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FISCAL IMPACT REPORT

SPONSOR HJC DATE TYPED 3/17/05 HB 1104/HJCS

SHORT TITLE State Railroad Operation Insurance SB _____

ANALYST Wilson

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$2,000.0	Recurring	General Fund or Road Fund

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bill 1104 provides if the State, a state agency or a political subdivision of the State covered by the Risk Management Division (RMD) of the General Services Department (GSD) enters into a contract for the construction, operation or maintenance of a public transportation system, including a railroad and related facilities requiring insurance, RMD must pay the cost of the insurance. The premiums shall not be a general obligation of the State, the state agency or the political subdivision of the State.

Significant Issues

In this bill insurance is a continuous obligation to procure an insurance policy, including an owner's, operator's or contractor's protective or liability insurance, project management protective liability insurance, builder's risk insurance, railroad protective insurance or other policy of insurance against the negligence of another party to the contract.

DOT indicated the following:

The state is in the process of negotiating with Burlington Northern & Santa Fe (BNSF) to allow the state to operate a commuter rail between Belen and Santa Fe. The commuter rail initiative was funded as part of the GRIP. BNSF requires certain insurance provisions which insures against the negligence of BNSF for accidents involving commuter rail operations. Under the contract between the state and BNSF, BNSF will perform dispatch operations for the state commuter rail and reserve the right to operate its freight lines on this segment of the rail line. BNSF will also carry its own insurance for its operations.

The state plans to contract its commuter rail operations to an operator. The operator will maintain and/or modify the rail lines for the state. The operator will be required to comply with the same insurance requirements with BNSF as part of its contract with the state. BNSF will still provide dispatch operations.

This bill will also allow Regional Transit Districts to operate commuter rail in the future, as well as other transportation systems, and the bill provides the mechanism to procure insurance peculiar to these type of operations which is available in the insurance industry. The cap required by federal law is \$200 million and the state will comply with this provision. AMTRAK carries similar type of coverage which insures against the negligence of BNSF. This type of coverage is common in the industry in other states where passenger commuter rail and freight operations share the same lines.

Under the existing provisions of NMSA 1978, Section 56-7-1, only project specific insurance is allowed to be purchased. Because the commuter rail operations will be a continuous operation, this bill allows the state, state agency or political subdivision of the state to procure a continuous insurance policy, including an owner's, operator's or contractor's protective or liability insurance, builder's risk insurance, railroad protective insurance or other policy of insurance against the negligence of another party to the contract.

FISCAL IMPLICATIONS

RMD is an enterprise agency and sets and collects premiums from other agencies or local governments in all lines of coverage. Even in areas when they reinsure such as property and casualty, they must collect the premiums from their insureds. If RMD is required to insure a public transportation project they will either need a general fund appropriation or premiums for all other insured will rise.

The HJC substitute however states if the state, a state agency or a political subdivision of the state insured by the RMD enters into a contract to procure insurance as permitted by this section, the cost of any insurance shall be paid by the RMD and shall not be a general obligation of the state.

The DOT states that the cost for the insurance coverage is approximately \$2 million per year and will be purchased by the RMD for the state with the specific agency, in this case the DOT, bearing the cost through the state road fund.

OTHER SUBSTANTIVE ISSUES

DOT provided the following:

Article IX, Section 14 prevents the state from directly or indirectly pledging aid of any private enterprise for the construction of any railroad. The commuter rail is part of the GRIP. This transaction does not violate the anti-donation clause because the state's power to procure insurance for another party's negligence is a bargained-for exchange, which constitutes an exception to the anti-donation clause. Procurement of insurance is not the same as providing a blanket indemnity. Procurement of insurance is a contract to purchase coverage. It is not a promise to pay damages. For example: A \$2 million premium will purchase \$200 million of coverage for all parties' negligence. Blanket indemnity would mean that the state would need to create a fund of \$200 million for indemnification for all parties' negligence. This bill provides only for insurance and not for blanket indemnification.

Under the current provisions of Section 56-7-1, B(1), a party to the contract [construction contract] can indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents. The provisions of this bill allow the state to expand insurance coverage required for transactions involving commuter rail operations on a continuous basis. It is standard in the industry to purchase insurance for another party's negligence involving commuter rail operations. Since this is an insurance requirement as part of the transaction to allow the state to operate a commuter rail on the rail between Belen to Santa Fe, it is a bargained-for exchange which constitutes an exception to the anti-donation clause. Furthermore, for reasons stated above, this does not create a tort claims problem either.

There is not problem with that section of the State Constitution, Art. XX, sec.16, which provides that a railroad is liable in damages for injuries to its employees caused by its own negligence. Nothing in the bill excludes a railroad's liability. The bill just provides insurance for that liability, and that constitutional provision does not mention or forbid such insurance.

There is no problem of unconstitutional indebtedness with this bill. The state may promise to procure insurance, through the RMD, so long as a special fund such as the state road fund is the source of premium payments, and not general revenues.

POSSIBLE QUESTIONS

DOT believes the \$2 million premium will come from the road fund, but the bill states that RMD is responsible for paying the premiums. Is the intent for RMD to pass the cost along to the road fund? This needs to be clarified.

DW/yr