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FISCAL IMPACT REPORT

ORIGINAL DATE 1/22/16
LAST UPDATED 2/13/16 **HB** _____

SPONSOR Padilla

SHORT TITLE Resident Business Set-Aside Act **SB** 10/aSCTC

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund & Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB93

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Office of the State Auditor (OSA)
 General Services Department (GSD)
 Department of Information Technology (DoIT)
 Energy Minerals and Natural Resources Department (EMNRD)
 State Land Office (SLO)
 Indian Affairs Department (IAD)
 Economic Development Department (EDD)
 Public Education Department (PED)
 Public Schools Facilities Authority (PSFA)
 Municipal League
 Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of SCTC Amendment

Senate Corporations and Transportation Committee amendment to Senate Bill 10 proposes to award at least 33 percent of the total of all a contracting agency's contracts, including any that were awarded without a competitive process.

Synopsis of Bill

Senate Bill 10 proposes to create a new section to the Procurement Code, NMSA 1978 Article 13 requiring state contracting agencies to set-aside a 33 percent of its contracts for resident businesses as an incentive to encourage businesses to grow and expand the state's economy. Contracts included in the State Use Act awarded to resident businesses are included in the agency's 33 percent set-aside. Contracting agencies are required to submit an annual report to GSD reporting outcomes of the proposed legislation and GSD is required to analyze those reports and use the data to report to the governor and the legislature and to publish results on the sunshine portal.

State contracting agencies would be required to consult with the GSD to designate a portion of a contract as a resident business set-aside and to develop an annual plan on how to achieve the purpose of this proposed legislation. Any disagreement between the GSD and the contracting agency as to the designation of a resident business set-aside is to be sent to the State Auditor for final determination.

Businesses or contractors desiring to be certified as a resident business must submit an application and affidavit to the Taxation and Revenue Department acknowledging that it meets the requirements proposed under this legislation. The TRD may assess a reasonable fee to issue the certificate which must not exceed the actual cost to the carry out its duties. The certification is valid for three years from the date of issuance. If the TRD, denies the certification the business has 15 days to file an objection with supporting documentation and may request a hearing. The TRD is required to review the documentation and issue a decision within 15 days of the objection being filed. Filing false information bars a business or contractor from receiving a certificate for five years and is subject to a \$50 thousand administrative penalty. The proposed legislation allows a business or contractor the right to judicial review the decision of TRD.

The GSD is required to consult with industry representative every six months and promulgate rules necessary to implement the provisions of this legislation.

The effective date of this bill is July 1, 2016.

FISCAL IMPLICATIONS

The OSA opines that it will require additional resources to fulfill the bill's requirements to resolve contract disputes should it become law.

DoIT reports that additions or changes to the Sunshine Portal will require development which would cost about \$10,000.

Although, SLO supports efforts to ensure resident businesses and resident contractors are able to compete for contracts SB 10 could potentially result in restricting competition for 33 percent of all its contracts which, in turn, could lead to increased prices for goods and services. These increased costs could potentially increase SLO's budgetary needs and therefore negatively impact the distributions to beneficiaries.

EDD reports it will not be able to absorb the additional workload and would require a part-time FTE.

SIGNIFICANT ISSUES

GSD believes that because this bill would restrict competition by requiring 33 percent of all state contracts to be awarded to a defined and limited class of vendors (resident businesses), this action could result in those state contracts being awarded with higher pricing than with competition. Whether this pricing would be offset by increased revenue to the state is unknown, and would require more analysis.

According to TRD the bill does not address the following:

- That the owner or majority of owners (Indian Tribe or Nation) do not pay property taxes or rent on real property in the state and do not pay gross receipts tax or at least one other tax administered by the state.
- An Indian Tribe or Nation will not qualify unless they have a business not located on tribal land and unless the owner or majority of owners pays gross receipts or property taxes or rent on real property.
- If allowed, an Indian Tribe or Nation would have an unfair advantage over other businesses since they do not currently pay gross receipts taxes. This would negatively impact state revenue and Indian Tribes would get an additional advantage over existing businesses. They currently do not qualify so these points should be non-issues unless the qualifications are changed to include Indian tribes.

See: Final Decision and Order Denial dated July 25th, 2014: Velocity Build LLC.

AOC reports that there is a consensus that set-asides that address a legitimate local interest such as business development, and that do not set aside too high of a percentage of public money exclusively for local businesses, are constitutional. There appears to be no binding legal authority for or prohibition against the 33 percent set-aside that SB 10 would create. The constitutionality of the system would thus have to be definitively resolved by the courts.

The Bill does not require agencies to report residency information to DoIT so it is possible that system development contracts may be excluded from the requirements of SB 10. If the presumption is to include system development contracts, coordination among GSD and TRD will be necessary to determine the residency requirement.

ADMINISTRATIVE IMPLICATIONS

According to SLO, the additional requirements of SB 10 could delay the contract issuance timeframe which could hinder its ability to generate revenue or protect trust assets in a timely manner.

EMNRD reports that it may have to designate staff to track compliance and reporting of SB 10 and may require development of a computer application to properly account its progress in awarding contracts with resident set-asides.

A cautionary note for public entities should the bill be enacted is to examine contracting entities

identifying themselves as resident contractors to ensure that the entity's staff, geographical source of revenue, and location of work performed is mostly in the state.

The effective date of the bill may not allow sufficient time to promulgate rules for implementation, which can be up to six months. Drafting the rules can take at least 60 days. Those must then be posted for 30 days to allow for public comment. All comments must be given due consideration and if accepted included in a subsequent draft. GSD must then work closely with the Commission on Public Records to fulfill all publication requirements before the rules can be published in the New Mexico Register.

RELATIONSHIP

Relates to House Bill 93, Veterans' Preference.

