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FISCAL IMPACT REPORT

ORIGINAL DATE 3/3/09

SPONSOR Taylor LAST UPDATED _____ HB 883

SHORT TITLE Clean Government Contracting Act SB _____

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate See Below	Indeterminate See Below		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 99, HB 151, HB 244, HB 252, HB 253, HB 272, HB 495, HB 535, HB 550, HB 553, HB 614, HB 646, HB 686, HB 808, HB 850, HB 878, HB 891, SB 49, SB 94, SB 116, SB 128, SB 139, SB 140, SB 163, SB 258, SB 262, SB 263, SB 269, SB 296, SB 346, SB 451, SB 521, SB 535, SB 555, SB 557 SB 606, SB 611, SB 613, SB 646, SB 652, SB 676, SB 678 & SB 693

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Department of Finance & Administration (DFA)
 Department of Transportation (DOT)
 General Services Department (GSD)
 Public Education Department (PED)

SUMMARY

Synopsis of Bill

House Bill 883 creates the Clean Government Contracting Act (Act). The purpose of the Act is to prevent influence peddling and the appearance of public corruption between government officials and sole-source government contractors.

Government includes the executive, legislative, and judicial branches, any entity created by the constitution, and any branch of government that receives public funding. Sole-source government contracts are contracts in excess of \$50,000 awarded without a competitive bidding process. A sole-source contractor must agree, for the duration of the contract and for two years thereafter, not to make or solicit contributions for the benefit of a candidate for nomination or election to any elective office in New Mexico. Prospective contractors must also agree, during the period of negotiation, not to make campaign contributions for the benefit of candidates to elective office in New Mexico. The Act also prohibits any attempt to circumvent its provisions by making an indirect contribution through a conduit.

Contractors who violate the Act are ineligible to receive another major sole-source contract for three years, are precluded from being a public employee with the contracting governmental entity, and may be subject to contract liability. Public officials or candidates who violate the Act may be liable to pay restitution to the general treasury. An intentional violation of the Act shall be grounds for removal from office, disqualification to hold office, and shall constitute misconduct and malfeasance in office.

The Act also imposes liability upon bookkeepers and government workers who intentionally fail to report violations of the Act.

The secretary of state, attorney general, and registered voters may enforce the provisions of the Act.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

GSD notes that DFA will require a substantial dataset from the State Purchasing Division on a frequent basis. This data is not currently captured electronically and creation of a database to house, cleanse, and transfer to DFA will be necessary.

SIGNIFICANT ISSUES

The AGO provided the following:

The bill specifically targets sole source contracting which has been at the center of many of these Pay to Play scandals. The bill creates a comprehensive procurement procedure that applies to all levels of government, including local public bodies and finally, the bill creates a web-based disclosure system to create open transparency on all of these contractors

The bill presents serious first amendment speech issues when it comes to prohibitions on contributions by individuals, such as spouses and dependent children over the age of 21. Likewise, can a subcontractor along with spouse and dependent children)be required to waive First Amendment political speech and be prohibited from making campaign contributions—as well as be prohibited from soliciting contributions--as a condition of working for a contractor that has a state contract?

In fairness to the bill, there are federal district court opinions and opinions from other state Supreme Courts which have upheld some bans on contributions by individuals; but so far, the US Supreme Court has only upheld bans on contributions by corporate entities. Although the US Supreme Court has repeatedly stated that campaign contributions deserve less protection than campaign expenditures since expenditures are closer to core speech.

However, the US Supreme Court has been especially protective of speech directed towards ballot measures.

The bill may also raise issue by mixing all contractors into the same category. For example, should a contractor with one agency of the Executive be prohibited from giving to a candidate belonging to a local body or another independent executive branch such as the treasurer's office? Each executive agency is independent and does not influence the award of contracts by another executive agency or local body.

A more effective approach to ending Pay to Play might be to pass legislation which limits campaign contributions. Limitations on contributions would have far less ramifications on First Amendment speech. And campaign limits would remove the temptation to award state contracts in exchange for large donations and the improper appearance of such connections even if there is no proof of an illegal quid pro quo arrangement.

An additional, and complementary, approach to ending Pay to Play might be to pass legislation which expands the Procurement Code's disclosure requirements for contractors and prospective contractors.

As a final point, the bill also explicitly impacts collective bargaining agreements; the legal ramifications on these contracts are not quite apparent without more detailed study.

PED notes much of the information required to be reported to DFA by the non-governmental party in the bill is already required by DFA in its contract approval process. The beginning and end dates of the contract, the amount and rate of payment under the contract, and the nature of the goods or services to be procured are all facts found in the final contract itself. All professional service contracts over \$5,000 between a state agency and a private entity are already required to be approved by DFA. In addition, DFA rules already provide that state agencies must provide explanation of any sole-source contract, which requires a detailed, sufficient explanation of the reasons, qualifications, proprietary rights, or unique capabilities that make the prospective contractor a sole source.

