

New Disclosure Requirements for Contracting with Public Entities

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New statutory disclosure requirements for dealing with public entities

- ▶ How will these new requirements work in the real world?
- ▶ Pre-award disclosures (House Bill 23)
- ▶ Post-award disclosures (House Bill 1295)

Disclosures at the time the bid is
submitted...

House Bill 23

Local Government Code 176

- ▶ Added in 2005 to require officers of local government entities and those who wish to contract with local government entities to make certain financial and business disclosures.
- ▶ Basic rule (before House Bill 23)
 - ▶ Local Government officers and vendors must disclose if:
 - ▶ A business relationship between LGO and vendor results in taxable income over \$2500; or
 - ▶ Vendor has given LGO gift(s) with an aggregate value of over \$250.

Definitions

- ▶ “Vendor” means a person who enters or seeks to enter into a contract with a local governmental entity. The term includes an agent of a vendor. The term includes an officer or employee of a state agency when that individual is acting in a private capacity to enter into a contract. The term does not include a state agency except for Texas Correctional Industries.

Definitions

- ▶ “Agent” means a third party who undertakes to transact some business or manage some affair for another person by the authority or on account of the other person. The term includes an employee.
- ▶ “Gift” means a benefit offered by a person, including food, lodging, transportation, or entertainment accepted as a guest. The term does not include a benefit offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.

Definitions

- ▶ “Local government entity” includes a county, municipality, school district, charter school, junior college district, water district created under Subchapter B, Chapter 49 of the Water Code, or other political subdivision of this state; or
- ▶ A local government corporation, board, commission, district, or authority to which a member is appointed by the commissioners court of a county, the mayor of a municipality, or the governing body of a municipality.

House Bill 23

▶ Expansion of Chapter 176:

- ▶ Requires disclosure of business relationship with any public employee involved in the solicitation process (No longer applies to just members of the governmental body or top administrative officer).
- ▶ An agent “who exercises discretion in the planning, recommendation, selecting, or contracting of a vendor.”
- ▶ Determination must be made on a case-by-case basis.
- ▶ LGC 176.0065 requires records administrator to provide a list of local government officers.

House Bill 23

Expansion of Chapter 176:

- ▶ Requires disclosure where vendor has given \$100 worth of gifts to local officer (or “family member”) in preceding 12 months.
- ▶ Family member = relative within 1st degree of blood or marriage.
- ▶ Expands reporting requirement to include reporting of lodging, transportation, and entertainment (meals are still not required to be reported).

House Bill 23

- ▶ Expansion of Chapter 176:
 - ▶ Requires disclosure of family relationship between potential vendor and local officer.
 - ▶ Family Relationship = relationship within the 3rd degree of blood or marriage.

House Bill 23

- ▶ Practical implications:
- ▶ Those employees in the field are going to have to know:
 - ▶ Those local government employees involved in each procurement;
 - ▶ Costs of entertaining local government employees (and their family members);
 - ▶ Any family relationships that must be disclosed.

House Bill 23

- ▶ File Conflict of Interest Questionnaire (CIQ) detailing applicable disclosures.
- ▶ Note the corresponding filing obligation for the local government officer (Form CIS).

House Bill 23

- ▶ Enforcement
- ▶ Local governmental entity given discretion to terminate contract if a violation has occurred.
- ▶ Criminal penalties:
 - ▶ Right to cure;
 - ▶ Class A misdemeanor if contract is over \$5 million
 - ▶ Class B misdemeanor if contract is between \$1 million and \$5 million
 - ▶ Class C misdemeanor if contract is less than \$1 million

Post-award, pre-contract disclosures

House Bill 1295

House Bill 1295

- ▶ Applies to a contract of a governmental entity or state agency that:
 - ▶ Requires an action or vote by the governing body of the entity or agency before the contract may be signed; or
 - ▶ Has a value of at least \$1 million.

House Bill 1295

- ▶ A governmental entity may not enter into a covered contract with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency.

House Bill 1295

- ▶ “Contract” includes an amended, extended, or renewed contract.
- ▶ A contract does not require a vote of the governing body if:
 - ▶ the governing body has the legal authority to delegate to its staff the authority to execute the contract;
 - ▶ the governing body has delegated authority to its staff; and
 - ▶ the governing body does not participate in the selection of the business entity with which the contract is entered.

House Bill 1295

- ▶ “Governmental entity” means municipality, county, public school district, or special-purpose district or authority;
- ▶ “Business entity” means any entity recognized by law through which business is conducted, including a sole proprietorship, partnership, or corporation.
- ▶ “Interested party” means a person who has a controlling interest in a business entity with whom a governmental entity contracts or who actively participates in facilitating the contract or negotiating the terms of the contract, including a broker, intermediary, adviser, or attorney for the business entity.

