

TESTIMONY ON LB 814
GOVERNMENT, MILITARY, AND VETERANS AFFAIRS COMMITTEE

February 21, 2018

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Good Afternoon Chairman Murante and members of the Government, Military, and Veterans Affairs Committee:

I am here today to testify in favor of LB 814 which would change the process of contract procurement in the state of Nebraska to allow judicial appeal of an adverse contract award decision by the Department of Administrative Services.

There are others here who can testify regarding the legal and procedural aspects to this bill. I want to address the bill from my perspective as the head of a state agency. As I am sure you are aware, DHHS is the largest department in state government and, due to the nature of its services, is routinely involved with DAS in soliciting bids and executing contracts many of which are very large. The Department cannot do its work without an efficient, effective, and unbiased contracting process.

Let me tell you about the process as it exists based on my experience. For large contracts there is almost always a protest by one or more unsuccessful bidders. Because the protest process begins and ends inside DAS with the Director having the final decision on the merits of the protest, and protests are rarely upheld, the protester is very rarely satisfied with that decision. This leaves the protester looking for the next step of appeal. In Nebraska there is none as the process currently exists. For smaller contracts, the protest may end there, but for larger contracts the protester has more incentive to try to find other alternatives to continue the protest.

This often results in the protester attempting to find a legal theory to get into court since there is no independent right to appeal to a court. This may include arguing the protester has standing as a taxpayer or some other equally tenuous argument. The result frequently is a protracted period of motions and hearings and other procedures as the protester attempts to find the right formula for pursuing its claim in court.

From the agency's point of view, this protracted period is a period of uncertainty. Although the contract has been awarded and probably executed, we would always be "looking over our shoulder" watching the litigation proceed and concerned that the court might determine the contract award was not valid with serious consequences for delivery of our services. This could mean that some steps of implementation would be delayed waiting for the litigation to be finished.

An example of this situation is a contract for a new Medicaid Management Information System (MMIS) which was signed prior to my tenure at DHHS but was being implemented when I arrived. The state at that time was embroiled in a lawsuit brought by an unsuccessful bidder which took about two years to resolve at which time the lawsuit was settled. During that time even though the Department was implementing the contract, there was always uncertainty as to the contract's future due to the pending lawsuit.

Another concern from the contracting agency's perspective is the need to be able to rely on the soundness of the procurement process and that it yields the most qualified contractor and best contract for the benefit of the state. I have no concern about the expertise of the staff of DAS, but the fact is there is little or no effective outside or objective review of the criteria and process that results in awarding a bid. And, because a protest is decided solely by the Director of DAS, there is no objective evaluation of the merits of a protest.

In the case of the MMIS project, that contract was awarded to a small company with little track record and without the resources to fulfill the contract requirements. This became painfully clear to me when I came on, and one of my first actions was to terminate that contract and "return to the drawing board" for the MMIS project.

Providing a route for judicial review will answer both problems; it will provide an expeditious means for a bid protest to be finally resolved in a matter of months rather than years and will provide an objective review of the bid process and award for the benefit of bidders and the people of the state of Nebraska.

I don't know what DAS' position on this change may be. I do know after speaking with a former Director of DAS that he very much disliked the role of deciding these protests, feeling ill equipped to understand fully the issues raised in the protest and that, without some compelling argument, he had no reason to differ with his staff who had made the award decision. In his case, he would have welcomed another stage of objective appeal.

Some may be concerned that this will greatly increase the amount of litigation against the state, and that may be true. But whatever litigation results will in my view provide more credibility to the procurement process as well as providing encouragement for there to be more bidders that may now be discouraged about the current process. And litigation may well decline in the future as court precedents are set and potential protesters may be better able to evaluate their prospects for a successful appeal. In addition, the amount of litigation can be limited by setting a high floor on the contract value that is eligible for judicial review as this bill contemplates.

Thank you for your time and attention, and I will be happy to answer any questions you may have.