

# **A Look into New Texas Conduct and Disclosure Requirements**

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## Introduction

Transparency and ethics reform were very popular terms used by many during the 84<sup>th</sup> Texas Legislature. In fact, Governor Gregg Abbott declared ethics reform a top priority. One of his main priorities was to require legislators, statewide elected officials and gubernatorial appointees to disclose contracts or any other arrangements in which they were paid by a public agency. Governor Abbott's priority measure was contained in House Bill 3736. In a political twist of fate, Governor Abbott eventually vetoed House Bill 3736 because a state senator amended the bill and added a measure that Governor Abbott said weakened Texas' ethics laws. He has since stated that serious ethics reform must be addressed next session. While the legislature failed to pass meaningful reforms that applied to Texas legislators, they did, however, pass several ethics measures that apply to state agencies, local governments and those wishing to do business with local governments. This paper discusses the ethics and disclosure measures that did pass in the 84<sup>th</sup> Texas Legislature and are now in effect.

## Local Government Officers and Vendors

The Texas Legislature could not resist tweaking Chapter 176 of the Local Government Code. In 2005, the 79<sup>th</sup> Legislature enacted House Bill 914 which added Chapter 176 relating to the disclosure of certain relationships with

local government officers and vendors. It required local government officers and vendors to file conflicts disclosure statements and questionnaires with the records administrator of the local government entity. It was a class C misdemeanor with a maximum fine of \$500. It has been amended almost every session since.

In 2015, the Texas Legislature's stated reason for amending Chapter 176 was to establish consistency in local and state procurement laws. Supporters argued that such disclosure deters self-dealing and ensures a level playing field among those wishing to do business with local governments. They also stated that clearer definitions were needed to make it easier for both government officers and vendors to know what to disclose. Opponents argued that new regulations and increased penalties were unnecessarily onerous for both vendors and local government officers and employees.

House Bill 23 not only amended Chapter 176, it added, transferred, redesignated and repealed different provisions of Chapter 176. It changed several definitions, mandated new disclosure requirements and stiffened penalties for failure to file. House Bill 23 amended the definition of local government officer to include an agent (including an employee) of the local government who exercises discretion in the planning, recommending, selecting, or contracting of a vendor and specifically provided that water districts are considered a local governmental entity. Although it fell on deaf ears, opponents argued that inclusion of local government employees involved in the planning of a

procurement could result in employees who had no real involvement in selecting a vendor being subject to criminal penalties for failing to file a disclosure form.

It also added a new definition for “vendor” as a person who entered or sought to enter into a contract with a local governmental entity, including an agent of a vendor<sup>1</sup> and defined “family relationship” as one between two persons within the third degree by consanguinity or the second degree by affinity which are defined by Subchapter B, Chapter 573, Government Code.

As has been the law since the inception of Chapter 176, a local government officer must file a conflicts disclosure statement with respect to a vendor if the vendor enters into a contract with the local governmental entity or if the local governmental entity is considering entering into a contract with a vendor and the vendor has a business relationship with the local government officer or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the preceding year.<sup>2</sup>

As has also been the law since the inception of Chapter 176, a local government officer must file a conflicts disclosure statement if he or she received

a certain amount of gifts from a vendor. House Bill 23, however, decreased the aggregate value of gifts accepted by a local government officer and any family member of the officer from a vendor that triggers the requirement that the officer file a conflicts disclosure statement. Until passage of HB 23, the aggregate value of gifts to trigger a disclosure statement was \$250 during the preceding year. Now, a local government officer must file a conflicts disclosure statement if the vendor has given to the local government officer or a family member of the officer one or more gifts that have an aggregate value of more than \$100 during the preceding year.<sup>3</sup>

Although the term “gift” is defined in Section 176.001 (2-b) to include food, Section 176.003 (a-1) provides that a local government officer is not required to file a conflicts disclosure statement in relation to a gift if the gift is a political contribution or food accepted as a guest. Before passage of HB 23, lodging, transportation and entertainment accepted as a guest were also excluded from the requirement of filing the statement. Now they are not, and lodging, transportation and entertainment are included as items in the aggregate value of \$100. The bill specifies that “gift” does not include “a benefit offered on account of kinship or a personal, professional, or business

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<sup>1</sup> House Bill 23 provides that the term “vendor” includes an officer or employee of a state agency if that person is acting in a private capacity to enter a contract. It also states that the term “vendor” does not include state agencies, except for Texas Correctional Industries, a department of the Texas Department of Criminal Justice that works with prisoners to produce license plates, furniture and other goods.

