

Date of Hearing: April 29, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

AB 1200 (Gordon) – As Amended April 7, 2015

**SUBJECT:** Political Reform Act of 1974: lobbying: procurement contracts.

**SUMMARY:** Provides that communicating with state governmental officials in order to influence governmental procurement, as defined, can result in a person being considered a “lobbyist” under the Political Reform Act (PRA). Specifically, **this bill:**

- 1) Defines “governmental procurement,” for the purposes of this bill, as any of the following:
  - a) Preparing the terms, specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract;
  - b) Soliciting for a procurement contract;
  - c) Evaluating a procurement contract;
  - d) Awarding, approving, denying, or disapproving a procurement contract; or,
  - e) Approving or denying an assignment, amendment, other than an amendment authorized and payable under the terms of a procurement contract as the procurement contract was finally awarded or approved, renewal, or extension of a procurement contract, or any other material change in a procurement contract resulting in financial benefit to the offeror.
- 2) Provides that the term “administrative action,” for the purposes of the PRA, includes governmental procurement, as defined.

**EXISTING LAW:**

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the PRA.
- 2) Defines a "lobbyist" as an individual who receives \$2,000 or more in a calendar month or whose principal duties as an employee are to communicate directly or through his or her agents with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action.
- 3) Defines a "lobbying firm" as any business entity, except as specified, including an individual contract lobbyist, which meets either of the following criteria:
  - a) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person, and any partner, owner, officer, or

employee of the business entity is a lobbyist; or,

- b) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person, if a substantial or regular portion of the activities for which the business entity receives compensation is for the purpose of influencing legislative or administrative action.
- 4) Defines a "lobbyist employer" as any person, other than a lobbying firm, who:
    - a) Employs one or more lobbyists for economic consideration, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action; or
    - b) Contracts for the services of a lobbying firm for economic consideration, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action.
  - 5) Defines "legislative action," for the purposes of the PRA, as either of the following:
    - a) The drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity; or,
    - b) The action of the Governor in approving or vetoing any bill.
  - 6) Defines "administrative action," for the purposes of the PRA, as either of the following:
    - a) The proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or a quasi-legislative proceeding, as specified; or,
    - b) With regard only to placement agents, as defined, the decision by any state agency to enter into a contract to invest state public retirement system assets on behalf of a state public retirement system.
  - 7) Defines "agency official," for the purposes of the PRA, as any member, officer, employee or consultant of any state agency who as part of his official responsibilities participates in any administrative action in other than a purely clerical, secretarial or ministerial capacity.
  - 8) Requires an individual who is considered a lobbyist, as defined, to register as a lobbyist and to comply with various ethics and reporting rules.
  - 9) Requires lobbyists to complete a biennial orientation course on the relevant ethical issues and laws relating to lobbying.

- 10) Prohibits lobbyists from receiving any payment that is in any way contingent upon defeat, enactment, or outcome of any proposed legislative or administrative action.
- 11) Prohibits a lobbyist from making gifts aggregating more than \$10 in a calendar month to any state candidate, elected state officer, legislative official, or an agency official of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist.
- 12) Prohibits a lobbyist from doing anything with the purpose of placing any elected state officer, legislative official, agency official, or state candidate under personal obligation to the lobbyist or the lobbyist's employer.
- 13) Prohibits a lobbyist from deceiving or attempting to deceive any elected state officer, legislative official, agency official, or state candidate with regard to any material fact pertinent to any pending administrative action.
- 14) Prohibits a lobbyist from making a contribution to an elected state officer or candidate for elected state office if the lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer.
- 15) Requires lobbying firms and lobbyist employers to register with the Secretary of State (SOS) and to file periodic disclosure reports that contain information about the firms' and employers' lobbying interests and agencies lobbied.
- 16) Makes violations of the PRA subject to administrative, civil, and criminal penalties.

**FISCAL EFFECT:** Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

**COMMENTS:**

- 1) **Purpose of the Bill:** According to the author:

The State of California authorized over \$11 billion in procurement contracts in 2014. In light of this substantial spending, the public should have the ability to see who, if anyone is attempting to influence the procurement process and expenditure of taxpayer dollars. California voters enacted the Political Reform Act, in part, to ensure that state and local government ‘serve the needs and respond to the wishes of all citizens equally’ and ‘perform their duties in an impartial manner.’ To serve these goals, the Political Reform Act requires lobbying firms and parties employing lobbying firms to report their legislative and regulatory activities. Lobbying of procurement contracts does not fall under the purview of the Political Reform Act. For the same reasons that the state currently imposes registration and reporting requirements on legislative and regulatory lobbying, and in light of the amount of taxpayer money spent on

procurement, this bill would impose necessary reporting requirements on procurement lobbying.

- 2) **Lobbying Regulation & Contracts:** Under existing law, individuals and entities that make or receive specified levels of payments for the purpose of influencing legislative or administrative actions may be required to comply with the state's lobbying rules, including requirements to register with the SOS and to file periodic reports. As detailed above, the term "administrative action" is defined primarily to include rule- and rate-making, the adoption of regulations, and quasi-legislative proceedings. Contracting decisions by state agencies are not included within the definition of the term "administrative action," so individuals and entities that attempt to influence state contracting decisions are not required to comply with lobbying rules as a result of their efforts with respect to contracting decisions. For example, in its Lobbying Information Disclosure Manual, the FPPC states that an entity bidding on a contract with the Department of Housing and Community Development (Department) to provide low and moderate-income housing units would not be engaged in lobbying as a result of submitting a bid, because although the Department is an administrative agency, the awarding of a contract is not considered an administrative action.

