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What You're Missing: Emerging Issues in Contracts

Michelle R. Morris

Coby Wilbanks

Michelle R. Morris/Coby Wilbanks
ROGERS, MORRIS & GROVER, LLP
5718 Westheimer Rd., Suite 1200
Houston, Texas 77057
(713) 960-6000
mmorris@rmgllp.com
cwilbanks@rmgllp.com

DISCLAIMER: THIS PAPER IS BY NO MEANS AN EXHAUSTIVE LIST OF ISSUES AND LAWS THAT MUST BE CONSIDERED WHEN REVIEWING OR PREPARING CONTRACTS FOR EDUCATIONAL ENTITIES. RATHER, THIS PAPER IS INTENDED TO HIGHLIGHT RECENT (AND NOT SO RECENT, BUT NONETHELESS CHALLENGING) LEGAL REQUIREMENTS APPLICABLE TO OUR CLIENTS' CONTRACTING ACTIVITIES.

I. CERTAIN REQUIRED ACTIONS AND PROVISIONS WHEN CONTRACTING

School district contracts are governed by a web of state and federal laws imposing numerous requirements and mandatory provisions. In addition to statutory requirements, the modern regulatory and compliance environment necessitates Districts incorporate certain protections, not mandated by statute but essential to the point of included here as "required."

A. Form 1295 – Disclosure of Interested Parties

Tex. Gov't Code 2252.908(d) - A governmental entity or state agency may not enter into a contract described by Subsection (b) with a business entity unless the business entity, in accordance with this section and rules adopted under this section, submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency.

H.B. 1295 from the 2015 legislative session added section 2252.908 to the Texas Government Code requiring certain business entities to submit a disclosure of interested parties. The term "business entity" is defined broadly as "any entity recognized by law through which business is conducted," and specifically includes a sole proprietorship.¹

According to the legislative bill analysis, "more transparency is necessary with regard to the interested parties of a contract with a governmental entity or state agency. H.B. 1295 seeks to remedy this issue by requiring certain contracts with governmental entities and state agencies to include certain disclosure."

The provision applies to any contract with a business entity requiring action by the Board of Trustees, or with a value of at least \$1 million.² The section carves out several exceptions, notably including interagency contracts of a state agency or an institution of higher education; contracts with a publicly traded business entity; and contracts with an electric or gas utility.³

¹ Tex. Gov't Code § 2252.908(a)(1)

² Tex. Gov't Code § 2252.908(b)

³ Tex. Gov't Code § 2252.908(c)

The required form, aptly named “Form 1295,” is an electronic form located on the Texas Ethics Commission website.⁴ The form requires the vendor to submit a list of “interested parties,” which is a person with a controlling interest in the vendor, *or* a person “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.”⁵ A vendor completes the online form, prints and signs the form, and submits the completed form to the governmental entity. “Not later than the 30th day after the date the governmental entity or state agency receives a disclosure,” the entity must login to the online system to acknowledge the vendor’s form.⁶

Districts must require completion of a new Form 1295 in the event an existing contract is changed, amended, or renewed if the change requires Board action, the value of the changed contract is at least \$1 million greater than the value of the existing contract, or there is a change to the disclosure.⁷

Applies to: All contracts with business entities requiring Board action, not just contracts for goods and services.

Requires: Districts to obtain and acknowledge a completed Form 1295 from Vendors.

B. Anti-Terrorism Requirements

Tex. Gov’t Code 2252.152 - A governmental entity may not enter into a governmental contract with a company that is identified on a list prepared and maintained under Section 806.051 [redesignated as 2270.0201], 807.051[repealed], or 2252.153.

The 2017 Legislature added a series of provisions regarding “scrutinized companies” and designated foreign terrorist organizations. The state comptroller is obligated to create a list of companies engaged in “scrutinized business operations” in Sudan, in Iran, with a designated foreign terror organization, or “has been complicit in the Darfur genocide during any preceding 20-month period,”⁸ and then a separate list of companies “known to have contracts with or provide supplies or services to a foreign terrorist organization.”⁹ Districts are prohibited from entering into a contract with a company identified on the lists prepared by the comptroller.

The statute defines “governmental contract” broadly to include contracts with companies “for general construction, an improvement, a service, or a public works project or for a purchase of supplies, materials, or equipment,” and specifically notes the provision applies

⁴ https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

⁵ Tex. Gov’t Code § 2252.908(a)(3).

⁶ Tex. Gov’t Code § 2252.908(f).

⁷ Tex. Ethics. Com’n Rule 46.4.

⁸ Tex. Gov’t Code § 2270.0001(9).

⁹ Tex. Gov’t Code § 2252.153.

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