

OFFICE OF LEGISLATIVE RESEARCH
PUBLIC ACT SUMMARY



PA 11-229—sSB 882

Government Administration and Elections Committee

Judiciary Committee

Labor and Public Employees Committee

AN ACT CONCERNING THE STATE SET-ASIDE PROGRAM, FILING REQUIREMENTS OF STATE CONTRACTORS, EVALUATION OF CONTRACTORS AND SUBCONTRACTORS AND A PROGRAM TO INCREASE CONTRACTS AWARDED TO RESIDENT BIDDERS

SUMMARY: This act makes several changes to state contracting laws. It generally eliminates requirements for contractors and bidders to affirm that they are in compliance with state ethics laws each time they enter into a state contract. Instead, the act generally requires contractors to provide these affirmations only when there is a change to the information contained in previously filed affirmations. It also allows the affirmations to be provided electronically. State ethics laws covered by the affirmations include gift bans, anti-discrimination laws, and laws banning collusion.

Additionally, the act:

1. eliminates the requirement that a prequalification applicant's financial statements be prepared by a certified public accountant (CPA) if the applicant is being assisted by a certified community development financial institution;
2. potentially allows more people and businesses to qualify for the state set-aside program;
3. extends liability protections for people who complete evaluations of contractors or subcontractors;
4. requires the Department of Administrative Services (DAS) to submit a report on in-state contracting and develop and implement a program to increase the number of state contracts awarded to in-state firms; and
5. repeals an obsolete statute.

EFFECTIVE DATE: October 1, 2011, except for the DAS report and the repeal of the obsolete statute, which are effective upon passage.

§§ 1-5 & 10 — CONTRACTOR AFFIRMATIONS AND CERTIFICATIONS

The act changes the frequency for filing certain affirmations with state contracting agencies or quasi-public agencies. Under prior law, contractors and bidders had to file them each time they entered into a state contract. Such affirmations concern (1) state ethics laws, (2) gifts, (3) nondiscrimination policies, and (4) consulting agreements. Contractors had to provide the appropriate affirmations to be awarded state contracts.

The act generally requires contractors to file these affirmations only when the

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information contained in previously filed affirmations has changed. If there is a change, the contractor must file the updated information (1) within 30 days of the change or (2) upon the submittal of a new bid or proposal (for anti-discrimination affidavits it is upon the execution of a new contract), whichever is earlier.

The act also requires the gift and anti-discrimination affirmations to be resubmitted no later than 14 days after the 12-month anniversary of the most recent submission.

§ 1 — Ethics

By law, contractors and bidders for large state construction or procurement contracts (i.e., those costing more than \$500,000) must affirm (1) their receipt of a summary of state ethics laws and (2) that key personnel have read and understand the summary and agree to comply with the ethics laws. Large state construction or procurement contractors must obtain these affirmations from their subcontractors and consultants and provide them to the state contracting agency.

The act requires contractors to file such affirmations only when there is a change to the information contained in previously filed affirmations. Presumably, the contractor would have to report changes if key personnel are hired and they refuse to read or agree to comply with state ethics laws.

For subcontractors and consultants, the act specifies that the contractor must (1) obtain the affirmations before entering into a contract with the subcontractors and consultants, (2) provide them to state institutions and quasi-public agencies in addition to state agencies, and (3) provide them no later than 15 days after the request by the agency, institution, or quasi-public agency.

§ 2 — Gifts

In addition to the changes regarding the frequency with which affirmations are filed, the act broadens the scope of and changes the law requiring contractors, in order to be awarded a large contract with a state agency, to certify that they have not made gifts to the awarding agency.

Under prior law, the recipient of a large state contract had to certify that no gifts were given between the date the agency began planning the contract and the date it was executed to (1) any public official or state employee who participated substantially in preparing the bid or request for proposal or negotiating or awarding the contract or (2) any official or employee of any agency that supervises or makes appointments to the contracting agency. The certification covered the person; business; or any officer, director, shareholder, member, partner, managerial employee of the business or their agent who participated substantially in preparing the bid or contract proposal or negotiating the contract.

By law, any bidder or proposer who does not make these or related certifications must be disqualified and the agency must either (1) award the contract to the next-highest-ranked proposer or the next-lowest responsible qualified bidder or (2) seek new bids or proposals.

The act:

1. allows any official of the firm authorized to sign state contracts to make the certification, rather than just the one authorized to sign the specific

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- large contract;
2. expands the scope of the gift ban in the certification, requiring all personnel substantially involved in preparing bids or proposals or negotiating any state contracts to certify that they have not given gifts, at any time, to state contracting personnel or their supervisors; and
 3. requires contractors to generally certify that all of their bids or proposals are without fraud or collusion, instead of just the present bid or proposal.

Under prior law, the person authorized to execute a large state contract for a state or quasi-public agency had to certify that the selection process was devoid of collusion, gifts (either promised or received), compensation, fraud, or inappropriate influence. The act allows any official or employee of the agency authorized to sign state contracts (including those valued at less than \$500,000) to make this certification. It also eliminates a requirement for bid specifications or requests for proposals to include the beginning date of the project's planning.

