

Regular Session, 2011

SENATE BILL NO. 242

BY SENATOR APPEL

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

PUBLIC CONTRACTS. Requires recording of certain public work and material and supplies contracts and certain amendments, revisions, and change orders; increases fines and criminal penalties for splitting profits, fees, and commissions. (8/15/11)

1 AN ACT

2 To amend and reenact R.S. 14:141 and R.S. 39:126 and 1767, and R.S. 48:251.8, to enact
3 R.S. 38:2192 and 2222 and R.S. 39:1557.1, and to repeal R.S. 38:2196.1, R.S.
4 39:200(N) and 1493.1, and Part X of Chapter 17 of Subtitle III of Title 39 of the
5 Louisiana Revised Statutes of 1950, consisting of R.S. 39:1758, relative to public
6 contracts; to provide for prohibited splitting of profits, fees, and commissions; to
7 provide with respect to recordation of certain change orders , amendments, or other
8 revisions to public contracts; and to provide for related matters.

9 Be it enacted by the Legislature of Louisiana:

10 Section 1. R.S. 14:141 is hereby amended and reenacted to read as follows:

11 §141. Prohibited splitting of profits, fees or commissions; exceptions

1 party.

2 B. There shall be no splitting of profits, fees or commissions, past or present,
3 derived from the sale of any commodity, goods, services, insurance, or anything of
4 value to the state or any **political** subdivision thereof from which a public **officer**
5 official or **public** employee, representing the state **or a political subdivision, as the**
6 **case may be**, in his official capacity ~~in the contract negotiations~~, receives or offers
7 to receive a portion of the profits, fees and/or commissions, ~~unless the amount~~
8 ~~thereof and the conditions therefor are included in detail in the contract of sale or the~~
9 ~~insurance contract and said contract is filed by the public official or employee~~
10 ~~hereinabove described with the secretary of state at least ten days prior to execution~~
11 ~~of said contract. The ten-day filing period shall be waived in the event of an~~
12 ~~emergency in which such filing is not reasonable. Upon filing thereof, the secretary~~
13 ~~of state shall immediately release to the news media the details of such contract and,~~
14 ~~upon written request, furnish a copy of such contract to the news media. **The**~~
15 **contract shall be a public record.**

16 C. Whoever commits the crime of ~~failure to report the splitting of receiving~~
17 **or offering to receive a portion of the** profits, fees or commissions, ~~and to contain~~
18 ~~such fee arrangement in the contract of sale or in the insurance contract as provided~~
19 ~~by this act~~ **Section** shall upon conviction be fined not more than ~~one~~ **ten** thousand
20 dollars or shall be imprisoned, with or without hard labor, for not more than ~~two~~ **ten**
21 years, or both.

22 Section 2. R.S. 38:2192 and 2222 are hereby enacted to read as follows:

23 **§2192. Certain contract amendments and revisions; recordation**

24 **Each amendment or other revision to any service or insurance contract**
25 **which adds an amount of ten percent or more of the original contract amount**
26 **and which additional amount is at least ten thousand dollars or all amendments**
27 **and other revisions to any service or insurance contract aggregating to an**
28 **amount of twenty percent or more of the original contract amount and which**
29 **additional amount is at least ten thousand dollars shall be recorded by the**

public entity which entered into the contract in the office of the recorder of
mortgages in the parish where the public entity is domiciled not later than
thirty days after the date of the amendment or other revision which requires
that the recordation take place. In addition, the original contract shall be
recorded together with the amendments or other revisions if not previously
recorded.

* * *

§2222. Change orders; recordation

Each change order to a public works contract or to a contract for materials and supplies which adds an amount of ten percent or more of the original contract amount and which additional amount is at least ten thousand dollars or all change orders to a contract aggregating to an amount of twenty percent or more of the original contract amount and which additional amount is at least ten thousand dollars shall be recorded by the public entity which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done or, if not a public work, where the entity is domiciled not later than thirty days after the date of the change order which requires that the recordation take place. In addition, the original contract shall be recorded together with the change orders if not previously recorded. The provisions of this Section shall not apply to the office of facility planning and control, and the office of state purchasing.

Section 3. R.S. 39:126 and 1767 are hereby amended and reenacted and R.S. 39:1557.1 is hereby enacted to read as follows:

§126. Change orders

A. Any change order in excess of one hundred thousand dollars for a project undertaken pursuant to an appropriation in the Capital Outlay Act shall require the approval of the Joint Legislative Committee on the Budget. In addition, a change order for a project undertaken pursuant to this Part shall also be subject to the approval of the commissioner of administration. Any change order in excess of fifty

1 thousand dollars but less than one hundred thousand dollars shall be submitted to the
2 Joint Legislative Committee on the Budget for review but shall not require
3 committee approval.

