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FISCAL IMPACT REPORT

ORIGINAL DATE 3/2/15
 SPONSOR Maestas LAST UPDATED 3/16/15 HB 517/aHBEC/aHWMC
 SHORT TITLE Historically Underutilized Businesses SB _____
 ANALYST Malone

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$90.0+	\$90.0+	\$180.0+	Recurring	OSA Operating Budget

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 722.
 Related to SB 69 and HB 130.

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the State Auditor (OSA)
- Attorney General’s Office (AGO)
- Department of Finance and Administration (DFA)
- Economic Development Department (EDD)
- General Services Department (GSD)

SUMMARY

Synopsis of HWMC Amendment

The House Ways and Means Committee amendment to HB 517 substitutes “gross revenue” for “volume” to define the size of a business that qualifies as a historically underutilized business, addressing technical issue number one, below.

Synopsis of HBEC Amendment

The House Business and Employment Committee amendment to HB 517 strikes “economic census data” on page 3, line 24 and inserts in lieu thereof “census bureau survey of business owners.” The amendment also calls for OSA to update the searchable database for underutilized businesses monthly rather than semiannually.

Synopsis of Original Bill

House Bill 517 establishes the Historically Underutilized Business Opportunity Act to promote full and equal business opportunities for all businesses by encouraging and setting goals for the use of historically underutilized businesses by state agencies in all public purchasing decisions.

The bill defines historically underutilized business as a legally recognized for-profit business organization, corporation, sole proprietorship, partnership, or joint venture that has a valid historically underutilized business certificate issued by the State Auditor certifying that:

1. It has an average volume of no more than \$1.5 million and average number of employees no more than 150 for the preceding three fiscal years;
2. New Mexico is the principal place of business; and
3. At least 51 percent of the business is owned by a woman, veteran, or individual who is a racial minority.

The State Auditor is tasked with setting statewide goals for FY16 to use historically underutilized businesses for ten percent or more for the procurement of heavy construction, special trade construction, profession services, other services, and commodities contracts. In FY17 OSA shall modify these goals consistent with the UNM Bureau of Business and Economic research review of US economic census data and its most recent findings and recommendations related to historically underutilized businesses.

State agencies are required to make a “good-faith effort” to use historically underutilized businesses in contracts for the above procurements.

The State Auditor is given the following new responsibilities:

1. Establish procedures certification of historically underutilized business status, revocation of that status, and approval of facilitating nonprofit agencies.
2. Semiannually produce an online, searchable database of businesses certified as historically underutilized businesses.
3. Provide forums for historically underutilized businesses to demonstrate their capabilities to state agencies.
4. Review and approve each state agency’s goals for using historically underutilized businesses.
5. Produce an annual report on the use of historically underutilized businesses, including dollar amount and number of contracts.

State agencies are required to establish agency-specific goals for using historically underutilized businesses for procurement, explore opportunities to use such businesses through subcontracting, and compile monthly reports for the State Auditor regarding dollar amounts and number of contracts going to underutilized businesses.

FISCAL IMPLICATIONS

OSA anticipates the need for one additional FTE to fulfill the requirements of this bill. The average cost of an FTE at OSA is about \$90 thousand.

Additionally, OSA will be required to create a searchable database for historically underutilized businesses. The cost associated with this is undetermined at this time.

The bill contains no appropriation.

SIGNIFICANT ISSUES

1. OSA is tasked with ensuring all government agencies receive an annual audit or agreed upon procedures if the agency falls with the tiered system of financial reporting. The office may also conduct special audits. Currently, OSA does not oversee procurement activities of government agencies except to ensure compliance with laws and regulations during the financial audit process. AGO notes that OSA becoming involved with the management decisions of agency procurement could interfere with OSA's independence.
2. DFA notes that the Procurement Code is currently geared towards lowest price or most advantageous offeror for procurements, and expresses concern that if historically underutilized businesses do not meet that criteria, a state agency would have difficulty justifying granting an award to the business.
3. This bill may conflict with the State Use Act, Section 13-1C-1 through 13-1C-7 NMSA 1978, which is intended to encourage and assist persons with disabilities to achieve maximum personal independence through useful and productive employment. The act gives procurement preference, notwithstanding the Procurement Code, to individuals with disabilities through an organizing non-profit, Horizons of New Mexico.
4. The bill does not provide OSA with any enforcement mechanism for the state agency procurement requirements. So, if an agency does not meet the 10 percent requirement in FY16 or requirements in subsequent years, there is no consequence.
5. Although OSA must review and approve agency plans for using historically underutilized businesses, the office is not given any authority to determine the inclusion of information in those plans.
6. GSD notes that introducing quotas for procurement may have the following consequences:
 - a. Reduce the competitive nature of the procurement process and possibly result in higher prices for state agencies;
 - b. Favoring some businesses over others through the evaluation process; and
 - c. Legal contestation over favoring businesses majority-owned by women, veterans, or minorities.
7. GSD is concerned that it is unclear how underutilized businesses will be selected if they are not competitive bidder through the statutory procurement process.

PERFORMANCE IMPLICATIONS

This bill will not impact existing performance measures, but if passed, creating new performance measures for OSA to incorporate these new responsibilities would be appropriate.

ADMINISTRATIVE IMPLICATIONS

OSA will have substantial new administrative responsibilities, which are detailed in the bill

summary above.

All agencies will have the new responsibility to create agency-specific goals and report monthly on use of historically underutilized businesses.

DUPLICATION, RELATIONSHIP

Duplicates SB 722. Related to SB 69 and HB 130.

TECHNICAL ISSUES

1. The bill would benefit from a definition of “volume” as it is used as one of the criteria for businesses to qualify as historically underutilized.
2. EDD observes that the bill calls for using fiscal years to determine business eligibility, but that most businesses operate on calendar years rather than fiscal years. This would create difficulty for businesses in applying for certification as historically underutilized.
3. State agencies must comply with the Procurement Code, and this act may create conflicts with that code.

ALTERNATIVES

It might be useful to create more specific parameters under which historically underutilized businesses be given favor when they cannot provide the most competitive bid. For instance, perhaps provide a cap on how much over the most competitive bid can be paid to benefit an underutilized business.

General Services Department or the Secretary of State Corporations Bureau maybe better agencies to be assigned this responsibility.

CEM/bb