

AB 1200: EXTENDING LOBBYING REPORTING REQUIREMENTS TO THE LOBBYING OF GOVERNMENT CONTRACTS

AB 1200 (Gordon): Political Reform Act of 1974: Lobbying: Procurement Contracts.

Robert C. Binning,¹ Alexander Khan,² & Robert Nash³

IDENTIFICATION OF THE PROBLEM

In 2014, California spent \$11 billion buying goods and services from private businesses.⁴ Despite the substantial material benefits businesses receive through these contracts, lobbyists and advocates for these businesses do not have to report the lobbying they do to help get those contracts. While California law considers advocating for changes to the law or regulations to be lobbying, at this point advocating for a government contract that would provide a direct benefit to a lobbyist's employer is not considered lobbying.

To provide greater transparency, which would provide taxpayers and small and minority businesses much needed information about how government contracts are awarded, Assembly Member Richard Gordon introduced AB 1200.

BACKGROUND RESEARCH

Evidence of the problem

The People of California enacted the Political Reform Act, in part, to ensure that Public Officials “serve the needs and respond to the wishes of all citizens equally” and “perform their duties in an impartial manner.”⁵ To serve these goals, the Political Reform Act requires lobbying firms and parties employing lobbying firms to report their legislative and regulatory lobbying.⁶ Although procedures are in place to make the awarding of government contracts as objective as possible, because there are no disclosure requirements it is unknown to what extent lobbying affects how government contracts are awarded.

While Department of Government Services (DGS)⁷ employees are governed by a conflict of interest code,⁸ the contract process enables outside influences to shape how contracts are

¹ *J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2015; M.A., Government, CSU Sacramento; 2010; B.A., Political Science, California Polytechnic State University, San Luis Obispo, 2008.*

² *J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2015; B.A., Government, CSU Sacramento, 2010.*

³ *J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2015; B.A., Political Science, University of Illinois at Urbana-Champaign, 2010.*

⁴ *See State Contract & Procurement Registration System (SCPRS) Data, DEP'T OF GENERAL SERVICES, PROCUREMENT DIVISION, <http://www.dgs.ca.gov/pd/Programs/eprocure/SCPRSData.aspx> (last visited December 8, 2014).*

⁵ CAL. GOV'T CODE § 81001(a)–(b).

⁶ *Id.* §§ 86114–16.

⁷ DGS is the state agency that, for the most part, oversees the state government contract bidding process.

formed, shaping the bidding process before many of the Code's safeguards kick in. This article does not allege that the lobbying of government contracts, known as "procurement lobbying," is leading to corruption or the misappropriation of funds, but merely that there is insufficient transparency to ensure that contracts are awarded fairly.

Furthermore, currently twenty-five states, including Arizona, Florida, Maryland, New York, and Texas and the federal government require lobbyists to report procurement lobbying activities.⁹ While California is often a leader in political reform, here, California is behind the curve.

Law related to AB 1200

Under current law, there is a complex set of rules governing how DGS solicits bids and awards contracts.¹⁰ As a general rule, DGS is required to contract with the vendor who makes the lowest bid on each contract.¹¹ This general rule should, in theory, ensure that lobbying does not play a role in how procurement contracts are awarded; however, in preparing each contract for bidding, DGS procurement officers define the specifications of the product or services for the contract.¹² In conversations with a former DGS employee, he indicated that lobbyists influence the procurement process by influencing the specifications of contract requests, reducing the competition their clients face when bidding on those contracts. Further, lobbyists may contact procurement officers or other DGS employees during the bidding process to have contract specifications changed.

Under the Political Reform Act, lobbyists, lobbying firms, and lobbyist employers must register and file periodic reports with the Secretary of State disclosing the legislation they seek to influence, political contributions made, and gifts given to public officials.¹³ They may not misrepresent material facts related to legislation or accept payment contingent upon the outcome of proposed legislative or administrative action (which does not include procurement decisions).¹⁴ Additionally, they may not directly or indirectly make gifts worth more than ten dollars in a calendar month to anyone.¹⁵

The definition of a "lobbyist" is limited. In order to qualify as a lobbyist, an individual must either: "receive \$2,000 or more in compensation in any calendar month for engaging in direct communication, other than administrative testimony, with one or more qualifying officials for the purpose of influencing legislative or administrative action [on behalf of any person other than

⁸ See CAL. PUB. CONT. CODE § 10410. As the FPPC investigation is ongoing, the details of the case remain confidential.