4 **B. Each change order to a contract which adds an amount of ten percent**
5 **or more of the original contract amount and which additional amount is at least**
6 **ten thousand dollars or all change orders to a contract aggregating to an**
7 **amount of twenty percent or more of the original contract amount and which**
8 **additional amount is at least ten thousand dollars shall be recorded by the**
9 **agency which entered into the contract in the office of the recorder of mortgages**
10 **in the parish where the work is to be done not later than thirty days after the**
11 **date of the change order which requires that the recordation take place. In**
12 **addition, the original contract shall be recorded together with the amendments**
13 **or other revisions if not previously recorded.**

14 * * *

15 **§1557.1. Change orders; recordation**

16 **Each change order to a contract which adds an amount of ten percent or**
17 **more of the original contract amount and which additional amount is at least**
18 **ten thousand dollars or all change orders to a contract aggregating to an**
19 **amount of twenty percent or more of the original contract amount and which**
20 **additional amount is at least ten thousand dollars shall be recorded by the**
21 **governmental body which entered into the contract in the office of the recorder**
22 **of mortgages in the parish where the work is to be done or where the entity is**
23 **domiciled not later than thirty days after the date of the change order which**
24 **requires that the recordation take place. In addition, the original contract shall**
25 **be recorded together with the amendments or other revisions if not previously**
26 **recorded. The provisions of this Section shall not apply to the office of facility**
27 **planning and control, and the office of state purchasing.**

28 * * *

29 §1767. Appropriation dependency; requirement for affidavit of notice of fee

disposition

A. All lease-purchase contracts entered into pursuant to this Chapter shall contain an annual appropriation dependency requirement to the effect that renewal and continuation of such contract is contingent upon the appropriation of funds to fulfill the requirements of the contract and if the legislature, after a diligent and good faith effort, fails to appropriate sufficient monies to provide for the continuation of a contract, or if such appropriation can not be effected, the contract shall terminate in accordance with the terms of the lease on the last day of the last fiscal year for which funds were appropriated, provided the equipment is returned to the nonprofit lessor or his agent, as provided in the equipment-lease-purchase contract and such contract shall not be a long-term debt of the state or the applicable purchasing agency. In addition, in such equipment-lease-purchase contracts, the nonprofit lessor shall covenant and agree to indemnify and hold the lessee harmless against any loss, damage, liability, cost, penalty, or expense, including attorney fees, which is not otherwise agreed to by the lessee in the equipment-lease-purchase contract and which is incurred and arises upon a failure of the legislature to appropriate funds in the manner described above for a continuation of the contract or the exercise of the option to purchase the selected equipment.

B. Notwithstanding any limitation of the applicability of this Part or Chapter in any other provision of law, contracts shall be subject to the provisions of R.S. 38.2196.1 regarding the requirement for an affidavit of notice of fee disposition, if applicable.

Section 4. R.S. 48:251.8 is hereby amended and reenacted to read as follows:

§251.8. Public contracts; certain provisions invalid; ~~requirement for affidavit of notice of fee disposition~~

A. The legislature hereby declares null and void and unenforceable as against public policy any provision in a department contract which requires either of the following:

(1) That a suit or arbitration proceeding must be brought in a forum or

1 jurisdiction outside of this state, instead of being pursued in accordance with the laws
2 of this state governing such actions.

3 (2) That the agreement must be interpreted according to the laws of another
4 jurisdiction.

5 ~~B. Notwithstanding any limitation of the applicability of this Part or Chapter~~
6 ~~in any other provision of law, contracts shall be subject to the provisions of R.S.~~
7 ~~38:2196.1 regarding the requirement for an affidavit of notice of fee disposition, if~~
8 ~~applicable.~~

9 Section 5. R.S. 38:2196.1, R.S. 39:200(N) and 1493.1, and Part X of Chapter 17 of
10 Subtitle III of Title 39 of the Louisiana Revised Statutes of 1950, consisting of R.S. 39:1758,
11 are hereby repealed in their entirety.

The original instrument was prepared by Jerry J. Guillot. The following digest, which does not constitute a part of the legislative instrument, was prepared by Sharon F. Lyles.

