

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 2-27-09

SPONSOR Varela LAST UPDATED _____ HB 836

SHORT TITLE AG Approval of Certain Contracts SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB263 and SB296

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Administrative Office of the Courts (AOC)
 Educational Retirement Board (ERB)
 Public Employees Retirement Board (PERA)
 Energy, Minerals and Natural Resources (EMNRD)
 Corrections Department (NMCD)
 Public Education Department (PED)
 Higher Education Department (HED)

SUMMARY

Synopsis of Bill

House Bill 836 amends the Procurement Code by requiring the Attorney General to approve contracts in excess of \$1 million.

SIGNIFICANT ISSUES

In light of recent scandals over "pay to play", this bill seeks to address problems surrounding the inappropriate awarding of contracts--especially sole source contracts. This would restore a prior system of independent review of Executive procurement activity that worked efficiently and collegially. As noted by the Attorney General's Office, "pay to play" undermines the quality and integrity of the procurement system and negatively impact the purchasing value of public funds

by creating an atmosphere where contracts are awarded based on undue influence. Even where these awards of contracts are not illegal, there is still an appearance of impropriety that would be dissipated if the AGO reviewed these contracts before they became effective. Thus, this bill protects against the evils of favoritism, collusion, fraud, and corruption in the award of public contracts.

The Administrative Office of the Courts expressed concern over the Attorney General's Office approving contracts in which judicial agencies are parties. Saying that it would also be an unprecedented departure from the Judiciary's constitutionally established independence as a separate branch of government. The Judiciary has never been required to seek approval of contracts by the Attorney General. 1.4.1.2.B(2), NMAC, of the General Services Department's procurement rules, specifically exempts the Judiciary (and Legislature) from compliance. AOC has a seasoned general counsel's office, and its procurement activities are subject to disclosure under the Inspection of Public Records Act and inquiry by such entities as the State Auditor's Office. There are enough assurances of appropriate procurement by the Judiciary already.

Also, to provide the Office of the Attorney General with authority over the Judiciary's contracts would be to provide a regular party before the Judiciary with influence over one of the Judiciary's most essential administrative functions. This creates a substantial, irreconcilable appearance of impropriety for all other parties who may appear before the Judiciary, whether they are businesses or individuals. It would not only erode the Judiciary's independence, it would erode public confidence in the Judiciary's objectivity among litigants.

Several of the responding executive agencies contend that an unnecessary layer of bureaucracy is added to the procurement process and will create time delays. The Corrections Department further goes on to say that the short title of the bill does not reflect that the bill essentially gives the Legislative Finance Committee (LFC) additional duties not yet included in Section 2-5-3 NMSA 1978 and gives it perpetual oversight over approved state agency contracts of \$1 million or more.

PERFORMANCE IMPLICATIONS

PERA and ERB investment-related professional service contracts are exempt from the procurement code. *See* NMSA 1978, Section 13-1-98 CC. The aggregate expenditures of the majority of these contracts exceed \$1 million however, because they fall within an exemption from the procurement code they would also be exempt from the review proposed by HB 836.

ERB is concerned that if the bill were amended to require investment agencies to submit investment services contracts to the Attorney General, it could make it more difficult to respond to changing market conditions, transfer assets between investment managers, delay investment transactions, and otherwise hamper ERB's ability to manage the pension fund.

RELATIONSHIP

SB263 and SB296 also amend the Procurement Code to strengthen the disclosure requirements for prospective contractors bidding on contracts who have also made campaign contributions.

OTHER SUBSTANTIVE ISSUES

The lack of specificity in defining what constitutes a “state contract” concerns EMNRD because of its construction contracts. Depending on the efficiency of the AG in turning around the approval, this could provide a significant delay in the awarding of construction contracts. Bidders on construction contracts are only required to hold their bid price for 60 days, much of which is eaten up between internal review, State Purchasing and DFA in encumbering funds. Typically, there is approximately 10 days left in this 60 day period by the time EMNRD is ready to issue a Notice to Proceed. If the AG is facing a backlog of contracts for review, EMNRD may go outside of the 60 day window where the Contractor has to hold its bid. EMNRD generally issues one or two \$1 million plus contracts per year, but has, depending on the outcome of the federal economic stimulus package, will likely have four such contracts in the next two years.

ALTERNATIVES

AOC suggests amending the phrase “state contracts” at page 1, line 18, to read “state agency contracts.”

Higher Education Department recommends adding clear timeframes for the approval process by the AGO.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Without this bill, there will continue to be less transparency in government and will reinforce an appearance of impropriety in the public’s mind, thereby undermining public trust in government.

EO/mc