

AMENDED IN SENATE JUNE 29, 2009

AMENDED IN ASSEMBLY APRIL 14, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 759

Introduced by Assembly Member Ma

February 26, 2009

An act to amend Section ~~10111~~ 10286.1 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 759, as amended, Ma. Public contracts: ~~Department of General Services reporting~~ expatriate corporations.

Existing law regarding contracting between state agencies and private contractors sets forth requirements for the procurement of materials, supplies, equipment, and services by state agencies. Existing law sets out the various responsibilities of the Department of General Services, and other state agencies, in overseeing and implementing state contracting procedures and policies.

Existing law prohibits a state agency from entering into any contract with an expatriate corporation, as defined, or its subsidiary, unless certain conditions are met. Existing law defines an expatriate corporation as a foreign incorporated entity that is publicly traded in the United States and that meets specified criteria.

This bill would revise the definition of an expatriate corporation to also require that the entity be domiciled in a jurisdiction that does not have an income tax treaty in force with the United States.

Existing law requires the Department of General Services to make available a report on contracting activity containing specified

information, as provided, including the level of participation of business enterprises by race, ethnicity, and gender of the business owner, where that information has been voluntarily reported, for construction, professional services, and specified purchasing contracts.

This bill would expand the reporting requirements of the Department of General Services to include the level of participation of business enterprises by race, ethnicity, and gender of the business owner, where that information has been voluntarily reported, for information technology procurements and architectural, engineering, and other professional service contracts. This bill would also require the department to include the dollar values with respect to those specified contracts.

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~-no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. *It is the intent of the Legislature in enacting this*
2 *statute to clarify that an expatriate corporation located in a foreign*
3 *jurisdiction that does not have an income tax treaty with the United*
4 *States shall not enter into any contracts with a state agency.*

5 SEC. 2. *Section 10286.1 of the Public Contract Code is*
6 *amended to read:*

7 10286.1. (a) For purposes of this part, except as otherwise
8 provided in subdivisions (b) and (c), a state agency shall not enter
9 into any contract with an expatriate corporation or its subsidiaries.

10 (b) (1) For purposes of this article, an “expatriate corporation”
11 means a foreign incorporated entity that is publicly traded in the
12 United States to which all of the following apply:

13 (A) The United States is the principal market for the public
14 trading of the foreign incorporated entity.

15 (B) The foreign incorporated entity has no substantial business
16 activities in the place of incorporation.

17 (C) *The foreign incorporated entity is domiciled in a jurisdiction*
18 *that does not have an income tax treaty in force with the United*
19 *States.*

20 ~~(D)~~

21 (D) Either clause (i) or clause (ii) applies:

22 (i) The foreign entity was established in connection with a
23 transaction or series of related transactions pursuant to which (I)

1 the foreign entity directly or indirectly acquired substantially all
2 of the properties held by a domestic corporation or all of the
3 properties constituting a trade or business of a domestic partnership
4 or related foreign partnership, and (II) immediately after the
5 acquisition, more than 50 percent of the publicly traded stock, by
6 vote or value, of the foreign entity is held by former shareholders
7 of the domestic corporation or by former partners of the domestic
8 partnership or related foreign partnership. For purposes of
9 subclause (II), any stock sold in a public offering related to the
10 transaction or a series of transactions is disregarded.

11 (ii) The foreign entity was established in connection with a
12 transaction or series of related transactions pursuant to which (I)
13 the foreign entity directly or indirectly acquired substantially all
14 of the properties held by a domestic corporation or all of the
15 properties constituting a trade or business of a domestic partnership
16 or related foreign partnership, and (II) the acquiring foreign entity
17 is more than 50 percent owned, by vote or value, by domestic
18 shareholders or partners.

19 (iii) For purposes of this subparagraph, indirect acquisition of
20 property includes the acquisition of a stock share, or any portion
21 thereof, of the owner of that property.