<sup>2</sup> “Family member” is defined differently than “family relationship” in Chapter 176. A family member means a person related to another person within the first degree by consanguinity or affinity.

<sup>3</sup> House Bill 23 carved out an exception for a local governmental entity or vendor if it is an administrative agency created to supervise the performance of an interlocal contract.

relationship independent of the official status of the recipient.”

House Bill 23 provides a new instance in which a local government officer must file a statement. Now, an officer is required to file a statement if the officer becomes aware that the vendor has a family relationship with the local government officer. And as mentioned earlier in this paper, “family relationship” is defined as one between two persons within the third degree by consanguinity<sup>4</sup> or the second degree by affinity<sup>5</sup>.

Texas Local Government Code Section 176.006 provides that a vendor must also file a conflict of interest questionnaire if the vendor has a business relationship with the local government officer or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the preceding year or if the vendor has given to the local government officer or a family member of the officer one or more gifts that have an aggregate value of more than \$100 during the preceding year. Just like for local government officers, HB 23 provides a new instance in which a vendor must file a statement. Now, a

vendor is required to file a statement if he or she has a family relationship with a local government officer of that local governmental entity. House Bill 23 also now requires a vendor to describe each employment or business relationship with a corporation in which a local government officer held ownership interest of 1 percent or more, a reduction from 10 percent as previous law dictated. Since passage, the Texas Ethics Commission has updated the conflict of interest questionnaire that local government officers and vendors must use and it can be found on its website at [www.ethics.state.tx.us](http://www.ethics.state.tx.us).

The new law specifies that a person who is both a local government officer and a vendor of a local governmental entity is required to file a conflict of interest questionnaire only if the person enters or seeks to enter into a contract with the local governmental entity or is an agent of a person who enters or seeks to enter into a contract with the local governmental entity. It also requires the local government’s records administrator to maintain a list of local government officers of the local entity and make the list available to the public

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<sup>4</sup> Section 573.023 (c) Texas Government Code provides, “An individual’s relatives within the third degree by consanguinity are the individual’s: (1) parent or child (relatives in the first degree); (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual or niece who is a child of a brother or sister of the individual (relatives in the third degree).”

<sup>5</sup> Section 573.025 (a) Texas Government Code provides, “A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.”

and any vendor who could be required to file a conflict of interest questionnaire.

The new law allows the governing body of a local governmental entity to declare a contract void if the governing body determines that a vendor failed to file a conflict of interest questionnaire, with certain exceptions, and repeals a provision establishing that a local governmental entity does not have a duty to ensure that a vendor files a conflict of interest questionnaire. The bill revises provisions making it an offense for a local government officer or a vendor to knowingly fail to file, by a specified time, the required conflicts statement or questionnaire, as applicable, disclosing certain relationships with the appropriate records administrator and establishes penalties depending on the amount of the contract at issue. It is now a Class C misdemeanor if the contract is less than \$1 million, a Class B misdemeanor if the contract was over \$1 million but less than \$5 million and a Class A misdemeanor if the contract amount is at least \$5 million. Lastly, it is an exception to enforcement if the local government officer or vendor files the conflicts disclosure statement not later than the seventh day after receiving notice from the local governmental entity of the alleged violation.

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<sup>6</sup> A contract does not require an action or vote if (1) the governmental entity has the legal authority to delegate to its staff the authority to execute the contract; (2) the governmental entity 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.

### Disclosure Regarding Contracts with Governmental Entities

The Texas Legislature passed another measure that requires the disclosure of interested parties in certain contracts with governmental entities. The stated purpose of the bill was to disclose everyone influencing contracts with local governments. House Bill 1295 creates a new section in Chapter 2252 of the Texas Government Code. It defines, among other things, “interested party” as 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.” It also defines “governmental entity” to include any special–purpose district or authority.

