

Date of Hearing: May 9, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 2003 (Daly) – As Introduced February 1, 2018

SUBJECT: Public contracts: sanitation districts: notice.

SUMMARY: Eliminates bid notice requirements for sanitation districts, and instead allows sanitation districts to notice bids in a manner that the district board determines is reasonable, which may include, but is not limited to, newspapers, websites, radio, television, or other means of mass communication.

EXISTING LAW:

- 1) Contains countless requirements for local agencies (as well as state agencies and non-governmental entities) to publish a broad range of public, legal notices in a newspaper of general circulation.
- 2) Outlines the requirements for a newspaper to become adjudicated as a newspaper of general circulation.
- 3) Requires sanitation districts to advertise bids for contracts exceeding \$35,000 by doing one of the following:
 - a) Publishing notice at least twice, not less than five days apart, in a newspaper of general circulation, printed and published in the district; or,
 - b) If there is no newspaper of general circulation, by posting notice in at least three public places in the district that have been designated by the district board as the places for posting this notice.

FISCAL EFFECT: None

COMMENTS:

- 1) **Bill Summary.** This bill eliminates bid notice requirements for sanitation districts, and instead allows sanitation districts to notice bids in a manner that the district board determines is reasonable, which may include, but is not limited to, newspapers, websites, radio, television, or other means of mass communication. This bill is sponsored by the Orange County Sanitation District.
- 2) **Author's Statement.** According to the author, "The law requiring publication in a newspaper of general circulation was enacted in 1994. Today, however, advertisements in newspapers may not always be the most effective method for notifying contractors about public construction projects. Other options include online bid advertising platforms such as PlanetBids or BidSync. AB 2003 will give sanitation districts greater flexibility to choose the appropriate notification platform and create a more efficient and effective bid

construction process. By expanding the allowable public notification methods, this bill will maintain transparency for public construction bid opportunities."

- 3) **Background.** According to the Public Notice Resource Center, "The history of public notice begins long before the emergence of newspapers. The concept itself has existed since early civilizations posted notices in public squares. This crude method was eventually refined with the publication of the first English language newspaper in 1665...The American system is modeled closely after the British system. While state governments had been publishing public notices in newspapers throughout colonial times, it was not long before the newly-created federal government followed suit. In 1789, the Acts of the First Session of the Congress required all bills, orders, resolutions and congressional votes be published in at least three publicly available newspapers.

"The purpose of public notice is to display information in places where the public is likely to come into notice. The important premise is that information about government activities must be accessible in order for people to make well-informed decisions. Public notice laws in this country serve to outline the most effective method of reaching the public. Before a state designates a newspaper to publish public notices, states generally require the newspaper to have a paid circulation, a minimum percentage of news content, a local publishing address, and a continuous publishing history. The latter requirement ensures stability in the venue for public notices, so that the public will have a reliable place to search for public notices.

"There is a long tradition that there are four elements that mark a valid public notice. The notice must be published from an independent party, the publication must be archivable, the publication must be accessible, and the publication must be verifiable. If any one of these elements is absent, the public loses and the notice itself may be challenged."

The Public Notice Resource Center further expands on the four elements of valid public notices, as follows:

- a) **Public Notice Must Be Published by an Independent Third Party.** A public notice must be published in a forum independent of the government, typically in a local newspaper. An independent and neutral third party has an economic and civic interest in ensuring that the notice delivery requirements are followed.
- b) **Public Notice Must Be Archivable.** A public notice must be archived in a secure and publicly available format. Print newspapers have always fulfilled this element because a public notice published in a newspaper is easily archivable, and can be archived now, in several different places, formats, and without wait. Newspapers are usually archived by the publishing company and by libraries. These archiving venues provide the public with the option to retrieve the notices for years after date of publication.
- c) **Public Notice Must Be Accessible.** A public notice must be capable of being accessed by all segments of society.

- d) **Public Notice Must Be Verifiable.** The public must be able to verify that the public notice was not altered once published. In a newspaper notice, an affidavit is provided by the publisher, which can be used in an evidentiary proceeding to demonstrate that a true copy was published as well as the exact wording that was used.

"Thousands of laws in all 50 states of our nation require governmental and non-governmental entities to publish public notices. The types of notices required to be published range from public budgets, to notices of public hearings, to notices informing creditors of dissolving corporations. While these laws vary greatly with regard to the details of publication, they all share the same goal: to ensure that the public is adequately informed of the actions of its government and other entities in their communities...(There are) an estimated 30,000 public notice laws between the states and federal government."

