

AMENDED IN ASSEMBLY JUNE 28, 2010

AMENDED IN SENATE JUNE 1, 2010

AMENDED IN SENATE APRIL 20, 2010

AMENDED IN SENATE APRIL 5, 2010

SENATE BILL

No. 1249

Introduced by Senator ~~Ducheny~~ Cedillo

February 19, 2010

~~An act to add Chapter 2.01 (commencing with Section 10490.10) to Part 2 of Division 2 of the Public Contract Code, relating to state contracts. An act to amend Section 350 of the Penal Code, relating to crimes.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 1249, as amended, ~~Ducheny~~ Cedillo. ~~Contracting by state agencies: best value competitive bid contracts. Counterfeit marks: donations.~~

Existing law makes it a misdemeanor or a felony for a person to willfully manufacture, intentionally sell, or knowingly possess for sale any counterfeit registered trademark, as specified. Existing law also requires the court, in any action under those provisions resulting in a conviction or a plea of nolo contendere, to order the forfeiture and destruction of all of those marks and matter bearing the marks, and order the disposition of all devices for manufacturing, reproducing, transporting, or assembling those marks, used in connection thereof. Existing law authorizes the court, upon law enforcement request and consent from the specific registrants, to consider a motion to have the goods, not including recordings or audiovisual works, as defined, donated to a nonprofit organization for the purpose of distributing the

goods to persons living in poverty at no charge to the persons served by the organization.

This bill would provide that no person shall be liable for costs, damages, or other claims or expenses as a result of actions taken or omitted in good faith in the course of donating goods to a nonprofit organization pursuant to these provisions, and that no person shall be criminally prosecuted or be subjected to any criminal penalty as a result of any action taken or omitted in good faith in the course of donating those goods.

~~Existing law governs contracting between state agencies and private contractors, sets forth requirements for the bidding, awarding, and overseeing of contracts for construction projects, and regulates the awarding of contracts for the purchase of goods and services.~~

~~This bill would permit competitive bid contracts for construction projects, including, but not limited to, projects of the California State University, contracts for goods and services, and contracts for information technology acquisition, to be awarded as best value competitive bid contracts, as defined, taking into consideration, when awarding the contract, the total direct and indirect economic benefit to the state of the proposed contract, as prescribed. The bill would prohibit the award of a contract to a bidder pursuant to these provisions if the Director of General Services determines that the award of the contract to that bidder would result in a net loss of revenues to the General Fund based on estimates of the total direct and indirect economic benefit to the state under the contract. The bill would authorize the Director of General Services to adopt regulations to assist state agencies in implementing these provisions.~~

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. Section 350 of the Penal Code is amended to*
- 2 *read:*
- 3 *350. (a) Any person who willfully manufactures, intentionally*
- 4 *sells, or knowingly possesses for sale any counterfeit mark*
- 5 *registered with the Secretary of State or registered on the Principal*
- 6 *Register of the United States Patent and Trademark Office, shall,*
- 7 *upon conviction, be punishable as follows:*

1 (1) When the offense involves less than 1,000 of the articles
2 described in this subdivision, with a total retail or fair market value
3 less than that required for grand theft as defined in Section 487,
4 and if the person is an individual, he or she shall be punished by
5 a fine of not more than five thousand dollars (\$5,000), or by
6 imprisonment in a county jail for not more than one year, or by
7 both that fine and imprisonment; or, if the person is a business
8 entity, by a fine of not more than one hundred thousand dollars
9 (\$100,000).

10 (2) When the offense involves 1,000 or more of the articles
11 described in this subdivision, or has a total retail or fair market
12 value equal to or greater than that required for grand theft as
13 defined in Section 487, and if the person is an individual, he or
14 she shall be punished by imprisonment in a county jail not to
15 exceed one year, or in the state prison for 16 months, or two or
16 three years, or by a fine not to exceed two hundred fifty thousand
17 dollars (\$250,000), or by both that imprisonment and fine; or, if
18 the person is a business entity, by a fine not to exceed five hundred
19 thousand dollars (\$500,000).