22 (2) Notwithstanding subdivision (a), a state agency may contract
23 with an expatriate corporation, or its subsidiary, if it was an
24 expatriate corporation before January 1, 2004, to which both of
25 the following apply:

26 (A) The foreign entity provides, by operation of law, by
27 provisions of its governing documents, by resolution of its board
28 of directors, or in any other manner, at least the following
29 shareholders' rights:

30 (i) Shareholders of the entity have the right to inspect, at a
31 principal place of business in the United States, copies of the
32 entity's books and records, including, but not limited to,
33 shareholder names, addresses, and shareholdings in accordance
34 with the corporation law, as amended from time to time and as
35 that law is interpreted by the courts, of the United States
36 jurisdiction in which the entity was previously incorporated, or, if
37 the entity was not previously incorporated, in accordance with the
38 terms set forth in the Model Business Corporation Act, as that act
39 may be amended from time to time, provided that, if the corporate
40 law of the United States jurisdiction in which the entity was

1 previously incorporated or the Model Business Corporation Act
2 does not provide access to the shareholder names, addresses, and
3 shareholdings, these books and records are available for inspection
4 by shareholders for purposes properly related to their status as
5 shareholders of the entity.

6 (ii) The entity permits its shareholders to bring derivative
7 proceedings on behalf of the entity, provided that these derivative
8 proceedings are brought on a basis and under the terms applicable
9 under the law, as amended from time to time and as interpreted
10 by, or required by, the courts of the United States jurisdiction in
11 which the entity was previously incorporated, or, if the entity was
12 not previously incorporated, on a basis and under the terms set
13 forth in the Model Business Corporations Act as that act may be
14 amended from time to time and as it is interpreted by, or required
15 by, the courts.

16 (iii) Entity transactions in which any director is interested are
17 approved in accordance with the applicable law, as amended from
18 time to time and as interpreted by the courts, of the United States
19 jurisdiction in which the entity was previously incorporated, or, if
20 the entity was not previously incorporated, in accordance with the
21 terms set forth in the Model Business Corporations Act, as may
22 be amended from time to time and as interpreted by the courts.

23 (iv) The entity has consented to the jurisdiction, for any
24 otherwise available cause of action by or on behalf of the entity's
25 shareholders, including any pendent state causes of action, of all
26 of the following courts:

27 (I) The state courts of one or more states.

28 (II) The United States federal courts in any state in which the
29 entity consents to the jurisdiction of that state's courts pursuant to
30 subclause (I).

31 (v) The entity has appointed an agent for service of process in
32 the state or states in which the entity has consented to jurisdiction,
33 as described in clause (iv), and the entity meets at least one of the
34 following conditions:

35 (I) The entity has unencumbered assets in the United States,
36 which assets may include equity or debt investments in United
37 States companies, with a book value in excess of fifty million
38 dollars (\$50,000,000), and the entity delivers to the Secretary of
39 State an opinion of an attorney licensed in the United States that

1 judgments rendered against the entity may be satisfied by using
2 these assets.

3 (II) The entity posts a bond or similar security in an amount of
4 at least fifty million dollars (\$50,000,000).

5 (III) The entity has directors' and officers' insurance in an
6 amount of at least fifty million dollars (\$50,000,000).

7 (vi) The entity agrees that, in connection with any lawsuit
8 brought against it by its shareholders in any court in which the
9 entity has consented to jurisdiction as described in clause (iv), the
10 entity will provide to the court notice of the manner in which the
11 entity complied with clause (v) and, if the entity complied with
12 that clause in the manner specified in subclause (I) of clause (v),
13 a copy of the opinion described in that subclause.

14 (vii) Shareholder approval is required for any sale of all or
15 substantially all of the entity's assets in accordance with the law,
16 as amended from time to time and as it is interpreted by the courts,
17 of the United States jurisdiction in which it was previously
18 incorporated, or, if it was not previously incorporated, in
19 accordance with the terms set forth in the Model Business
20 Corporations Act, as it may be amended from time to time.

