

FISCAL NOTE
LEGISLATIVE FISCAL ANALYST ESTIMATE

ESTIMATE OF FISCAL IMPACT – STATE AGENCIES (See narrative for political subdivision estimates)				
	FY 2018-19		FY 2019-20	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS	194,696	194,696	195,601	195,601
TOTAL FUNDS	194,696	194,696	195,601	195,601

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

LB 814 requires the Department of Administrative Services to immediately adopt and promulgate rules and regulations providing that any protest of an agency procurement decision awarded pursuant to this section (73-504) involving an award in excess of some undesignated amount shall be deemed to be a contested case under the Administrative Procedure Act and shall be subject to judicial review under section 84-917.

The Department of Administrative Services estimates the need to hire 2.0 FTE to address the bill's provisions. In total, the DAS estimate is \$194,696 in fiscal year 2018-19 and \$195,601 in fiscal year 2019-20.

Depending on the threshold that is set for these awards, it is possible that the work involved will meet the estimate provided by DAS. However, a more accurate assessment cannot be made until "an award in excess of XXX dollars" is specified. Clearly, a lower threshold will result in a higher workload.

Due to the uncertainty of the bill's provisions, there is no basis to disagree with the DAS estimate.

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 814	AM:	AGENCY/POLT. SUB: Department of Administrative Services	
REVIEWED BY: Neil Sullivan	DATE: 1/18/2018	PHONE: (402) 471-4179	
COMMENTS: No basis to disagree with the Department of Administrative Services estimate of fiscal impact from LB 814.			

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE			
LB: 814	AM:	AGENCY/POLT. SUB: Department of Health and Human Services	
REVIEWED BY: Neil Sullivan	DATE: 2/20/2018	PHONE: (402) 471-4179	
COMMENTS: No basis to disagree with Department of Health and Human Services assessment related to enterprise impact from LB 814.			

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE		
LB: 814	AM:	AGENCY/POLT. SUB: Attorney General
REVIEWED BY: Neil Sullivan	DATE: 1/24/2018	PHONE: (402) 471-4179
COMMENTS: No basis to disagree with the Attorney General estimate of indeterminate fiscal impact from LB 814.		

ADMINISTRATIVE SERVICES STATE BUDGET DIVISION: REVIEW OF AGENCY & POLT. SUB. RESPONSE		
LB: 814	AM:	AGENCY/POLT. SUB: Secretary of State's Office
REVIEWED BY: Neil Sullivan	DATE: 1/12/2018	PHONE: (402) 471-4179
COMMENTS: No basis to disagree with the Secretary of State's Office estimate of no fiscal impact from LB 814.		

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

2018

LB⁽¹⁾ 814

FISCAL NOTE

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

Prepared by: ⁽³⁾ Doug Wilken Date Prepared: ⁽⁴⁾ 1/8/2018 Phone: ⁽⁵⁾ 402-471-4114

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	FY 2018-19		FY 2019-20	
	EXPENDITURES	REVENUE	EXPENDITURES	REVENUE
GENERAL FUNDS	_____	_____	_____	_____
CASH FUNDS	_____	_____	_____	_____
FEDERAL FUNDS	_____	_____	_____	_____
REVOLVING FUNDS	\$194,696	\$194,696	\$195,601	\$195,601
TOTAL FUNDS	<u>\$194,696</u>	<u>\$194,696</u>	<u>\$195,601</u>	<u>\$195,601</u>

Explanation of Estimate:

LB 814 would require that bid protests for service contracts over a certain dollar amount (\$XX) 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 814 is a departure from the Department of Administrative Services (DAS) and Materiel Division - State Purchasing Bureau (SPB) bid protest process. The 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, the 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, the State Purchasing Manager, and the Materiel Administrator. Under LB 814 each of these personnel could be required to do 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' attorneys 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 impossible 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 814.

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 order the cost is \$90.00 for the first hour and every hour thereafter is \$70.00. If a transcript is order the 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, life insurance, 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 \$40.62

Backup Buyer III: [salary and benefits] – cost per hour \$40.62

Staff assistant: [salary and benefits] – cost per hour \$32.07

Attorney III: [salary and benefits] – cost per hour \$50.69

Paralegal I: [salary and benefits] – cost per hour \$35.06

Procurement Supervisor: [salary and benefits] – cost per hour \$42.81

State Procurement Manager: [salary and benefits] – cost per hour \$50.44

Materiel Administrator: [salary and benefits] – cost per hour \$73.47

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

2017 - 10 Protests
2016 - 10 Protests
2015 - 1 Protests
2014 - 5 Protests
2013 - 11 Protests

An unquantifiable cost to the State of protests under LB 814 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 of time 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 814 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 814 both of these scenarios will lead to additional costs to the State as indicated above.

It is impossible 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 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 FTE's is \$194,696 in FY18-19 and \$195,601 in FY19-20. 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 (communication/data processing, printing/publication, rent/depreciation surcharge and supplies. There would also be a onetime cost of \$2,500 for each FTE in FY18-19 for set up costs and the cost of new equipment.

These additional costs would result in the need for additional revolving fund appropriation and an increase in the Materiel – Purchasing Assessment. The FY18-19 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 4 year [2014-2017] average of operating expenses.