⁹ See *How States Define Lobbying and Lobbyist*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 31, 2014), <http://www.ncsl.org/research/ethics/50-state-chart-lobby-definitions.aspx>.

¹⁰ CAL. PUB. CONT. CODE §§ 10290–10490.

¹¹ CAL. PUB. CONT. CODE § 10301 ("Except in cases when the agency and the department agree that an article of a specified brand or trade name is the only article that will properly meet the needs of the agency, or in cases where the State Board of Control has made a determination pursuant to Section 10308, all contracts for the acquisition or lease of goods in an amount of twenty-five thousand dollars (\$25,000), or a higher amount as established by the director, shall be made or entered into with the lowest responsible bidder meeting specifications.").

¹² CAL. PUB. CONT. CODE § 10302.5.

¹³ CAL. GOV'T CODE §§ 86113–16.

¹⁴ CAL. GOV'T CODE § 86205.

¹⁵ CAL. GOV'T CODE § 86203.

his or her employer];” or “spend[] one-third or more of the time, in any calendar month, for which he or she receives compensation from his or her employer, engaging in direct communication, other than administrative testimony, with one or more qualifying officials for the purpose of influencing legislative or administrative action.”¹⁶ As many members of lobbying firms do not engage in sufficient “direct communication” attempting to influence legislation to qualify, many members of the lobbying community that may describe themselves as lobbyists are not actually required to register.

Amendments to the Political Reform Act, an initiative measure, require a two-thirds vote in each house.¹⁷

Prior attempt to address the problem

AB 13 (2001–2002) was a product of a gut and amend and was never voted on by legislators.¹⁸ The relevant version was the result of the discovery that an Oracle lobbyist had spent over \$900 on dinners for government officials who made decisions on state contracts that Oracle was applying for.¹⁹

AB 13 would have required that registration information, activity reports, and activity expense reports filed by lobbying firms, lobbyist employers, and lobbyists disclose lobbying information related to decisions on state contracts for goods and services.²⁰ It would have only applied to nonrestrictive contracts for goods or services, which it defined as “a noncompetitively bid contract, including a contract eligible to be entered under the California Multiple Award Schedule or a master services agreement, under which a state agency receives goods or services from any person, if the contract is not a collective bargaining agreement, or is not a contract for personal services.”²¹ It also defined a decision on a nonrestrictive contract for goods or services as “a decision on the solicitation, proposal, negotiation, drafting, amendment, awarding, or rescission of a nonrestrictive contract for goods or services.”²²

AB 1200 casts a wider net than AB 13 by including competitively bid contracts.

Views of the interested parties

We have met with a wide-array of interested parties and, in general, we have received very positive feedback. However, a number of parties have suggested amendments, which the “Work

¹⁶ CAL. CODE REGS. tit. 2, § 18239; accord CAL. GOV'T CODE § 82039.

¹⁷ CAL. GOV'T CODE § 81012.

¹⁸ *Complete Bill History*, OFFICIAL CAL. LEGISLATIVE INFO., http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_13_bill_20021130_history.html (last updated 2002); SENATE COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, AB 13 BILL ANALYSIS 1 (Aug. 22, 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_13_cfa_20020820_151506_sen_comm.html.

¹⁹ SENATE COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, AB 13 BILL ANALYSIS 2–3 (Aug. 22, 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_13_cfa_20020820_151506_sen_comm.html.

²⁰ AB 13, Cal. 2001–02 Leg. Sess. §§ 3–9 (as amended Aug. 21, 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_13_bill_20020821_amended_sen.pdf.

²¹ *Id.* § 2.

²² *Id.* § 1.

