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## FISCAL IMPACT REPORT

SPONSOR Larrañaga ORIGINAL DATE 01/21/14  
 LAST UPDATED \_\_\_\_\_ HB 46

SHORT TITLE Professional Services Procurement SB \_\_\_\_\_

ANALYST Cerny

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

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Narrative				

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- General Services Division (GSD)
- New Mexico Municipal League (NMML)
- Office of the Attorney General (AGO)
- Department of Finance and Administration (DFA)

### SUMMARY

#### Synopsis of Bill

House Bill 46 (HB 46) proposes to amend Section 13-1-98 of the Procurement Code, NMSA 1978, Sections 13-1-28 to -199, which outlines exemptions to the Procurement Code.

Specifically, the proposed language amends the exemption for home-rule municipalities found in Section 13-1-98(K) and would require home-rule municipalities to follow Sections 13-1-120 through 13-1-124 of the Procurement Code when contracting for public works projects and construction management contracts.

HB 46 also proposes to amend Section 13-1-119 of the Procurement Code to require home-rule municipalities to comply with Sections 13-1-120 through 13-1-124 of the Procurement Code when contracting with architects, landscape architects, engineers and surveyors.

In subsection N, HB 46 updates nomenclature. It would replace “handicaps” with “disabilities”. In subsection S, HB 46 makes a technical correction replacing “service” with “services”.

The effect of HB 46 would be to:

1. require municipalities with home rule charters to procure services for architects, engineers, landscape architects and surveyors in accordance with applicable sections of the Procurement Code mandating competitive sealed qualifications-based proposals;
2. require the services of architects, landscape architects, engineers and surveyors to be procured via competitive sealed qualifications-based proposals regardless of dollar amount, except where a special procurement method is authorized and used;
3. correct subject-verb inconsistencies; and update nomenclature.

## **FISCAL IMPLICATIONS**

Analysis from the NMML states “This legislation could result in an increase or decrease in cost for home rule municipalities procuring the services of Architects, Engineers, Landscape Architects and Surveyors.”

DFA analysis states “The premise of HB 46 appears to be that qualification-based proposals is invariably in the best interests of the state agency or local public body when procuring the services of architects, landscape architects, engineers or surveyors. This premise should be tested with procurement experts.”

While widely adopted by a majority of states and the federal government, few cost-benefit analyses have been conducted to determine outcomes of the QBS process.

## **SIGNIFICANT ISSUES**

The Brooks Act (Public Law 92-582), enacted on October 18, 1972, established the ABS procurement process by which architects and engineers (A/Es) are selected for design contracts with federal design and construction agencies.

The process outlined uses competitive sealed qualifications-based (QBS) proposals. QBS proposals are procurements in which qualifications are the most important selection criteria. When procuring services through competitive sealed qualifications-based proposals, price is not an evaluation factor; in other words, businesses do not compete on price. Fee negotiations take place following selection and may be dictated by a fixed rate schedule or following review and audit of a proposal detailing direct and indirect costs. Qualified firms are ranked and, should fee negotiations with the highest ranked qualified business fail, negotiations are held with the next highest ranked business, and so on (Section 13-1-120 -122, NMSA 1978).

DFA analysis suggests what might be unintended consequences of the proposed amendments:

*Home rule municipalities.* Currently, municipalities who have adopted home rule charters and who have enacted their own purchasing ordinances are exempt from the Procurement Code (Section 13-1-98(K) NMSA 1978). HB 46 would change this by requiring such municipalities to procure the services of architects, engineers, landscape architects and surveyors through the competitive sealed qualifications-based proposal provisions of the Procurement Code. This would be accomplished by amending Section 13-1-98 NMSA 1978 to read as follows: “The provisions of the Procurement Code shall not apply to: K. municipalities having adopted home rule charters and having enacted their own

purchasing ordinances, except for competitive sealed qualifications-based proposals pursuant to sections 13-1-120 through 13-1-124 NMSA 1978”. In addition, Section 13-1-119 NMSA 1978 would be amended by adding “including home rule municipalities” after “local public body”.

*Competitive sealed qualifications-based proposals not limited to public works projects.* Currently, competitive sealed qualifications based proposals are only required “when procuring the services of architects, landscape architects, engineers or surveyors **for state public works projects or local public works projects**”. Section 13-1-119 NMSA 1978 (emphasis added).

State and local public work projects are those state agency (except for state educational institutions, the supreme court building commission, and the legislature) and local public body projects “us[ing] architectural or engineering services requiring professional services costing fifty thousand dollars (\$50,000) or more or landscape architectural or surveying services requiring professional services costing ten thousand dollars (\$10,000) or more, excluding applicable state and local gross receipts taxes.” Section 13-1-66.1 (local public works projects) and Section 13-1-91 (state public work projects) NMSA 1978.