	FY18-19	FY19-20
	Expenditures	Expenditures
General Funds	\$ 48,410	\$ 48,635
Cash Funds	\$ 72,591	\$ 72,929
Federal Funds	\$ 42,044	\$ 42,239
Revolving Funds	\$ 31,651	\$ 31,798
Total Funds	\$194,696	\$195,601

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

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

POSITION TITLE	NUMBER OF POSITIONS		2018-19	2019-20
	18-19	19-20	EXPENDITURES	EXPENDITURES
Attorney III	1	1	71,409	72,837
Paralegal I	1	1	43,033	42,893
Benefits.....			67,296	70,913
Operating.....			7,958	7,958
Travel.....				
Capital outlay.....			5,000	
Aid.....				
Capital improvements.....				
TOTAL.....			194,696	195,601

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 1-18-18

Phone: (5) 471-6719

	<u>FY 2018-2019</u>		<u>FY 2019-2020</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS				
CASH FUNDS				
FEDERAL FUNDS				
OTHER FUNDS				
TOTAL FUNDS	<u>See Below</u>	<u>See Below</u>	<u>See Below</u>	<u>See Below</u>

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

Explanation of Estimate:

Fiscal impact would be dependent on any changes in cost mandated by the Department of Administrative Services (DAS) State Building Division and the threshold established in the bill. The bill as drafted requires DAS to promulgate rules and regulations to create an Administrative Procedure Act hearing process for contracts for state agencies. This new process may require DAS to increase its procurement assessment to the Department of Health and Human Services (DHHS). Any such increase in cost to DHHS would require additional appropriation/funds to match increased assessments.

In addition to any increase in assessment costs, this process could cause a delay in awarding new contracts. This may require DAS to enter into emergency contracts to maintain continuity of critical services and programs to avoid public harm. Said contracts are not subject to the bid process and may increase costs to state.

MAJOR OBJECTS OF EXPENDITURE

PERSONAL SERVICES:	NUMBER OF POSITIONS		2018-2019 EXPENDITURES	2019-2020 EXPENDITURES
	18-19	19-20		
Benefits.....				
Operating.....				
Travel.....				
Capital Outlay.....				
Aid.....				
Capital Improvements.....				
TOTAL.....			\$0	\$0

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2018

LB⁽¹⁾ 814

FISCAL NOTE

State Agency OR Political Subdivision Name: ⁽²⁾ Attorney General

Prepared by: ⁽³⁾ Ryan Post Date Prepared: ⁽⁴⁾ 1-22-18 Phone: ⁽⁵⁾ 471-2687

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	<u>FY 2018-19</u>		<u>FY 2019-20</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS	_____	_____	_____	_____
CASH FUNDS	_____	_____	_____	_____
FEDERAL FUNDS	_____	_____	_____	_____
OTHER FUNDS	_____	_____	_____	_____
TOTAL FUNDS	=====	=====	=====	=====

Explanation of Estimate:

This Bill will likely increase the number of Administrative Procedure Act Appeals filed each year and will increase the time and cost to defend those appeals. The fiscal impact is unknown at this time since the Bill does not identify a dollar threshold.

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

<u>POSITION TITLE</u>	<u>NUMBER OF POSITIONS</u>		<u>2018-19 EXPENDITURES</u>	<u>2019-20 EXPENDITURES</u>
	<u>18-19</u>	<u>19-20</u>		
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Benefits.....	_____	_____	_____	_____
Operating.....	_____	_____	_____	_____
Travel.....	_____	_____	_____	_____
Capital outlay.....	_____	_____	_____	_____
Aid.....	_____	_____	_____	_____
Capital improvements.....	_____	_____	_____	_____
TOTAL.....	_____	_____	_____	_____

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

2018

LB⁽¹⁾ 814

FISCAL NOTE

State Agency OR Political Subdivision Name: ⁽²⁾ Nebraska Secretary of State's Office

Prepared by: ⁽³⁾ Joyce Woofter Date Prepared: ⁽⁴⁾ 1/9/2018 Phone: ⁽⁵⁾ 402-471-2384

ESTIMATE PROVIDED BY STATE AGENCY OR POLITICAL SUBDIVISION

	<u>FY 2018-19</u>		<u>FY 2019-20</u>	
	<u>EXPENDITURES</u>	<u>REVENUE</u>	<u>EXPENDITURES</u>	<u>REVENUE</u>
GENERAL FUNDS	_____	_____	_____	_____
CASH FUNDS	_____	_____	_____	_____
FEDERAL FUNDS	_____	_____	_____	_____
OTHER FUNDS	_____	_____	_____	_____
TOTAL FUNDS	=====	=====	=====	=====

Explanation of Estimate:

No fiscal impact.

BREAKDOWN BY MAJOR OBJECTS OF EXPENDITURE

Personal Services:

<u>POSITION TITLE</u>	<u>NUMBER OF POSITIONS</u>		<u>2018-19</u>	<u>2019-20</u>
	<u>18-19</u>	<u>19-20</u>	<u>EXPENDITURES</u>	<u>EXPENDITURES</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Benefits.....	_____	_____	_____	_____
Operating.....	_____	_____	_____	_____
Travel.....	_____	_____	_____	_____
Capital outlay.....	_____	_____	_____	_____
Aid.....	_____	_____	_____	_____
Capital improvements.....	_____	_____	_____	_____
TOTAL.....	_____	_____	_____	_____