



LEGAL INSIGHT

Contracts and disclosure of parties: Who is interested?

by Ramiro Canales

Transparency in government will be a hot topic for the 85th Texas Legislature. Revisions to HB 1295 are expected.

Transparency in government was a priority of the 84th Texas Legislature. In an effort to provide more disclosure about contracts with governmental entities, the Texas Legislature passed HB 1295. The bill added Section 2252.908 titled “Disclosure of Interested Parties” to the Government Code. Public school districts are subject to these disclosure requirements; open-enrollment charter schools are not. The disclosure of interested parties is in addition to the disclosure of conflicts of interest required in HB 23, which I addressed in “Ethical Disclosures 2.0” in the fall 2015 issue of *INSIGHT*.

The disclosure does not apply to all contracts. It applies only to certain contracts entered after January 1 that are subject to the specific requirements of the new statute and rules adopted by the Texas Ethics Commission in Title 1 of the Texas Administrative Code (“1 TAC”).

Key definitions

The word “contract” was not defined in HB 1295. The Texas Ethics Commission defined the term through the rule-making process to mean “a contract between a governmental entity or state agency and a business entity at the time it is voted on by the governing body or at the time it binds the governmental entity or state agency, whichever is earlier, and includes an amended, extended or renewed contract.”

The term “business entity” is defined in Section 2252.908(1) of the Government Code as “any entity recognized by law through which business is conducted, including a sole proprietorship, partnership or corporation.” The administrative rules adopted by the Texas Ethics Commission clarify that definition. In 1 TAC §46.3(b), “business entity” is defined as including “an entity through which business is conducted with a governmental entity or state agency, regardless of whether the entity is a for-profit or nonprofit entity. The term does not include a governmental entity or state agency.”

The statutory definition of “interested party” is a “person who has a controlling interest in a business entity with whom a governmental entity or state agency contracts or who actively participates in facilitating the contract or negotiating the terms of the contract, including a broker, intermediary, adviser or attorney for the business entity.” The definition of “interested party” in 1 TAC §46.3(d) does not contain the statutory language relating to facilitating or negotiating a contract.

HB 1295 did not define “controlling interest.” The commission rules define “controlling interest” in 1 TAC §46.3(c) as “(1) an ownership interest or participating interest in a business entity by virtue of units, percentage, shares, stock or otherwise that exceeds 10 percent; (2) membership on the board of directors or other governing body of a business entity of which the board or other governing body is composed of not more than 10 members; or (3) service as an officer of a business entity that has four or fewer officers or service as one of the four officers most highly compensated by a business entity that has more than four officers.” The Texas Ethics Commission recently adopted the following amendment: “Subsection (3) of this section does not apply to an officer of a publicly held business entity or its wholly owned subsidiaries.”

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In 1 TAC §46.3(e), the Texas Ethics Commission defined “intermediary” as a “person who actively participates in the facilitation of the contract or negotiating the contract, including a broker, adviser, attorney, or representative of or agent for the business entity who: (1) receives compensation from the business entity for the person’s participation; (2) communicates directly with the governmental entity or state agency on behalf of the business entity regarding the contract; and (3) is not an employee of the business entity or of an entity with a controlling interest in the business entity.”

The Texas Ethics Commission also adopted the following definitions for “signed” and “value.” Signed includes “any symbol executed or adopted by a person with present intention to authenticate a writing, including an electronic signature.” Furthermore, the value of a contract is “based on the amount of consideration received or to be received by the business entity from the governmental entity or state agency under the contract.”

Contracts that require disclosure

In 1 TAC §46.1(b), the Texas Ethics Commission determined that contracts entered after Dec. 31, 2015, require a disclosure of interested parties only if either of the following conditions is met: (1) the contract requires an action or vote by the school

board, or (2) the value of the contract is at least \$1 million.

Contracts that don’t require disclosure

According to the rules adopted by the Texas Ethics Commission in 1 TAC §46.1(c), a contract does not require an action by the school board if (1) the school board has “legal authority to delegate to its staff the authority to execute the contract; (2) the school board “has delegated to its staff the authority to execute the contract”; and (3) the school board “does not participate in the selection of the business entity with which the contract is entered into.”

Contracts that meet these three requirements are not subject to filing a form disclosing the interested parties.

Disclosure form

If a contract meets the disclosure requirements, the business entity must submit the Texas Ethics Commission form to the school district “at the time the business entity submits the signed contract” to the school district. A school district is prohibited from entering into a contract with a business entity unless the form is timely filed.

A school district that receives a form for a contract that is subject to the disclosure

requirements in Section 2252.908(1) of the Government Code must electronically notify the Texas Ethics Commission of its receipt. The notification must be made “no later than the 30th day after the date the [school district] receives the disclosure.”

Each disclosure form that is filed electronically with the commission shall be made available to the public on the Texas Ethics Commission website no later than the seventh business day after the commission receives it from the school district.

In an effort to assist school districts, the Texas Ethics Commission has published a frequently asked questions (FAQ) page about HB 1295. It is available at www.ethics.state.tx.us/whatsnew/FAQ_Form1295.html.

Transparency in government will be a hot topic for the 85th Texas Legislature. Revisions to HB 1295 are expected. School districts and business entities must use due diligence to ensure disclosure of interested parties in applicable contracts. ■

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Disclaimer: School districts and business entities that have questions regarding the applicability and implementation of HB 1295 should consult with their legal counsel.