

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 790 (Padilla)
Version: March 22, 2023
Hearing Date: April 11, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Public records: contracts for goods and services

DIGEST

This bill specifies that any executed contract for the purchase of goods or services by a state or local agency, including the price and terms of payment, is a public record subject to disclosure under the California Public Records Acts (CPRA), and that any written agreement that purports to exclude such a contract from disclosure by agreeing to consider it a confidential or proprietary record of the vendor is void and unenforceable as a matter of law. The bill provides that it does not require disclosure of a record that is otherwise exempt from disclosure or prohibited from disclosure pursuant to federal or state law.

EXECUTIVE SUMMARY

The CPRA makes all records of a public agency open to public inspection upon request unless the records are otherwise exempt or prohibited from public disclosure, and grants the public the right to obtain a copy of any public record. Generally, final contracts with public agencies are disclosable public records due to the public's right to determine whether public resources are being spent to benefit the community as a whole. (*Cal. State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810.) According to the author and sponsor it is common for public agencies to receive contract documents from vendors that include standard language establishing that the contract itself, including price and terms of payment, is a confidential document that the public agency client agrees to withhold from public disclosure. This often must be negotiated out of the contract before execution in order to ensure that a public agency can meet its obligations under the CPRA. This bill specifically provides that an executed contract for goods or services entered into by a public agency is a public record and disclosable under the CPRA and that any provision in a contract otherwise is void and unenforceable. The bill is sponsored by the San Diego Metropolitan Transit System and supported by the California News Publishers Association, Oakland Privacy, and the Utility Consumers' Action Network. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)
- 2) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 7920.000 et seq.)
 - a) States that, the Legislature, mindful of the individual right to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
- 3) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 7922.530.)
 - a) Some records are prohibited from being disclosed and other records are permissively exempted from being disclosed. (See e.g. Gov. Code §§ 7923.600 et. seq.)
 - b) Requires a public agency withholding any public record to demonstrate that the record in question is exempt under express provisions of the CPRA or that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code § 7922.000.)
- 4) Prohibits a state or local agency from allowing another party to control disclosure of information that is otherwise subject to disclosure under the CPRA. (Gov. Code § 7921.005.)

This bill:

- 1) Specifies that any executed contract for the purchase of goods or services by a state or local agency, including the price and terms of payment, is a public record subject to disclosure under the CPRA.
- 2) Provides that any written agreement that purports to exclude such a contract from disclosure by agreeing to consider it a confidential or proprietary record of the vendor is void and unenforceable as a matter of law.
- 3) Provides that it does not require disclosure of a record that is otherwise exempt from disclosure or prohibited from disclosure pursuant to federal or state law.

COMMENTS

1. Stated need for the bill

The author writes:

This bill would clarify current legislative intent of the law under Government Code Section 7921.005, and expressly identify a contract for the purchase of goods or services, including the price and terms of payment, as a public record subject to disclosure under the California Public Records Act (CPRA). The proposed amendment would expressly identify a public agency contract for purchase of goods or services, including the price and terms of payment as a public record subject to disclosure. This would be declaratory of existing law. The proposed amendment would clarify that a written agreement to keep a public agency contract for the purchase of goods and services confidential is void and unenforceable, eliminating a potential conflict between these standard vendor agreements and a public agency's obligations under the CPRA. This bill would preserve existing exemptions from the CPRA.

2. Public right of access under the CPRA

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Cod § 7921.000.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide general election),¹ which amended the California Constitution to specifically protect the right of the public to access and obtain government records: "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and

¹ Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).

agencies shall be open to public scrutiny.” (Cal. Const., art. I, sec. 3 (b)(1).) In 2014, voters approved Proposition 42 (Jun. 3, 2014, statewide direct primary election)² to further increase public access to government records by requiring local agencies to comply with the CPRA and the Ralph M. Brown Act³, and with any subsequent statutory enactment amending either act, as provided. (Cal. Const., art. I, sec. 3 (b)(7).) Under the CPRA, public records are open to inspection at all times during the office hours of a public agency for inspection by the public, unless exempted. (Gov. Code § 7922.525.) A public record is defined as any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 7920.530.) The CPRA allows a public agency 10 days or, in specified “unusual circumstances,” within 14 days of the 10-day period to disclose the requested public record, and authorizes the agency to charge a fee for its “direct costs of duplication” to the record. (Gov. Code § 7922.530(a) & 7922.535.) The CPRA prohibits a state or local agency from allowing another party to control disclosure of information that is otherwise subject to disclosure under the CPRA. (Gov. Code § 7921.005.)

