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HOUSE BILL 25

**53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

INTRODUCED BY

Sarah Maestas Barnes and Michael Padilla

AN ACT

RELATING TO PROCUREMENT; ENACTING THE RESIDENT BUSINESS SET-  
ASIDE ACT; REQUIRING THAT THIRTY-THREE PERCENT OF A CONTRACTING  
AGENCY'S CONTRACTS BE AWARDED TO RESIDENT BUSINESSES; PROVIDING  
FOR CERTIFICATION OF RESIDENT BUSINESSES AND RESIDENT  
CONTRACTORS; REQUIRING REPORTING; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be  
cited as the "Resident Business Set-Aside Act".

SECTION 2. [NEW MATERIAL] PURPOSE.--The purpose of the  
Resident Business Set-Aside Act is to encourage the health of  
the state's economy, which is directly related to the  
competitive strength and well-being of the state's businesses,  
by providing an opportunity for businesses to freely enter into  
business and to grow and expand and by ensuring that a fair

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1 proportion of the state's total contracts for construction,  
2 property and services is placed with resident businesses.

3 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the  
4 Resident Business Set-Aside Act:

5 A. "contracting agency" means a department,  
6 commission, council, board, committee, institution, legislative  
7 body, agency, government corporation or official of the  
8 executive, legislative or judicial branch of the government of  
9 the state;

10 B. "department" means the general services  
11 department;

12 C. "Indian nation, tribe or pueblo" means a  
13 federally recognized Indian nation, tribe or pueblo located  
14 wholly or partially in New Mexico, including:

15 (1) a political subdivision, agency or  
16 department of an Indian nation, tribe or pueblo;

17 (2) an incorporated or unincorporated  
18 enterprise of an Indian nation, tribe or pueblo or of a  
19 political subdivision of an Indian nation, tribe or pueblo; or

20 (3) a corporation considered to be an Indian  
21 nation, tribe or pueblo by the federal government or the state;

22 D. "legacy contractor" means a construction  
23 business that has been licensed in this state for ten  
24 consecutive years;

25 E. "new business" means a business that has been in

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1 existence for less than three years;

2 F. "new contractor" means a business that has been  
3 in existence for less than five years;

4 G. "relocated business" means a business that moved  
5 eighty percent of its total domestic personnel from another  
6 state to New Mexico in the past five years;

7 H. "resident business" means a business or  
8 contractor that has a valid resident business or resident  
9 contractor certificate issued by the taxation and revenue  
10 department pursuant to Section 5 of the Resident Business Set-  
11 Aside Act;

12 I. "set-aside contract" means:

13 (1) a contract for items of tangible personal  
14 property, equipment, construction, services or professional  
15 services that is designated as a contract with respect to which  
16 bids or proposals are solicited only from a resident business;

17 or

18 (2) a portion of a contract when that portion  
19 has been designated as a portion with respect to which bids or  
20 proposals are solicited and accepted only from a resident  
21 business; and

22 J. "tangible personal property" means tangible  
23 property other than real property that has a physical  
24 existence, including supplies, equipment, materials and printed  
25 materials.

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1           SECTION 4.   [NEW MATERIAL] CONTRACTING AGENCIES--

2   REQUIREMENTS--DESIGNATION OF SET-ASIDE CONTRACTS.--

3           A.   Every contracting agency shall award at least  
4   thirty-three percent of the total number of its contracts,  
5   regardless of whether those contracts were awarded pursuant to  
6   a competitive process, to resident businesses.  A contract  
7   pursuant to the State Use Act that is awarded to a resident  
8   business shall be included in the contracting agency's  
9   calculation pursuant to this subsection.

10          B.   Every contracting agency shall, in consultation  
11   with the department, develop an annual plan for how it will  
12   achieve the purpose and requirements of the Resident Business  
13   Set-Aside Act.

14          C.   Contracting agencies, in consultation with the  
15   department, may designate a contract, or a portion thereof, as  
16   a resident business set-aside contract pursuant to the Resident  
17   Business Set-Aside Act if there is a reasonable expectation  
18   that bids or proposals may be obtained from at least three  
19   qualified resident businesses that are capable of furnishing  
20   the desired items of tangible personal property, equipment,  
21   construction, services or professional services at a fair and  
22   reasonable price.  The designation of the contract shall be  
23   made before the contracting agency solicits bids or proposals.

24          D.   If the department and a contracting agency  
25   disagree as to the designation of a resident business set-aside

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1 contract or the requirement that a resident business  
2 subcontractor perform work on a portion of a contract, the  
3 dispute shall be submitted to the state auditor for a final  
4 determination within twenty-one days of receipt of written  
5 notice of the disagreement.

