

Regular Session, 2010

SENATE BILL NO. 601

BY SENATOR CLAITOR

PUBLIC CONTRACTS. Provides relative to criminal sanctions for certain violations of the design-build process in awarding public contracts. (gov sig)

1 AN ACT

2 To enact R.S. 14:140.1, relative to kickbacks in state contracts; to provide prohibitions,
3 definitions, penalties, and reporting requirements; and to provide for related matters.

4 Be it enacted by the Legislature of Louisiana:

5 Section 1. R.S. 14:140.1 is hereby enacted to read as follows:

6 **§ 140.1. Kickbacks relative to state contracts**

7 **A. As used in this Section:**

8 **(1) "Contracting agency", when used with respect to a prime contractor,**
9 **means the state or any department, agency, or political subdivision of the state**
10 **that enters into a prime contract with a prime contractor.**

11 **(2) "Kickback" means any money, fee, commission, credit, gift, gratuity,**
12 **thing of economic value, or compensation of any kind that is provided, directly**
13 **or indirectly, to any prime contractor, prime contractor employee,**
14 **subcontractor, or subcontractor employee for the purpose of improperly**
15 **obtaining or rewarding favorable treatment in connection with a prime contract**
16 **or in connection with a subcontract relating to a prime contract. Nothing**
17 **herein shall prohibit a labor organization representing employees of a prime**

1 contractor or subcontractor in collective bargaining from entering into market
2 recovery arrangements intended to subsidize the wage and benefit packages of
3 affected employees.

4 (3) "Person" means any individual, partnership, limited liability
5 company or corporation, association, labor union, political committee,
6 corporation, or other legal entity, including their subsidiaries.

7 (4) "Prime contract" means a contract or contractual action entered into
8 by the state for the purpose of obtaining supplies, materials, equipment, or
9 services of any kind.

10 (5) "Prime contractor" means a person who has entered into a prime
11 contract with the state.

12 (6) "Prime contractor employee" means any officer, partner, employee,
13 or agent of a prime contractor.

14 (7) "State" means the state of Louisiana or any department, agency, or
15 political subdivision thereof.

16 (8) "Subcontract" means a contract or contractual action entered into
17 by a prime contractor or subcontractor for the purpose of obtaining supplies,
18 materials, equipment, or services of any kind under a prime contract.

19 (9) "Subcontractor" means:

20 (a) Any person, other than the prime contractor, who offers to furnish
21 or furnishes any supplies, materials, equipment, or services of any kind under
22 a prime contract or a subcontract entered into in connection with such prime
23 contract.

24 (b) Any person who offers to furnish or furnishes general supplies to the
25 prime contractor or a higher tier subcontractor.

26 (10) "Subcontractor employee" means any officer, partner, employee,
27 or agent of a subcontractor.

28 **B. It shall be unlawful for any person to knowingly and willfully:**

29 (1) Provide, attempt to provide, or offer to provide any kickback.

1 **(2) Solicit, accept, or attempt to accept any kickback.**

2 **(3) Include, directly or indirectly, the amount of any kickback prohibited**
3 **by Paragraph (1) or (2) of this Subsection in the contract price charged by a**
4 **subcontractor to a prime contractor or a higher tier subcontractor or in the**
5 **contract price charged by a prime contractor to the state.**

6 **C. Any person who engages in conduct prohibited by Subsection B shall**
7 **be imprisoned for not more than ten years or be subject to a fine of ten**
8 **thousand dollars, or both.**

9 **D. Civil actions. (1) The state may, in a civil action, recover a civil**
10 **penalty from any person who violates Subsection B of this Section. The amount**
11 **of such civil penalty shall be twice the amount of each kickback involved in the**
12 **violation, but not more than ten thousand dollars for each occurrence of**
13 **prohibited conduct.**

14 **(2) The state may, in a civil action, recover a civil penalty from any**
15 **person whose employee, subcontractor or subcontractor employee violates**
16 **Subsection B of this Section by providing, accepting, or charging a kickback.**
17 **The amount of such civil penalty shall be the amount of the kickback.**

18 **(3) A civil action under this Subsection shall be barred unless the action**
19 **is commenced within six years after the later of:**

