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## FISCAL IMPACT REPORT

**SPONSOR** Smith/ Ivey-Soto      **ORIGINAL DATE** 2/07/17  
**LAST UPDATED** 3/6/17      **HB** 278/aHSIVC

**SHORT TITLE** Notice and Review of Exempt Procurements      **SB** \_\_\_\_\_

**ANALYST** McIntyre

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

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>		Minimal	Minimal	Minimal	Recurring	Operating Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE (dollars in thousands)

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	Recurring	See Fiscal Impact

Parenthesis ( ) indicate revenue decreases

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Department of Finance and Administration (DFA)
- Department of Health (DOH)
- Public Education Department (PED)
- Human Services Department (HSD)
- Commission for the Blind (CFB)
- Education Retirement Board (ERB)
- State Investment Council (SIC)
- Public Employees Retirement Association (PERA)

### SUMMARY

#### Synopsis of HSIVC amendment to House Bill 278

The amendment removes the provision for the delayed repeal of all exemptions in the procurement code. The amendment also changes the requirement that the intent to enter into an exempt procurement be posted for thirty days prior to the award to a requirement that it be posted within thirty days before or after.

**Summary of agency responses to amendment:** Most agencies indicate that the amendment addressed concerns they may have had with the bill. Agencies responsible for financial investments, like SIC, still indicate that the provision requiring the posting of the cost of the procurement will negatively impact their ability to make profitable investments, as fund managers are adverse to their fees being published. The Commission for the Blind is concerned about publicly posting the identities of disabled clients. Agency recommendations to address these concerns include not requiring posting when in conflict with federal law, allowing redaction of sensitive personal information, and allowing the state procurement officer to waive the posting requirement for certain agencies.

### Synopsis of Bill

HB 278 requires LFC and GSD to review and provide recommendations to the legislature on the use of exemptions in the procurement code before December 31<sup>st</sup>, 2018 and repeals all exemptions in Section 13-1-98 NMSA 1978 on June 30<sup>th</sup>, 2019. It also requires that exempt procurements be published for 30 days prior to award. The effective date of this bill is July 1<sup>st</sup>, 2017.

### **FISCAL IMPLICATIONS**

A decrease in the use of procurement exemptions may result in significant cost savings by avoiding non-competitive procurement processes. Exempt procurements are not required to follow the provisions of the procurement code, and so many do not pursue a competitive process, according to a 2016 LFC program evaluation, *Obtaining Value in State Procurement and Issues with Non-Competitive Methods*. LFC program evaluations have pointed to research that competitive procurement is the most effective way to achieve the best value at the best price. The state spends an estimated \$10 billion on procurement, with approximately \$7 billion awarded through exemptions, and so a small fraction of change in obtaining the best price can make a significant difference in total savings. GSD states that “a decrease in the use of procurement exemptions may result in significant cost savings by avoiding non-competitive procurement processes.”

Agencies providing investment-related services, including ERB, PERA, and SIC, have stated that repeal of the procurement exemption for investments will have a significant impact on the performance of their investments and thus their contribution to state permanent and general funds, if their exemption is not renewed by the legislature after the LFC and GSD review. The following analysis from SIC is a representative sample of their concerns:

Subjecting SIC investment contracts to the Procurement Code would effectively preclude the SIC from many private markets through which the SIC has historically been able to obtain higher returns than from public markets. For example, the SIC currently has roughly \$1.6 billion invested in private equity funds that require financial commitments that exceed the Procurement Code’s 4 year limitations. Over the last ten years, these private equity funds have produced returns that exceed the returns obtained on public equity by roughly 3% annually. Accordingly, going forward, if the SIC could not invest in private equity funds the Permanent Funds would expect to earn roughly \$50 million less per year, which would cost the state’s General Fund roughly \$2.5 million per year.

There is no expected fiscal impact on LFC to review and provide recommendations for use of exemptions, but GSD states:

While the LFC has staff to assign to a study of the elimination/retention of exemptions, the GSD is not blessed with extra staff for such a purpose. Accordingly, funding for such staff would be necessary.

HSD states that the provisions of the bill “will not have a significant fiscal impact on HSD.” DOH anticipated a fiscal impact of \$69 thousand for posting exempt procurements on the sunshine portal, and an impact of approximately \$1 million if their exemptions are not renewed by the legislature after the LFC and GSD review.

### **SIGNIFICANT ISSUES**

The 2016 LFC program evaluation identified several examples of the use of exemptions with questionable justification or as a means of avoiding the competitive process. There are currently 37 exemptions in the procurement code and the LFC evaluation recommends reviewing their effectiveness and repealing those that are no longer necessary. DFA states that “Exemptions can potentially be overused and abused by entities within state government seeking a simple and expedient way to avoid actual procurements.” GSD states that “Non-competitive procurement is generally **NOT** a best practice for obtaining the most value in a contract.”

Historically, many exemptions were enacted to address process issues and agency needs in unique areas and some agencies have commented that the exemptions they use are necessary for the procurement of goods and services in a timely manner. Agencies have also expressed that requiring a 30 day posting before the award of an exempt procurement may impact services. For example, DOH states that “this may affect the health and safety of New Mexicans by delaying critical services being provided to clients in a timely manner.” PED states that this “could further delay the continuity of services to students, parents, and educators.” ERB states that they do “not have information such as the cost of the services or even the identity of the parties to the proposed procurement until NMERB’s survey, search, due diligence and engagement process is completed.” However, DFA states that “The requirement for posting, while it is not a cure for the potential overuse or misuse of exemptions, may deter unnecessary use of procurement code exemptions.”

### **PERFORMANCE IMPLICATIONS**

LFC program evaluations find that avoiding non-competitive procurement is a best practice for obtaining the most value from a contract. Therefore, it is likely that contractor performance will improve if exemptions are limited. However, agency performance may suffer if exemptions that meet a legitimate need are removed, and so a careful review of exemption use should be conducted to avoid repealing necessary exemptions.

### **ADMINISTRATIVE IMPLICATIONS**

Reviewing the use of exemptions is not expected to be administratively burdensome to the LFC, though the agency would be required to prioritize the review within staff assignments.

DOH expects an administrative impact on managing procurement if their exemptions are repealed. CFB states:

The exemptions in 13-1-98 include several exemptions that assist the state to comply with Federal law and to serve persons with disabilities... Repealing the exemption at 13-1-98 AA would impose a significant administrative hardship on the vocational rehabilitation program. Requiring that notice of exempted procurements be posted would also impose a significant administrative hardship.

## **TECHNICAL ISSUES**

GSD recommends:

As much of the services contained in Sections 13-1-98.1 and 13-1-98.2 is for medical related services, which are mostly by nature professional, that each of the new subsections being amended into this legislation include reference to “professional services” in addition to “tangible personal property and services.”

## **OTHER SUBSTANTIVE ISSUES**

CFB expresses concern about unintended consequences if certain exemptions are not renewed by the legislature after the LFC and GSD review, stating that:

Elimination of 13-1-98 Z would eliminate the State Use Act and the New Mexico Council for Purchasing from Persons with Disabilities. The State Use Act is a significant source of employment for persons with disabilities, including many members of the Jackson class.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Notice of procurements declared exempt by individual agencies will not be posted on the sunshine portal and not posted for 30 days prior to award. Existing procurement exemptions will remain in place.

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