§§ 3, 4 — Anti-discrimination

By law, all contractors with state or municipal contracts must file a representation and documentation that they comply with state anti-discrimination laws. The act eliminates a requirement to file such information for each new contract and instead requires contractors to update the information within 30 days after any change or upon the execution of a new contract, whichever is earlier. Additionally, the act requires the affirmations to be resubmitted no later than 14 days after the 12-month anniversary of the most recent submission. It specifically prohibits the state or a political subdivision from awarding a contract unless the contractor has provided the representation and documentation.

§ 5 — Consulting

The act broadens the scope of the law that requires agencies, in certain cases, to obtain an affidavit regarding the use of consultants before awarding a contract to purchase goods or services worth \$50,000 or more in a calendar or fiscal year. Under prior law, the chief official of the bidder awarded the contract had to submit an affidavit on whether any consulting agreements had been entered into in connection with the contract. The act (1) allows any principal or key person (and not just the chief official) to submit the affidavit; (2) extends the requirement to apply to all bidders, not just those awarded the contract; (3) requires the bidder to attest to whether it has ever entered a consulting agreement on any state contract for the purchase of goods or services worth \$50,000 or more; and (4) eliminates the requirement that the affidavit be written.

Under prior law, the affidavit had to indicate whether the consultant's duties included any direct or indirect communication concerning the business of the contracting agency. The act extends the scope of the affidavit to include communications concerning the business of any state agency, not just the contracting agency.

§ 6 — PREQUALIFICATION APPLICATION

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By law, with certain exceptions, contracts for the construction, reconstruction, alteration, remodeling, repair, or demolition of a public building or other public work estimated to cost more than \$500,000 must be awarded through competitive bidding to the lowest responsible prequalified bidder. The act eliminates the requirement that a prequalification applicant's financial statements be prepared by a CPA if the applicant is being assisted by a certified community development financial institution. Instead, the act requires such applicants to provide only the financial documents required by the institution to qualify for the program. It also eliminates a requirement that the financial statements contain information on the applicant's plant and equipment and bank and credit references.

The act defines a "certified community development financial institution" as a community development bank, credit union, or loan or venture capital fund that (1) provides financial products and services in economically distressed markets and (2) is certified by the U.S. Department of the Treasury's Certified Development Financial Institution Fund.

The act also specifies that each applicant must provide a bonding company letter that states its aggregate work capacity and single project limit bonding capacity. Under prior law, the bonding company statement and maximum bonding capacity were included in the applicant's financial statements.

§ 7 — SET-ASIDE PROGRAM

By law, state agencies and political subdivisions, other than municipalities, must set aside 25% of the total value of all contracts they let for construction, goods, and services each year for certified small contractors. The agencies must further set aside 25% of the set-aside value (6.25% of the total) for exclusive bidding by certified small minority-owned businesses.

The act potentially expands the people and businesses that may be certified as small businesses by eliminating the requirement that (1) a small contractor do business under the same ownership or management for a year before it is certified and (2) at least 51% of a small contractor's ownership is held by someone with authority over daily operations, management, and policies and who receives beneficial interests. It eliminates the requirement that DAS maintain a pre-certification list of small contractors that do not meet the one-year requirement for certification since the act eliminates the need for the list.

The act prohibits a small contractor from receiving certification if it is affiliated with another person and together their revenues exceed \$15 million. By law, "affiliated" means one person, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with another person. "Control" means having the power to direct or cause the direction of any person's management and policies, whether through the ownership of voting securities, by contract, or through any other direct or indirect means. Control is presumed to exist if a person directly or indirectly owns, controls, holds with the power to vote, or holds proxies representing, 20% or more of the voting securities of another person.

§ 8 — CONTRACTOR EVALUATIONS

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By law, public agencies must, after completing a contract, evaluate the performance of contractors and, to the extent known, subcontractors. Political subdivisions may rely on the contractor's evaluation of subcontractors. Existing law protects public agencies and their employees and certifying officials from losses or injuries a contractor suffers as a result of the evaluation unless they acted willfully, wantonly, or recklessly.

The act extends this protection to any person, not just government officials, for any loss or injury sustained by a contractor or subcontractor resulting from the evaluation, thus protecting contractors who complete evaluations of subcontractors.

§ 9 — RESIDENT BIDDERS

Report

The act requires the DAS commissioner, by January 1, 2012, to submit a report on the use of resident bidders to the governor and Labor Committee. The report must (1) analyze any laws or economic factors that disadvantage resident bidders in submitting the lowest responsible qualified bid (presumably for a state contract), (2) determine why any laws intended to give preference to state citizens for employment on public works projects are not being enforced, and (3) recommend administrative or legislative action to increase the number of state contracts awarded to resident bidders. Such recommendations must be within the confines of the U.S. Constitution's Commerce Clause (Article 1, Section 8, Clause 3). The commissioner must consult with the transportation, public works, and labor commissioners and the UConn president, or their designees.

Program

By July 1, 2012, DAS must consider the report's findings and develop and implement a program to increase the number of state contracts awarded to resident bidders. The program may include preferences for in-state firms but must not violate the Commerce Clause.

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