

Assembly Bill No. 1650

CHAPTER 573

An act to add Chapter 2.7 (commencing with Section 2200) to Part 1 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor September 30, 2010. Filed with Secretary of State September 30, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1650, Feuer. Public contracts: state and local contract eligibility: energy sector investment activities in Iran.

Existing law sets forth the requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities.

The federal Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which became Public Law 111-195 on July 1, 2010, authorizes a state or local government to adopt and enforce measures meeting certain requirements, to divest the assets of the state or local government from, or prohibit the investment of those assets in, any person that the state or local government, using credible information available to the public, determines to be engaged in investment activities in Iran. The federal act specifies that an investment includes the entry into, or renewal of, a contract for goods or services, and that such a measure is not preempted by any federal law or regulation.

Pursuant to this authority, this bill would prohibit a person that provides goods or services of \$20,000,000 or more in the energy sector of Iran, as identified on a list created by the Department of General Services, or a financial institution that extends \$20,000,000 or more in credit to such a person, from bidding on or entering into or renewing a contract for goods or services of \$1,000,000 or more with a public entity, as specified.

This bill would, by June 1, 2011, require the Department of General Services to, using credible information available to the public, develop, or contract to develop, a list of persons it determines provide goods or services of \$20,000,000 or more in the energy sector of Iran. This bill would, before a person is included on the list, require the Department of General Services to provide 90 days' written notice of its intent to include the person on the list and to inform the person that inclusion on the list would make the person ineligible to bid on, submit a proposal for, or enter into or renew, a contract for goods and services of \$1,000,000 or more with a public entity, and would require the department to provide the person with an opportunity to comment in writing that it is not engaged in investment activities in Iran.

This bill would require a prospective bidder for those contracts to certify that it is not identified on a list created by the Department of General Services, or a financial institution that extends \$20,000,000 or more in credit

to such a person, as provided, and would impose penalties, as specified, for a person that provides a false certification. This bill would require a local public entity, or the Department of General Services in the case of state contracts, to provide a person with 90 days' written notice and an opportunity to comment in writing before the penalties are imposed. The bill would allow a public entity, under specified conditions, to permit a person engaged in investment activities in Iran to be eligible for, to bid on, submit a proposal for, or enter into or renew, a contract for goods or services.

This bill would preempt any law, ordinance, rules, or regulation of any local public entity involving contracts for goods or services of \$1,000,000 or more with a person engaged in investment activities in Iran.

This bill would make legislative findings and declarations regarding a statewide concern.

This bill would become inoperative upon the date that federal authorization ceases.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2.7 (commencing with Section 2200) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 2.7. IRAN CONTRACTING ACT OF 2010

2200. This chapter shall be known and may be cited as the Iran Contracting Act of 2010.

2201. The Legislature hereby finds and declares all of the following:

(a) In imposing United States sanctions on Iran, Congress and the President have determined that the illicit nuclear activities of the Government of Iran, combined with its development of unconventional weapons and ballistic missiles, and its support of international terrorism, represent a serious threat to the security of the United States, Israel, and other United States allies in Europe, the Middle East, and around the world.

(b) On September 9, 2009, it was reported that American intelligence agencies have concluded that Iran has already created enough nuclear fuel to develop a nuclear weapon, and United States Ambassador to the International Atomic Energy Agency Glyn Davies declared that Iran had achieved "possible breakout capacity."

(c) On September 21, 2009, Iran sent a letter to the International Atomic Energy Agency acknowledging that it is considering a previously undeclared "new pilot fuel enrichment plan."

(d) On Sept. 25, 2009, President Barack H. Obama, joined by Prime Minister Gordon Brown of Britain and President Nicolas Sarkozy of France, stated that the secret plant "represents a direct challenge to the basic foundation of the nonproliferation regime" and "deepens a growing concern that Iran is refusing to live up to those international responsibilities, including specifically revealing all nuclear-related activities. As the international

community knows, this is not the first time that Iran has concealed information about its nuclear program.”

(e) The International Atomic Energy Agency has repeatedly called attention to Iran’s unlawful nuclear activities, and, as a result, the United Nations Security Council has adopted a range of sanctions designed to encourage the Government of Iran to cease those activities and comply with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (commonly known as the “Nuclear Non-Proliferation Treaty”).

(f) On July 1, 2010, President Barack Obama signed into law H.R. 2194, the “Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010” (Public Law 111-195), which expressly authorizes states and local governments to prevent investment in, including prohibiting entry into or renewing contracts with, companies operating in Iran’s energy sector with investments that have the result of directly or indirectly supporting the efforts of the Government of Iran to achieve nuclear weapons capability.