6 E. If the implementation of the purpose or  
7 provisions of the Resident Business Set-Aside Act would  
8 jeopardize the state's participation in a program from which  
9 the state receives federal funds or other benefits, a  
10 contracting agency may, in consultation with the department,  
11 withdraw the affected contracts from consideration or  
12 calculation of a contracting agency's resident business  
13 contract awards.

14 SECTION 5. [NEW MATERIAL] RESIDENT BUSINESS AND RESIDENT  
15 CONTRACTOR--CERTIFICATION.--

16 A. To be certified as a resident business, a  
17 business shall submit an application to the taxation and  
18 revenue department. The application shall include an affidavit  
19 from a certified public accountant, licensed attorney or  
20 enrolled agent authorized to practice before the internal  
21 revenue service setting forth that the business is licensed to  
22 do business in this state and:

23 (1) that the business has paid property taxes  
24 or rent on real property in the state and has paid at least one  
25 other tax administered by the state in each of the three years

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1 immediately preceding the submission of the affidavit;

2 (2) if the business is a new business, that  
3 the owner or majority of owners has paid property taxes or rent  
4 on real property in the state and has paid at least one other  
5 tax administered by the state in each of the three years  
6 immediately preceding the submission of the affidavit and has  
7 not applied for a resident business or resident contractor  
8 certificate pursuant to this section during that time period;

9 (3) if the business is a relocated business,  
10 that at least eighty percent of the total personnel of the  
11 business in each of the years immediately preceding the  
12 submission of the affidavit were residents of the state and  
13 that, prior to the submission of the affidavit, the business  
14 either leased real property for ten years or purchased real  
15 property greater than one hundred thousand dollars (\$100,000)  
16 in value in the state;

17 (4) if the business was previously certified  
18 pursuant to this subsection and the business has reorganized  
19 into one or more different legal entities, was purchased by  
20 another legal entity but operates in the state as substantially  
21 the same commercial enterprise or has merged with a different  
22 legal entity but operates in the state as substantially the  
23 same commercial enterprise and the business has obtained a new  
24 tax identification number, that the business meets the  
25 requirements provided in Paragraph (1) of this subsection; or

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1 (5) if the business is owned by an Indian  
2 nation, tribe or pueblo, that the principal place of business  
3 is in the state and that at least eighty percent of the total  
4 personnel of the business in each of the years immediately  
5 preceding the submission of the affidavit were residents of the  
6 state.

7 B. To be certified as a resident contractor, a  
8 contractor shall submit an application to the taxation and  
9 revenue department. The application shall include an affidavit  
10 from a certified public accountant, licensed attorney or  
11 enrolled agent authorized to practice before the internal  
12 revenue service setting forth that the contractor is currently  
13 licensed as a contractor in this state and:

14 (1) that the contractor has:

15 (a) registered with the state at least  
16 one vehicle; and

17 (b) in each of the five years  
18 immediately preceding the submission of the affidavit: 1) paid  
19 property taxes or rent on real property in the state and paid  
20 at least one other tax administered by the state; and 2) paid  
21 unemployment insurance on at least three full-time employees  
22 who are residents of the state; provided that if a contractor  
23 is a legacy contractor, the requirement of at least three  
24 full-time employees who are residents of the state is waived;

25 (2) if the contractor is a new contractor,

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1 that the owner or majority of owners has paid property taxes or  
2 rent on real property in the state and has paid at least one  
3 other tax administered by the state in each of the five years  
4 immediately preceding the submission of the affidavit and has  
5 not applied for a resident business or resident contractor  
6 certificate pursuant to this section during that time period;

7 (3) if the contractor is a relocated business,  
8 that at least eighty percent of the total personnel of the  
9 business in each of the years immediately preceding the  
10 submission of the affidavit were residents of the state and  
11 that, prior to the submission of the affidavit, the contractor  
12 either leased real property for ten years or purchased real  
13 property greater than one hundred thousand dollars (\$100,000)  
14 in value in the state;

15 (4) if the contractor was previously certified  
16 pursuant to this subsection and the contractor has reorganized  
17 into one or more different legal entities, was purchased by  
18 another legal entity but operates in the state as substantially  
19 the same enterprise or has merged with a different legal entity  
20 but operates in the state as substantially the same commercial  
21 enterprise and the contractor has obtained a new tax  
22 identification number, that the contractor meets the  
23 requirements provided in Paragraph (1) of this subsection; or

24 (5) if the contractor is a business owned by  
25 an Indian nation, tribe or pueblo, that the principal place of

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1 business is in the state and that at least eighty percent of  
2 the total personnel of the business in each of the years  
3 immediately preceding the submission of the affidavit were  
4 residents of the state.

