

Legal Q&A

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Q: What is Section 2252.908 of the Government Code?

A: Section 2252.908 is a new governmental transparency law that was enacted by House Bill 1295 in 2015. It prohibits a governmental entity or state agency from entering into certain contracts with a business entity unless the business entity submits a disclosure of interested parties (i.e., discloses persons with a financial or business interest in the contract). TEX. GOV'T CODE § 2252.908(d). Although the bill became effective on September 1, 2015, it only applies to a contract entered into on or after January 1, 2016.

Q: What role does the Texas Ethics Commission have in the implementation of Section 2252.908?

A: The Texas Ethics Commission (Commission) is charged with adopting rules to implement the new statute, developing the disclosure of interested parties form, and posting a copy of the form on its website. *Id.* § 2252.908(g).

The Commission adopted initial rules (found at 1 Texas Administrative Code Chapter 46) on November 30, 2015, and adopted amendments to those rules on April 8 and June 1, 2016. The most recent version of the Certificate of Interested Parties (Form 1295) was adopted by the Commission on April 8, 2016.

Q: What local governmental entities are subject to this law?

A: The term “governmental entity” is defined to include a city, county, public school district, or special-purpose district or authority. *Id.* § 2252.908(a)(2).

While there is no attorney general opinion, Commission rule, or reported case that specifically addresses the issue, the League does not believe public nonprofit corporations like housing finance corporations and economic development corporations are governmental entities subject to this new disclosure law. TEX. LOC. GOV'T CODE chs. 394, 501-505.

Q: To what types of city contracts does Section 2252.908 apply?

A: This new disclosure law applies to contracts that: (1) require an action or vote by the city council before the contract may be signed; or (2) have a value¹ of at least \$1 million. TEX. GOV'T CODE § 2252.908(b). Pursuant to the Commission's rules, a contract does not require an action or vote by the city council if:

¹ The term “value” is defined as “the amount of consideration received or to be received by the business entity from the governmental entity or state agency under the contract.” 1 T.A.C. § 46.3(g). Although a plain reading of this definition does not make it clear, at the time it was adopted, the Commission indicated that the term also encompasses an amount of consideration received by a city from a business entity.

- (1) The governing body has legal authority to delegate to its staff the authority to execute the contract;
- (2) The governing body has delegated to its staff the authority to execute the contract; and
- (3) The governing body does not participate in the selection of the business entity with which the contract is entered into.

1 T.A.C. § 46.1(c).

It is important to note that the Commission defines the term “contract” to include an amended, extended, or renewed contract. *Id.* § 46.3(a). The League understands this to mean that if, for instance, a city entered into a contract in 2015, but seeks to amend, extend, or renew that contract on or after January 1, 2016, the disclosure requirements of Section 2252.908 may be triggered.

The Commission also defines the term “contract” to mean “a contract between a governmental entity . . . and a business entity at the time it is voted on by the governing body or at the time it binds the governmental entity.” *Id.* The League understands this temporal requirement to mean that a city would not have to get a disclosure form from some downstream third party who is ultimately assigned to carry out an obligation under a contract.

Q: To what types of business entities does Section 2252.908 apply?

A: The term “business entity” is defined to mean “any entity recognized by law through which business is conducted, including a sole proprietorship, partnership, or corporation.” TEX. GOV’T CODE § 2252.908(a)(1). The Commission’s rules clarify that the term “business entity” includes nonprofits, but does not include a governmental entity. 1 T.A.C. § 46.3(b). That means, for instance, that if a city executes an interlocal agreement with another city or county the disclosure requirements of Section 2252.908 are not triggered.

Q: What types of interested parties must a business entity disclose when it enters into a contract with a city?

A: A business entity must disclose “(1) a person who has a controlling interest in a business entity with whom a governmental entity . . . contracts; or (2) an intermediary.” 1 T.A.C. § 46.3(d) (defining “interested party”); *see also* TEX. GOV’T CODE § 2252.908(a)(3).

The Commission defines the terms “controlling interest” and “intermediary” as follows:

“Controlling interest” means: (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.²

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“Intermediary,” . . . means, 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.

1 T.A.C. § 46.3(c),(e).

It is possible that, although a business entity is subject to Section 2252.908, no interested parties will exist. Thus, a business entity may end up filing a form that has very little information on it.