(g) On October 7, 2008, then-Senator Obama stated, “Iran right now imports gasoline, even though it’s an oil producer, because its oil infrastructure has broken down. If we can prevent them from importing the gasoline that they need and the refined petroleum products, that starts changing their cost-benefit analysis. That starts putting the squeeze on them.”

(h) The serious and urgent nature of the threat from Iran demands that states, local governments, educational institutions, and private institutions work together with the federal government and American allies to do everything possible diplomatically, politically, and economically to prevent Iran from acquiring a nuclear weapons capability.

(i) There are moral and reputational reasons for this state and local governments to not engage in business with foreign companies that have business activities benefiting foreign states, such as Iran, that commit egregious violations of human rights, proliferate nuclear weapons capabilities, and support terrorism.

(j) It is the responsibility of the state to decide how, where, and by whom its financial resources should be invested. It also is the prerogative of the state to not invest in, or do business with, companies whose investments with Iran place those companies at risk from the impact of economic sanctions imposed upon the Government of Iran for sponsoring terrorism, committing egregious violations of human rights, and engaging in illicit nuclear weapons development.

(k) The human rights situation in Iran has steadily deteriorated in 2009, as punctuated by transparently fraudulent elections and the brutal repression and murder, arbitrary arrests, and show trials of peaceful dissidents.

(l) During the postelection protests in June 2009, the Iranian government imposed widespread and unjustifiable restrictions on telecommunications services, denying the citizens of Iran their rights and liberties to free speech.

(m) On October 14, 2007, Governor Arnold Schwarzenegger stated his intention to support “efforts to further prevent terrorism” when signing Assembly Bill 221, which prohibits the state’s pension funds from investing in companies with active business in Iran.

(n) This state currently honors contracts with foreign companies that may be at financial risk due to business ties with foreign states, such as Iran, that are involved in the proliferation of weapons of mass destruction, commit human rights violations, and support terrorism.

(o) The concerns of the State of California regarding Iran are strictly the result of the actions of the Government of Iran.

(p) The people of the State of California declare all of the following:

(1) We have feelings of friendship for the people of Iran.

(2) We regret that developments in recent decades have created impediments to that friendship.

(3) We hold the people of Iran, their culture, and their ancient and rich history in the highest esteem.

(q) In order to effectively address the need for the governments of this state to respond to the policies of Iran in a uniform fashion, prohibiting contracts with persons engaged in investment activities in the energy sector of Iran must be accomplished on a statewide basis, and, therefore, the subject is a matter of statewide concern rather than a municipal affair.

(r) It is the intent of the Legislature to implement the authority granted under Section 202 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111-195).

2202. As used in this chapter, the following definitions apply:

(a) “Awarding body” means a department, board, agency, authority, or officer, agent, or other authorized representative of the public entity awarding a contract for goods or services.

(b) “Energy sector” of Iran means activities to develop petroleum or natural gas resources or nuclear power in Iran.

(c) “Financial institution” means the term as used in Section 14 of the Iran Sanctions Act of 1996 (Public Law 104-172; 50 U.S.C. 1701 note).

(d) “Iran” includes the Government of Iran and any agency or instrumentality of Iran.

(e) “Person” means any of the following:

(1) A natural person, corporation, company, limited liability company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group.

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution, as defined in Section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)).

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2).

2202.5. For purposes of this chapter, a person engages in investment activities in Iran if any of the following is true:

(a) The person provides goods or services of twenty million dollars (\$20,000,000) or more in the energy sector of Iran, including a person that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran.

(b) The person is a financial institution that extends twenty million dollars (\$20,000,000) or more in credit to another person, for 45 days or more, if that person will use the credit to provide goods or services in the energy sector in Iran and is identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran as described in subdivision (a).

2203. (a) (1) A person that, at the time of bid or proposal for a new contract or renewal of an existing contract, is identified on a list created pursuant to subdivision (b) as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, is ineligible to, and shall not, bid on, submit a proposal for, or enter into or renew, a contract with a public entity for goods or services of one million dollars (\$1,000,000) or more.

(2) A person that, at the time of bid or proposal for a new contract or renewal of an existing contract, engages in investment activities in Iran as described in subdivision (b) of Section 2202.5, is ineligible to, and shall not, bid on, submit a proposal for, or enter into or renew, a contract with a public entity for goods or services of one million dollars (\$1,000,000) or more.

