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FISCAL IMPACT REPORT

ORIGINAL DATE 02/05/13
LAST UPDATED 02/08/13 **HB** _____

SPONSOR Rue/Varela

SHORT TITLE Procurement Code Changes **SB** 182

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal			Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Corrections Department (NMCD)
 General Services Department (GSD)
 Administrative Office of the Courts (AOC)
 New Mexico Municipal League (NMML)
 Children, Youth & Families Department (CYFD)
 Department of Health (DOH)
 Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 182 (SB 182) amends the Procurement Code (Code) and adds procedures for sole source and emergency procurements, restricts who may make emergency procurements, expands who may protest a sole source procurement award, and increases penalties for willful violations.

More specifically, the bill:

- Section 1 amends Section 13-1-98 relating to exemptions under the Code by including a catch-all provision “...exemptions as otherwise provided by law”.
- Section 2 amends Section 13-1-126 relating to sole source procurements by adding additional requirements, 1) that the subject of the contract be unique, 2) that other services or items cannot meet the intended purpose, 3) the use of “due diligence” as to the basis for the sole source, and 4) by prohibiting pre-selection through narrow specifications.

- Section 3 amends Section 13-1-127 relating to emergency procurements and 1) disallows central purchasing staff from abdicating responsibility when determining an emergency exists, and 2) requires due diligence and in writing the basis for an emergency procurement and the selection of a particular contractor.
- Section 4 amends Section 13-1-128 by requiring the posting of award information to agency web sites and the Sunshine Portal and forwarding of same information to the LFC. For emergency contracts the posting must occur within 3 business days, for sole source contracts the posting must occur before the award.
- Section 5 amends Section 13-1-199 by increasing the penalties for violating the Code. The penalties range from a misdemeanor if the transaction involves \$50 thousand or less to a fourth degree felony if the transaction involves more than \$50 thousand.
- Section 6 adds a new section to require the posting of the intent to award a sole source contract at least thirty days before. This section provides a contractor the right to protest within 15 calendar days of the posting. Posting may be on the state purchasing agent's website for agencies that do not maintain websites.
- Section 7 also adds a new section requiring records relating to competitive sealed bids or proposal procurements to be retained 3 years.

FISCAL IMPLICATIONS

The bill strengthens the penalty for willful violations to deter unlawful activities. The potential for increases in prosecution costs for the judiciary will most likely be balanced by the deterrent effect of increasing the penalty for procurement transactions above \$50 thousand.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes as indicated in the table above.

SIGNIFICANT ISSUES

SB 182 is endorsed by the LFC and supported by the New Mexico Attorney General's Office. The bill was drafted in response to the LFC's 2008 *General Services Department – Procurement Division Effectiveness Review* and may help deter willful violations of the Code due to greater transparency over the awarding of sole source and emergency contracts.

The bill expands the protest of procurement awards. In the past, only awards made pursuant to a request-for-proposal or invitation-to-bid could be protested and then only by aggrieved offers or bidders.

According to the GSD Secretary, the provisions in the bill are complimentary to legislation that will be proposed by the Procurement Reform Task Force.

PERFORMANCE IMPLICATIONS

The bill provides that a *willful* violation be treated as a misdemeanor if the transaction is \$50 thousand or less and be treated as a fourth degree felony if the transaction amount is greater. Under current law, violators are guilty of a misdemeanor under any transaction amount. The bill uses the term *willful* to signify a sense of criminal intent as opposed to an inadvertent action.

The bill adds the phrase “...exemptions as otherwise provided by law” to the inventory of items and services in the bill that are purchased or contracted outside of the Code only to alert the public that exemptions from the Code exist in other areas of law.

ADMINISTRATIVE IMPLICATIONS

The CYFD was concerned that the posting requirements may impact the timeliness of sole source procurements. Sole source procurements are not emergencies and it must be thoroughly documented that a particular vendor holds a unique set of skills or expertise that make it impossible for anyone else to do the work or that the goods are not available from any another source. Equally important, other vendors must then have the opportunity to protest the award.

The NMCD was concerned about the ability to extend authorization to field staff to make an emergency procurement. The bill does not restrict such authorizations only increases accountability for decisions made or actions taken to the highest level within an agency.

The NMML was concerned the lease of heavy road equipment is disallowed under emergency procurements. This is not a new provision under the bill. The bill only moves an existing provision in Section 13-1-127 (A) on page 8 to the newly proposed paragraph (C) on page 9.

OTHER SUBSTANTIVE ISSUES

The term “due diligence” replaces the term “good faith” to create a higher standard that a reasonable investigation of other available sources will be conducted.

The NMML voiced concern about employees that make inadvertent errors. The use of the term *willful* in the bill may protect an employee from an action made by them in good faith at the request of a supervisor that may later be determined to be unlawful.

It does not appear a potential offeror would be able to protest an emergency procurement.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Contract award data would continue to be posted on the Sunshine Portal without the distinction of whether sole source or emergency, and handling of emergency procurements would continue to go through the DFA for approval and payment without posting or 3 business day notification requirements. Code violations would remain a misdemeanor for transactions of any amount.

AHO/svb