5 C. The taxation and revenue department shall  
6 prescribe the form and content of an application for  
7 certification as a resident business or resident contractor and  
8 of the required affidavit.

9 D. The taxation and revenue department shall  
10 examine applications and affidavits submitted pursuant to this  
11 section and, if necessary, may seek additional information to  
12 ensure that the business or contractor is eligible to receive a  
13 certificate pursuant to the provisions of this section. If the  
14 taxation and revenue department determines that an applicant is  
15 eligible, it shall issue a certificate. If the taxation and  
16 revenue department determines that the applicant is not  
17 eligible, it shall issue notification within thirty days. If  
18 no notification is provided by the taxation and revenue  
19 department, the certificate is deemed approved. A certificate  
20 is valid for three years from the date of its issuance;  
21 provided that if there is a change of ownership of more than  
22 fifty percent, a resident business or resident contractor shall  
23 reapply for a certificate.

24 E. A business or contractor whose application for a  
25 certificate is denied has fifteen days from the date of the

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1 taxation and revenue department's decision to file an objection  
2 with the taxation and revenue department. The person filing  
3 the objection shall submit evidence to support the objection  
4 and may request a hearing. The taxation and revenue department  
5 shall review the evidence and issue a decision within fifteen  
6 days of the filing of the objection.

7 F. If, following a hearing and an opportunity to be  
8 heard, the taxation and revenue department finds that a  
9 business or contractor provided false information to the  
10 taxation and revenue department in order to obtain a  
11 certificate or that a business or contractor used a certificate  
12 to obtain a resident business set-aside contract and the  
13 resident business or contractor did not perform work pursuant  
14 to the contract that was required to be performed by a resident  
15 business or contractor, the business or contractor:

16 (1) is not eligible to receive a certificate  
17 pursuant to this section for a period of five years from the  
18 date on which the taxation and revenue department became aware  
19 of the submission of the false information or the failure to  
20 perform the contract as required; and

21 (2) is subject to an administrative penalty of  
22 up to fifty thousand dollars (\$50,000) for each violation.

23 G. In a decision issued pursuant to Subsection D, E  
24 or F of this section, the taxation and revenue department shall  
25 state the reasons for the action taken and inform an aggrieved

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1 business or contractor of the right to judicial review of the  
2 determination pursuant to the provisions of Section 39-3-1.1  
3 NMSA 1978.

4 H. The taxation and revenue department may assess a  
5 reasonable fee for the issuance of a certificate not to exceed  
6 the actual cost of administering the taxation and revenue  
7 department's duties pursuant to this section.

8 I. The state auditor may audit or review the  
9 issuance or validity of certificates.

10 SECTION 6. [NEW MATERIAL] ANNUAL REPORT.--

11 A. Every contracting agency shall submit an annual  
12 report to the department on or before the deadline established  
13 by the department. An annual report shall include:

14 (1) the total number of contracts that the  
15 contracting agency awarded to a resident business, and the  
16 total dollar value of those contracts;

17 (2) the total number of contracts for which a  
18 portion of the contract work was performed by a resident  
19 business, and the total dollar value of the work performed  
20 pursuant to those contracts;

21 (3) the total number of resident business set-  
22 aside contracts designated and awarded, and the total dollar  
23 value of those contracts;

24 (4) the percentage of the contracting agency's  
25 total procurement that was awarded to a resident business; and

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1 (5) the efforts made by the contracting agency  
2 to publicize and promote procurement pursuant to the Resident  
3 Business Set-Aside Act.

4 B. The department shall receive and analyze reports  
5 submitted pursuant to this section and, using the report data,  
6 shall prepare and submit an annual report to the governor and  
7 to the legislature and for publication on the sunshine portal  
8 by November 1 of each year, beginning in 2018, to show whether  
9 the purpose and the directives of the Resident Business Set-  
10 Aside Act were met during the preceding fiscal year.

11 SECTION 7. [NEW MATERIAL] CONSULTATION WITH INDUSTRY.--  
12 The department shall consult at least every six months with  
13 representatives from industries affected by the Resident  
14 Business Set-Aside Act to ensure effective implementation of  
15 that act.

16 SECTION 8. [NEW MATERIAL] RULES.--The department shall  
17 promulgate rules necessary to implement the provisions of the  
18 Resident Business Set-Aside Act.

19 SECTION 9. EFFECTIVE DATE.--The effective date of the  
20 provisions of this act is July 1, 2017.