Q: How is the Certificate of Interested Parties Form (Form 1295) completed and submitted to the city?

A: The Commission has available on its website an electronic filing application that must be used to file Form 1295. The process, as implemented by the Commission, is as follows:

1. A business entity must use the Commission’s online filing application to enter the required information on Form 1295. The business entity must then print a copy of the form, which will contain a unique certification number. 1 T.A.C. § 46.5. An authorized agent of the business entity must sign the printed copy of the form and have the form notarized. *Id.*
2. The completed Form 1295 must be filed with the city by “the time the business entity submits the signed contract” to the city. TEX. GOV’T CODE § 2252.908(d).
3. The city must use the Commission’s online filing application to acknowledge that the city has received the signed/notarized Form 1295 not later than the 30th day after the date the city receives the form. *Id.* § 2252.908(f); 1 T.A.C. § 46.5(c). The city should not send a copy of the notarized copy of the Form 1295 to the Commission.

² This subsection (3) does not apply to an officer of a publicly held business entity or its wholly owned subsidiaries. 1 T.A.C. § 46.3(c).

Instructional videos and a FAQ about how to register and file/acknowledge a Form 1295 are available on the Commission's website here:

https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm.

Q: What type of transaction triggers the disclosure requirement?

A: This remains unclear. The statute broadly prohibits a city from “enter[ing] into a contract described by Subsection (b) with a business entity unless the business entity” submits the disclosure. TEX. GOV'T CODE § 2252.908(d). The Commission rules provide that Form 1295 describe “the services, goods, or other property [such as real property] *used by the [city] under the contract.*” 1 T.A.C. § 46.5(a)(4) (emphasis added). Form 1295 (box 3) directs the business entity to “provide a description of the services, goods, or other property to be *provided under the contract.*” (emphasis added). Cities should consult their local legal counsel in deciding whether any particular transaction triggers the requirements of Section 2252.908.

Q: Will the city have to provide any of the information that the business entity needs to include on Form 1295?

A: Yes. Although not required by Section 2252.908, the Commission's rules provide that the business entity must include on Form 1295 an “identification number used by the [city] . . . to track or identify the contract for which the form is being filed.” *Id.* Even though the rules provide for such a number, nothing in the rule requires a city to create a numbering system of any type.

Q: How will the public access a Form 1295 that is completed by a business entity?

A: The Commission is required to post the completed Form 1295 on its website within seven business days after receiving notice from the city that the city has received the filed Form 1295 and certification of filing. TEX. GOV'T CODE § 2252.908(g); 1 T.A.C. § 46.5(d). The database of acknowledged forms is available on the Commission's website here: https://www.ethics.state.tx.us/dfs/search_1295.htm. In addition, cities must provide the completed forms in accordance with the Public Information Act.

Q: What happens if a city or business entity fails to comply with Section 2252.908?

A: All the ramifications for a city are unclear at this time. According to the Commission's website, the Commission does not have any authority (beyond rulemaking and adoption of the form) to enforce or interpret House Bill 1295. *See* <https://www.ethics.state.tx.us/tec/1295-Info.htm>; *cf.*, *e.g.*, TEX. GOV'T CODE §§ 571.061 (listing the laws that the Commission administers and enforces), 571.091 (listing the statutes about which the Commission may issue advisory opinions).

As for a business entity, the statute does provide that a Form 1295 “disclosure is made under oath and under penalty of perjury.” *See* TEX. GOV'T CODE § 2252.908(e)(2); *see also* TEX. PENAL CODE ch. 37 (providing for offense of perjury).

Q: If a business entity has already filed the CIQ Form required by Local Government Code Chapter 176 could it also have to file Form 1295?

A: Yes. In the past decade, the number and type of interests that must be disclosed by city officials, employees, and vendors have increased. The various state conflicts/disclosure laws come with their own separate legal requirements. Thus, complying with one does not fulfill the obligations imposed by the other. In some circumstances, the same financial interest may require a business entity to file more than one disclosure form. A discussion of the various conflicts and disclosure laws that apply to city officials, employees, and vendors is available on the League's website here:
<http://www.tml.org/p/Conflicts%20and%20Disclosure%20Laws.pdf>.