens of agency contracting, including the need for additional personnel to comply with the requirements for each contract, for establishing overall goals and reporting overall results. To the extent that using historically underutilized businesses would be more costly, the bill would have a negative effect on the net revenues of the state land office and its distributions to the trust land beneficiaries.

The Office of the State Auditor in its 2015 response to a similar bill stated it would need to hire an additional FTE to fulfill the requirements of this bill at a cost of about \$90 thousand.

SIGNIFICANT ISSUES

GSD reports that while the goal of this legislation to promote full and equal business opportunities for all businesses by encouraging the setting of goals for the use of historically underutilized businesses by state agencies in all public purchasing decisions is very good, there remain a number of concerns. It is impossible to measure the Act's impact on limiting competition and its potential resultant effect of increased expenses on bill paying agencies, or how many contracts may be diverted from veteran businesses.

It is further concerned that the bill may increase costs to the state, limit competition and reduce opportunities for all New Mexico businesses by creating subcategories that reduce competition by giving a defined class preferences. Additionally, because the bill is not supported by a study that shows a compelling government interest, the finding required in *Adarand Constructors, Inc v. Pena*, 515 US 200, 1995 may not be met.

The Indian Affairs Department (IAD) opines that introducing quotas for procurement may have unintended consequences, such as reducing the competitive nature of the procurement process, resulting in higher prices for state agencies. The present Procurement Code is focused on providing the "best value" in State acquisitions and is therefore slanted towards lowest price or most advantageous offer for procurements. If historically underutilized businesses do not meet either criteria, state agencies will have difficulty justifying granting an award to the business. Further, if the underutilized business is not a competitive bidder through the statutory procurement process, then the question of the selection method for contract or subcontract award is not addressed in the bill.

The Economic Development Department (EDD) states that the contracting process may be delayed due to the requirements in this bill.

DFA indicates that the bill is not clear on how a historically underutilized business will be selected if it is not a competitive bidder under the statutory procurement process.

ADMINISTRATIVE IMPLICATIONS

IAD states that it and other agencies will have to incorporate detailed information in their internal tracking processes, including compliance by contractors to incorporate historically underutilized businesses in subcontracts to generate the required reports.

The Department of Transportation (DOT) indicated that if the bill becomes law, it will work with GSD to incorporate the requirements into its solicitations.

CONFLICT, RELATIONSHIP

This bill may also conflict with the following sections of the Procurement Code:

- State Use Act, Sec. 13-1C-1 through 13-1C-7
- Sections 13-1-21 & 13-1-22 providing preferences to veteran businesses
- Section 13-1-29C Purposes of the Procurement Code
- Section 13-1-98Z Exemptions for State Use
- Section 13-1-99A Professional Service Procurements
- Section 13-1-118 Professional Service Contracts Contract Review
- Section 13-1-88 Definition of Small Business

Conflicts with *Adarand Constructors, Inc v. Pena*, 515 U.S. 200, 1995

Relates to House Bill 25 and Senate Bill 18, Resident Business Set-Aside Act and House Bill 217, Increase Cap for Veterans Contractor Bidding.

OTHER SUBSTANTIVE ISSUES

EDD states that while HB198 attempts to stimulate economic development and job creation, it is unknown whether this bill will actually impact the economy beyond the traditional recruitment, expansion and retention and start-up of businesses efforts it already conducts.

IAD points out that the bill does not contain any enforcement mechanism for GSD to use if a state agency does not set utilization goals or use historically underutilized businesses.

The New Mexico Corrections Department (NMCD) states that requiring responders/contractors to subcontract with underutilized businesses could result in higher costs. It usually contracts with larger companies (not based in New Mexico) with a proven track record, which may not qualify as historically underutilized businesses.

ALTERNATIVES

An alternative to this bill, according to GSD and DFA, is to have the GSD-State Purchasing Division include a separate rated factor into requests for proposal for underutilized businesses, which could show the fiscal impact on the state or local community of that procurement.

ABS/jle/al/jle