

BILL ANALYSIS

C.S.H.B. 198
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Government Efficiency & Reform
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 a private industry and a state governmental agency can be complicated and economically detrimental to Texas. Without proper knowledge and expertise, the state may at times enter into a contract that is not financially prudent. Permitting the use of a private procurement specialist to collaborate with and assist a state agency during the procurement of a contract could save Texas millions of dollars.

C.S.H.B. 198 adds provisions to the law relating to the use of a private procurement specialist 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 and the Department of Information Resources in SECTION 3 of this bill.

ANALYSIS

C.S.H.B. 198 amends the Government Code to require a state agency, when appropriate, to select a private procurement specialist as provided by the bill's provisions. The bill requires a private procurement specialist to be a person from the private sector who is an expert in the subject matter of the contract for which the private procurement specialist is selected and proficient in the procurement laws applicable to that contract. The bill requires a private procurement specialist, during the contract formation and contract management process with respect to the high-cost contract for which the private procurement specialist is selected, to review and approve the agency's public release of solicitation documents, execution of a final contract, and making of a payment or a series of payments that equal half of the contract value. The bill requires the private procurement specialist, throughout the contract formation and contract management process, to provide recommendations and assistance to the state agency regarding the contract for which the private procurement specialist is selected. The bill requires the comptroller of public accounts or, if applicable, the Department of Information Resources (DIR) and the state agency seeking to enter into the contract, before the comptroller or the DIR approves the use of a private procurement specialist, to consider potential private procurement specialists' relative experience and knowledge on the subject matter of the contract and probable fees or costs associated with securing the services of a private procurement specialist.

C.S.H.B. 198 prohibits a private procurement specialist or a business entity in which the specialist has a substantial interest from bidding on or otherwise making a proposal to receive a contract for which the specialist was selected. The bill prohibits a selected private procurement specialist or a business entity in which the specialist has a substantial interest from providing services for or to a client, other than services provided to a state agency under the bill's provisions, if the provision of services involves a matter directly related to the contract for which the specialist was selected by the agency or creates a conflict of interest that may directly affect

the state's interest. The bill extends the prohibition against bidding on or making a proposal to receive a contract for which the specialist was selected and the prohibition against providing service for or to a client, other than services provided to a state agency, under the specified conditions to make those prohibitions applicable to a proposal to an agent, subsidiary, or parent company of the private procurement specialist and to a person related within the second degree of consanguinity or affinity to the private procurement specialist.

C.S.H.B. 198 establishes that, for purposes of the bill's provisions relating to the use of private procurement specialists by state agencies, a private procurement specialist has a substantial interest in a business entity if the specialist or the specialist's spouse, if applicable, owns the business entity, or the combined ownership of the specialist and the specialist's spouse, if applicable, is at least 10 percent of the voting stock or shares of the business entity or if the specialist or the specialist's spouse, if applicable, is a partner, limited partner, or officer of the business entity. The bill defines "business entity" for purposes of the bill's provisions relating to the use of private procurement specialists by state agencies.

C.S.H.B. 198 requires a state agency, with the approval of the comptroller or, if applicable, the DIR, to use a private procurement specialist for a high-cost contract if the agency determines that, given the cost and nature of the proposed contract, there probably will be a net savings to the state over the life of the contract if a specialist is selected. The bill requires DIR approval, rather than the comptroller's approval, to use a private procurement specialist for a high-cost contract for a major information resources project. The bill requires a state agency seeking to enter into a high-cost contract to send to the comptroller or, if applicable, to the DIR the information necessary to approve the use of a private procurement specialist. The bill requires that information to include, at a minimum, the state agency's draft solicitation for the contract.

C.S.H.B. 198 requires a state agency, during the contract formation and contract management process with respect to a high-cost contract for which a private procurement specialist is approved, to collaborate with and, except as otherwise provided, obtain the approval of the private procurement specialist before publicly releasing solicitation documents, executing a final contract, and making a payment or a series of payments that equal half of the contract value. The bill requires the selected private procurement specialist, in determining whether to approve such agency actions, to review related documentation to ensure that potential risks related to the high-cost contract have been identified and mitigated. The bill authorizes a state agency, if the agency disagrees with the determination of the private procurement specialist regarding an agency action, to take the action without the specialist's approval if the agency's administrative head and the comptroller or, if applicable, the DIR approve the action.

