

BILL ANALYSIS

C.S.H.B. 4682
By: Parker
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

During the current economic downturn, Texas officials must seek ways to conduct the state's business in the most fiscally responsible manner possible. Procurement contract negotiations between private industries and Texas' governmental agencies can be complicated and economically detrimental to Texas. Without proper knowledge and expertise, the state may at times enter into contracts that are not financially prudent. Requiring the use of a private procurement specialist to collaborate with and assist state agencies during the procurement of contracts could save Texas millions of dollars.

C.S.H.B. 4682 adds provisions to the law relating to the use of private procurement specialists on certain high-cost and other contracts.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the comptroller of public accounts in SECTION 3 of this bill.

ANALYSIS

C.S.H.B. 4682 amends Government Code provisions on statewide contract management to add a subchapter relating to private procurement specialists. The bill defines "high-cost contract" to mean a state agency contract that has a value of at least \$10 million. The bill defines "major information resources project" to mean any information resources technology project designated in the General Appropriations Act as a major information resources project, or to mean any information resources technology project identified in a state agency's biennial operating plan whose development costs exceed \$1 million if the project requires one year or longer to reach operations status, involves more than one state agency, or substantially alters work methods of state agency personnel or the delivery of services to clients. The bill defines "solicitation" to mean a solicitation for bids, offers, qualifications, proposals, or similar expressions of interest for a high-cost contract. The bill specifies that the subchapter applies to a Texas Department of Transportation contract only if it is a high-cost contract and is for a major information resources project, and makes a conforming change elsewhere in the code's provisions on statewide contract management. The bill establishes that the subchapter does not apply to a contract for professional or consulting services under the Professional Services Procurement Act.

C.S.H.B. 4682 requires the comptroller of public accounts to select and assign private procurement specialists. The bill requires such a specialist to be a private person who is an expert in the subject matter of the assigned contract and who is proficient in the procurement laws applicable to the assigned contract. The bill requires the comptroller and the state agency seeking to enter into a contract to consider, before the comptroller assigns a specialist, each potential specialist's relative experience and knowledge on the subject matter of the contract and any fees or costs associated with securing the services of the private procurement specialist. The bill prohibits a specialist from bidding on or otherwise making a proposal to receive a contract to which the specialist was assigned.

C.S.H.B. 4682 authorizes a state agency to request the comptroller to assign a private procurement specialist for a proposed contract if the agency determines that, given the costs and nature of the contract there will probably be a net savings to the state over the life of the contract if a specialist is assigned. The bill requires the comptroller, in the case of a high-cost contract, to assign a specialist if the comptroller determines that given the cost and nature of the proposed contract there will probably be a net savings to the state over the life of the contract if a specialist is assigned. The bill requires a state agency seeking to enter into a high-cost contract to send to the comptroller the information necessary for the comptroller to make a determination.

C.S.H.B. 4682 requires a state agency, during the contract formation and contract management process with respect to which a private procurement specialist is assigned, to collaborate with and obtain the approval of the specialist before taking any action to publicly release solicitation documents, execute a final contract, or make a payment or a series of payments that equal half of the contract value. The bill, however, establishes exceptions to the required approval of any such action by the specialist. The bill provides that if a state agency disagrees with a determination of a specialist regarding an action, the agency may take the action without the approval of the specialist if the administrative head of the agency and the comptroller approve the action. The bill, moreover, authorizes the comptroller to adopt rules for waiving the approval of a specialist.

C.S.H.B. 4682 requires the assigned specialist and the comptroller, in determining whether to approve an action, to review related documentation to ensure that potential risks related to the high-cost contract have been identified and mitigated. The bill gives a specialist the duties of reviewing and approving actions and, throughout the contract formation and contract management process, providing recommendations and assistance to the state agency regarding the contract to which the specialist is assigned.

C.S.H.B. 4682 authorizes the assigned private procurement specialist, after review of and comment on the matter by the Legislative Budget Board and the governor, to recommend the cancellation of a solicitation of a high-cost contract during the contract formation or contract management process if a proposed solicitation is not in the best interest of the state, a proposed contract would place the state at an unacceptable risk if executed, or an executed contract is experiencing performance failure or payment irregularities. The bill provides that each high-cost contract is subject to cancellation in accordance with those and other provisions.

C.S.H.B. 4682 requires the state agency seeking to enter into a contract for which a private procurement specialist is assigned to enter into an agreement to compensate the specialist using either a flat fee agreement or a pay-for-performance agreement. The bill requires a state agency using a pay-for-performance agreement to develop a pro forma budget for the contract based on the agency's expected cost of entering into and managing the contract if the agency were using ordinary procurement procedures but without using the services of a specialist. The bill requires the pay-for-performance agreement to provide that the specialist will be paid a percentage of the savings realized by the agency as a result of employing the specialist, compared with the agency's pro forma budget for the contract.