Section 2252.908 of the Texas Government Code applies to contracts of a governmental entity or state agency that either 1) requires an action or vote by the governmental entity<sup>6</sup> or 2) has a value of \$1 million or more<sup>7</sup>. Section 2252.908 of the Texas Government Code prohibits a governmental entity or state agency from entering into a contract with a business entity unless the business entity submits a disclosure of interested parties to the governmental entity at the time the contract is signed. The Legislature tasked the Texas Ethics Commission to

<sup>7</sup> The Legislature carved out three exceptions. This new law does not apply to (1) a sponsored research contract of an institution of higher education or (2) an interagency contract of a state agency or an institution of higher education or (3) a contract related to health and human services if the value of the contract cannot be determined at the time the contract is executed and the vendor is eligible for the contract.

draft form for the business entities to use. The form, named Form 1295, must include a list of each interested party for the contract of which the contracting business entity is aware and the signature of the business entity's agent acknowledging that the disclosure is made under oath and under penalty of perjury. Form 1295 must be filed electronically by the business entity with the Texas Ethics Commission and then the governmental entity must then confirm with the Commission within 30 days of the date the contract binds all parties to the contract. This new law applies to all contracts entered into on or after January 1, 2016. The Texas Ethics Commission website contains short tutorials on navigating the online filing application process.

#### Disclosure by Political Subdivisions Regarding Capital Appreciation Bonds

The Texas Legislature adopted House Bill 114, which added Section 1201.0245 of the Texas Government Code. The law places limitations and requirements on political subdivisions that issue capital appreciation bonds. Capital appreciation bonds are a type of bonds that does not pay interest until its maturity date. Because political subdivisions are not required to pay monthly or quarterly interest payments, these types of bonds are used to raise funds when a political subdivision cannot afford to issue bonds otherwise. Section 1201.0245 limits the amount of capital appreciation bonds a political subdivision could issue to no more than 25 percent of the political subdivision's total bond indebtedness at the time of issuance.<sup>8</sup>

Political subdivisions are now prohibited from using capital appreciation bonds secured by ad valorem taxes unless: (1) the bonds had a scheduled maturity date of not more than 20 years after the date of issuance; (2) the political subdivision received a written estimate of the cost of the issuance including the amount of principal and interest to be paid until maturity, the amount of fees to be paid by outside vendors, the amount of fees to be paid to each financing team member and the projected tax impact of the bonds; (3) the political subdivision determined in writing if any personal or financial relationship existed between any governing members of the political subdivision and professionals associated with the issuance of the bonds; and (4) the political subdivision displayed on its website the amount of the proposed bond, the length of maturity, projects to be financed with the bond proceeds, the intended use of the bond proceeds not spent after completion of original intended use, and the total amount of the public subdivision's outstanding bonded indebtedness at the time of the election of the bonds.

Section 1201.0245 of the Texas Government Code prohibits political subdivisions from using capital appreciation bonds to purchase maintenance items or transportation-related items, such as buses. Political subdivisions can now only spend any unused surplus on uses that have been identified on the political subdivision's website. Unused bond proceeds could be spent for another use if the political subdivision first holds a successful election to repurpose the bond proceeds.

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<sup>8</sup> These limitations do not apply to the issuance of refunding bonds under Chapter 1207 of the

Texas Government Code or capital appreciation bonds issued for transportation projects.

This new law imposes a couple of new duties upon political subdivisions. First, a political subdivision that determines a personal or financial relationship exists between the political subdivision and professionals associated with the issuance of the bonds is now required to submit that determination to the Texas Ethics Commission. Second, a political subdivision shall regularly update the debt information posted on its website.

Lastly, this new law prohibits political subdivisions from extending the maturity date of an issued capital appreciation bond in most cases although there exists two exceptions: (1) the extension of the maturity date will decrease the total amount of projected principal and interest that the subdivision would have to pay until maturity or (2) if the political subdivision was a school district and the Texas Education Agency certified that the solvency of the permanent school fund's bond guarantee program would be threatened without the extension.

#### State Agency Revolving Door

The Texas Legislature adopted Senate Bill 20 which was an omnibus bill which made comprehensive changes to state agency contracting, purchasing, and accounting procedures. Newly added Section 572.069 of the Texas Government Code prohibits a former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation from accepting employment from the entity that was involved with the procurement before the second anniversary of the date the officer's or employee's service or employment with

the state agency ceased. The revolving door prohibition only applies to a state officer or employee whose service or employment with a state agency ceased on or after September 1, 2015.

#### Conclusion

Ethics reforms and transparency will continue to remain hot topics at the Texas Legislature. Governor Abbott has indicated that he will push greater ethics reforms in the 2017 Regular Session. Stay tuned to see what the Texas Legislature does next.