Ethics Commission Rules

- ▶ “Business entity” includes an entity through which business is conducted with a governmental entity or state agency, regardless of whether the entity is a for-profit or nonprofit entity. The term does not include a governmental entity or state agency.
- ▶ “Controlling interest” means:
 - ▶ Ownership interest that exceeds 10%;
 - ▶ Board membership where board has 10 or fewer members;
 - ▶ Service as an officer when there are 4 or fewer officers; or
 - ▶ Service as one of entity’s 4 most highly compensated officers.
 - ▶ *Pending*: Does not include director of publicly traded entity or wholly owned subsidiary.

Ethics Commission Rules

- ▶ “Interested party” means:
 - ▶ Person who has a controlling interest in business entity with whom a governmental entity contracts; or
 - ▶ Person who actively participates in facilitating or negotiating a contract, including broker, intermediary, adviser, or attorney for business entity.
- ▶ “Intermediary” means:
 - ▶ Person who actively participates in facilitating or negotiating a contract, including broker, intermediary, adviser, or attorney for business entity who:
 - ▶ receives compensation from the business for the person’s participation;
 - ▶ communicates directly with the governmental entity regarding the contract; and
 - ▶ is not an employee of the business entity (*or of an entity with a controlling interest in the entity*).

House Bill 1295

▶ Questions:

- ▶ How is a contract valued?
 - ▶ What about hourly compensation with no cap?
- ▶ What does it mean to participate in the selection of a business entity?
- ▶ What is an “officer”? *Ex officio*? Non-voting?

Public Commentary to Rule-Making

- ▶ Controlling interest should be set at 50%
- ▶ Controlling interest should differ depending on corporate structure of business entity. (Tax Code vs. Government Code definitions)
- ▶ Must a form be required when there is no interested party?
- ▶ Can oath be modified? (“...to the best of my knowledge...”)
- ▶ What if business entity has multiple places of business?
- ▶ Suggested two-part form: one for “controlling interests” and one for “negotiate/facilitate”.
- ▶ Bond counsel issues: Multiple contracts, contract valuation.

Volume of Filings

- ▶ Between January 1st and March 31st there were 15,460 Form 1295 certificates filed with the Ethics Commission.

Form 1295

CERTIFICATE OF INTERESTED PARTIES		FORM 1295	
Complete Nos. 1 - 4 and 6 if there are interested parties. Complete Nos. 1, 2, 3, 5, and 6 if there are no interested parties.		OFFICE USE ONLY	
1 Name of business entity filing form, and the city, state and country of the business entity's place of business.			
2 Name of governmental entity or state agency that is a party to the contract for which the form is being filed.			
3 Provide the identification number used by the governmental entity or state agency to track or identify the contract, and provide a description of the goods or services to be provided under the contract.			
4		Nature of Interest (check applicable)	
Name of Interested Party	City, State, Country (place of business)	Controlling	Intermediary
5 Check only if there is NO Interested Party. <input type="checkbox"/>			
6 AFFIDAVIT I swear, or affirm, under penalty of perjury, that the above disclosure is true and correct.			
_____ Signature of authorized agent of contracting business entity			
AFFIX NOTARY STAMP / SEAL ABOVE			
Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20 _____, to certify which, witness my hand and seal of office.			
_____ Signature of officer administering oath		_____ Printed name of officer administering oath	
_____ Title of officer administering oath			
ADD ADDITIONAL PAGES AS NECESSARY			

Form 1295

- ▶ Form must be sworn to by an authorized agent of the contracting business entity.
- ▶ If no interested parties to disclose, should you counsel your client to file a Form 1295?
- ▶ If unaware of interested parties, should a filer be willing to swear that there are no interested parties?

Ethics Commission Rules

- ▶ How do the rules envision land use transactions?
 - ▶ Rule 46.3(b) currently provides that a business entity is “an entity through which business is conducted with a governmental entity.”
 - ▶ Pending rule change would require Form 1295 to describe “the services, goods, or other property *used by the governmental entity.*”
 - ▶ Form will now require filers to “identify the contract, and provide a description of the services, goods, or other property *to be provided* under the contract.”

House Bill 1295

- ▶ What it means practically...
- ▶ Start thinking about who the “interested parties” are within your company.
- ▶ Establish an online filing account with the Texas Ethics Commission.
- ▶ Make sure your employees involved in contracting with government entities know who the interested parties are for your company.

Questions:

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