HB 46 would remove the highlighted language from Section 13-1-119 NMSA 1978, which means that competitive sealed qualifications based proposals would be required for architects, landscape architects, engineers or surveyors, except when a special procurement method is authorized and used (e.g., sole source (Section 13-1-126 NMSA 1978), small purchase (Section 13-1-125(B)), or emergency (Section 13-1-127 NMSA 1978)).

Home rule municipalities who have enacted their own purchasing ordinances are not otherwise subject to the Procurement Code, including its small purchase, sole source, and emergency procurement provisions. Consequently, as written, arguably the only authorized procurement method for home rule municipalities when procuring the services of architects, landscape architects, engineers or surveyors is competitive sealed qualifications-based proposals. If that is not the intent of the bill, appropriate amendments should be considered to avoid that unintended result.

State agencies not using another authorized procurement method would also be required to procure the services of architects, landscape architects, engineers and surveyors via competitive sealed qualification-based proposals, regardless of the dollar amount of the services.

Because HB 46 strikes the qualifying language “for state public works projects or local public work projects” from the current Procurement Code, and because such works are defined by the cost of the A/E and other services, it would require that any entity subject to the State Procurement code utilize QBS processes when procuring architectural, engineering, landscape architectural or surveyor services, regardless of project size and cost. (The only exception, which according to DFA analysis would not apply to Home Rule Municipalities, would be if a special procurement method is authorized and used, such as the sole source, small purchase or emergency provisions of the procurement code.)

Analysis from the NMML states: “The New Mexico Municipal League is a strong supporter of the concept of home rule embodied in the New Mexico Constitution and it sees this legislation as an infringement on the state constitutional rights granted to municipalities that elect to become home rule municipalities.”

Analysis from GSD states that the first change would help ensure that all political entities across the state were conducting QBS procurements in the same fashion. This would ensure standardization, quality and consistency in various public works projects both from the government side as well as the A&E and surveyors communities. It would also complement the goals of the State Purchasing Division and its push to provide standardization in procurement throughout the state through its chief procurement officer responsibilities.

AGO analysis states that this statutory change would preempt any municipal enactment contrary to this amendment. The change would require home-rule municipalities that do not currently follow the procurement process enumerated under Sections 13-1-120 through 13-1-124 to change their practices. See New Mexico Constitution, Art. X, § 6 that states “A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.”

## **PERFORMANCE IMPLICATIONS**

HB 46’s proposed amendments to the Procurement Code would affect municipalities with home rule charters, who follow their own procurement ordinances, policies, procedures and practices that are currently inconsistent with the Procurement Code for procuring architects, engineers, landscape architects and surveyors. Such home rule municipalities will be required to update procurement ordinances, policies and procedures to comply with the amendments, if different than that set forth in the amendments.

As stated above, state agencies not using another authorized procurement method would also be required to procure the services of architects, landscape architects, engineers and surveyors via competitive sealed qualification-based proposals, regardless of the dollar amount of the services.

The premise of HB 46 appears to be that qualification-based proposals is invariably in the best interests of the state agency or local public body when procuring the services of architects, landscape architects, engineers or surveyors. This premise should be tested with procurement experts.

GSD analysis notes that “Home Rule municipalities might need some training in how to properly conduct QBS procurements but the standardization of such procurements across the state would be a worthwhile benefit.”

## **TECHNICAL ISSUES**

HB 46, Section 2 would strike “for state public works projects or local public works projects” from Section 13-1-119, requiring all procurement of architects, landscape architects, engineers or surveyors to comply “with Sections 13-1-120 through 13-1-124 NMSA 1978.” Sections 13-1-120 and 13-1-121, however, consistently refer to “state public works projects” and “local public works projects,” creating an inconsistency among the laws.

**AMENDMENTS**

Depending on the intent of the bill, either reinstate the proposed deleted language in Section 13-1-119 NMSA 1978 OR amend Section 13-1-120 and Section 13-1-121 to remove the reference to state public works projects and local public works projects, given that competitive sealed qualifications-based proposals would no longer be limited to such public works projects.

Consider amendments to give home rule municipalities procurement options in addition to competitive sealed qualifications-based proposals.

**OTHER SUBSTANTIVE ISSUES**

According to a 2013 analysis by the non-profit American Council of Engineering Companies ([http://www.acec.org/advocacy/committees/pdf/qbs\\_matrix.pdf](http://www.acec.org/advocacy/committees/pdf/qbs_matrix.pdf)) forty-seven states have adopted QBS laws and twenty-six states have QBS laws that apply to local units of government. Some states have established thresholds, for example, for contracts estimated to be above \$25,000 or \$50,000, or have exemptions for specific entities, such as school districts or community colleges.

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