

FISCAL NOTE
LEGISLATIVE FISCAL ANALYST ESTIMATE

ESTIMATE OF FISCAL IMPACT – STATE AGENCIES (See narrative for political subdivision estimates)				
	FY 2021-22		FY 2022-23	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS	See Below	See Below	See Below	See Below
TOTAL FUNDS	See Below	See Below	See Below	See Below

Any Fiscal Notes received from state agencies and political subdivisions are attached following the Legislative Fiscal Analyst Estimate.

LB 61 requires the Department of Administrative Services (DAS) to immediately adopt and promulgate rules and regulations to establish formal protest procedures, including procedures for a contested case hearing, for any contract for services in excess of ten million dollars (\$10,000,000) awarded by any state agency.

DAS estimates the cost to administer the provisions of LB 61 to be \$198,108 in fiscal year 2021-22 and \$200,644 in fiscal year 2022-23. In large part, this estimate is based on the bill's requirement of an accelerated timeframe for contested cases and the departure from the current Administrative Procedure Act (APA) provisions. Of the costs estimated, \$11,645 and \$8,645, respectively, are for operational costs. The remainder of the estimated costs are to hire two (2.0) new FTE and associated benefits.

According to the DAS response, an average of 6.6 protests have been filed over the last five years. Of these, only 2.4 per year are in a range of contracts over \$10 million. From this average of 2.4 contract protests being filed, it appears that the requested need for 2.0 additional FTE is unwarranted. Clearly additional staff time and effort will be required to address such protests, and DAS has included the estimated costs of current staff time to address this need. DAS did not include those costs as part of their estimate for additional funding. Current staff costs were provided for informational purposes and DAS correctly identified them as absorbable within their current budget.

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 61	AM:	AGENCY/POLT. SUB: Department of Administrative Services	
REVIEWED BY: Neil Sullivan		DATE: 1/19/2021	PHONE: (402) 471-4179
COMMENTS: The Department of Administrative Services assessment of fiscal impact from LB 61 appears reasonable.			

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 61	AM:	AGENCY/POLT. SUB: Department of Health & Human Services	
REVIEWED BY: Neil Sullivan		DATE: 2/17/2021	PHONE: (402) 471-4179
COMMENTS: The Department of Health & Human Services indication of fiscal impact from LB 61 due to enterprise assessments appears reasonable.			

Please complete ALL (5) blanks in the first three lines.

2021

LB⁽¹⁾ 61

FISCAL NOTE

State Agency OR Political Subdivision Name: ⁽²⁾ Department of Administrative Services (DAS) – Materiel Division

Prepared by: ⁽³⁾ Jennifer Sommars-Link Date Prepared: ⁽⁴⁾ 1-11-2021 Phone: ⁽⁵⁾ 402-471-1405

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	<u>FY 2021-22</u>		<u>FY 2022-23</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS	_____	_____	_____	_____
CASH FUNDS	_____	_____	_____	_____
FEDERAL FUNDS	_____	_____	_____	_____
REVOLVING FUNDS	<u>\$198,018</u>	<u>\$198,018</u>	<u>\$200,644</u>	<u>\$200,644</u>
TOTAL FUNDS	<u>\$198,018</u>	<u>\$198,018⁽¹⁾</u>	<u>\$200,644</u>	<u>\$200,644⁽¹⁾</u>

⁽¹⁾ See the table below for the enterprise wide impact by fund type for the increase in revenue.

Explanation of Estimate:

LB 61 would require bid protests for service contracts over \$10,000,000 be deemed a contested case in accordance with the Administrative Procedure Act (APA) and be subject to judicial review. The bill also requires DAS to adopt and promulgate rules and regulations.

LB 61 is a departure from the Department of Administrative Services (DAS) and Materiel Division - State Purchasing Bureau's (SPB) bid protest process. Current process requires a bidder to submit a written protest to SPB within 10 days of the posting of the intent to award. (Step 1) The Materiel Administrator issues a written response after consultation with legal counsel generally within 10 days. If not satisfied with the response of the Materiel Administrator, the bidder may, within 10 days of the response, make a written request to meet with the Materiel Administrator and the Director of DAS. (Step 2) At the meeting the bidder presents its issues. The Director of DAS provides a final written decision after consultation with legal counsel, generally within 10 days of the meeting. The bidder also has the option to skip the written protest to the Materiel Administrator and proceed directly to requesting a meeting with the Director of DAS. Bidders have the right to file a lawsuit following the final decision of the Director of DAS.