C.S.H.B. 198 authorizes the selected 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 or a contract 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, with regard to an executed contract, an agency is experiencing performance failure or payment irregularities. The bill makes each high-cost contract subject to cancellation in accordance with these provisions and requires a state agency to include in each of its high-cost contracts a term that provides that the state agency may immediately terminate the contract without further obligation to the contractor if there is a performance failure or there are payment irregularities with regard to the contract.

C.S.H.B. 198 requires a state agency seeking to enter into a contract for which a private procurement specialist is selected to enter into an agreement with the specialist to compensate the specialist using either a flat fee agreement or a pay-for-performance agreement. The bill requires a state agency, if a pay-for-performance agreement is used, to develop a projected budget for the contract based on the agency's expected cost of entering into and managing the contract if the agency were to enter into and manage the contract using ordinary procurement procedures but without using the services of a private procurement specialist. The bill requires

the pay-for-performance agreement to provide that the private procurement specialist will be paid a percentage of the savings realized by the agency as a result of using the private procurement specialist, compared with the agency's projected budget for the contract. The bill defines "ordinary procurement procedures" for purposes of the bill's provisions relating to payment of private procurement specialist services.

C.S.H.B. 198 requires each state agency that has used the services of a private procurement specialist during the preceding year to report, not later than January 1 of each year, to the comptroller the savings realized by the agency as a result of using the private procurement specialist's services. The bill requires a state agency to base the determination of savings realized on the agency's projected costs or budget for the contract compared to the actual costs for the contract.

C.S.H.B. 198 requires the comptroller and the DIR to adopt rules to implement and administer these provisions, including rules for waiving approval of the use of a private procurement specialist.

C.S.H.B. 198 creates an exception to the nonapplicability of state law regarding statewide contract management to certain contracts of the Texas Department of Transportation (TxDOT) and makes the bill's provisions applicable to a TxDOT contract only if the contract is a high-cost contract and is for a major information resources project. The bill exempts from the bill's provisions a contract entered into under state law governing building construction and acquisition by the state.

C.S.H.B. 198 removes review of the solicitation of major contracts by state agencies from the Contract Advisory Team's duties to assist state agencies in improving contract management practices.

C.S.H.B. 198 makes its provisions relating to private procurement specialists applicable only to a contract for which the solicitation of bids, offers, qualifications, proposals, or similar expressions of interest is published on or after September 1, 2011.

C.S.H.B. 198, for purposes of the bill's provisions, defines "high-cost contract" and "solicitation" and provides for the meaning of "major information resources project" by reference.

C.S.H.B. 198 repeals Section 2262.051(f), Government Code, relating to a requirement for the contract management guide to establish procedures for state agency consultation with the Contract Advisory Team before issuing a major contract solicitation.

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 198 differs from the original by exempting a contract entered into under state law governing building construction and acquisition by the state from the bill's provisions relating to the use of private procurement specialists by state agencies, whereas the original exempts a contract for professional or consulting services under the Professional Services Procurement Act from those provisions.

C.S.H.B. 198 differs from the original by prohibiting a private procurement specialist; a business entity in which the specialist has a substantial interest; an agent, subsidiary, or parent company of the private procurement specialist; or a person related within the second degree of consanguinity or affinity to the private procurement specialist from bidding on or otherwise making a proposal to receive a contract for which the specialist was selected, whereas the

original prohibits only a private procurement specialist from doing so.

C.S.H.B. 198 contains a provision not included in the original prohibiting the same entities that are prohibited from bidding or making such proposals from providing services for or to a client, other than services provided to a state agency if the provision of services involves a matter directly related to the contract for which the specialist was selected by the agency or creates a conflict of interest that may directly affect the state's interest. The substitute contains a provision not included in the original establishing the conditions that constitute having a substantial interest in a business.

C.S.H.B. 198 contains a provision not included in the original defining "business entity" for purposes of the substitute's provisions relating to the use of private procurement specialists by state agencies.

C.S.H.B. 198 contains a provision not included in the original defining "ordinary procurement procedures" for purposes of the bill's provisions relating to payment of private procurement specialist services