21 (viii) The directors and officers of the entity occupy a fiduciary
22 relationship with the entity and its shareholders and these directors
23 and officers, in performing their duties, act in good faith in a
24 manner that a director or officer believes to be in the best interests
25 of the entity and its shareholders, as that standard of care is
26 interpreted by the courts.

27 (ix) The entity agrees to hold no more than one of every four
28 annual shareholder meetings in a location outside the United States
29 and, in the event that the entity holds an annual meeting outside
30 the United States, the entity agrees to provide access to that meeting
31 through a Web cast or other technology that allows the entity's
32 shareholders to do both of the following:

33 (I) Listen to the meeting, watch the meeting, or both.

34 (II) Send questions that will be addressed at the meeting.

35 (x) The entity provides a description of the shareholder rights
36 described in clauses (i) to (ix), inclusive, and any subsequent
37 changes to these rights, on the entity's Web site or in its 10K filings
38 with the United States Securities and Exchange Commission.

39 (B) The entity uses worldwide combined reporting to calculate
40 the income on which it pays taxes to the state.

1 (c) The chief executive officer of a state agency or his or her
2 designee may waive the prohibition specified in subdivision (a) if
3 the executive officer or his or her designee has made a written
4 finding that the contract is necessary to meet a compelling public
5 interest. For purposes of this section, a “compelling public interest”
6 includes, but is not limited to, ensuring the provision of essential
7 services, ensuring the public health and safety, or an emergency
8 as defined in Section 1102. If a waiver is granted to a vendor
9 pursuant to this subdivision, the requirement to submit a declaration
10 of compliance, as set forth in paragraph (1) of subdivision (d),
11 does not apply to that vendor.

12 (d) (1) For purposes of this chapter, “state agency” means every
13 state office, department, division, bureau, board, commission, and
14 the California State University, but does not include the University
15 of California, the Legislature, the courts, or any agency in the
16 judicial branch of government.

17 (2) On or after January 1, 2004, all state agencies shall, as a
18 condition of the contract, require any vendor that is offered a
19 contract to do business with the state to submit a declaration stating
20 that the vendor is eligible to contract with the state pursuant to this
21 section.

22 (3) A vendor that declares as true any material matter in a
23 declaration described in this subdivision that he or she knows to
24 be false is guilty of a misdemeanor.

25 (e) (1) Except as provided in paragraph (2) and subdivision (f),
26 this section applies to contracts that are entered into on or after
27 January 1, 2004.

28 (2) With respect to an entity that was an expatriate corporation,
29 as defined in paragraph (1) of subdivision (b), before January 1,
30 2004, this section applies to contracts that are entered into on or
31 after April 1, 2004.

32 (f) (1) The declaration requirement set forth in subdivision (d)
33 does not apply to a credit card purchase of goods of two thousand
34 five hundred dollars (\$2,500) or less.

35 (2) The total amount of exemption authorized herein shall not
36 exceed seven thousand five hundred dollars (\$7,500) per year for
37 each company from which a state agency is purchasing goods by
38 credit card. It shall be the responsibility of each state agency to
39 monitor the use of this exemption and adhere to these restrictions
40 on these purchases.

1 SECTION 1. ~~Section 10111 of the Public Contract Code is~~
2 ~~amended to read:~~

3 ~~10111. Commencing January 1, 2007, the department shall~~
4 ~~make available a report on contracting activity containing the~~
5 ~~following information:~~

6 ~~(a) A listing of consulting services contracts that the state has~~
7 ~~entered into during the previous fiscal year. The listing shall~~
8 ~~include the following:~~

9 ~~(1) The name and identification number of each contractor.~~

10 ~~(2) The type of bidding entered into, the number of bidders,~~
11 ~~whether the low bidder was accepted, and if the low bidder was~~
12 ~~not accepted, an explanation of why another contractor was~~
13 ~~selected.~~