20 (b) Any person who has been convicted of a violation of either
21 paragraph (1) or (2) of subdivision (a) shall, upon a subsequent
22 conviction of paragraph (1) of subdivision (a), if the person is an
23 individual, be punished by a fine of not more than fifty thousand
24 dollars (\$50,000), or by imprisonment in a county jail for not more
25 than one year, or in the state prison for 16 months, or two or three
26 years, or by both that fine and imprisonment; or, if the person is
27 a business entity, by a fine of not more than two hundred thousand
28 dollars (\$200,000).

29 (c) Any person who has been convicted of a violation of
30 subdivision (a) and who, by virtue of the conduct that was the basis
31 of the conviction, has directly and foreseeably caused death or
32 great bodily injury to another through reliance on the counterfeited
33 item for its intended purpose shall, if the person is an individual,
34 be punished by a fine of not more than fifty thousand dollars
35 (\$50,000), or by imprisonment in the state prison for two, three,
36 or four years, or by both that fine and imprisonment; or, if the
37 person is a business entity, by a fine of not more than two hundred
38 thousand dollars (\$200,000).

39 (d) (1) Except as provided in paragraph (2), in any action
40 brought under this section resulting in a conviction or a plea of

1 nolo contendere, the court shall order the forfeiture and destruction
2 of all of those marks and of all goods, articles, or other matter
3 bearing the marks, and the forfeiture and destruction or other
4 disposition of all means of making the marks, and any and all
5 electrical, mechanical, or other devices for manufacturing,
6 reproducing, transporting, or assembling these marks, that were
7 used in connection with, or were part of, any violation of this
8 section.

9 (2) Upon request of any law enforcement agency and consent
10 from the specific registrants, the court may consider a motion to
11 have the items described in paragraph (1), not including recordings
12 or audiovisual works as defined in Section 653w, donated to a
13 nonprofit organization for the purpose of distributing the goods to
14 persons living in poverty at no charge to the persons served by the
15 organization. *No person, including, but not limited to, a requesting*
16 *law enforcement agency or a specific registrant, shall be liable*
17 *under the laws of the state to any person for costs, damages, or*
18 *other claims or expenses as a result of actions taken or omitted in*
19 *good faith in the course of donating goods pursuant to this*
20 *paragraph. No person who is granted immunity by this paragraph*
21 *shall be criminally prosecuted or be subjected to any criminal*
22 *penalty for or on account of any action taken or omitted in good*
23 *faith in the course of donating goods pursuant to this paragraph.*

24 (3) Forfeiture of the proceeds of the crime shall be subject to
25 Chapter 9 (commencing with Section 186) of Title 7 of Part 1.
26 However, no vehicle shall be forfeited under this section that may
27 be lawfully driven on the highway with a class 3 or 4 license, as
28 prescribed in Section 12804 of the Vehicle Code, and that is any
29 of the following:

30 (A) A community property asset of a person other than the
31 defendant.

32 (B) The sole class 3 or 4 vehicle available to the immediate
33 family of that person or of the defendant.

34 (C) Reasonably necessary to be retained by the defendant for
35 the purpose of lawfully earning a living, or for any other reasonable
36 and lawful purpose.

37 (e) For the purposes of this section, the following definitions
38 shall apply:

39 (1) When counterfeited but unassembled components of
40 computer software packages are recovered, including, but not

1 limited to, counterfeited computer diskettes, instruction manuals,
2 or licensing envelopes, the number of “articles” shall be equivalent
3 to the number of completed computer software packages that could
4 have been made from those components.

5 (2) “Business entity” includes, but is not limited to, a
6 corporation, limited liability company, or partnership. “Business
7 entity” does not include a sole proprietorship.

