

WRITTEN ONLY

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TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
SENATE BILL NO. 2563, S.D. 1

February 23, 2012

RELATING TO MANAGEMENT OF STATE FUNDS

Senate Bill No. 2563, H.D. 1, amends Section 36-2.5, HRS, Full Disclosure of Entities Receiving State Awards, by: 1) establishing new deadlines to implement a searchable website on "state awards"; and 2) changing the lead agency responsible for the website from the Department of Budget and Finance to the Chief Information Officer (CIO). The current implementation deadline for a pilot website is July 1, 2008, and for a fully functional website, including sub awards, is January 1, 2009. [NOTE: The previous Administration made a policy decision not to implement a website because of fiscal and staffing constraints, and various technical issues/concerns with the section.] This bill specifies implementation of a pilot website by January 1, 2014, and implementation of a fully functional website by July 1, 2015.

The Administration supports the intent of this bill. The proposed revised timetable is more realistic and changing the lead agency to the CIO is better aligned with the CIO's overall responsibilities. We note, however, that there are several other significant, technical issues/concerns with Section 36-2.5 that need to be thoroughly analyzed and resolved before the website can be efficiently and effectively brought

online (see Attachment 1 for a detailed discussion). Some of these issues may need to be brought back to the Legislature for further policy discussion and possible statutory revisions.

The Administration welcomes the opportunity for further dialogue on a transparency website and looks forward to working with the Legislature on this matter.

Attachment

ACT 272, SLH 2007
IMPLEMENTATION ISSUES & SUGGESTED APPROACH
(Original 5/8/08; Revised 2/1/12)

Act 272 Requirements and Definitions:

- Establish, by January 1, 2009, a single searchable website that includes for each award the following information:
 - Name of entity receiving award;
 - Amount of the award;
 - Information on the award, including transaction type, funding agency, program source, and award title descriptive of the purpose of each funding action;
 - Full address of the entity receiving the award and primary location of performance under the award;
 - A unique identifier of the entity receiving the award and of the parent entity (if the entity is owned by another entity); and
 - Other relevant information as specified by lead agency.

- Establish, not later than July 1, 2008, a pilot program (which is to terminate not later than January 1, 2010) to:
 - Test collection and accession of data about subgrants and subcontracts; and
 - Determine how to implement a subaward reporting program across the state, including:
 - A reporting system under which the entity issuing a subgrant or subcontract is responsible for fulfilling the subaward reporting requirement; and
 - A mechanism for collecting and incorporating agency and public feedback on the design and utility of the website.

- Based on the pilot program, not later than January 1, 2010, lead agency is to ensure that:
 - Data regarding subawards are disclosed in the same manner as data regarding other state awards; and
 - Method for collecting and distributing data about subawards:
 - Minimizes burdens imposed on state award recipients and subaward recipients;
 - Allows state award recipients and subaward recipients to allocate reasonable costs for collection and reporting of subaward data as indirect costs; and
 - Establishes cost-effective requirements for collecting subaward data under block grants, formula grants, and other type of assistance to local governments;
 - For subaward recipients that receive state funds through county governments, the lead agency may extend the deadline for subawards disclosure for a period

not to exceed eighteen months if it is determined that compliance would impose an undue burden on the subaward recipient.

- The website shall:
 - Allow searches by any of the identifying elements specified in the preceding section;
 - Allow public to ascertain through a single search the total amount of funding awarded to an entity by state award that is a grant, subgrant, loan, awards cooperative agreement, or other form of financial assistance by fiscal year;
 - Allow public to ascertain through a single search the total amount of funding awarded to an entity by state award that is a contract, subcontract, purchase order, task order, or delivery order by fiscal year;
 - Allow downloading of data from the outcome of searches;
 - Provide an opportunity for the public to provide input about the utility of the site and recommendations for improvement;
 - Be updated not later than thirty days after the award of any state award requiring a posting; and
 - Provide for separate searches for the state awards.

- “State awards” mean state financial assistance and expenditures that:
 - Are grants, subgrants, loans, awards, cooperative agreements, other forms of financial assistance, contracts, subcontracts, purchase orders, task orders, and delivery orders;
 - Do not include single transactions less than \$25,000; and
 - Before October 1, 2009, do not include credit card transactions.

- “Entities” include for profit and nonprofit:
 - Corporations;
 - Associations;
 - Partnerships;
 - Limited liability companies;
 - Limited liability partnerships;
 - Sole proprietorships;
 - Other legal business entities;
 - Other grantees or contractors;
 - State or county entities; and
 - On or after January 1, 2010, subcontractors and subgrantees.

- Exclusions and exceptions from disclosure requirements:
 - Individual recipients of state public assistance;
 - State employees;
 - Tax-related awards pursuant to Title 14, HRS, which are subject to taxpayer disclosure provision under Title 14; and
 - Classified information.