14 ~~(3) The amount of the contract price.~~

15 ~~(4) Whether the contract was a noncompetitive bid contract,~~
16 ~~and why the contract was a noncompetitive bid contract.~~

17 ~~(5) Justification for entering into each consulting services~~
18 ~~contract.~~

19 ~~(6) The purpose of the contract and the potential beneficiaries.~~

20 ~~(7) The date when the initial contract was signed, and the date~~
21 ~~when the work began and was completed.~~

22 ~~(b) The report shall also include a separate listing of consultant~~
23 ~~contracts completed during that fiscal year, with the same~~
24 ~~information specified in subdivision (a).~~

25 ~~(c) The information specified in subdivisions (a) and (b) shall~~
26 ~~also include a list of any contracts underway during that fiscal year~~
27 ~~on which any change was made regarding the following:~~

28 ~~(1) The completion date of the contract.~~

29 ~~(2) The amount of money to be received by the contractor, if it~~
30 ~~exceeds 3 percent of the original contract price.~~

31 ~~(3) The purpose of the contract or duties of the contractor. A~~
32 ~~brief explanation shall be given if the change in purpose is~~
33 ~~significant.~~

34 ~~(d) The level of participation, by agency, of disabled veteran~~
35 ~~business enterprises in statewide contracting and shall include~~
36 ~~dollar values of contract award for the following categories:~~

37 ~~(1) Construction.~~

38 ~~(2) Architectural, engineering, and other professional services.~~

39 ~~(3) Procurement of materials, supplies, and equipment.~~

40 ~~(4) Information technology procurements.~~

1 ~~Additionally, the report shall include a statistical summary~~
2 ~~detailing each awarding department's goal achievement and a~~
3 ~~statewide total of those goals.~~

4 ~~(e) The level of participation by small business in state~~
5 ~~contracting including:~~

6 ~~(1) Upon request, an up-to-date list of eligible small business~~
7 ~~bidders by general procurement and construction contract~~
8 ~~categories, noting company names and addresses and also noting~~
9 ~~which small businesses also qualify as microbusinesses.~~

10 ~~(2) By general procurement and construction contract categories,~~
11 ~~statistics comparing the small business and microbusiness contract~~
12 ~~participation dollars to the total state contract participation dollars.~~

13 ~~(3) By awarding department and general procurement and~~
14 ~~construction categories, statistics comparing the small business~~
15 ~~and microbusiness contract participation dollars to the total state~~
16 ~~contract participation dollars.~~

17 ~~(4) Any recommendations for changes in statues or state policies~~
18 ~~to improve opportunities for small businesses and microbusinesses.~~

19 ~~(5) A statistical summary of small businesses and~~
20 ~~microbusinesses certified for state contracting by the number of~~
21 ~~employees at the business for each of the following categories:~~
22 ~~0-5, 26-50, 51-75, and 76-100.~~

23 ~~(6) To the extent feasible, beginning in the year 2008, the~~
24 ~~number of contracts awarded by the department in the categories~~
25 ~~specified in paragraph (5).~~

26 ~~(7) The number of contracts and dollar amounts awarded~~
27 ~~annually pursuant to Section 14838.5 of the Government Code to~~
28 ~~small businesses, microbusinesses, and disabled veteran business~~
29 ~~enterprises.~~

30 ~~(f) The level of participation of business enterprises, by race,~~
31 ~~ethnicity, and gender of owner, for the following categories of~~
32 ~~contracts, to the extent that the information has been voluntarily~~
33 ~~reported to the department, and shall include the dollar values of~~
34 ~~the contracts awarded for those categories:~~

35 ~~(1) Construction.~~

36 ~~(2) Purchases of materials, supplies, or equipment.~~

37 ~~(3) Architectural, engineering, and other professional services.~~

38 ~~(4) Information technology procurements.~~

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