PED also notes that the enforcement provisions of the bill allow for enforcement by a registered voter of the state by filing a complaint for injunctive or declaratory relief or for civil damages and remedies in the district court. However, it is questionable whether being a registered voter is enough to confer standing upon an individual to support a legal challenge in court. Generally, standing requirements in court require that a plaintiff's alleged injury be an invasion of a concrete and particularized legally-protected interest. The U.S. Supreme Court has recognized that a generalized grievance against allegedly illegal governmental conduct is insufficient to provide standing. without showing actually injury, it is questionable whether a registered voter would have legislatively created standing to bring an enforcement action in district court. Because it is said that courts cannot render advisory opinions but must render opinions in cases where there is an actual case or controversy, appellate courts have struggled for decades to determine the circumstances when citizens can bring suits in disapproval of governmental acts or policies.

The Act does not:

- prohibit employees who are subject to collective bargaining agreements from making campaign contributions, with their own money, as long as they are not a direct party to a sole-source government contract;

- prohibit any person from participating in campaign activities that do not involve fundraising;
- apply to contracts for legal services, medical services, or medicines if the contract is regularly offered, without preference, to a broad range of qualified professional providers;
- apply to combined incidental purchases of goods and services on the open retail market;
- apply to inadvertent technical violations of the Act; nor does it
- apply to agencies that are exclusively federally funded.

ADMINISTRATIVE IMPLICATIONS

DFA is required to enact reporting rules to insure compliance with the Act.

All of the affected agencies will need to implement additional contract processing steps to ensure that it complied with the reporting requirements to DFA, particularly the provision requiring identification of the officials responsible for negotiation, management, payment, inspection or certification of the government contract.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill is similar to, SB 258, Contribution from State Contractors that attempts to prohibit a principal of a state contractor or prospective state contractor from making a contribution to or soliciting a contribution on behalf of a candidate for state public office or a candidate's political committee. HB 883 applies only to sole source contractors whereas SB 258 applies to all state contracts worth \$20,000 or more.

In addition, HB 244, Prohibit Contractor Contribution Solicitation and SB 258 place bans on contributions on all contractors and prospective contractors.

This bill is related to HB 546, State Contractor & Contract Database that requires GSD to maintain an online database of all state contracts and contractors.

The AGO states that campaign limits will remove the temptation to award state contracts in exchange for large donations and the improper appearance of such connections even if there is no proof of an illegal quid pro quo arrangement. as proposed by HB 252, Political Contributions to Candidates, HB 495, Political Candidate & Committee Donations, SB 116, Limit Contributions to Candidates & PACs, SB 262, Political Contributions to Candidates, SB 346, Political Contributions to Candidates and SB 521, Campaign Contributions in Certain Elections.

An additional, and complementary, approach to ending pay to play might be to pass legislation which expands the Procurement Code's disclosure requirements for contractors and prospective contractors, as proposed by SB 263, Contractor Disclosure of Contributions, SB 296, State Contractor Contribution Disclosure and HB 878, State Contractor Registration & Info.

HB 883 also relates to the following ethics bills:

HB 99, Prohibit Former Legislators as Lobbyists
HB 151, State Ethics Commission Act
HB 253, Quarterly Filing of Certain Campaign Reports
HB 272, Quarterly Campaign Report Filing
HB 535, Lobbyist Identification Badges
HB 550, Local School Board Governmental Conduct
HB 553, Disclosure of Lobbyist Expenses
HB 614, State Ethics Commission Act
HB 646, School Board Candidate Contribution Info
HB 686, AG Prosecution of State Officer Crimes
HB 808, Tax-Exempt Election Contributions & Reporting
HB 891, Election Communication Contribution Reporting
HB 850, Governmental Conduct Act for All Employees
SB 49, Governmental Conduct Act For Public Officers
SB 94, Prohibit Former Legislators as Lobbyists
SB 128, Require Biannual Campaign Reports
SB 139, State Ethics Commission Act
SB 140, State Ethics Commission Act
SB 163, Prohibit Former Legislators as Lobbyists
SB 269, State Bipartisan Ethics Commission Act
SB 451, Contributions to PERA Board Candidates
SB 535, Election Definition of Political Committee
SB 555, Public Employee & Officer Conduct
SB 557, State Ethics Commissions Act
SB 606, Expand Definition of Lobbyist
SB 611, Investment Contractor Contributions
SB 613, Campaign Finance Changes
SB 646, Judicial Candidate Campaign Contributions
SB 652, Campaign Reporting Private Cause of Action
SB 676, School Board Candidate Contributions
SB 678, School Board Candidate Contributions
SB 693, Prohibit Certain Contributions to Candidates

TECHNICAL ISSUES

PED provided the following:

Section 4, paragraph B requires that parties to sole-source contracts not make or solicit contributions to or for a candidate or campaign committee during active contract negotiations. It is unclear how active contract negotiations differ from contract negotiations. The word active should be deleted.

Further, Paragraph E of Section 4 of the bill requires information about the sole source contract to be submitted on a continuing basis. However, once the sole-source contract is negotiated and executed, the information would not change unless the contract is amended. Therefore, the words on a continuing basis should be deleted.