- The lead agency shall submit to the legislature not later than twenty days prior to the convening of each regular session an annual report that includes:
 - Data regarding usage and public feedback on the utility of the site (including recommendations for improving data quality and collection);
 - An assessment of the reporting burden placed on state award and subaward recipients; and
 - An explanation of any extension of the subaward reporting deadline, if applicable.
 - Each annual report shall be posted on the website.
- DB&F is the lead agency and is authorized to designate one or more state agencies to participate in development and support of the website.
 - DAGS, in collaboration with B&F, is responsible for collecting and posting the required information on the website.
 - State agencies are required to comply with instructions given by DB&F and provide assistance upon request in ensuring operation of the website.

Issues in Implementing Act 272:

- Current State business processes for good and services procurement, purchase of service procurement, grants-in-aid funding, loan programs **do not** capture, or **even require** disclosure of, all of the information required to be reported under Act 272, especially with regard to information on subcontractors, subgrantees and parent entities. Major modifications to the procurement process, grants-in-aid funding process and various loan programs will be necessary to require **up front disclosure** of subaward recipients and parent entities as well as the primary location of performance of work in initial bids and proposal responses, grant applications and loan applications.

Up front disclosure is necessary because, it would greatly facilitate capturing this type of information (everything would be provided in the responding bid, etc.) and preclude any legal issues regarding post contracting disclosures and confidentiality. However, it should be noted that up front disclosure could adversely affect the bidding climate by requiring disclosure of previously closely held, proprietary business information.

- Act 272 terms and references, especially regarding the definition of “state awards,” are **not clearly defined** and **may not be consistent** with current State accounting, budgeting or procurement usage. The terms, “grants,” “loans,” “contracts” and “purchase orders” appear to follow current State usage, but the terms, “subgrants,” “awards,” “cooperative agreements,” “other forms of financial assistance,” “subcontracts,” “task orders” and “delivery orders” appear to need further clarification and/or definition. And there is no definition for a “parent entity.”

For example, clear definitions are required for “subgrants” and “subcontracts” to determine what type of business relationships need to be disclosed. Does accounting, legal, computer support or public relations services qualify as “subcontracts” or “subgrants,” or would it be considered general goods and services for the contractor or grantee? Would payments to individual health care provider payments under the Med/QUEST program need to be reported separately? Another example is the term “other forms of financial assistance.” Are reduced and/or preferential fees/rates, such as subsidized water rates and low cost leases, “other forms of financial assistance” that require disclosure. Further, it is unclear if the website is required to provide information on tax credits and/or deductions because the last clause of subsection (c) of the new codified section (on page 5, lines 5-9) makes reference to tax-related state awards.

- Act 272 appears to assume that the initial amount of a state award in terms of the successful bid is the same as actual expenditure. In some cases, such as the purchase of a truck, this is true but in many instances there are differences. Is the website required to track and disclose both initial award and actual expenditure? And conversely, many price list purchases from a particular vendor fall well below the \$25,000 single transaction threshold, however, when aggregated statewide over a year these purchases amount to significant sums of money. Is the website required to track, aggregate and disclose such purchases (if not, vendors involved with these types of transactions may not show up at all)?

Further, although grants may be appropriated, the funds may not be released. Is the website supposed to disclose and track all grant appropriations or only those for which funds are released. [NOTE: This should not be an issue with other expenditures such as contracts because it is assumed that disclosure and tracking will only commence upon a contract award or a purchase order placement.]

- If tracking of expenditures is required, then the details of certain type of transactions such as credit card purchases (P-Cards) could be problematic because details of these transactions are not recorded in the state accounting system. Records and details of P-Card transactions are maintained by the purchasing department; however, the only transaction recorded in the accounting system is the payment to the P-Card vendor. It should be noted that a larger percentage of purchases are now being made using P-Cards because of their convenience and preference by vendors (over vouchers).

In order to capture the details of P-Card transactions, either: a) modifications to the present transaction system and recordation process have to be made; or b) another approach could be to require the P-Card vendor to provide detailed transaction records electronically on a monthly basis (Section 36-2.5(c)(3) requires posting within 30 days of the award). DAGS needs to be consulted on the potential cost and workload impact of these modifications to track P-Card purchases.

- Act 272 places the reporting burden and workload on award recipients and subrecipients as it makes provision in subsection (d) of the new codified section (on page 5, lines 16-18) for a reporting system under which the entity issuing a subgrant or subcontract is responsible for fulfilling the subaward reporting requirement. However, for web security and data accountability reasons, departments/agencies need to be responsible for this function. Providing input access to thousands of contactors, vendors and grantees appears to be invitation to a security disaster and there is no assurance that they will voluntarily comply in a timely and correct manner.