By adding governmental procurement to the definition of "administrative action," this bill brings contracting within the types of governmental decisions that are covered by the state's lobbying rules. For individuals and entities that frequently attempt to influence state agency contracting decisions, but that do not regularly attempt to influence other actions by state agencies, this bill could require those individuals and entities to comply with the state's lobbying rules, including registering with the SOS and filing periodic disclosure reports.

Many individuals and entities that attempt to influence contracting decisions, however, may already be registered as lobbyists, lobbying firms, or lobbyist employers because those individuals and entities are involved in attempting to influence other actions by the Legislature or state agencies. For those entities and individuals, this bill will require them to disclose details about their procurement lobbying on the periodic disclosure reports that they already file.

Broadening the types of decisions that are covered by the state's lobbying rules will also broaden the application of certain restrictions that apply to lobbyists, lobbyist employers, and lobbying firms. For example, existing law prohibits a lobbyist or lobbying firm from accepting any payment that is contingent upon the outcome of any administrative action. As a result, if procurement decisions are included within the types of decisions that constitute "administrative action," then this bill could prohibit individuals or firms from being paid in exchange for successfully securing contracts with state agencies. Other restrictions that apply to lobbyists and lobbying firms that could be broadened in application if this bill is enacted include restrictions on campaign contributions, limits on gifts to public officials, restrictions on placing public officials under personal obligation, and restrictions on deceiving or attempting to deceive public officials.

- 3) **Lobbying Laws in Other States and at the Federal Level:** The lobbying laws in at least 18 states regulate lobbying on procurement issues, though the details of those laws vary considerably, and at least some of the states that regulate lobbying on procurement have rules

for procurement lobbying that differ considerably from the rules that apply to lobbying on other issues. Additionally, federal lobbying laws apply to communications related to the negotiation, award, or administration of federal contracts.

- 4) **Logistical/Technical Issues:** Although California's lobbying rules apply only with respect to communications with state officials and state agencies, the provisions of this bill are not clearly limited to contracts awarded or entered into by state government, and this bill could be construed to regulate communications between a person and a state official regarding local procurement decisions. The author and the committee may wish to clarify that this bill applies only to state procurement.

As currently drafted, this bill applies to all governmental procurement, regardless of the value of the contract. In the case of smaller contracts, any potential for undue influence in governmental contracting decisions is substantially reduced, so making such decisions subject to the state's lobbying laws may be excessive. On the other hand, in order to qualify as a lobbyist in the first place, an individual must receive compensation of at least \$2,000 in a calendar month for the purposes of, or must spend at least one-third of his or her compensated time, engaging in direct communication with public officials. As a result, a person who communicates with state officials regarding small value contracts will only be considered a lobbyist if he or she is communicating on a large number of contracts, or is engaging in direct communications with public officials on other issues. Nevertheless, if the goal of this bill is to provide transparency over major procurement decisions, it may be appropriate to make this bill applicable only to large state contracts.

As noted above, existing law prohibits a lobbyist or lobbying firm from accepting any payment that is contingent upon the outcome of any administrative action. Salespeople—who could be considered lobbyists under the provisions of this bill under certain circumstances—often are paid commissions based on their sales. If the state's lobbying rules are going to be extended to apply to contracting decisions, it may be advisable to consider whether it is reasonable or appropriate to have the contingency fee ban be applicable to those types of decisions.

- 5) **Arguments in Support:** The idea for this bill was developed, in part, by three students in the Legislative and Public Policy Clinic of the University of Pacific, McGeorge School of Law. In support of this bill, those students write:

In 2014, California spent over \$11 billion on procurement contracts. Yet, despite multiple prominent Sacramento-based lobbying firms openly advertising procurement lobbying services, lobbyists are not required to report which procurement contracts they lobby, how much they are paid by each client to lobby those contracts, or who pays them to influence the content of the contracts, which may offer lobbyist employers more direct benefits than legislative or regulatory lobbying.

Disclosure requirements help the [FPPC] identify patterns of activity that trigger a need for investigation. Because there are no procurement lobbying disclosure requirements, the State is without an important tool to ensure that procurement

contracts are awarded fairly.

AB 1200 would also help small and diverse businesses compete on a level playing field with their competitors by increasing the transparency of the procurement process and reducing the advantage of large businesses that employ well-connected lobbyists.

- 6) **Previous Legislation:** AB 13 (Florez) of the 2001-02 Legislative Session, would have required lobbyists, lobbying firms, and lobbyist employers to disclose information on services relating to the solicitation, proposal, negotiation, drafting, amendment, awarding, or rescission of a nonrestrictive contract for goods or services, as specified. These provisions of AB 13 were added to the bill in the Senate, and were never considered by the Assembly. AB 13 was never heard by a policy committee.

AB 707 (Hancock) of the 2005-06 Legislative Session, would have required contractors and their agents and consultants, as specified, who entered into specified contracts with state agencies to publicly disclose to the SOS certain communications with the state agency during the one-year period preceding the award of the contract. These provisions of AB 707 were added to the bill in the Senate, and were never considered by the Assembly. AB 707 subsequently was gutted-and-amended and used for another purpose, and the version of the bill dealing with state contracts was never heard by a policy committee.

- 7) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

3 individuals

##### **Opposition**

None on file.

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