TECHNICAL ISSUES

According to GSD, many other states do not limit competition by having resident preferences. Such states have reciprocity statutes that apply as a penalty to vendors from another state that has such a preference. Such reciprocity laws could result in NM vendors enjoying a preference in NM state contracting, but being penalized in procurements in other states. GSD further points out that "equipment" and "resident business subcontractor" are not defined.

TRD indicates the following issues with the bill:

- Section 3 of the bill, Subsection (E) defines New Business. It reads, "'business' means a business that has been in existence for less than three years." A better definition might be, "means a business that is not a construction business that has been in existence for less than three years."
- Section 3 of the bill, Subsection (F) defines New Contractor. It reads, "'new contractor' means a business that has been in existence for less than five years." A better definition might be, "means a construction business that has been in existence for less than five years." A definition of "construction" may be necessary.
- "In existence" as used in the proposed legislation should be defined. A business that does business outside of New Mexico may or may not be "in existence." "Licensed in New Mexico" may be preferable to "in existence."
- The definition of "relocated business" in Subsection (G) currently reads, "means a business that moved eighty percent of its total domestic personnel from another state to New Mexico in the past five years. A better definition might be, "means a business that has moved to New Mexico and employs a minimum of eighty percent of its total domestic personnel with New Mexico residents in the past five years."
- Section 5 of the bill, Subsection (D) contains the language, "If no notification is provided by the taxation and revenue department, the certificate is deemed approved." Emphasis added. The citizenry of the State of New Mexico would likely not want certification of resident businesses to become effective due to a possible oversight on the part of a public employee. This language should be changed and should indicate that after a period of time if no notice has been provided, the certificate should be deemed denied. Furthermore, if the certification is "deemed approved," there is no means for a "resident business" or "resident contractor" to demonstrate good standing without the requisite

certificate.

- Section 5 of the bill, Subsection (E) (page 10, line 2) indicates that a business or contractor that was denied certification may request a hearing and indicates, “[t]he taxation and revenue department shall review the evidence and issue a decision within fifteen days of the filing of the objection.” On July 1, 2015 the Taxation and Revenue’s Hearing Bureau ceased to exist. The Administrative Hearings Office was created which functions under DFA. Any “hearing” referenced by this section would presumably be performed by the Administrative Hearings Office. TRD would therefore not issue any decision and this subsection’s language needs to be modified accordingly.
- Section 5 of the bill, Subsections (F) and (G) also presume a hearing would be conducted and a decision would be issued by TRD. TRD no longer has a hearings bureau and language in these sections needs to be clarified as to what state agency would provide a review of the certification process.
- As this bill is currently drafted, there is no language or mechanism to revoke a license once issued.
- TRD is not provided any discretion in issuing certificates to businesses or contractors that provided false information or failed to perform the contracted services to a contracting agency after waiting the requisite five (5) years delineated in Section 5 of the bill, Subsection (F)(1). A contracting agency could potentially be obligated to contract with a resident business of questionable integrity due to the preference given to resident businesses. This surely is not the bill’s intent. Discretion should be provided to avoid certifying businesses of questionable character.

There may be a conflict of interest with the OSA being required to resolve disputes and then later having to audit the contract. The Yellow Book (Generally Accepted Governmental Auditing Standards) requires auditors to be independent in mind and appearance in all matters relating to the audit work.

According to IAD, Section 3 (C) of the bill broadens the definition of “Indian nation, tribe or pueblo” from that in the State-Tribal Collaboration Act (Section 11-18-1 NMSA1978) to include: (1) a political subdivision, agency or department of an Indian nation, tribe or pueblo; (2) an incorporated or unincorporated enterprise; or, (3) a corporation considered to be an Indian nation, tribe or pueblo by the federal government or the state.

The language in SB 10 states in Section 2 (I) (2) that the set-aside contract is designated as a contract with respect to which *bids or proposals* are solicited. This indicates that other contracts (i.e. sole source, emergency) or agreements (i.e. Intergovernmental Agreements) are not affected by the bill; more clarity in the definition section (Section 3) regarding *bids or proposals* (e.g. within the statewide procurement system overseen by GSD) may be useful.

OTHER SUBSTANTIVE ISSUES

TRD points out that there exists a potential conflict with the in-state and veteran preference certification process (Chapter 13, Articles 1 and 4 NMSA 1978) which will need to be reviewed and refined.

TRD should establish a relationship with the Construction Industries Division of the Regulation and License Department to maintain verification of those contractors registered and licensed.

SB 10 does not set forth penalties for agencies who do not meet either the contracting or reporting requirements.

POSSIBLE QUESTIONS

GSD poses the following questions:

- (1) While the state auditor is given authority to audit or review the issuance or validity of a Resident Business or Resident Contractor certificate, what action may be taken by that office as follow up to such audit or review? Is such action appealable?
- (2) What effect does limiting competition have on price and/or quality of items being procured under such set-asides? What impact does such pricing and quality have on the budgets of the agencies involved?
- (3) State Purchasing is required to perform procurements for Local Public Bodies (LPB) when requested (to reduce prices by having a larger amount of spend being offered thus having greater competition), and those agreements become statewide price agreements accessed by state agencies. How are those procurements to be treated under this bill? Will a state agency be required to forsake an in place procurement to do a set-aside, resulting potentially in a higher price being paid for the procurement? Conversely, if a state agency does a procurement for a statewide application accessed by a LPB, and pays a higher price as a result of such limited competition because it is done as a set-aside, how does that price affect the budgets of those LPBs that access that agreement?
- (4) How does this legislation interact with the current preference laws administered by TRD?
- (5) Is this Act to be a new section or sections of the Procurement Code? How are the two Acts to be read together?
- (6) How do emergency and sole-source procurements figure into agency annual plans?

ABS/jo/jle