Consequently, the **real and continuing** burden will fall on the departments and agencies that must input and maintain the various databases for the website. Recipient burden will more than likely **be minimal** and only involve providing the information required for disclosure via the initial bid response. The workloads of the respective departments and agencies will depend on the volume of state awards that they are responsible for (i.e., departments such as the Departments of Health and Human Services that have a lot of contracts, etc. will likely have heavy maintenance workloads).

Some county departments and agencies that administer grants and other programs which are funded by the State will have maintenance workloads. Will these county agencies comply without compensation for their efforts?

Suggested Implementation Approach:

Because of the issues discussed above, it does not appear to be **prudent or appropriate** to attempt full scale implementation of the Act 272 website – there are too many issues and questions that require legislative clarification/direction. Instead, a scaled back, phased implementation is recommended along with creation of one or more working committees to research and develop recommendations to amend Act 272 as necessary to address the various outstanding issues. This way the Administration can have a live (albeit scaled back) website in operation for the 2009 legislative session along with a report detailing the various issues/problems and recommended amendments to Act 272 to address these issues/problems. Based on legislative feedback during the 2009 session, the next phase(s) of website implementation can be planned, developed and implemented.

For the first phase website implementation, it is suggested that efforts be focused on using currently available information from existing state business processes and systems. The two most relevant processes/systems would appear to be SPO's procurement database and DAGS Accounting Division's DATAMART database – these two databases encompass the majority of the information referenced in Act 272; albeit, there are major reporting gaps relating to subcontractors and P-Card purchases that aren't currently captured in either system. Integration and conversion of these two databases will have to be worked out to meet the search and downloading requirements specified in Act 272. Proceeding in this manner would appear to be cost-effective approach in developing an initial, serviceable website to access to state award information envisioned in Act 272.

Additionally, it is recommended that a working committee (or committees) be established to thoroughly research and develop appropriate solutions and/or recommend statutory amendments (if necessary) for the following:

- *Subcontractor, subgrantor and parent entity disclosure requirements.* This involves getting feedback from contractors/bidders/proposal responders as to: (i) the impact that subcontractor and parent entity disclosure would have on bid/proposal responses and prices (especially in situations of limited number of bidders for goods and services) given that such disclosure would require making public closely held or proprietary business practices and/or relationships; and (ii) developing a clear and concise definition of the terms “subcontractor,” “subgrantee” and “parent entity” for disclosure purposes.

If it is found that subcontractor and parent entity disclosure would discourage participation in state procurements, or would increase bid/proposal costs, then it is strongly recommended that the Administration propose to the Legislature repeal of this requirement. If not, then appropriate modifications need to be undertaken to State business processes to require up front disclosure of “subcontractor,” “subgrantee” and “parent entity” information.

- *Other definitions and review of State business processes to determine compliance with disclosure requirements.* This involves: (i) developing clear and concise definitions for other terms and references in Act 272 that conform to current State accounting, budgeting or procurement usage to recommend to the Legislature; (ii) reviewing State business processes to determine if the various process capture the required information based on the recommended definitions; and (iii) developing appropriate modifications to State business processes to capture and input the required information based on the recommended definitions.

If it is found that certain types of “other financial assistance” should not be disclosed either because: (i) there are confidentiality issues; (ii) the information would be too costly or burdensome to capture and input; or (iii) some other justifiable reason, a case should be presented to the Legislature to specifically exclude that type of financial assistance from disclosure. The clearer and more explicit the definitions, references and exclusions are, the more understandable, “transparent” and “open” the website will be to the general public.

- *Determining whether to display initial amount of award, actual expenditures or a combination.* This involves: (i) making an assessment of what would be a meaningful and appropriate disclosure given the legislative intent behind Act 272; and (ii) developing a process/system for capturing the required information as may be necessary.

If the cost and/or compliance burden of pursuing the proposed disclosure of amounts, are substantial, serious consideration should be given to asking the Legislature to explicitly specify a more limited disclosure.

- *Estimating the compliance workload on departments and agencies.* As the first phase website is being developed and implemented, a concerted effort should be made to estimate/quantify the compliance workload of the lead and assisting departments as well as the line operating departments and agencies. The Legislature should be made aware of resources and effort it will take to implement and maintain the Act 272 website.

If these compliance costs are substantial, serious consideration should be given to asking the Legislature to repeal or significantly simplify the website and/or disclosure requirements, especially in this lean budget period.

- *Determining which State department/agency should have the lead in implementing and overseeing/managing the Act 272 website.* Act 272 currently specifies that the Department of Budget and Finance (DB&F) is responsible for overseeing the Act 272 website; however, DB&F may designate state agencies to participate in the development, establishment, maintenance and support of the website. Additionally, the Act specifies that DAGS is to provide data collection and posting support to B&F.

Originally, it was thought that the Act 272 implementation and maintenance requirements make DAGS the better fit to oversee the website rather than DB&F. However, with the creation of the Chief Information Officer (CIO), responsibility would appear to more appropriately fall under the CIO's purview.