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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/14
LAST UPDATED _____

SPONSOR Stewart **HB** 341

SHORT TITLE Contracts in Sunshine Portal **SB** _____

ANALYST Boerner

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$150.0		\$150.0	Nonrecurring	DoIT Operating Budget
		See Fiscal Implications	See Fiscal Implications	Unknown	Recurring	Various Agency Operating Budgets

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 201

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Information Technology (DoIT)
 Attorney General's Office (AGO)
 General Services Department (GSD)
 Department of Finance and Administration (DFA)
 Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

1. House Bill 341 amends the Sunshine Portal Transparency Act to require the disclosure of more contract details, such as the names and wages of all contractor and subcontractor employees. This amendment would apply to state contracts over \$20,000 and contracts involving state land [Section 1].
2. HB 341 amends the Procurement Code to require contracts to include provisions that require government contractors to maintain all records relating to government contracts and that those records are subject to the Inspection of Public Records Act. The bill also

provides that meetings between a government contractor and a policymaking body of a state agency or local public body are subject to the Open Meetings Act [Section 2].

3. The bill adds a new section to the Procurement Code that requires a cost benefit analysis prior to awarding a contract “for services that will replace the provision of similar services by public employees” [Section 3].
4. Finally, note also that Section 1 only applies to state agencies, while Sections 2 and 3 apply to contracts by local bodies as well as state agencies.

FISCAL IMPLICATIONS

DoIT estimates a cost of \$150 thousand to design, develop and implement the new functionality to meet the requirements outlined under paragraph 1 of the synopsis section above. There is an uncertainty in the cost due to indeterminate factors such as time required to establish business processes and technical criteria with stakeholders, time associated with process development with unknown and variable data structures, as well as other unforeseen costs.

Agency responses indicate other costs associated with this bill that are harder to quantify, including the need for more manual processes by agencies, the requirement for historical information that does not reside in SHARE, and a potential “chilling” effect on contractors’ willingness to do business with state as a result of some of the bill’s requirements.

SIGNIFICANT ISSUES

SHARE is the source of contract information on the Sunshine Portal. Some of the new information that HB 341 would require to be posted, however, is not captured in SHARE and may not be captured in SHARE in the future. First, SHARE does not have all historical payment information for vendors. SHARE currently contains payment information back to July 1, 2006, and does not contain payment information prior to that date. The agencies would ultimately rely on other records for earlier expenditure information, which may not be easy to query and tabulate. Information gathering will take more time as will inputting the information into the Sunshine Portal. Second, SHARE has no data fields for contractor employee and compensation information.

“Prior fiscal years” would literally mean all fiscal years since statehood. As indicated above, this information does not exist and, to the extent it does, may require manual tabulation and entry. In addition, it is unclear whether this requirement is meant to capture amounts paid to the contractor by the agency with the contract or all agencies.

Contractors and their subcontractors may be unwilling to provide for public view hourly wage or other rate of compensation for their respective employees. This could possibly reduce competition for contracts, particularly from contractors most experienced in the services to be provided under the contract.

Uniform Contract Clauses

Regarding contractor records, HB 341 does not specify how long the contractor must maintain the records. Currently, professional service and service contracts require that contractors

maintain records for three years after final payment. There is no similar or other timeline specified in the bill. In addition, the reference to “central purchasing office” seems unnecessary and redundant to state agency or local public body, since the central purchasing office is merely an office within a state agency or local public body Section 13-1-37.

With regard to open meetings, the proposed contract clause seems unnecessary. A meeting of a quorum of a policymaking body for the purpose of “discussing public business” is already subject to the Open Meetings Act. NMSA 1978, Section 10-5-1(B). This would seemingly apply to a meeting between the contractor and a quorum of the policymaking body, since the contractor’s work is “public business.”

Outsourcing Contracts-Cost Analyses-Compliance-Wages Particular Provisions

Meeting the requirements of this part of the proposed bill will be time consuming and labor intensive and subject to a wide range of interpretation. The outcome of the cost analysis will likely be subject to objection as there is room for differing interpretations depending on the background and experience of the person or persons conducting the analysis and the employees who may be affected if replaced by contractors. The provision requiring contractors to certify under penalty of perjury compliance with all federal and state laws applicable to the contractor is ambiguous to all the laws that apply, except for what is explicitly stated. Agencies may not be familiar with all federal and state laws that a contractor must follow that are outside the knowledge and experience of the public employee conducting and implementing the procurement.

Contractors may be unwilling to sign an affidavit that may exclude or include applicable law for fear of being prosecuted for perjury. Contractors may refuse to do business with New Mexico public agencies if forced to pay their own employees performing services under the contract the same pay and health benefits as that paid or provided to public employees replaced immediately prior to the start of the contract term. In some instances the contractor’s employees may be getting paid more than the public employee replaced, and there may not be health insurance benefits equal to that provided to public employees available that contractors can purchase for their employees due to the implementation of the Affordable Health Care Act, or the purchase of equivalent policies may be cost prohibitive, all of which may result in potential contractors refusing to do business the public sector, at worst, or increasing the cost of the contract, thereby reducing the savings that might otherwise be available to the state agency or local public body.

TECHNICAL ISSUES

The first section of changes is applicable to contracts over \$20,000. Drafters should note that the small purchase limit has been raised from \$20,000 to \$60,000. [See 13-1-125(A). A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding sixty thousand dollars (\$60,000), excluding applicable state and local gross receipts taxes, in accordance with the applicable small purchase rules adopted by the secretary, a local public body or a central purchasing office that has the authority to issue rules.]

The requirement that the Sunshine Portal include “amounts paid to the contractor in prior fiscal years and in the current fiscal year” is burdensome and ambiguous, as explained above under Significant Issues.

The requirement that the Sunshine Portal include the “total projected cost of the contract during its full term” is ambiguous. Does full term mean the initial term, for which money is encumbered and committed at execution? Or does it mean possible future extensions of the contract? If the latter, SHARE does not currently capture the amount of possible future contract extensions, since there is no commitment to be recorded.

ALTERNATIVES

Currently, purchase orders are available on the Sunshine Portal; additional fields could be added to include the accurate contract number associated with the purchase order, the duration of the associated contract, and a more comprehensive description of the contract. This additional information would allow interested parties to more easily locate the contract information they are seeking.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The Sunshine Portal currently makes information available on all purchase orders issued to all vendors. Information would continue to be available to the purchase order level.

CB/ds