(b) (1) By June 1, 2011, the Department of General Services shall, using credible information available to the public, develop, or contract to develop, a list of persons it determines engage in investment activities in Iran as described in subdivision (a) of Section 2202.5.

(2) The Department of General Services shall update the list every 180 days.

(3) Before finalizing an initial list pursuant to paragraph (1) or on updated list pursuant to paragraph (2), the Department of General Services shall do all of the following before a person is included on the list:

(A) Provide 90 days' written notice of its intent to include the person on the list. The notice shall inform the person that inclusion on the list would make the person ineligible to bid on, submit a proposal for, or enter into or renew, a contract for goods or services of one million dollars (\$1,000,000) or more with a public entity. The notice shall specify that the person, if it ceases its engagement in investment activities in Iran as described in subdivision (a) of Section 2202.5, may become eligible for a future contract, or contract renewal, for goods or services of one million dollars (\$1,000,000) or more with a public entity upon removal from the list.

(B) The Department of General Services shall provide a person with an opportunity to comment in writing to the Department of General Services that it is not engaged in investment activities in Iran. If the person demonstrates to the Department of General Services that the person is not engaged in investment activities in Iran as described in subdivision (a) of Section 2202.5, the person shall not be included on the list, and shall be eligible to enter into or renew a contract for goods or services of one million dollars (\$1,000,000) or more with a public entity, unless the person is otherwise ineligible to bid on a contract as described in paragraph (3) of subdivision (a) of Section 2205.

(4) The Department of General Services shall make every effort to avoid erroneously including a person on the list.

(5) The Department of General Services may assess a fee upon persons that use this list to comply with the provisions of this act, in order to pay for the necessary, actual costs of creating and maintaining this list. The Department of General Services shall provide the list free of charge to any public entity and to the Legislature, upon request.

(6) A person that has a contract with CalPERS or CalSTRS, or both, shall not be deemed a person that engages in investment activities in Iran on the basis of those investments with CalPERS or CalSTRS.

(c) Notwithstanding subdivision (a), a public entity may permit a person engaged in investment activities in Iran, on a case-by-case basis, to be eligible for, or to bid on, submit a proposal for, or enter into or renew, a contract for goods or services of one million dollars (\$1,000,000) or more with a public entity if either of the following are true:

(1) All of the following occur:

(A) The investment activities in Iran were made before July 1, 2010.

(B) The investment activities in Iran have not been expanded or renewed after July 1, 2010.

(C) The awarding body determines that it is in the best interest of the state or local public entity to contract with the person. For purposes of state contracts for goods or services of one million dollars (\$1,000,000) or more, “awarding body” means the Department of General Services. For purposes of local contracts for goods or services of one million dollars (\$1,000,000) or more, “awarding body” means the representative of the local public entity awarding the contract, as described in subdivision (a) of Section 2202.

(D) The person has adopted, publicized, and is implementing a formal plan to cease the investment activities in Iran and to refrain from engaging in any new investments in Iran.

(2) One of the following occurs:

(A) For a contract for goods or services of one million dollars (\$1,000,000) or more with a local public entity, the local public entity makes a public finding that, absent such an exemption, the local public entity would be unable to obtain the goods or services for which the contract is offered.

(B) For a contract for goods or services of one million dollars (\$1,000,000) or more with a state agency, other than the office of a state constitutional officer, the Governor makes a public finding that absent such an exemption, the state agency would be unable to obtain the goods or services for which the contract is offered.

(C) For a contract for goods or services of one million dollars (\$1,000,000) or more with an office of a state constitutional officer, if the state constitutional officer makes a public finding that, absent such an exemption, his or her office would be unable to obtain the goods or services for which the contract is offered.

(d) Notwithstanding subdivision (a), a public entity shall permit a financial institution described in subdivision (b) of Section 2202.5 to be eligible for, or to bid on, submit a proposal for, or enter into or renew, a

contract for goods or services of one million dollars (\$1,000,000) or more with a public entity if the person using the credit to provide goods or services in the energy sector of Iran is a person permitted to submit a bid or proposal to the public entity pursuant to subdivision (c).

(e) The prohibition described in paragraph (1) of subdivision (a) applies on and after June 1, 2011. The prohibition described in paragraph (2) of subdivision (a) applies on and after July 1, 2011.