Remaining” section below discusses. Further, there are a number of groups discussed below that we plan to meet with once our next set of amendments is in print. We have, in part, delayed meeting with those groups because we believe that those groups will only support us with the amendments and have wanted to keep AB 1200 off their radars as much as possible until those amendments are in place.

Lobbyists and lobbying firms

The Institute of Governmental Advocates (IGA) “is a voluntary, non-partisan association representing the leading professional lobbyists and lobbying firms in California’s Capitol.”²³ From the inception of this bill idea, we were concerned that our strongest opposition would come from lobbyists who would fight additional reporting requirements. However, IGA members voted to take no position on AB 1200.²⁴ Regardless, we met with IGA’s lobbyist, Tom Hiltachk.²⁵ Mr. Hiltachk, a McGeorge graduate, noted that AB 1200 likely needed to be amended to narrow the reach of the bill to exempt most salespeople, otherwise it would extend registration requirements to a very large new groups of individuals. Further, as most salespeople are paid by commission and lobbyists are barred from being paid on commission, as written AB 1200, in its second version, would cause significant payroll problems for businesses and their salespeople.²⁶

California Chamber of Commerce

The California Chamber of Commerce “serves as an advocate and resource for California employers and to engages in other activities, domestically and internationally, that enhance the California economy and make the state a better place to live, work and do business.”²⁷ They believed that the first two versions of AB 1200 needed significant amendments to protect businesses, but agreed to withhold opposition until the bill reached the Assembly floor. The Chamber was interested by our showing that California was behind 25 states that have already taken the step to regulate procurement lobbying.

NFIB

The National Federation of Independent Business (NFIB) “is 350,000 small and independent business owners united by one clear mission: to promote and protect your right to own, operate and grow your business.”²⁸

²³ *About Us*, INSTITUTE OF GOVERNMENTAL ADVOCATES, <http://www.californiaiga.org/about.html> (last visited Apr. 22, 2015).

²⁴ Telephone Interview with Thomas W. Hiltachk, Managing Partner, Bell, McAndrews & Hiltachk, LLP (Apr. 21, 2015).

²⁵ *Id.*

²⁶ See CAL. GOV’T CODE § 86205(f) (“No lobbyist or lobbying firm shall . . . [a]ccept or agree to accept any payment in any way contingent upon the defeat, enactment, or outcome of any proposed legislative or administrative action.”).

²⁷ *About the California Chamber of Commerce*, CAL CHAMBER, <http://www.calchamber.com/aboutus/Pages/Default.aspx> (last visited May 3, 2015).

²⁸ *About NFIB*, NFIB, <http://www.nfib.com/about-nfib/> (last visited May 3, 2015).

Howard Jarvis Taxpayers Association

The Howard Jarvis Taxpayer’s Association (HJTA) primarily seeks to protect Proposition 13 and reduce and eliminate taxes.²⁹ We believe that because AB 1200 would bring greater transparency to how taxpayer dollars are spent and potentially reducing government spending, the HJTA may support AB 1200.³⁰

Cal Tax

Cal Tax is a “non-profit research and advocacy association, [and] has a dual mission to guard against unnecessary taxation and to promote government efficiency.”³¹ They, like the HJTA, may support the bill as it would provide greater information about how tax revenue is disbursed.

Department of General Services

DGS raised a number of concerns with AB 1200. First, we need to better define "qualifying officials" for the purposes of procurement lobbying. Second, under current language, submitting a bid may count as lobbying. It is important that DGS be free to have technical and procedurally necessary discussions with members of the private sector. Exempting these types of discussions would protect that dialogue. Third, some businesses have employees who only pursue government contracts, some of whom may work as contract workers. Lastly, as the second version of AB 1200 eliminated the stipulation that qualifying contracts be over \$250,000, DGS believed it may inhibit the ability of small businesses to equally compete due to the more onerous reporting requirements that they would face.

Fair Political Practices Commission

We presented AB 1200 to representatives from the FPPC, who would enforce the bill’s provisions.³² While they were interested in the bill, they had concerns about the scope of the bill and how great of a burden AB 1200 may have on staff.³³ Particularly, they suggested amending the bill to except salespersons, which would reduce the scope of the bill and lessen their enforcement obligations.

