
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 256 **Hearing Date:** March 28, 2017
Author: Atkins
Version: March 20, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Public Contracts: Criminal Offenses and Statute of Limitations*

HISTORY

Source: State Controller Betty Yee

Prior Legislation: AB 1505 (Hernandez), 2015-16 Legislative Session, vetoed

Support: California District Attorneys Association

Opposition: Unknown

PURPOSE

The purpose of this bill is to extend, from one to three years, the statute of limitations for specified Public Contract Code misdemeanors relating to competitive bidding.

Existing law provides that a school district must put contracts out to bid for specified contracts involving equipment or services for more than \$50,000 or construction contracts for more than \$15,000. (Pub. Contract Code, § 20111.)

Existing law provides public projects by a local agency of more than \$175,000 shall be let to contract by a formal bidding contract, projects of less than \$175,000 may be bid by informal procedures. (Pub. Contract Code, § § 22032.)

Existing law provides that all contracts for any improvement in excess of \$25,000 by a reclamation district shall be let to the lowest responsible bidder. (Pub. Contract Code, § 20921.)

Existing law provides that a community college may make repairs, alterations etc. without bidding when the job does not exceed 350 hours if the districts number of full-time students is less than 15,000 and the job does not exceed 750 hours or \$21,000 if the number of students exceeds 15,000. (Pub. Contract Code, § 2065.)

Existing law provides that when the expenditure for a public project by a local agency exceeds \$5,000 it shall be contracted for and let to the lowest bidder after notice. (Pub. Contract Code, § 20162.)

Existing law provides that in counties of 500,000 or less, public projects between \$4,000 and \$10,000 shall be let to contract by informal bidding procedures and public projects of \$10,000 or more shall be let by formal bidding procedures. (Pub. Contract Code, § 20150.4.)

Existing law provides that in counties with a population of 2,000,000 or more must use a formal bidding process for public buildings if the cost is more than \$4,000 but they do not have to do work by bid if the cost estimate is less than \$6,500 and the requirements do not apply to repair work on county owned buildings if the cost is under \$50,000. (Pub. Contract Code, §§ 20121; 20122; 20123.)

Existing law provides that it shall be unlawful for a school district, community college district, reclamation agency or local agency to split or separate into smaller work orders or projects any work, project, service or purchase for the purpose of evading the provisions requiring contracting after competitive bidding. (Pub. Contract Code, §§ 20116; 20657; 20922; 22033.)

Existing law provides that in any county, it is unlawful to split or separate into small work orders or projects any public work project for the purpose of evading the provisions requiring public work to be done by contract after competitive bidding. The penalty for a violation of these sections is a misdemeanor. (Pub. Contract Code, §§ 20123.5; 20150.11; 20163.)

Existing law provides that in general the prosecution for a misdemeanor shall be commenced within one year after the commission of the offense. (Pen. Code, § 802.)

This bill provides that the prosecution for a violation of the Public Contracts Code prohibiting the splitting of jobs into smaller jobs to avoid competitive bidding shall be commenced within three years of the commission of the offense.

This bill specifies that willfully splitting jobs into smaller jobs to avoid competitive bidding found in various sections of the Public Contracts Code are misdemeanors.

COMMENTS

1. Need for This Bill

According to the author:

California law requires that most public work contracts be subject to competitive bidding. The purpose of the provision is to eliminate favoritism, fraud, and corruption in the awarding of public contracts. Also under current law, government agencies cannot split any public works projects into small work orders or projects in order to circumvent the state's competitive bidding laws.

As part of her duties, State Controller Betty Yee may perform audits of entities such as local governments by reviewing their financial records and practices. If a violation of the competitive bidding statute is discovered, a prosecutor may charge the offending entity with a misdemeanor. However, prosecution must begin within one year of the violation's occurrence.

In June 2015, the State Controller's Office released an audit of the city of West Covina's finances that was conducted in response to several complaints of misuse of public funds. The audit found serious and pervasive deficiencies in the city's administrative and internal accounting controls meant to ensure validity and accuracy of the city's finances. Of the 79 control components evaluated, 72 (or 91%) were found to be inadequate.

During review of the city's contracting process, Controller Yee found numerous violations of the city's contracting requirements that should have triggered the competitive bidding process, such as extending existing contracts and failing to explore other options or seek bids from other companies. However, because the statute of limitations for violating state and local contracting laws is one year from when the money is spent and the violations were not discovered during that time, prosecutors were unable to file charges.

Over the years, several other cities have demonstrated a similar lack of important financial controls, including the cities of Industry, Maywood, Beaumont, Bell, Irwindale, Richmond, Cudahy, and Montebello. The Controller's audit brought to light a deficiency in the statute of limitations in regards to violating state and local contracting laws. The discrepancy between the one-year statute of limitations and the time it takes for a contract to become public, for an audit to be conducted, and for results to be released has highlighted the need for statutory change to ensure future protection of existing law.