DIGEST

Appel (SB 242)

Present law (R.S. 14:141) prohibits the splitting of profits, fees or commissions in certain instances. Defines "splitting of profits, fees or commissions" as the giving, offering to give, receiving or offering to receive, directly or indirectly, anything of apparent present or prospective value by or to a public officer or public employee or to any fund or fiduciary existing for the benefit of or use by such public officer or employee, when such value is derived from any agreement or contract to which the state or any subdivision thereof is a party.

Present law defines "public officer," and "public employee" to apply to any executive, ministerial, administrative, judicial, or legislative officer, office, employee or position of authority respectively, of the state or any parish, municipality, district, or other political subdivision thereof, or of any agency, board, commission, department or institution of said state, parish, municipality, district, or other political subdivision.

Proposed law clarifies that the prohibition is also applicable to political subdivisions.

Present law provides that there shall be no splitting of profits, fees or commissions, past or present, derived from the sale of any commodity, goods, services, insurance, or anything of value to the state or any subdivision thereof from which a public official or employee, representing the state in his official capacity in the contract negotiations, receives or offers to receive a portion of the profits, fees and/or commissions, unless the amount thereof and the conditions therefor are included in detail in the contract of sale or the insurance contract and said contract is filed by the public official or employee with the secretary of state at least 10 days prior to execution of said contract. Requires that 10-day filing period be waived in the event of an emergency in which the filing is not reasonable. Upon the filing, the secretary of state shall immediately release to the news media the details of such contract and, upon written request, furnish a copy of such contract to the news media.

Proposed law clarifies that the provision also applies to political subdivisions, and that the contract itself is a public record. Also deletes provisions in present law which authorize including such profits, fees, and/or commissions in a contract of sale or insurance if the details of such contracts are filed with the secretary of state 10 days prior to execution (waived in an emergency) and required to be released to news media. Also specifies that the contract is a public record.

Present law provides that whoever commits the crime of failure to report the splitting of profits, fees or commissions, and to contain such fee arrangement in the contract of sale or in the insurance contract shall upon conviction be fined not more than \$1,000 or shall be imprisoned, with or without hard labor, for not more than two years, or both.

Proposed law changes present law and provides that whoever receives or offers to receive a portion of profits, fees or commissions shall upon conviction be fined not more than \$10,000 or shall be imprisoned, with or without hard labor, for not more than 10 years, or both.

Present law (R.S. 38:2196.1) provides that when any person or other entity enters into any contract awarded without bidding with a state entity or local entity, or any contract with a local entity exceeding \$10,000 awarded with bidding, in which a commission, fee, or other consideration is paid to the contractor for the contractor to sell to or provide to the state entity or local entity any commodity, goods, brokerage service or other service of any kind, insurance, or anything of value, then the full disposition, splitting, or sharing of such commission, fee, or other consideration shall be disclosed to the state entity or local entity by the contractor in writing by an affidavit of notice of fee disposition prescribed by the Board of Ethics notarized as to its authenticity. Requires that the affidavit include the full value of the commission, fee, or other consideration to be paid, the names of all parties to receive dispositions, splits, or shares of the commission, fee, or other consideration, and the signature of the party authorized to commit the entity receiving the commission, fee, or other consideration to the contract, who shall attest to the truth of the facts set forth in the affidavit. Requires that the affidavit of notice be attached to and made a part of the contract for which the commission, fee, or other consideration is paid and shall be recorded in the public record. Provides that if at any time the disposition, splitting, or sharing of the commission, fee, or other consideration changes, or the amount of the commission, fee, or other consideration changes, then a new affidavit reflecting the changes from the first affidavit shall be prepared, executed, notarized, and recorded by the contractor in the public record. Provides that if for any reason the information on the recorded affidavit shall be found to be incorrect, then the contract shall become null and void and all payments of the commission, fee, or other consideration shall be rebated to the state entity or local entity which entered into the contract. Provides that in addition, intentional misrepresentation of the facts on an affidavit shall subject the party attesting to the facts to the penalties provided for filing or maintaining false public records provided for in R.S. 14:133.

Proposed law repeals present law and all other provisions with similar requirements for other types of contracts.

Proposed law (R.S. 38:2192) provides that each amendment or other revision to any service or insurance contract which adds an amount of 10% or more of the original contract amount and which additional amount is at least \$10,000 or all amendments and other revisions to any service or insurance contract aggregating to an amount of 20% or more of the original contract amount and which additional amount is at least \$10,000 shall be recorded by the public entity which entered into the contract in the office of the recorder of mortgages in the parish where the public entity is domiciled not later than 30 days after the date of such amendment or other revision takes place. Also, proposed law provides that the original contract shall be recorded together with the amendments or other revisions if not previously recorded.