To respond to a bid protest SPB staff must analyze the protest and review the contract file and facts in relation to the protest. The Materiel Administrator and the Director of DAS, as a part of preparing their respective responses, complete an independent analysis of the protest, and review the procurement file and facts. Bidders may obtain information and documentation on the procurement process through a statutory public records request.

This proposed legislation would add a significant amount of additional staff time and additional cost due to the procedures provided under the APA.

Under the APA the protesting bidder would have the right to an administrative hearing before a hearing officer to present their protest. The parties would be able to present testimony, cross-examine witnesses, and present evidence. Under the APA, parties have the right to request discovery, subpoenas, and protective orders, and to file motions. The hearing officer can conduct a pre-trial conference to rule on matters brought before the hearing officer, and procedural matters related to conducting the hearing. The protesting party can request that a transcript of the proceedings be made and that the rules of evidence apply to the hearing. Either party is entitled to judicial review of the hearing officer's final ruling in the District Court and may appeal the District Court ruling to the Court of Appeals.

The costs of the formal hearing are paid by the party against whom the final decision is rendered. If the State appeals a final decision, the court costs and transcription fees would be the obligation of the State. There would also be additional costs based upon the number of hours State employees would have to allocate to respond to the bid protest under the APA that would not be incurred under the current protest process.

The SPB contracting process involves a team of personnel who are responsible for the contracting process. Each contract solicitation involves a team that can consist of staff assistants, one or two buyers, attorneys, a paralegal, a Procurement Supervisor, and the Materiel Administrator. Under LB 61 each of these personnel could be required to perform additional analysis of the bid process and protest, be interviewed regarding their involvement in the bid, be subpoenaed, and deposed and called as a witness. The DAS General Counsel would be responsible for representing SPB's interests in the bid protest.

How much time each of these positions would have to dedicate to the bid protest is difficult to determine as it would be based upon the complexity of the bid protest and by the protesting bidder's determination to overturn the contract award. For SPB staff it could be hours to tens of hours, and for the attorneys it could be tens of hours to over a hundred hours.

The fiscal impact of this bill is difficult to quantify due to the number of variables; variables that are mostly controlled by the protesting bidder. The following provides costs for personnel and services that would be necessary for a bid protest under LB 61.

Hearing officer: \$150.00 to \$800.00 per hour plus expenses. (Hearings could last between a half-day to a week)

Court Reporter: If no transcript is ordered the cost is \$90.00 for the first hour and every hour thereafter is \$70.00. If a transcript is ordered average cost is \$40.00 for the first hour and \$30.00 per hour for every hour thereafter, but the transcript fee is an additional charge which varies based upon the nature and complexity of the transcript.

Estimated costs per hour are based on current salary and health insurance costs, plus FICA, retirement, Employee Assistance Program and Workers' Compensation. Time necessary to respond to discovery, provide witness statements, and prepare necessary work product to prepare for the judicial review and/or court hearings would vary from protest to protest. Such costs for existing personnel would be absorbed within current operations, however allocated resources to bid protests would reduce the resources available to allocate to other procurements.

Buyer III: [salary and benefits] – cost per hour \$41.73

Backup Buyer III: [salary and benefits] – cost per hour \$41.73

Staff assistant: [salary and benefits] – cost per hour \$33.19

Attorney III: [salary and benefits] – cost per hour \$52.71

Paralegal I: [salary and benefits] – cost per hour \$36.17

Procurement Supervisor: [salary and benefits] – cost per hour \$49.37

Materiel Administrator: [salary and benefits] – cost per hour \$85.16

The number of protests for services contracts that DAS received by year is as follows:

2020 – 4 Protests (1 in a range over \$10 million)
2019 – 9 Protests (1 in a range over \$10 million)
2018 - 3 Protests (1 in a range over \$10 million)
2017 - 10 Protests (6 in a range over \$10 million)
2016 - 7 Protests (3 in a range over \$10 million)

An unquantifiable cost to the State of protests under LB 61 would be the extended delay in executing contracts due to APA procedures. Upon issuance of the Notice of Intent to Award, the protesting bidder would have a period in which to file the protest (Currently 10 days). A hearing date would then be set after reasonable notice as required by the APA. A minimum of 30 days would be reasonable for the notice, but that time could be extended based upon motions, discovery, interviews and depositions, and a pre-trial conference (1-3 additional months). After the hearing and receipt of the final ruling of the hearing officer, which will require time to compose, the losing party has 30 days to file an appeal to the District Court.

The District Court of Lancaster County is currently scheduling matters 3-6 months out. Additional time will be needed for the judge to consider the record and issue a ruling. The District Court judge can also remand the matter back to the hearing officer for further review in accordance with the remand. The amount of time for considering the remand by the hearing officer and issuance of a new ruling is an unknown. The ruling of the hearing officer upon remand can also be appealed to the District Court within 30 days of the issuance of the decision on remand. The appealing party has 30 days to get the record upon remand to the District Court. (For brevity, the timing in the District Court for the appeal on remand and the possibility of additional remand will not be addressed.)

