

FISCAL NOTE
LEGISLATIVE FISCAL ANALYST ESTIMATE

ESTIMATE OF FISCAL IMPACT – STATE AGENCIES (See narrative for political subdivision estimates)				
	FY 2023-24		FY 2024-25	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS				
TOTAL FUNDS				

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

LB 293 requires the Department of Administrative Services (DAS) to immediately adopt and promulgate rules and regulations establishing formal protest procedures, including procedures for a contested case hearing, for any state agency contract for services awarded in excess of ten million dollars (\$10,000,000). If a formal protest is filed, DAS shall proceed with notice and hearing for a contested case pursuant to the Administrative Procedure Act (APA). The hearing shall be held within sixty (60) days after the protest is filed.

DAS estimates the need for 2.0 FTE to address the provisions of LB 293. Included in this estimate are operating costs of \$9,159 in FY24 and \$7,385 in FY25. DAS estimates the potential need for hearing officers at a rate of \$150 to \$800 per hour. Hearings could last between a half-day to a week. In addition, court reporter and transcript costs could be incurred. These costs vary based on the nature and complexity of transcripts.

DAS reports the following number of protests for contracts over \$10 million:

- 2022 – 0
- 2021 – 0
- 2020 – 1
- 2019 – 1
- 2018 – 1
- 2017 – 6
- 2016 – 3

With an average of 1.7 complaints per year over the past 7 years, it is difficult to justify the need for 2.0 new FTE. Assuming 1 to 2 complaints per year in the future, there would be costs associated with hearings, court reporters, and transcripts. These costs are likely to be addressed within the Materiel Division’s current Revolving Fund authority of \$17,935,573 (in FY23).

No fiscal impact.

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 293	AM:	AGENCY/POLT. SUB: Dept. of Administrative Services – Materiel Division	
REVIEWED BY: Kimberly Burns	DATE: 01/31/2023	PHONE: (402) 471-4171	
COMMENTS: No basis to disagree with the Department of Administrative Services’ assessment of fiscal impact from LB 293.			

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 293	AM:	AGENCY/POLT. SUB: University of Nebraska System	
REVIEWED BY: Kimberly Burns	DATE: 01/25/2023	PHONE: (402) 471-4171	
COMMENTS: Concur with the University of Nebraska System's assessment of no fiscal impact from LB 293.			

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 293	AM:	AGENCY/POLT. SUB: Department of Health and Human Services	
REVIEWED BY: Kimberly Burns	DATE: 02/07/2023	PHONE: (402) 471-4171	
COMMENTS: No basis to disagree with the Department of Health and Human Services' assessment of indeterminate impact from LB 293.			

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

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

Prepared by: (3) John Meals

Date Prepared 2-7-2023

Phone: (5) 471-6719

	<u>FY 2023-2024</u>		<u>FY 2024-2025</u>	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS				
TOTAL FUNDS	\$0	\$0	\$0	\$0

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

Explanation of Estimate:

LB 293 creates a formal appeal process for agency contracts awarded in excess of \$10 million dollars to be filed under the Administrative Procedure Act (APA).

This bill presents more of an operational impact, though there would be a fiscal impact in staff time spent in support of the appeals process. The extent of the Department of Health and Human Services' (DHHS) involvement in the process is currently unknown, as the Department of Administrative Services (DAS) is responsible for establishing the rules and regulations of the Act. Given the unpredictable timing and frequency of appeals that would occur resulting from this bill, existing staff would need to be utilized, and the degree to which they are involved would be determined by the rules and regulations that DAS would develop.

The impact would be outsized on the Division of Medicaid & Long-Term Care (MLTC), which has the most contracts in excess of 10 million, at three. Overall, DHHS has about 21 active service contracts in excess of 10 million, although not all may be subject to LB 293 because of the ambiguity in the language.

The fiscal impact of this bill centers around the extra staff hours. If DAS assigns appeals to agency, DHHS Hearing Officers will expend more time due to complexity of appeals involved in awarded contracts. One such awarded contract could give rise to more than one appeal. In 2021, there were 30 DHHS contracts and in 2022, there were 29 DHHS contracts awarded in excess of \$10 million dollars. The impact of these appeals would be significant on staff workload and could require an additional staff member. Should DAS assign appeals to the agency, the required additional staff would be one (1) FTE Attorney III at a cost of \$87,027 in FY24 and \$121,838 in FY25.

Alternatively, if DAS absorbs this work and increases the assessment charged to DHHS to perform this service on our behalf, DHHS would need a corresponding increase to appropriation.