Common Cause

“Common Cause is a nonpartisan, grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the

²⁹ *History of HJTA*, HOWARD JARVIS TAXPAYERS ASSOC., <http://www.hjta.org/about-hjta/the-history-of-hjta/> (last visited Apr. 22, 2015).

³⁰ Interview with Jim Ewert, General Counsel, Cal. Newspaper Publishers Association, in Sacramento, Cal. (Apr. 9, 2015).

³¹ *About CalTax*, CAL. TAXPAYERS ASSOC., <http://www.caltax.org/about/index.html> (last visited Apr. 22, 2015).

³² Interview with Sukhi Brar, Jaycob Bytel, External Affairs Coordinator, Fair Political Practices Commission (Apr. 8, 2015).

³³ E-mail from Sukhi Brar, Senior Commission Counsel and Legislative Coordinator, Fair Political Practices Commission, to Robert Binning, Legislation and Public Policy Clinic, McGeorge School of Law (Apr. 14, 2015, 11:45 PST) (on file with the author).

public interest, and empowering ordinary people to make their voices heard in the political process.”³⁴ We had a productive conference call with them and their representative agreed to present AB 1200 to their board.³⁵ While we are awaiting final word, we anticipate that we will get their support for the bill.

California Newspaper Publishers Association

The California Newspaper Publishers Association (CNPA) promotes free press, accessibility of information, and the economic health and quality of California newspapers.³⁶ We met with Jim Ewert, a lobbyist from the CNPA. They were interested in the bill, but hoped that it would include additional reporting requirements.³⁷ Mr. Ewert was concerned that the impact of the bill would likely be minimal because the information that lobbyists report is so minimal.³⁸ He suggested that we look to the Public Contract Code for examples of how to classify contracts to provide reporters and the public more useful information on lobbying reports. At the time of the meeting the CNPA was unwilling to support AB 1200, but Mr. Ewert explained that their interest would significantly increase if we could increase the usefulness of the information to be disclosed.³⁹

ALTERNATIVE SOLUTIONS

Further narrow the scope of the contracts affected

Narrowing the scope of our proposal would reduce the parties likely to be affected and could reduce the size of our opposition. However, as this narrowing of our proposal is only likely to reduce the interest of opposition groups and not eliminate them, we do not believe that the gain in feasibility is worth the amount of disclosure we would sacrifice. We remain open to revisiting this alternative if necessary.

Promulgation of regulations by the FPPC

The FPPC does not have the authority to promulgate regulations that would expand lobbying reporting requirements to procurement lobbying practices.

State initiative

Given the practicality of the proposal, we believe that if this were to appear on the ballot it would have widespread support from voters. However, the proposal is unlikely to garner the moneyed interests necessary to support an initiative. As a result, this solution is not feasible.

³⁴ *About Us*, COMMON CAUSE, [HTTP://WWW.COMMONCAUSE.ORG/ABOUT/](http://www.commoncause.org/about/) (LAST VISITED MAY 3, 2015).

³⁵ Telephone Interview with Leila Pedersen, State Program Manager, Common Cause, and Drew Liebert (Apr. 10, 2015).

³⁶ *About Us*, CAL. NEWSPAPER PUBLISHERS ASS’N, <http://www.cnpa.com/site/about.html> (last visited May 3, 2015).

³⁷ Interview with Jim Ewert, General Counsel, Cal. Newspaper Publishers Association, in Sacramento, Cal. (Apr. 9, 2015).

³⁸ *Id.*

³⁹ *Id.*

Let present trends continue

The most practical approach to addressing this problem may be to wait until a large DGS corruption scandal occurs. As the past year’s scandals showed, corruption news stories tend to lead to reform bills. However, without any reporting requirements, it is unclear if the media or enforcement agencies can readily identify corrupt activities. At worst, AB 1200 may help to prime the legislature to pass a similar bill in future years.

