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## Texas Government Contracts: New Year, New Rules

Seeking a state purchasing contract? You may now be required to register as a lobbyist. Some independent contractors who help vendors secure procurement contracts in Texas are now required to register with the Texas Ethics Commission.<sup>1</sup> House Bill 3445, which the Texas Legislature passed last spring during the 81<sup>st</sup> Texas Legislative Session, established new guidelines for lobbying activities related to state procurement contracts.

Generally, Texas law prohibits contingent fees for lobbying; that is, contingent fees that are based on achieving favorable legislative or administrative action.<sup>2</sup> Previously, communicating with a member of the executive branch concerning the purchasing decisions of a state agency, or negotiations regarding such decisions, were excluded from lobbying registration and reporting requirements. Thus, consultants were able to accept contingent fees (or sales commissions based on a percentage of the contract) for their work in securing high-value state purchasing contracts. HB 3445 eliminated the broad exclusion and limits the contracts for which contingent fees may be properly accepted.

Section 305.022 of the Texas Government Code now provides that contingent fees for lobbying activities related to purchasing contracts with a value of over \$10 million are prohibited. As to lobbying activities related to purchasing contracts with a value that does not exceed \$10 million, some non-employee independent contractors (*i.e.*, consultants or lobbyists) who seek to influence purchasing decisions by state administrative agencies are now required to register as lobbyists with the Texas Ethics Commission. However, vendor employees are generally not required to register with the Commission.<sup>3</sup>

A vendor employee, defined as “a person employed full-time by an employer to perform services for compensation,” who is not an independent contractor or consultant, is generally not required to register with the Commission under the changes made by HB 3445. This exception exists for employees that receive compensation for: (1) lobbying concerning state agency purchasing decisions that do not exceed \$10 million, or (2) lobbying concerning state agency purchasing decisions of greater than \$10 million, so long as the employee’s compensation is not contingent on the outcome of the administrative action concerning the purchasing decision.<sup>4</sup>

An “independent contractor” is “a person, including a consultant, who communicates with a member of the executive branch concerning state agency purchasing decisions involving a product, service, or service provider or negotiations regarding such decisions” (but not including an employee of a vendor).<sup>5</sup> If an independent contractor seeks to influence a state purchasing decision with a value that does not exceed \$10 million and will accept a contingent fee (or sales commission) for such efforts, that individual must register with the Commission. If an independent contractor seeks to influence a state purchasing decision with a value of less than \$10 million but will *not* accept a contingent fee (or sales commission), the individual is not required to register with the Commission.

<sup>1</sup> The effective date of HB 3445 was September 1, 2009. However, the bill stated that registration, if required, would not be required “before January 1, 2010.” On November 10, 2009, a representative of the Commission confirmed that the Commission considers the registration requirement to have been effective as of September 1, 2009. On December 2, 2009, the Commission issued Ethics Advisory Opinion No. 486, expressing that Section 305.022 of the Texas Government Code, as amended by HB 3445, does not prohibit the payment of contingency fees or sales commissions pursuant to a contract that was legally binding before September 1, 2009.

<sup>2</sup> See Tex. Govt. Code § 305.022.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 305.0041.

<sup>5</sup> See Texas Ethics Commission Rules § 34.1.(5). The Commission finalized the changes to the Rules implementing HB 3445 on December 2, 2009.

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