

BILL ANALYSIS

C.S.S.B. 769

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State Affairs

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Committee Report (Substituted)

BACKGROUND AND PURPOSE

Currently, weaknesses exist in the statutes and regulations related to state agency contract solicitation, negotiation, and management. The manner in which state agencies engage in contracts with vendors is of vital concern because it directly affects the use of state appropriated financial resources, and, in some cases, the termination of state employee positions. In recent years, accounts have arisen alleging that some state agency employees have engaged in improper actions while working on state contracts. The announcement of this state's gradual withdrawal from its health and social services contract with Accenture's Texas Access Alliance demonstrates the need for increased oversight and training in the contracting process.

C.S.S.B. 769 improves the processes by which state agencies solicit, negotiate, enter into, and manage contracts with vendors. This bill expands the training processes for employees involved in contracting, improves contract reporting mechanisms for state agencies, requires needed provisions to address amendments, and addresses ethical issues specific to contracting. Finally, this bill establishes a stronger, more stringent review process prior to contract approval.

RULEMAKING AUTHORITY

It is the committee's opinion that administrative rulemaking authority is expressly granted to each state agency, as defined by Section 2056.001, Government Code, in SECTION 7 (Section 2262.060 (b), Government Code) of this bill.

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Building and Procurement Commission and the Office of the Attorney General in SECTION 11 (Section 2262.308, Government Code) of this bill.

ANALYSIS

SECTION 1. Amends the definition of "administrative action" by expanding certain requirements to state agencies.

SECTION 2. Amends Section 305.004, Government Code, by adding GENERAL to the heading.

SECTION 3. Establishes an exception for certain communications relating to state purchasing.

SECTION 4. Limits applicability of this chapter to certain contracts.

SECTION 5. Amends Section 2262.053, Government Code, by adding FOR CONTRACT MANAGERS to the heading.

SECTION 6. Modifies Section 2262.053, Government Code, to require certain entities develop a training program, with a separate class on ethics and contracting, for contract managers, under which the Texas Building and Procurement Commission is required to administer. State agencies are authorized to develop and make certain additions to their programs.

SECTION 7. Establishes required: training guidelines for certain individuals; repository requirements for state agencies; review processes for reporting contractor performances; database processes for the storage of contractor performance reviews; consultation and reporting

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requirements that state agencies must incorporate within their performance measures; formal guidelines for approved individuals who approve agency contracts; prohibitions against single employee negotiations in an agency that exceeds 200 employees; criteria that must be used to analyze certain contracts. Additionally, certain state agencies are authorized to establish a career latter of contract management within their agency.

SECTION 8. Establishes additional requirements for the Contract Advisory Team.

SECTION 9. Modifies the membership, and establishes a certain member to serve as chair, of the Contract Advisory Team.

SECTION 10. Requires the Contract Advisory Team to develop and publish certain definitions and forms to be used in state contracts and for reporting contractor performance.

SECTION 11. Establishes; certain provisions relating to the use of certain forms, enforcement mechanisms, and contract hiring preferences; ethics and conflict of interest requirements; authorizations for certain contract changes; definitions for "high-risk contract," "major information resources projects," "office," "quality assurance team," and "solicitation" in this subchapter; the requirement for a state office of contract management with duties and requirements; for review, approval, oversight, waiver, the use of outside services, solicitation and contract cancellation, and contract advisory team authorization provisions, without creating a cause of action.

SECTION 12. Transfers language within the Government Code and makes conforming changes.

SECTION 13. Along with conforming changes, establishes qualifications for certain business entities that enter into contracts with an institution of higher education; replaces the term "corporation" with "business entity," and provides a modified definition; and provides definitions for "governing board," "institution of higher education," and "nonprofit corporation."

SECTION 14. Removes a certain section of Government Code, to be effective on a specified date.

SECTION 15. Provides that except as provided, only certain state agency contracts are impacted under certain sections and subsections, Government Code.

SECTION 16. Provides that upon enactment, an agency must report to certain entities of their anticipation of entering into any high-risk contract during the biennium beginning September 1, 2007.

SECTION 17. Provides that after January 1, 2008, certain state agencies are prohibited from entering into a contract unless the certain administrative rules have been adopted.

SECTION 18. Establishes that members of a governing body of a state agency are not required to complete certain training requirements until September 1, 2009.

SECTION 19. Provides that an executive director of a state agency does not have to meet certain requirements until September 1, 2009.

SECTION 20. Requires the Contract Advisory Team to develop all items necessary to facilitate the provisions of the Act. Provides that a state agency is not required to comply with provisions of this Act until September 1, 2009.

SECTION 21. Effective date: November 1, 2007.

EFFECTIVE DATE

November 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.S.B. 769 broadens the definition of “administrative action” under the lobbying act, bringing a matter relating to state purchasing within the coverage of the act.

The substitute creates an exemption to the lobbyist registration for state purchasing if either of two tests are met: the item is not subject to competitive bidding and the cost of good or service does not exceed a threshold set by Building and Procurement Commission (commission) rule or the product or service is on a catalog or similar list of products prequalified for state purchase.

C.S.S.B. 769 strikes: the changes to the audit process; the changes to the cost evaluation process; and, the requirements for state agencies to make further disclosures related to contracts.

The substitute includes the office of the attorney general (OAG) in the training development.

C.S.S.B. 769 places the commission in charge of training programs, and deletes the provision allowing agencies to be charged for the training.