2204. (a) A public entity shall require a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a public entity with respect to a contract for goods or services of one million dollars (\$1,000,000) or more to certify, at the time the bid is submitted or the contract is renewed, that the person is not identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5, as applicable. A state agency shall submit the certification information to the Department of General Services.

(b) A public entity shall not require a person that submits a bid or proposal to, or otherwise proposes to enter into a contract with, the public entity with respect to a contract for goods or services of one million dollars (\$1,000,000) or more to certify that the person is not identified on a list created pursuant to subdivision (b) of Section 2203 as a person engaging in investment activities in Iran described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5, as applicable, if the person has been permitted to submit a bid or proposal to the public entity pursuant to subdivision (c) or (d) of Section 2203.

(c) (1) Subject to paragraph (2), the certification requirement described in subdivision (a) applies on and after June 1, 2011.

(2) A person that is a financial institution shall not be required to certify as provided in subdivision (a) until July 1, 2011. For any subsequent list created pursuant to subdivision (b) of Section 2203, a person that is a financial institution shall not be required to certify with respect to that subsequent list until 30 days after that list becomes available, but shall certify with respect to the immediately prior list for those 30 days.

2205. (a) If the local public entity, or the Department of General Services in the case of state contracts, determines, using credible information available to the public and after providing 90 days written notice and an opportunity to comment in writing for the person to demonstrate that it is not engaged in investment activities in Iran, that the person has submitted a false certification under Section 2204, and the person fails to demonstrate to the local public entity or the Department of General Services that the person has ceased its engagement in the investment activities in Iran within 90 days after the determination of a false certification, the following shall apply:

(1) Pursuant to an action under subdivision (b), a civil penalty in an amount that is equal to the greater of two hundred fifty thousand dollars (\$250,000) or twice the amount of the contract for which the false certification was made. Only one civil penalty may be imposed with respect

to one or more certifications made to any public entity that are false as a result of a particular investment.

(2) Termination of an existing contract with the awarding body at the option of the awarding body or the Department of General Services.

(3) Ineligibility to bid on a contract for a period of three years from the date of the determination that the person submitted the false certification.

(b) The local public entity, or the Department of General Services in the case of state contracts, shall report to the Attorney General the name of the person that the local public entity, or the Department of General Services in the case of state contracts, determines has submitted a false certification under Section 2204, together with its information as to the false certification, and the Attorney General shall determine whether to bring a civil action against the person to collect the penalty described in paragraph (1) of subdivision (a). The awarding body of a local public entity may also report to the city attorney, county counsel, or district attorney the name of the person that the awarding body determines has submitted a false certification under Section 2204, together with its information as to the false certification, and the city attorney, county counsel, or district attorney may determine whether to bring a civil action against the person to collect the penalty described in paragraph (1) of subdivision (a). If it is determined in that action that the person submitted a false certification, the person shall pay all reasonable costs and fees incurred in a civil action, including costs incurred by the awarding body for investigations that led to the finding of the false certification and all reasonable costs and fees incurred by the Attorney General, city attorney, county counsel, or district attorney. Only one civil action against the person to collect the penalty described in paragraph (1) of subdivision (a) may be brought for a false certification on a contract.

(c) A civil action to collect the penalties described in paragraph (1) of subdivision (a) must commence within three years from the date the certification is made.

(d) An unsuccessful bidder, or any other person other than the awarding body, shall have no right to protest the award of a contract or contract renewal on the basis of a false certification.

(e) This act does not create, nor authorize, a private right of action or enforcement of the penalties provided for in this act.

2206. This act shall occupy the field with regard to all public contracts for goods or services with a person engaged in investment activities in Iran and shall preempt any law, ordinance, rule, or regulation of any local public entity involving public contracts for goods or services with a person engaged in investment activities in Iran.

2207. The Legislature shall submit to the Attorney General of the United States a written notice describing this chapter within 30 days after the effective date of this act.

2208. (a) If any one or more provisions, sections, subdivisions, sentences, clauses, phrases, or words of this act or the application thereof to any person or circumstance is found to be invalid, illegal, unenforceable,

or unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective and functional notwithstanding such invalidity, illegality, unenforceability, or unconstitutionality.

(b) The Legislature hereby declares that it would have passed this act, and each provision, section, subdivision, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subdivisions, sentences, clauses, phrases, or words are declared invalid, illegal, unenforceable, or unconstitutional.

SEC. 2. Section 1 of this act shall become inoperative upon the date that federal law ceases to authorize the states to adopt and enforce the contracting prohibitions of the type provided for in that section.