PREFERRED SOLUTION

Our proposal would expand the definition of “administrative action,” requiring additional parties to register as lobbyists and all registered lobbyists to report their procurement lobbying behavior. Additionally, the proposal would require lobbying firms and lobbyist employers to report the procurement contracts related to their lobbying activity. Lastly, the proposal would make a number of current prohibitions on lobbyists applicable to their interactions with state employees who make decisions related to procurement contracts.

Legal Drafting

AB 1200 was initially limited to procurement contracts for goods, not services or technologies. Additionally, it only applied to lobbying that occurred after DGS had announced the contract specifications that bidders would have to comply with.

However, AB 1200 was amended to include all statewide contracts and, using language from New York, seeks to capture procurement lobbying that occurs throughout the process—including lobbying to create a contract, the specifications of that contract, and to change that contract after the bidding process begins.

We anticipate taking further amendments to the bill, as discussed in “Work Remaining” section.

Strategy

Our proposal was originally drafted narrowly to affect relatively few lobbyists and businesses. Primarily we targeted currently unregistered advocates and currently registered lobbyists who spend a significant amount of time directly communicating with state employees seeking to influence procurement contracts. Additionally, we targeted businesses that employ registered advocates and lobbyists for procurement lobbying, seeking to have them report the amounts they spend and the contracts that were lobbied on their behalf. In limiting the scope of the proposal, we hoped to avoid capturing small businesses, in-house counsels, and procurement consultants, thereby minimizing opposition.⁴⁰

Furthermore, we wanted to ensure that the proposed reporting requirements would not deter small businesses from competing for procurement contracts. Because California already provides

⁴⁰ Procurement consultants primarily prepare bids for clients and do not spend a substantial time attempting to influence decisions on procurement contracts through direct communication with DGS employees.

small businesses preferential treatment when they compete for contracts worth under \$250,000, we originally chose to exempt those contracts from the scope of the proposal.⁴¹ Additionally, by exempting those smaller contracts, we doubt that any employee of a small business would spend a third of their time directly communicating with qualifying officials in an attempt to influence legislation, regulations, and procurement contracts of that size. As a result, employees of small businesses would likely not have to register as lobbyists, reducing any impact on small businesses. While the \$250,000 floor for qualifying contracts was deleted from the second version of the bill, it will be reinserted with the third set of amendments following a recommendation from the committee consultant.

Additionally, we were attempting to ensure that the proposal would not vastly increase the number of registered lobbyists, assuaging concerns from the FPPC and potentially the Secretary of State who acts as a repository for lobbying reports. Our future amendments will seek to narrow the scope of the individuals affected, while ensuring that lobbying that occurs throughout the procurement process remains under the purview of AB 1200.

Assemblyman Gordon was our first choice to author the bill. We feel fortunate to have him carrying our bill. We have greatly appreciated the free-reign Assemblyman Gordon's office has given us to schedule meetings and do media outreach. Our two biggest criteria for a good author were (1) an ability to pass bills, and (2) a passion for government accountability laws. Assemblyman Gordon fit for criteria very well.

It took about 6 weeks from the time of our initial meeting until Assemblyman Gordon committed to carrying the bill. We were fortunate that he agreed to do so, but left ourselves vulnerable to a real scramble to find an alternate author, had he chosen otherwise. In the future, we would highly recommend that students not put all their proverbial eggs in one basket when selecting potential authors.

We have always believed this bill would gain the support of a significant portion of Californians, if properly promoted through the media. Earned media is the best tool we have to communicate the problem and the need for change effectively. We have also aware of the potential for a negative whisper campaign. Hence, we looked for options for a media push before any negative talk gained too much traction. We are still in the process of pursuing the proper channels to get our message out.

Executing Our Strategy

After Assemblyman Gordon agreed to author our bill the real work began. We set out to accomplish two goals: build a coalition and make our bill more effective. While we failed to get any formal support prior to our committee hearing, every party we met with helped us better understand our bill and the legislative process and prepare to amend AB 1200 again.

⁴¹ CAL. PUB. CONT. CODE § 10108.5.