MAJOR OBJECTS OF EXPENDITURE

PERSONAL SERVICES:	POSITION TITLE	NUMBER OF POSITIONS		2023-2024 EXPENDITURES	2024-2025 EXPENDITURES
		23-24	24-25		
Benefits.....					
Operating.....					
Travel.....					
Capital Outlay.....					
Aid.....					
Capital Improvements.....					
TOTAL.....				\$0	\$0

LB (1) 0293 Provide formal protest procedures for certain state contracts for services **FISCAL NOTE**

State Agency OR Political Subdivision Name:⁽²⁾ University of Nebraska System
 Prepared by:⁽³⁾ Chris Kabourek Date Prepared:⁽⁴⁾ 01/20/2023 Phone:⁽⁵⁾ (402) 472-7102

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	FY 2023 - 24		FY 2024 - 25	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
CASH FUNDS	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
FEDERAL FUNDS	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
OTHER FUNDS	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
TOTAL FUNDS	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>

Explanation of Estimate:

This legislation would have no impact on the University of Nebraska System.

For purposes of Neb. Rev. Stat. Sections 73-501 through 73-510, the definition of "state agency" excludes explicitly the University of Nebraska.

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

<u>POSITION TITLE</u>	<u>NUMBER OF POSITIONS</u>		<u>2023 - 24 EXPENDITURES</u>	<u>2024 - 25 EXPENDITURES</u>
	<u>23 - 24</u>	<u>24 - 25</u>		
	<u>0</u>	<u>0</u>		
	<u>0</u>	<u>0</u>		
Benefits.....				
Operating.....				
Travel.....				
Capital outlay.....				
Aid.....				
Capital improvements.....				
TOTAL.....				

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2023

LB⁽¹⁾ 293

FISCAL NOTE

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

Prepared by: ⁽³⁾ Amara Block Date Prepared: ⁽⁴⁾ 1/13/2023 Phone: ⁽⁵⁾ 402-432-0121

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	<u>FY 2023-24</u>		<u>FY 2024-25</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS	_____	_____	_____	_____
CASH FUNDS	_____	_____	_____	_____
FEDERAL FUNDS	_____	_____	_____	_____
REVOLVING FUNDS	\$205,092	\$205,092	\$214,019	\$214,019
TOTAL FUNDS	<u>\$205,092</u>	<u>\$205,092 ⁽¹⁾</u>	<u>\$214,019</u>	<u>\$214,019 ⁽¹⁾</u>

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

Explanation of Estimate:

LB 293 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 293 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 293 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, which 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 293.

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.

Procurement Contracts Officer: [salary and benefits] – cost per hour \$45.53

Administrative Technician: [salary and benefits] – cost per hour \$32.92

Attorney III: [salary and benefits] – cost per hour \$53.09

Paralegal: [salary and benefits] – cost per hour \$37.51

State Procurement Manager: [salary and benefits] – cost per hour \$ 52.83

Materiel Administrator: [salary and benefits] – cost per hour \$74.47

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

2022 – 1 Protest (0 in a range over \$10 million)
2021 – 5 Protests (0 in a range over \$10 million)
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 293 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 matters approximately 6 months out. The court will require additional time to review the record and issue a ruling.

A bid protest under LB 293 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 293 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 \$205,092 in FY23-24 and \$214,019 in FY24-25. 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, and other supplies. There would also be a one-time cost of \$887 for each FTE in FY23-24 for set up costs and the purchase of new non capitalized equipment (monitor, chair, etc.).

These additional costs would result in the need for additional revolving fund appropriation and an increase in the Materiel – biennial Purchasing Assessment. The FY23-25 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 [2019-2022] average for the purchasing assessment.

	FY23-24	FY24-25
	Expenditures	Expenditures
General Funds	\$72,987	\$76,164
Cash Funds	\$100,456	\$104,828
Federal Funds	\$9,947	\$10,380
Revolving Funds	\$21,702	\$22,647
Total Funds	\$205,092	\$214,019

The bill creates a fiscal impact; however, the full extent of the fiscal impact is unknown.

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

<u>POSITION TITLE</u>	<u>NUMBER OF POSITIONS</u>		<u>2023-24</u>	<u>2024-25</u>
	<u>23-24</u>	<u>24-25</u>	<u>EXPENDITURES</u>	<u>EXPENDITURES</u>
Paralegal	1	1	\$46,087	\$48,391
Attorney III	1	1	\$75,348	\$79,115
Benefits.....			\$74,498	\$79,128
Operating.....			\$9,159	\$7,385
Travel.....				
Capital outlay.....				
Aid.....				
Capital improvements.....				
TOTAL.....			\$205,092	\$214,019