Proposed law (R.S. 38:2222) requires that each change order to a public works contract or

to a contract for materials and supplies which adds an amount of 10% or more of the original contract amount and which additional amount is at least \$10,000 or all change orders to a contract aggregating to an amount of 20% or more of the original contract amount and which additional amount is at least \$10,000 shall be recorded by the public entity which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done or if not a public work, where the entity is domiciled, not later than 30 days after the date of the change order which requires that the recordation take place.

Present law (R.S. 39:126), relative to capital outlay projects, provides that any change order in excess of \$100,000 for a project undertaken pursuant to an appropriation in the Capital Outlay Act shall require the approval of the Joint Legislative Committee on the Budget. Provides that, in addition, a change order for a project undertaken pursuant to Capital Outlay Budget law shall also be subject to the approval of the commissioner of administration. Requires that any change order in excess of \$50,000 but less than \$100,000 be submitted to the Joint Legislative Committee on the Budget for review but shall not require committee approval.

Proposed law (R.S. 39:126(B)) retains present law and adds requirement that each change order to a contract for a capital outlay project which adds an amount of 10% or more of the original contract amount and which additional amount is at least \$10,000 or all change orders to a contract aggregating to an amount of 20% or more of the original contract amount and which amount is at least \$10,000 shall be recorded by the agency which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done not later than 30 days after the date of the change order which requires the recordation to take place. Also, proposed law provides that the original contract shall be recorded together with the amendments or other revisions if not previously recorded. Also, proposed law provides that it shall not apply to the office of facility planning and control and the office of state purchasing.

Proposed law (R.S. 39:1557.1), relative to the Louisiana Procurement Code, requires each change order to a contract which adds an amount of 10% or more of the original contract amount and which additional amount is at least \$10,000 or all change orders to a contract aggregating to an amount of 20% of the original contract amount shall be recorded by the governmental body which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done or where the entity is domiciled not later than 30 days after the date of the change order which requires that such recordation take place. Also, proposed law provides that the original contract shall be recorded together with the amendments or other revisions if not previously recorded. Also, proposed law provides that it shall not apply to the office of facility planning and control and the office of state purchasing.

Effective August 15, 2011.

(Amends R.S. 14:141, R.S. 39:126 and 1767, and R.S. 48:251.8; adds R.S. 38:2192 and 2222 and R.S. 39:1557.1; repeals R.S. 38:2196, R.S. 39:200(N), 1493.1, and 1758)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Transportation, Highways, and Public Works to the original bill.

1. Deletes provisions in present law regarding inclusion of profits, fees and/or commissions in detail in contracts of sale or insurance and filing of such contracts 10 days in advance of execution with the secretary of state and waiver of such requirement in event of an emergency and requirement for secretary of state to release details of such contracts to news media immediately and furnish a copy of such contracts to same upon request, because the provisions are replaced by proposed law.

2. Defines crime as receiving or offering to receive a portion of profits, fees or commissions.
3. Increases penalty upon conviction to a fine of not more than \$10,000 or imprisonment, with or without hard labor, for not more than 10 years.
4. Specifies that contracts for the sale of commodities, goods, insurance, or "anything of value" are public records.
5. Adds new law to require that amendments or other revisions to service or insurance contracts which add an amount equal to 10% or more of the original contract amount and which additional amount is at least \$10,000 or all amendments and other revisions to such contracts aggregating to an amount of 20% of the original contract amount and which additional amount is at least \$10,000 shall be recorded by the public entity in the office of the recorder of mortgages in the parish of the domicile of the public entity not later than 30 days after date of such amendment or revision and requires recordation of original contract with said amendments or other revisions if not previously recorded.
6. Changes value of any change orders that triggers recordation requirement for public works contracts, contracts for materials and supplies, capital outlay projects and procurement code contracts to 10% or more of the original contract amount and which additional amount is at least \$10,000 or value of all change orders to such contracts aggregating to an amount of 20% of the original contract amount and which additional amount is at least \$10,000.
7. Requires recordation of original contracts with change orders, amendments or other revisions which trigger recordation where such original contract has not been previously recorded.
8. Provides an exception to the requirement for recordation of change orders, amendments or other revisions which trigger recordation for the office of facility planning and control and office of state purchasing.
9. Repeals provisions that required an affidavit of notice of fee disposition relative to lease-purchase contracts, DOTD contracts, telecommunication procurement contracts, state professional, personal, consulting, and social services contracts, and data processing procurement contracts.