20 **(a) The date on which the prohibited conduct establishing the cause of**
21 **action occurred.**

22 **(b) The date on which the state knew or should reasonably have known**
23 **that the prohibited conduct had occurred.**

24 **E. A contracting agency may offset the amount of a kickback provided,**
25 **accepted, or charged in violation of Subsection B of this Section against any**
26 **moneys owed by the state to the prime contractor under the prime contract to**
27 **which such kickback relates.**

28 **F. Duties of prime contractor. (1) Upon direction of a contracting agency**
29 **with respect to a prime contract, the prime contractor shall withhold from any**

1 sums owed to a subcontractor under a subcontract of the prime contract the
2 amount of any kickback that was or may be offset against that prime contractor
3 under Subsection E of this Section.

4 (2) Such contracting agency may order that sums withheld under
5 Paragraph (1) of this Subsection either be paid over to the contracting agency,
6 or retained by the prime contractor, if the state has already offset the amount
7 of such sums against the prime contractor.

8 (3) The prime contractor shall notify the contracting agency when an
9 amount is withheld and retained under Paragraph (2) of this Subsection.

10 G. Contract requirements. (1) Each contracting agency shall include in
11 each prime contract awarded by such agency a requirement that the prime
12 contractor shall have in place and follow reasonable procedures designed to
13 prevent and detect violations of Subsection B of this Section in its own
14 operations and direct business relationships.

15 (2) Each contracting agency shall include in each prime contract
16 awarded by such agency a requirement that the prime contractor shall
17 cooperate fully with any state agency investigating a violation of Subsection B
18 of this Section.

19 H. Reporting requirements. (1) Whenever a prime contractor or
20 subcontractor has reasonable grounds to believe that a violation of Subsection
21 B of this Section may have occurred, the prime contractor or subcontractor
22 shall promptly report the possible violation in writing to the contracting agency
23 head and the inspector general.

24 (2) In the case of an administrative or contractual action to prohibit any
25 person who otherwise is eligible from entering into contracts with the state
26 because of violations of Subsection B, evidence that such person has supplied
27 information pursuant to Paragraph (1) of this Subsection shall be favorable
28 evidence of such person's conduct.

29 (3) Paragraphs (1) and (2) of this Subsection shall not apply to a prime

1 contract that is not greater than one hundred thousand dollars or to a prime
2 contract for the acquisition of commercial items. For purposes of this

3 Subparagraph:

4 (a) "Item" means any individual part, component, subassembly,
5 assembly, or subsystem integral to a major system, and other property that may
6 be replaced during the service life of the system, and includes spare parts and
7 replenishment spare parts, but does not include packaging or labeling
8 associated with shipment or identification of such item.

9 (b) "Commercial item" means:

10 (i) Any item, other than real property, that is of a type customarily used
11 by the general public or by nongovernmental entities for purposes other than
12 governmental purposes, and that has been sold, leased, or licensed to the general
13 public, or has been offered for sale, lease, or license to the general public.

14 (ii) Any item that evolved from an item described in Item (i) of this
15 Subparagraph through advances in technology or performance and that is not
16 yet available in the commercial marketplace, but will be available in the
17 commercial marketplace in time to satisfy the delivery requirements under a
18 state contract.

19 (iii) Any item that, but for modifications of a type customarily available
20 in the commercial marketplace, or minor modifications made to meet applicable
21 technical requirements would satisfy the criteria in Items (i) or (ii) of this
22 Subparagraph.

23 I. Notwithstanding any provisions of Subsection H, a prime contractor
24 shall cooperate fully with any state agency investigating a violation of
25 Subsection B of this Section.

26 Section 2. This Act shall become effective upon signature by the governor or, if not
27 signed by the governor, upon expiration of the time for bills to become law without signature
28 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
29 vetoed by the governor and subsequently approved by the legislature, this Act shall become

1 effective on the day following such approval.

The original instrument was prepared by Alden A. Clement, Jr. The following digest, which does not constitute a part of the legislative instrument, was prepared by Michael Bell.

DIGEST

Claitor (SB 601)

Proposed law creates the crime of kickbacks relative to state contracts.