Generally, final contracts with public agencies are disclosable public records due to the public’s right to determine whether public resources are being spent to benefit the community as a whole. (*Cal. State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810.) The court has held that public disclosure of competitive proposals or bids as part of a process of qualifying and negotiating for a public contract generally does not have to be disclosed until final approval and award of the contract. (*Michaelis, Montanari, & Johnson v. Superior Court* (2006) 38 Cal.4th 1065.) Existing law provides that financial statements and questionnaires submitted by prospective bidders to local and state agencies are not public records and not subject to public disclosure. (*see* Pub. Contract Code §§ 10165, 10506.6, 10763, 20101, 20111.5, 20209.7, 20209.26, & 20651.5.) Additionally, under the CPRA there are “exceptions to the general policy of disclosure” as set forth under the former Section 6254 provisions⁴, which lists several categories of disclosure-exempt material. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652.) These exemptions are permissive, not mandatory and provide the public agency with discretionary authority to override these statutory exceptions when a dominating public interest favors disclosure. (*Ibid.*) One of these exemptions is that the CPRA does not require the disclosure of records that are exempt or prohibited from disclosure under existing state or federal law including under the Evidence Code. This section essentially imports the confidentiality of trade secrets protected under Section 1060 of the Evidence Code into the CPRA.

² Prop. 42 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 3 (Leno, Ch. 123, Stats. 2013).

³ The Ralph M. Brown Act is the open meetings laws that apply to local agencies. (Gov. Code §§ 59450 et. seq.)

⁴ The CPRA was recodified in Division 10 of Title 1 (§ 7920.000 et. seq.) of the Government Code effective January 1, 2023 and prior Section 6254 provisions were re-numbered (*see* Gov. Code § 7920.505).

According to the author and sponsor, it is common for public agencies to receive contract documents from vendors that include standard language establishing that the contract itself, including price and terms of payment, is a confidential document that the public agency client agrees to withhold from public disclosure. This provision must often be negotiated out of the contract before execution in order to ensure that a public agency can meet its obligations under the CPRA. The author and sponsor note that as there is no express provision in the CPRA that unequivocally states that purchase contracts are public records legal arguments against including these confidentiality provisions in a contract relies upon the general legislative intent of the CPRA, existing case law, the fact that the CPRA contains exemptions for a very narrow category of contracts, and the prohibition against allowing another party to control disclosure of information. This bill seeks to make it explicitly clear that purchase contracts are public records under the CPRA. The bill specifically provides that its provisions do not require disclosure of a record that is otherwise exempt from disclosure or prohibited from disclosure pursuant to federal or state law to ensure that information currently protected from disclosure under the CPRA remains protected.

3. Statements in support

The San Diego Metropolitan Transit System, sponsor of the bill, writes in support stating:

Many contracts from vendors including standard language establishing that the contract itself, including price and terms of payment, is a confidential document that the public agency client agrees to withhold from public disclosure. This often must be negotiated out of the contract before execution. How a public agency spends public funds is a core principle of the CPRA. However, there is no express portion of the CPRA that unequivocally states that purchase contracts are public records. Instead, the legal argument against these confidentiality provisions relies upon the general legislative intent of the law, the fact that the CPRA contains exemptions for a very narrow category of contracts, and the prohibition against allowing another party to control disclosure of information in Section 7921.005.

The California News Publishers Association writes in support stating:

By making these contracts executed by the state or local agency subject to disclosures unless exempted, it would hold the state and local agency accountable. State and local agency would be held accountable if they do not follow proper protocol for entering into contracts for the purchase of goods or services. It will also ensure that the state or local agency does not abuse their power and have the interest of the people as a priority.

By making these contracts executed by the state or local agency subject to disclosure unless exempted, it would allow the public to monitor the

government's transactions. This would provide the people a way to review contracts for any abuse, fraud, or incompetence. It would further allow the people to see if their tax dollars are being used properly.

SUPPORT

San Diego Metropolitan Transit System (sponsor)
California News Publishers Association
Oakland Privacy
Utility Consumers' Action Network

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.