C.S.H.B. 4682 requires each state agency that has used the services of a private procurement specialist during the preceding year to report to the comptroller, not later than January 1 of each year, the savings realized by the agency as a result of using the specialist's services.

C.S.H.B. 4682 requires the comptroller to adopt rules to implement and administer the new subchapter on private procurement specialists.

C.S.H.B. 4682 removes the review of the solicitation of major contracts by state agencies from the duties of the Contract Advisory Team. The bill repeals a provision relating to the inclusion of procedures for agency consultation with the team and requirements relating to those procedures in the contract management guide developed by that team.

C.S.H.B. 4682 repeals Section 2262.051(f), Government Code.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 4682 adds provisions not in the original applying provisions of the new subchapter relating to private procurement specialists only to a Texas Department of Transportation (TxDOT) high-cost contract that is for a major information resources project. The substitute differs from the original by referencing that TxDOT provision specifically as an exception to a provision elsewhere in the law on statewide contract management that makes such law inapplicable to TxDOT contracts that relate to highway construction or highway engineering or that are subject to TxDOT law on contract claims. The original creates a less specific, different exception to that provision.

C.S.H.B. 4682 adds a provision not in the original making the new subchapter on private procurement specialists inapplicable to a contract for professional or consulting services under Professional Services Procurement Act.

C.S.H.B. 4682 adds provisions not in the original requiring the comptroller to select and assign private procurement specialists, establishing eligibility requirements for such specialists, and prohibiting those specialists from bidding on or otherwise making a proposal on a contract to which the specialist was assigned.

C.S.H.B. 4682 makes technical corrections to provisions included in the original relating to rules required of the comptroller for the purchasing and procurement of contracts. The substitute differs from the original by requiring the comptroller to assign a private procurement specialist for a high-cost contract if the comptroller determines that there will probably be a net savings to the state over the life of the contract if a specialist is assigned, whereas the original requires all high-cost contracts to include the collaboration of a specialist for certain purposes regardless of potential net savings. The substitute adds a provision not in the original requiring a state agency seeking to enter into a high-cost contract to send to the comptroller the information necessary for the comptroller to make a determination as to net savings. The substitute adds a provision not in the original authorizing a state agency to request that the comptroller assign a specialist for a proposed contract if the agency determines that there will probably be a net savings.

C.S.H.B. 4682 makes changes, primarily technical and corrective, with respect to issues that the comptroller and state agency are required to consider before a private procurement specialist is assigned and relating to coordination and consultation with the specialist on high-cost contracts relating to a major information resources project.

C.S.H.B. 4682, with respect to collaboration between a state agency and a private procurement specialist on a high-cost contract, adds provisions not included in the original requiring that such collaboration occur during the contract formation and contract management process. The substitute adds provisions not in the original requiring, with certain exceptions, approval by the specialist of an action to publicly release solicitation documents, execute a final contract, or make a payment or series of payments that equal half the contract value. The substitute, with respect to such a contract, adds a provision not in the original authorizing a state agency that disagrees with a determination of a private procurement specialist regarding such an action to take the action if the administrative head of the agency and the comptroller approve. The substitute differs from the original by requiring the comptroller to adopt rules for waiving the approval of a private procurement specialist, whereas the original authorizes the comptroller by rule to adopt criteria for waiving the review and approval requirements.

C.S.H.B. 4682 differs from the original by removing a provision included in the original establishing that a private procurement specialist's fee is to be paid by the appropriate agency out of funds appropriated. The substitute differs from the original by instead specifying that a state agency seeking to enter into a contract for which a specialist is assigned to enter into an agreement to compensate the specialist using either a flat fee agreement or a pay-for-performance agreement, and setting forth requirements relating to the use of a pay-for-performance agreement.

C.S.H.B. 4682 adds a provision not included in the original establishing that each high-cost contract is subject to cancellation.

C.S.H.B. 4682 adds a provision not included in the original establishing reporting requirements for each state agency that has used the services of a private procurement specialist during the preceding year.

C.S.H.B. 4682 adds a provision included not in the original requiring the comptroller to adopt rules to implement and administer the new subchapter on private procurement specialists.

C.S.H.B. 4682 differs from the original by providing for a September 1, 2009, effective date, whereas the original provides for immediate effect contingent on the bill's receiving the necessary two-thirds vote in each house, or otherwise a September 1, 2009, effective date.