Despite these laws and their long history, there have been numerous efforts to alter or eliminate requirements to publish notices in newspapers since the advent and broad adoption of the Internet. According to a University of Southern California brief entitled "Insult to Injury: The Disappearance of Public Notices in US Newspapers," there were 153 proposals, amendments and pieces of legislation in 40 states in the 2008 – 2009 legislative cycle recommending changes to public notice laws. The brief notes, "While newspaper revenues dropped nearly 18 percent in 2008, public notices have been considered one of the few stable categories. According to the (National Newspapers Association), while classified revenue dropped 29 percent the category that includes public notices fell only 4.3 percent. Public notices matter, and the shift to online notices is eroding one of the few stable revenue categories that exist for the traditional newspaper industry."

- 4) **California Law and Public Notices.** As noted above, California law contains dozens if not hundreds of requirements for public notices of various types and by various entities. Public notices typically require publication in a newspaper, and often contain a set number of times the notice must be published, a time frame during which the notice must be published, the size of the notice, and specifications regarding the content of the notice.

Existing law specifies that, whenever any official advertising, notice, resolution, order, or other matter of any nature whatsoever is required by law to be published in a newspaper, such publication shall be made only in a newspaper of general circulation.

California law defines "a newspaper of general circulation" as a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the state, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.

California law further specifies that a newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number thereof, when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation.

California law establishes a process that must be completed before a newspaper can qualify as a newspaper of general circulation, which requires the newspaper's publisher, manager, editor or attorney to file a verified petition in the superior court of the county in which it is established, printed and published. The newspaper must receive a judicial decree from a court that the newspaper has attained "adjudicated status" allowing it to publish legal notices for particular geographic regions before such notices are considered valid and sufficient. This legal status provides for an affidavit of publication, which is a sworn, written statement made in the presence of a notary public or a person who is authorized to administer an oath, attesting that a publication took place on specified days.

- 5) **Sanitation Districts and Bid Notices.** Existing law requires sanitation districts to competitively bid construction projects that exceed \$35,000 by publishing notice at least twice, not less than five days apart, in a newspaper of general circulation that is printed and published in the district. If a newspaper of general circulation does not exist in its respective area, a sanitation district is required to post the advertisement in at least three public places in the district that have been designated by the district board as the places for posting such notices.
- 6) **Orange County Sanitation District Publishing Costs.** According to information submitted by the Orange County Sanitation District, the cost for print advertisements for the district has doubled over the last seven years, from \$2,500 to \$5,000, and is now averaging \$5,033 per ad. The district estimates a total cost of \$500,000 for print advertising during the next 10-12 years. The district points to on-line bid advertising platforms that are free of charge, such as BidSync and Planet Bids, the use of which could save the district advertising costs if this bill becomes law.
- 7) **Policy Considerations.** The Committee may wish to consider the following policy issues raised by this bill:
 - a) **Public Notice Protections in Existing Law.** As noted above, publication in a newspaper of general circulation offers protections for the public that are not necessarily replicated with web-based notification. While this bill is limited to the publication of bid notices by sanitation districts, it raises a broader policy debate regarding the purpose of public notices – to provide notice to the *public* – and the most appropriate and effective venue for notifying the public of the activities of its government. It might be appropriate to require local governments to provide more information on their websites – indeed, the Legislature has increasingly been doing so in recent years. However, the Committee may wish to consider if web-based notification or the other means of communication proposed by this bill, coupled with the very broad discretion this bill affords sanitation districts in how they utilize these means of communication, provide enough assurances that notice to the *public* will be independent, archivable, accessible and verifiable.
 - b) **Legal Notices are *Legal* Notices.** As outlined above, California law specifies that newspapers of general circulation are the only publications that can publish legal notices, and outlines an extensive court-approved process before a newspaper can qualify as a newspaper of general circulation. The sponsor has noted that existing law requires local agencies to submit to the Department of Industrial Relations (DIR) information regarding

all executed public works contracts, which could provide sufficient defense in any legal action against a sanitation district that cannot produce an affidavit of publication.

However, according to DIR, while this contract award notice requirement includes various forms of information (such as contract amount, estimated project start date, bid ad date, etc.), it does not include a requirement to provide DIR with a copy of actual bid or contract documents. The Committee may wish to consider the legal implications of allowing a notice that is currently required to be published in a newspaper of general circulation to instead be provided via website, radio, television, or other means of mass communication, and the consequent absence of affidavits of publication in any legal proceedings that might be brought by or against a sanitation agency regarding contracts not advertised in a newspaper of general circulation.