Proposed law provides that for the purposes of proposed law:

- (1) "Contracting agency", when used with respect to a prime contractor, means the state or any department, agency, or political subdivision of the state that enters into a prime contract with a prime contractor.
- (2) "Kickback" means any money, fee, commission, credit, gift, gratuity, thing of economic value, or compensation of any kind that is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract. Nothing herein will prohibit a labor organization representing employees of a prime contractor or subcontractor in collective bargaining from entering into market recovery arrangements intended to subsidize the wage and benefit packages of affected employees.
- (3) "Person" means any individual, partnership, limited liability company or corporation, association, labor union, political committee, corporation, or other legal entity, including their subsidiaries.
- (4) "Prime contract" means a contract or contractual action entered into by the state for the purpose of obtaining supplies, materials, equipment, or services of any kind.
- (5) "Prime contractor" means a person who has entered into a prime contract with the state.
- (6) "Prime contractor employee" means any officer, partner, employee, or agent of a prime contractor.
- (7) "State" means the state of Louisiana or any department, agency, or political subdivision thereof.
- (8) "Subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
- (9) "Subcontractor" means:
 - (a) Any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract.
 - (b) Any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.
- (10) "Subcontractor employee" means any officer, partner, employee, or agent of a

subcontractor.

Proposed law provides that it is unlawful for any person to knowingly and willfully:

- (1) Provide, attempt to provide, or offer to provide any kickback.
- (2) Solicit, accept, or attempt to accept any kickback.
- (3) Include, directly or indirectly, the amount of any kickback prohibited by proposed law in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the state.

Proposed law provides that any person who engages in conduct prohibited by proposed law can be imprisoned for not more than 10 years or subjected to a fine of \$10,000, or both.

Proposed law provides that the state may recover a civil penalty from any person who violates proposed law. Proposed law further provides that the amount of such civil penalty is to be twice the amount of each kickback involved in the violation, but not more than \$10,000 for each occurrence of prohibited conduct.

Proposed law provides that the state may recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates proposed law by providing, accepting, or charging a kickback. Proposed law further provides that the amount of such civil penalty is to be the amount of the kickback.

Proposed law provides that a civil action under proposed law is barred unless the action is commenced within six years after the later of the date on which the prohibited conduct establishing the cause of action occurred, or the date on which the state knew or should reasonably have known that the prohibited conduct had occurred.

Proposed law provides that a contracting agency may offset the amount of a kickback provided, accepted, or charged in violation of proposed law against any moneys owed by the state to the prime contractor under the prime contract to which such kickback relates.

Proposed law provides that upon the direction of a contracting agency with respect to a prime contract, the prime contractor is to withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback that was or may be offset against that prime contractor under proposed law. Proposed law provides that such contracting agency may order that sums withheld under proposed law either be paid over to the contracting agency, or retained by the prime contractor if the state has already offset the amount of such sums against the prime contractor. Proposed law further provides that the prime contractor is to notify the contracting agency when an amount is withheld and retained under proposed law.

Proposed law provides that each contracting agency is to include in each prime contract awarded by such agency a requirement that the prime contractor must have in place and follow reasonable procedures designed to prevent and detect violations of proposed law in its own operations and direct business relationships. Proposed law further provides that each contracting agency must include in each prime contract awarded by such agency a requirement that the prime contractor will cooperate fully with any state agency investigating a violation of proposed law.

Proposed law provides that whenever a prime contractor or subcontractor has reasonable grounds to believe that a violation of proposed law may have occurred, the prime contractor or subcontractor is to promptly report the possible violation in writing to the contracting agency head and the inspector general.

Proposed law provides that in the case of an administrative or contractual action to prohibit

any person who otherwise is eligible from entering into contracts with the state because of violations of proposed law, evidence that such person has supplied information to the state pursuant to proposed law is favorable evidence of such person's conduct. Proposed law further provides that these provisions of proposed law do not apply to a prime contract that is not greater than \$100,000 or to a prime contract for the acquisition of commercial items.

Proposed law provides a definition of "item".

Proposed law provides that a prime contractor must cooperate fully with any state agency investigating a violation of proposed law.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 14:140.1)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Judiciary C to the original bill.

1. Exempts a labor organization representing employees of a prime contractor or subcontractor in collective bargaining from the definition of "kickback".