

AMENDED IN SENATE AUGUST 5, 2010
AMENDED IN SENATE SEPTEMBER 2, 2009
AMENDED IN SENATE JULY 15, 2009
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 10286.1 of the Public Contract Code, ~~and to amend Sections 24411 and 25110 of, and to add Section 25117 to, the Revenue and Taxation Code, relating to corporations: relating to public contracts.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 759, as amended, Ma. Public contracts with expatriate corporations: ~~corporation tax law water's-edge election: corporations.~~

~~(1) Existing~~

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, and would exclude as an expatriate corporation a foreign incorporated entity that is publicly traded in the United States that meets specified conditions, including, among others, that the foreign incorporated entity is created and organized under the laws of a foreign country with which the United States has a comprehensive income tax treaty and is considered a resident of that foreign country for purposes of that treaty or any successor treaty.

~~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.~~

~~(2) Existing law provides that, in the case of a business with income derived from, or attributable to, sources both within and without this state, the income is apportioned between this state and other states and foreign countries for tax purposes in accordance with a specified formula based on the property, payroll, and sales within and without this state, except as otherwise provided. Existing law permits certain taxpayers, as provided, to elect to determine their income under a water's-edge election and specifies certain requirements under that election.~~

~~This bill would conform specified provisions relating to, among other things, the water's-edge election to specified federal income tax laws relating to the taxation of certain shareholders of controlled foreign corporations, as provided.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
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.

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

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

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

8 (C) Either clause (i) or clause (ii) applies:

9 (i) The foreign entity was established in connection with a
10 transaction or series of related transactions pursuant to which (I)
11 the foreign entity directly or indirectly acquired substantially all
12 of the properties held by a domestic corporation or all of the
13 properties constituting a trade or business of a domestic partnership
14 or related foreign partnership, and (II) immediately after the
15 acquisition, more than 50 percent of the publicly traded stock, by
16 vote or value, of the foreign entity is held by former shareholders
17 of the domestic corporation or by former partners of the domestic
18 partnership or related foreign partnership. For purposes of
19 subclause (II), any stock sold in a public offering related to the
20 transaction or a series of transactions is disregarded.

21 (ii) The foreign entity was established in connection with a
22 transaction or series of related transactions pursuant to which (I)
23 the foreign entity directly or indirectly acquired substantially all
24 of the properties held by a domestic corporation or all of the
25 properties constituting a trade or business of a domestic partnership
26 or related foreign partnership, and (II) the acquiring foreign entity
27 is more than 50 percent owned, by vote or value, by domestic
28 shareholders or partners.

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

32 (2) (A) *For purposes of this chapter, a foreign incorporated*
33 *entity that is publicly traded in the United States is not an*
34 *“expatriate corporation” if all of the following are true:*

35 (i) *The foreign incorporated entity, or any predecessor entity,*
36 *was originally established in connection with a transaction or*
37 *series of related transactions between unrelated publicly traded*
38 *corporations.*

39 (ii) *Immediately after the transaction or series of related*
40 *transactions, not more than 70 percent of the publicly traded stock,*

1 *by vote or value, of the foreign incorporated entity is held in the*
2 *manner described in clause (i) of subparagraph (C) of paragraph*
3 *(1).*

4 *(iii) The transaction or series of related transactions that*
5 *originally established the foreign incorporated entity, or any*
6 *predecessor entity, was a taxable transaction for any United States*
7 *shareholders of any domestic corporation that was a party to such*
8 *transaction.*

9 *(iv) The foreign incorporated entity is both of the following:*

10 *(I) Created or organized under the laws of a foreign country*
11 *with which the United States has a comprehensive income tax*
12 *treaty.*

13 *(II) Considered a resident of that foreign country for purposes*
14 *of that treaty, or any successor treaty with that foreign country*
15 *meeting the requirements of this paragraph.*

16 *(B) A foreign incorporated entity meeting the requirements of*
17 *subparagraph (A) shall include any successor corporation resulting*
18 *from a corporate reorganization, as defined in Section 368 of the*
19 *Internal Revenue Code, or a transaction satisfying the requirements*
20 *of Section 351 of the Internal Revenue Code.*

21 ~~(2)~~

22 *(3) 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.

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All matter omitted in this version of the bill appears in the bill as amended in the Senate, September 2, 2009. (JR11)

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