By extending the statute of limitations from one year to three years, SB 256 will give auditors more time to discover violations of the Public Contract Code and give prosecutors more time to file charges and hold local government administrators accountable. In doing so, it will provide greater protection of taxpayer dollars and hold elected officials to a greater degree of accountability.

The bill also specifies that violations of these sections of the Public Contract Code are misdemeanors, addressing the Governor's veto message of a prior version of the bill, AB 1505, in which he stated that penalty provisions of the law were not sufficiently clear.

2. The Statute of Limitations Generally; Law Revision Commission Report

The statute of limitations requires commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Penal Code § 804.) The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. *People v. Morris* (1988) 46 Cal.3d 1, 13. The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The Legislature enacted the current statutory scheme regarding statutes of limitations for crimes in 1984 in response to a report of the California Law Revision Commission:

The Commission identified various factors to be considered in drafting a limitations statute. These factors include: (a) The staleness factor. A person accused of crime should be protected from having to face charges based on possibly unreliable evidence and from losing access to the evidentiary means to defend. (b) The repose factor. This reflects society's lack of a desire to prosecute for crimes committed in the distant past. (c) The motivation factor. This aspect of the statute imposes a priority among crimes for investigation and prosecution. (d) The seriousness factor. The statute of limitations is a grant of amnesty to a defendant; the more serious the crime, the less willing society is to grant that amnesty. (e) The concealment factor. Detection of certain concealed crimes may be quite difficult and may require long investigations to identify and prosecute the perpetrators.

The Commission concluded that a felony limitations statute generally should be based on the seriousness of the crime. Seriousness is easily determined based on classification of a crime as felony or misdemeanor and the punishment specified, and a scheme based on seriousness generally will accommodate the other factors as well. Also, the simplicity of a limitations period based on seriousness provides predictability and promotes uniformity of treatment.¹

Generally, the statute of limitations for misdemeanor offenses requires commencement of prosecution within one year (Pen. Code, § 802), and within three years for felony offenses (Pen. Code, § 801). There are specified exceptions to the general rules that either provides for a longer statute of limitations, tolls the time that the statute starts to run, or provides no statute of limitations at all. For example, certain misdemeanors relating to contractor and licensing violations under the Business and Professions Code specifies a four-year statute of limitations.

This bill would specify a three-year statute of limitations for a violation of the Public Contracts Code prohibiting the splitting of jobs into smaller jobs to avoid competitive bidding, rather the general one year statute of limitations.

3. Ex Post Facto

The U.S. Constitution prohibits ex post facto laws. (U.S. Const., art. I, §§ 9 and 10.) Ex post facto refers to a criminal law that applies retroactively in a way that disadvantages the offender affected by them. (*Collins v. Youngblood* () 497 U.S. 37, 41, citing *Calder v. Bull* (1798) 3 U.S. 386). In *Stogner v. California* (2003) 539 U.S. 607, the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause of the U.S. Constitution when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.)

This bill extends the statute of limitations for certain offenses contained in the Public Contracts Code from one year to three years. As stated by the author, the statute of limitations has already passed for the violations discovered in the State Controller's 2015 audit. This bill would only affect crimes committed on or after the bill is enacted, because to do otherwise would violate the Ex Post Facto Clause of the United States Constitution.

¹ 1 Witkin Cal. Crim. Law Defenses, Section 214 (3rd Ed. 2004), citing 17 Cal. Law Rev. Com. Reports, pp.308-314.

4. Governor's Veto Message of Prior Legislation

AB 1505 (Hernandez), of the 2015-16 Legislative Session was substantially similar to this bill. AB 1505 was vetoed by the Governor. In his veto message, Governor Brown pointed out that, “[a]lthough the bill extends the criminal statute of limitations for violations of seven Public Contract Code sections, violations of four of those code sections carry no criminal penalties and are not actual crimes. We should not introduce any uncertainty into the Penal Code.”

This bill specifies that violations of these code sections are misdemeanors.

5. Argument in Support

In support, State Controller Betty Yee states:

As part of my July 2015 review of the City of West Covina’s administrative and internal controls, my auditors discovered the city violated [California Public Contract Code] PCC 20163, which precludes cities from splitting work orders on public work projects into smaller pieces in order to avoid the state’s competitive bidding requirements. Violation of this law is a misdemeanor, but prosecution of any alleged violation must take place within a year of the violation occurring.

Unfortunately in the case of West Covina, the violations were not discovered during that one-year period, meaning charges could not be brought against the people accused of violating the PCC. By extending the period of time to three years for filing charges, SB 256 will give prosecutors more time to discover violations of the PCC.

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