The substitute revises requirements for agencies to maintain all contracts for the agency in a central location by limiting the requirement to major contracts and by allowing the agency to make such contracts available electronically on its website in lieu of maintaining them in a central location in their offices.

C.S.S.B. 769 retains the requirement that a contractor performance database be established, and requires the Contract Advisory Team (CAT) to establish the evaluation process (in Engrossed version, Building and Procurement Commission is given the responsibility).

The substitute retains requirements that agencies develop performance measures in contracts, but limit such requirement to major contracts.

C.S.S.B. 769 deletes the provision excluding contractors from the solicitation process because of poor performance.

The substitute modifies provision prohibiting agencies from allowing a single employee to engage in contract negotiations so that provision only applies to agencies with more than 200 employees and only to major contracts.

C.S.S.B. 769 retains requirements that state agencies establish a career ladder program for contract management, but adds a reference to major contracts. It also deletes a provision requiring state agencies to work with the state auditor to determine whether the duties are sufficient for the employee to be considered a contract manager.

C.S.S.B. 769 modifies a requirement in the APPROVAL OF CONTRACTS section by adding that the \$1 million or above contract threshold for requiring written authorization from the agency executive director must include the value of amendments or extensions. It also deletes a requirement that each state agency must annually report to the commission a list containing each person authorized to approve contracts.

The substitute retains the requirement that state agencies conduct an in depth analysis before outsourcing services or functions that have a value of \$10 million or more or that would lead to the loss of 100 or more existing state employee positions, but allow the agencies to use their discretion in determining the factors to consider. The substitute also changes references to a developing a model program to performing an analysis.

C.S.S.B. 769 deletes the prohibition in the bill against outsourcing functions or services that are “inherently governmental in nature.”

The substitute makes the Governor’s designated staff member the chair of the Contract Advisory Team.

C.S.S.B. 769 deletes certain language in the section on CONTRACT TERMS RELATING TO NONCOMPLIANCE relating to the team developing recommended contract terms for state

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contracts and state agencies being able to include applicable recommended contract terms in their agency contracts.

C.S.S.B. 769 deletes the required contract disclosure statements relating to outsourcing.

The substitute retains the contract disclosure requirements meant to avoid conflicts of interest but limit the disclosure to employees who were employed by the state during a one year period, instead of a two year period.

C.S.S.B. 769 retains the hiring preference for certain large contracts, but determines that the employee must have been terminated solely because of the contract or contract extension or amendment in order to receive the preference.

The substitute retains the provision in place requiring an extension of a contract or an amendment to go through the same approval process as contracts, but limits the provision's reach to extensions, change orders, or amendments where the value totals more than fifteen percent of the original contract value on a contract having an initial value of \$50 million or more.

C.S.S.B. 769 leaves the Building and Procurement Commission in charge of the Office of Contract Management, but gives the OAG significant oversight of the contracting process.

The substitute gives defines a high-risk contract as one having an initial value of at least \$25 million, and gives the OAG the ability to identify high-risk contracts when the value is less than \$25 million which meet certain criteria.

C.S.S.B 769 expands the definition of "high-risk contract" to include additional factors, such as being incorporated outside of the United States or having had within the previous five years a contract with a state agency or the federal government canceled for various reasons.

C.S.S.B. 769 allows OAG and the State Office of Contract Management to review relevant documentation to determine whether contract risks have been properly mitigated, and if risks are not properly mitigated, the contract may not be approved, unless approved by the team and the office of the governor.

The substitute puts the OAG in a position of providing assistance to state agencies in the preparation of solicitations, planning for contract negotiations, contract negotiations, drafting of the contract, and other preparations involving a high-risk contract. Provides that, subject to 2262.307, no stat agency may enter into or execute a high-risk contract unless the contract is expressly approved in writing by the office of the attorney general.

C.S.S.B. 769 gives the OAG and the State Office of Contract Management the ability to retain necessary outside legal counsel and consultants at agency expense and gives OAG oversight of outside legal counsel.

C.S.S.B. 769 provides for the review of and comments on proposed or executed high-risk contracts by the office of the attorney general, the Legislative Budget Board, and the governor, after which the office may recommend the cancellation of a solicitation or a contract during the review period if a proposed solicitation is not in the best interest of the state, places the state at unacceptable risk, or if an executed contract is experiencing performance failure or payment irregularities.

C.S.S.B. 769 provides that if the office or the office of the attorney general disapproves a contract under this subchapter, notwithstanding another provision of this subchapter, the team, with the approval of the governor, may authorize the solicitation or execution of a high-risk contract that the office or the office of the attorney general disapproves under another provision of this subchapter if the team determines that a proposed solicitation or a high-risk contract would not place the state at an unacceptable risk and is in the best interest of the state.

The substitute gives the OAG rulemaking authority in addition to that given the commission, relevant to high-risk contracts.

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C.S.S.B. 769 adds language clarifying that the provisions do not create a cause of action.

C.S.S.B 769 modifies the audit procedures to clarify that the auditor is to have access to information related to the performance of the contract.

The substitute adds provisions delaying implementation of the OAG and commission review until January 1, 2008.

C.S.S.B. 769 adds a provision requiring agency notice to the OAG and the State Office of Contract Management on November 1, 2007 of all high risk contracts they anticipate entering into during the biennium.

C.S.S.B 769 adds a provision that on or after Jan. 1, 2008, a state agency subject to Chapter 2262, Government Code, may not enter into a contract unless the required administrative rules have been adopted.