8 (3) “Counterfeit mark” means a spurious mark that is identical
9 with, or confusingly similar to, a registered mark and is used, or
10 intended to be used, on or in connection with the same type of
11 goods or services for which the genuine mark is registered. It is
12 not necessary for the mark to be displayed on the outside of an
13 article for there to be a violation. For articles containing digitally
14 stored information, it shall be sufficient to constitute a violation
15 if the counterfeit mark appears on a video display when the
16 information is retrieved from the article. The term “spurious mark”
17 includes genuine marks used on or in connection with spurious
18 articles and includes identical articles containing identical marks,
19 where the goods or marks were reproduced without authorization
20 of, or in excess of any authorization granted by, the registrant.
21 When counterfeited but unassembled components of any articles
22 described under subdivision (a) are recovered, including, but not
23 limited to, labels, patches, fabric, stickers, wrappers, badges,
24 emblems, medallions, charms, boxes, containers, cans, cases,
25 hangtags, documentation, or packaging, or any other components
26 of any type or nature that are designed, marketed, or otherwise
27 intended to be used on or in connection with any articles described
28 under subdivision (a), the number of “articles” shall be equivalent
29 to the number of completed articles that could have been made
30 from those components.

31 (4) “Knowingly possess” means that the person possessing an
32 article knew or had reason to believe that it was spurious, or that
33 it was used on or in connection with spurious articles, or that it
34 was reproduced without authorization of, or in excess of any
35 authorization granted by, the registrant.

36 (5) Notwithstanding Section 7, “person” includes, but is not
37 limited to, a business entity.

38 (6) “Registrant” means any person to whom the registration of
39 a mark is issued and that person’s legal representatives, successors,
40 or assigns.

1 (7) “Sale” includes resale.

2 (8) “Value” has the following meanings:

3 (A) When counterfeit items of computer software are
4 manufactured or possessed for sale, the “value” of those items
5 shall be equivalent to the retail price or fair market price of the
6 true items that are counterfeited.

7 (B) When counterfeited but unassembled components of
8 computer software packages or any other articles described under
9 subdivision (a) are recovered, including, but not limited to,
10 counterfeited digital disks, instruction manuals, licensing
11 envelopes, labels, patches, fabric, stickers, wrappers, badges,
12 emblems, medallions, charms, boxes, containers, cans, cases,
13 hangtags, documentation, or packaging, or any other components
14 of any type or nature that are designed, marketed, or otherwise
15 intended to be used on or in connection with any articles described
16 under subdivision (a), the “value” of those components shall be
17 equivalent to the retail price or fair market value of the number of
18 completed computer software packages or other completed articles
19 described under subdivision (a) that could have been made from
20 those components.

21 (C) “Retail or fair market value” of a counterfeit article means
22 a value equivalent to the retail price or fair market value, as of the
23 last day of the charged crime, of a completed similar genuine article
24 containing a genuine mark.

25 (f) This section shall not be enforced against any party who has
26 adopted and lawfully used the same or confusingly similar mark
27 in the rendition of like services or the manufacture or sale of like
28 goods in this state from a date prior to the earliest effective date
29 of registration of the service mark or trademark either with the
30 Secretary of State or on the Principle Register of the United States
31 Patent and Trademark Office.

32 (g) An owner, officer, employee, or agent who provides, rents,
33 leases, licenses, or sells real property upon which a violation of
34 subdivision (a) occurs shall not be subject to a criminal penalty
35 pursuant to this section, unless he or she sells, or possesses for
36 sale, articles bearing a counterfeit mark in violation of this section.
37 This subdivision shall not be construed to abrogate or limit any
38 civil rights or remedies for a trademark violation.

1 (h) This section shall not be enforced against any party who
2 engages in fair uses of a mark, as specified in Section 14247 of
3 the Business and Professions Code.

4 (i) When a person is convicted of an offense under this section,
5 the court shall order the person to pay restitution to the trademark
6 owner and any other victim of the offense pursuant to Section
7 1202.4.