A further appeal may be taken to the Court of Appeals within 30 days of the final ruling in the District Court. The Court of Appeals is currently scheduling matter 3-4 months out. The court will require additional time to review the record and issue a ruling.

A bid protest under LB 61 could result in a delay of an estimated minimum of 60 days and an estimated maximum of one and one-half years. Delay in executing the contract could result in additional unquantifiable costs to maintain continuity of services through statutory exceptions to the normal contracting process.

It has been SPB's experience that there can be multiple bid protests filed on the same intent to award. Additionally, it has been the experience of SPB that upon sustaining a bid protest and awarding to another bidder SPB receives additional protests on the new award. Under LB 61 both scenarios will lead to additional costs to the State as indicated above.

It is difficult to determine when existing DAS Materiel and Legal staff could no longer handle the additional workload and additional staff would be required. Any increased cost would result in an increase to the state-wide biennial Purchasing Assessment.

Due to the potential for legal precedence being set by this bid protests process, the State's interests would be best served if the process were centralized.

If the process were centralized in DAS – Materiel - SPB at least one Attorney III and one Paralegal would need to be added to the DAS – Materiel SPB staff to handle statewide bid protests. The estimated cost for these two new FTE's is \$198,018 in FY21-22 and \$200,644 in FY22-23. These costs include salary and benefits (health insurance is budgeted using the State's current share of the highest cost family plan as a base); and ongoing annual operating costs (OCIO expenses including computer leasing costs, printing/publication, rent/depreciation surcharge and other supplies. There would also be a one-time cost of \$1,500 for each FTE in FY21-22 for set up costs and the purchase of new non capitalized equipment (monitors, furniture, etc.).

These additional costs would result in the need for additional revolving fund appropriation and an increase in the Materiel – biennial Purchasing Assessment. The FY21-23 biennial Purchasing Assessment has already been published and would need to be adjusted.

The table below summarizes the estimated impact by fund type of the increased statewide Purchasing Assessment. The allocation by fund type is based on a four (4) year [2016-2019] average for the purchasing assessment.

	FY21-22	FY22-23
	Expenditures	Expenditures
General Funds	\$43,821	\$44,402
Cash Funds	\$108,813	\$110,256
Federal Funds	\$21,701	\$21,989
Revolving Funds	\$23,683	\$23,997
Total Funds	\$198,018	\$200,644

The bill creates a fiscal impact; however, the exact fiscal impact is unknown.

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

<u>POSITION TITLE</u>	<u>NUMBER OF POSITIONS</u>		<u>2021-22</u>	<u>2022-23</u>
	<u>21-22</u>	<u>21-23</u>	<u>EXPENDITURES</u>	<u>EXPENDITURES</u>
Attorney III	1	1	\$71,761	\$73,196
Paralegal I	1	1	\$43,245	\$44,109
Benefits.....			\$71,367	\$74,694
Operating.....			\$11,645	\$8,645
Travel.....				
Capital outlay.....				
Aid.....				
Capital improvements.....				
TOTAL.....			\$198,018	\$200,644

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

State Agency or Political Subdivision Name:(2) Department of Health and Human Services

Prepared by: (3) Mike Michalski

Date Prepared 2-17-2021

Phone: (5) 471-6719

	<u>FY 2021-2022</u>		<u>FY 2022-2023</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS				
TOTAL FUNDS	See Below	See Below	See Below	See Below

Return by date specified or 72 hours prior to public hearing, whichever is earlier.

Explanation of Estimate:

This bill would have a fiscal impact, however, the exact amount is unknown. The Department of Health and Human Services (DHHS) currently has 17 contracts that exceed \$10 million and this bill would potentially cause delays, depending on the extent of the contested case process and resulting appeals. This would cause DHHS to enter into new emergency contracts with existing vendors, likely requiring DHHS to pay more. This makes the impact difficult to predict, but could be large. In addition, if the Department of Administrative Services will be increasing costs to assessments as a result of this bill, then DHHS would also require an increase in appropriation.

MAJOR OBJECTS OF EXPENDITURE

PERSONAL SERVICES:	NUMBER OF POSITIONS		2021-2022	2022-2023
	POSITION TITLE	21-22	22-23	EXPENDITURES
Benefits.....				
Operating.....				
Travel.....				
Capital Outlay.....				
Aid.....				
Capital Improvements.....				
TOTAL.....				