Meeting with groups that we believed may support us led us to meet with California Forward, Common Cause, and the California Newspaper Publishers Association (CNPA). California Forward's lobbyist, Phillip Ung, formerly worked for Common Cause and had a great deal of experience with political reform. While California Forward could not lend their support to the bill, Mr. Ung provided us feedback on our second version and guidance for further meetings. Common Cause had recently lost its Sacramento lobbyist, and it was not until Mr. Ung put us in contact with their Los Angeles office that we were able to speak with Common Cause representatives. Their representatives were very supportive of the bill and agreed to take the bill to their board for feedback. Lastly, the CNPA was also supportive of the bill, but felt it failed to address the bigger problem, which was limited detail in reporting requirements. While we agreed that more detail was important, our group believed that concern was better addressed with a different bill. We believe that Common Cause and the CNPA will eventually pledge formal support for the bill.

When we met with the FPPC their representatives had a number of technical and practical questions about the bill. As we found throughout our meetings, they were most intrigued by the number of other states that had similar laws. The representatives were reluctant to provide us any substantive feedback on the contents of the bill and were largely just looking for more information with which to present the Commission. Further, they were very appreciative of additional fact sheets and reports we provided them after the meeting. Eventually, they communicated to us that they were concerned that without a salesperson exception, that they would have to regulate a significant number of new registered lobbyists.

Rather than meeting with the Chamber of Commerce ourselves, Gary Winuk, one of our supporters who eventually testified at committee on behalf of the bill, instead met with them. Because our concern was making a large set of amendments after the committee hearing, our goal was for the Chamber to wait to intervene and potentially oppose the bill. Mr. Winuk assured them that we shared their concerns about negatively harming businesses, and they agreed to wait to address the bill.

Together with Mr. Winuk and Ellen Hou, our point of contact in Assemblyman Gordon's office, we met with a representative from DGS. While DGS could not take a formal position, he provided us with extensive feedback on how the bill, as currently drafted, would have impacted the procurement process. He offered us a number of significant concerns, which we believed we would need to address in order to avoid a governor's veto.

About a week prior to our committee hearing, Mr. Winuk, Ms. Hou, and our group met with the committee consultant and the opposition's consultant. In these meetings we were able to talk in depth about the language of the bill, options for future amendments, and potential concerns that they had. Essential to these meetings was accurately and in detail previously preparing the committee questionnaire with necessary information and supplying them with any fact sheets, support letters, or other media that we had available. Our goal was to give them the background

information that we believed was necessary for them to, when preparing an analysis, look favorably upon the bill. Both meetings went very well and believed both were supportive of our efforts.

Lastly, the Thursday before our first committee hearing our group met with the staffer from each office who staffed the committee. For the most part, the staffers had not had an opportunity to look over the bill and our presentation was the first thing they were hearing about AB 1200. This offered us the opportunity to, like our meetings with the consultants, set the tone for how they would view the bill and answer any of their preliminary questions. In these meetings we benefitted from our media training, which had taught us to avoid jargon and to use simple phrasing to describe the complicated aspects of our bill.

BILL LANGUAGE

The most current version of AB 1200 (Gordon) can be seen here:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1200#.

WORK REMAINING

After passing out of committee, our immediate goal is to amend AB 1200 to address the concerns commonly raised by the interested parties and legislative offices. First, we will reinsert the \$250,000 floor to qualifying contracts. This will insulate further reporting requirements on small businesses. Second, we will clarify that AB 1200 will only apply to state contracts only, not local contracts. Third, we will create an exception for salespersons, although we are yet to determine how to best accomplish this. Some states have created exceptions for “bona fide salespeople,” while others exempt individuals paid on commission.

Additionally, we believe that in order to avoid a veto, we will need to address additional concerns raised by DGS that AB 1200 clarify who a “qualifying official” from DGS would entail and that communications limited to technical information and procedural communications (e.g., submitting the bid itself) not be included as lobbying.

Once these amendments are in print, we will approach the interested parties again for additional feedback, hopefully gaining some support and assuaging their concerns. As we need a two-thirds vote, we need to address the concerns of a wide variety of groups and plan to work closely with anyone willing to speak with us.

LISTING OF HEARING DATES AND TIMES

Assembly Elections and Redistricting (April 29, 2015). *At this time, not available online.*