8 ~~SECTION 1. It is the intent of the Legislature to do both of~~
9 ~~the following:~~

10 ~~(a) Permit a contract entered into between the state and outside~~
11 ~~entities to reflect the true costs, both direct and indirect, of the~~
12 ~~contract to the state.~~

13 ~~(b) Permit the method established for calculating the actual~~
14 ~~cost of any contract entered into to include both direct and indirect~~
15 ~~economic benefits to the state through the employment of~~
16 ~~individuals or companies or both or the purchase of goods or~~
17 ~~services or both that generate revenues to the state, including~~
18 ~~personal or corporate, or both personal and corporate, income~~
19 ~~taxes, property taxes, or sales and use taxes.~~

20 ~~SEC. 2. Chapter 2.01 (commencing with Section 10490.10) is~~
21 ~~added to Part 2 of Division 2 of the Public Contract Code,~~
22 ~~immediately following Chapter 2 (commencing with Section~~
23 ~~10290), to read:~~

24
25 ~~CHAPTER 2.01. BEST VALUE COMPETITIVE BID CONTRACTS~~
26

27 ~~10490.10. (a) Notwithstanding any provision of law,~~
28 ~~commencing January 1, 2011, every contract that would otherwise~~
29 ~~be required to be awarded on a competitive basis pursuant to~~
30 ~~Chapter 1 (commencing with Section 10100), Chapter 2~~
31 ~~(commencing with Section 10290), Chapter 2.5 (commencing with~~
32 ~~Section 10700), Chapter 3 (commencing with Section 12100), and~~
33 ~~any other applicable state statute governing state contracts, may~~
34 ~~be awarded, instead, as a best value competitive bid contract to~~
35 ~~the bid or proposal that presents the best overall value to the state.~~

36 ~~(b) For purposes of this chapter, "best value competitive bid~~
37 ~~contract" means a contract that is awarded on a competitive process~~
38 ~~that is not based merely on the lowest direct cost to the state under~~
39 ~~the contract, but rather is awarded to the bidder that presents the~~
40 ~~overall best value to the state after consideration of the total direct~~

1 and indirect economic benefit to the state under the contract,
2 including, but not limited to, all of the following:

3 (1) The direct cost of the contract, including, but not limited to,
4 materials, goods, and services.

5 (2) Indirect value to the state generated by the contract,
6 including, but not limited to, an analysis of the proposed contract
7 to determine all of the following:

8 (A) (i) The total projected indirect revenue to the state generated
9 by the wages that the contractor and subcontractors, if any, propose
10 to pay their workers in performing under the contract.

11 (ii) The total projected indirect revenue to California local
12 governments generated by the wages that the contractor and
13 subcontractors, if any, propose to pay their workers in performing
14 under the contract and the indirect revenue to the state generated
15 thereby.

16 (B) (i) The total projected indirect revenue to the state generated
17 from the goods and materials that the contractor and subcontractors,
18 if any, propose to purchase or provide in performing under the
19 contract.

20 (ii) The total projected indirect revenue to California local
21 governments generated by the goods and materials that the
22 contractor and subcontractors, if any, propose to purchase or deliver
23 in performing under the contract and the indirect revenue to the
24 state generated thereby.

25 (iii) The indirect economic benefit to the state generated by the
26 economic activity related to the production of the goods and
27 materials to be purchased or delivered under the contract.

28 (e) The Director of General Services shall adopt regulations
29 that shall take effect immediately and are exempt from the
30 rulemaking provisions of the Administrative Procedure Act to
31 provide guidance to state agencies on best methods and practices
32 and a related matrix to assist those agencies in determining the
33 overall best value.

34 (d) In determining the overall economic benefit to the state of
35 a proposed contract pursuant to this section, state agencies shall
36 consider, to the extent not prohibited under federal law, the location
37 where the wages are to be paid and the location where the products
38 or materials are to be manufactured or produced.

39 (e) No contract shall be awarded to a bidder pursuant to this
40 chapter if the Director of General Services determines that the

- 1 ~~award of the contract to that bidder would result in a net loss of~~
- 2 ~~revenues to the General Fund based on estimates of the total direct~~
- 3 ~~and indirect economic benefit to the state under the contract.~~

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