- c) **How Significant are the Potential Cost Savings?** One of the arguments for this bill is the rising cost of newspaper advertising for sanitation agencies and the desire to dedicate those funds to other purposes and save taxpayers money. The Committee may wish to consider whether potential cost savings justify the changes this bill seeks in public notice requirements for sanitation agencies.
 - d) **Precedent.** As noted above, requirements to publish notices in newspapers of general circulation are liberally sprinkled throughout California law, and apply to local and state governments as well as private entities. The Committee may wish to consider the precedent this bill establishes and the potential invitation to change or eliminate additional public notice requirements.
 - e) **Comprehensive vs. Piecemeal Approach.** The Committee may wish to consider if changes to public notice laws should be addressed on a case-by-case basis, or if a more comprehensive approach is preferable.
 - f) **Necessity.** There is nothing in existing law to prevent sanitation districts from advertising bid notices on their own websites, on electronic bid platforms, radio, television or other forms of communication – and many of them already do so, in one form or another. The Committee may wish to consider if this bill is necessary in order to allow sanitation districts the flexibility they desire in advertising bid notices.
- 8) **Arguments in Support.** The Orange County Sanitation District, sponsor of this bill, states, "Newspaper publications may not be the most effective method of public notification, as bid advertising is largely conducted through online bid advertising platforms. Throughout the last 30 years, there have been significant advances in technology that have improved both the efficiency and effectiveness of bid advertising. We support adding flexibility into the public contracting code to allow sanitation districts to expand outreach efforts and broaden the potential reach with innovative and potentially more effective methods to provide notice to potential bidders. This bill will create a more efficient and effective bid construction process. Additionally, this bill will ensure that appropriate notice is provided to the construction industry and will maintain transparency with public agency construction bid opportunities."

- 9) **Arguments in Opposition.** The California News Publishers Association, in opposition, writes, "AB 2003 mistakenly presupposes the target audience of these bid notices is contractors and vendors who might want to submit a bid...These published public notices inform not just the political insiders who might occasionally visit a government website or sign up for mailed alerts, or even those with a direct stake in the matter, but the entire community. Allowing these notices to be posted on a district website for access by insiders already attuned to the process would wholly subvert the purpose of the public notice and do nothing to protect against rigged bidding practices that public notices were designed to guard against...Newspaper public notices about public contracting alert and energize the entire community to make sure these transactions are executed in the full light of day."

The Air Conditioning Sheet Metal Association, California State Building and Construction Trades Council, California Chapters of the National Electrical Contractors Association, California Legislative Conference of the Plumbing, Heating and Piping Industry, Construction Industry Force Account Council, Northern California Allied Trades, United Contractors, Wall and Ceiling Alliance, and Western Wall & Ceiling Contractors Association, in opposition, state, "The requirements to publish bids proposed by AB 2003 provide too much latitude and could be manipulated to notify a singular preselected contractor of bidding opportunities. In addition, this change would be a precedent setting departure from existing practice for the advertising of public works construction opportunities in the state. Bid advertisement requirements are designed to ensure that a robust number of local contractors have the opportunity to submit bids on local public works projects. The agencies themselves benefit when there is a high volume of bidders as the agency will get more cost-effective construction pricing. Tax payers also benefit as public advertising protects against cronyism and kickbacks.

"We do understand that the world has moved to a digital age and that the industry needs to look at new ways to advertise. We believe, as an alternative, this measure should study alternate bid advertising options and ask that the bill be narrowed to a district pilot program that contains a study, a report to the legislature and a sunset. We suggest the study look at mandating the use of internet websites in combination with notification to national bid notification services, local building exchanges and local building trades councils. The concept of a state-run bid posting service would be a viable option as well."

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County Sanitation District [SPONSOR]
California Association of Sanitation Agencies
California Special Districts Association
Cities of Fullerton, Huntington Beach and Placentia
City of Irvine Councilmember Melissa Fox
Costa Mesa Sanitary District
County Sanitation Districts of Los Angeles County
Irvine Ranch Water District
Midway City Sanitary District
Vallejo Flood and Wastewater District

Opposition

Air Conditioning Sheet Metal Association (unless amended)
California Chapters of the National Electrical Contractors Association (unless amended)
California Legislative Conference of the Plumbing, Heating and Piping Industry
(unless amended)
California News Publishers Association
California State Building and Construction Trades Council (unless amended)
Construction Industry Force Account Council (unless amended)
Northern California Allied Trades (unless amended)
Southern California News Group
United Contractors (unless amended)
Wall and Ceiling Alliance (unless amended)
Western Wall & Ceiling Contractors Association (unless amended)
Williams Pioneer Review, Colusa County News

Analysis Prepared by: Angela Mapp / L. GOV. / (916) 319-3958