

BILL ANALYSIS

Senate Research Center

C.S.S.B. 543
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Business & Commerce
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The manner in which state agencies engage and administer 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. Successful contract management involves four phases: planning, procurement, contract formation/rate/price establishment, and contract oversight. A sole focus on any one stage would not prevent problems from risks or predatory practices from occurring in subsequent phases. The state's lengthy and costly withdrawal from several state contracts in recent years demonstrates the need for increased oversight and training in the contracting process.

C.S.S.B. 543 improves management of state contracts by adding required policies and procedures by which state agencies solicit, negotiate, enter into, and manage contracts with vendors.

C.S.S.B. 543 amends current law relating to certain requirements applicable to contracts entered into by, and the contract management process of, state agencies.

[**Note:** While a statutory reference in this bill is to the Texas Building and Procurement Commission (TBPC), the comptroller of public accounts of the State of Texas is the successor agency to TBPC for procurement services.]

RULEMAKING AUTHORITY

Rulemaking authority previously granted to each state agency that makes procurements to which Chapter 2261 applies is modified in SECTION 11 (Section 2261.202, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2102.005, Government Code, as follows:

Sec. 2102.005. INTERNAL AUDITING REQUIRED. Requires a state agency to conduct a program of internal auditing that includes an annual audit plan that is prepared using risk assessment techniques and that identifies the individual audits to be conducted during the year, including an annual audit of the agency's contracts.

SECTION 2. Amends Section 2113.102(a), Government Code, as follows:

(a) Prohibits a state agency from using appropriated money to contract with a person to audit the agency, rather than to audit the financial records or accounts of the agency, except as provided by Subsections (b), (c), and (d), and in accordance with Section 321.020. Deletes existing text prohibiting a state agency from using appropriated money to audit the agency except as provided by Chapter 466, pertaining to the state lottery, Chapter 2306, pertaining to the Texas Department of Housing and Community Affairs, and Chapter 361, Transportation Code, pertaining to the Texas Turnpike Authority division of the Texas Department of Transportation. Makes nonsubstantive changes.

SECTION 3. Amends Section 2162.103(a), Government Code, as follows:

(a) Requires the State Council on Competitive Government (council), in comparing the cost of providing a service, to consider the:

- (1) and (2) Makes nonsubstantive changes;
- (3) installation costs and any other initial costs associated with a contract with a private contractor;
- (4) other costs associated with the transition to using a private contractor's goods or services; and
- (5) cost savings to the state if a private contractor were awarded the contract.

SECTION 4. Amends Section 2261.002, Government Code, as follows:

Sec. 2261.002. DEFINITIONS. Redefines "contract" and defines "contract deliverable," "contract manager," "executive director," "general counsel," and "major contract" in this chapter.

SECTION 5. Amends Subchapter A, Chapter 2261, Government Code, by adding Sections 2261.004, 2261.005, 2261.006, and 2261.007, as follows:

Sec. 2261.004. STATE AGENCY REPOSITORY AND RECORDS. (a) Requires each state agency to maintain in a central location all contracts for that agency.

(b) Requires each state agency to maintain a comprehensive list of all contracts for that agency.

(c) Provides that in this subsection, "contract" includes a sole-source contract. Requires each state agency to maintain accurate records of all essential information relating to agency contracts, including information on:

(1) a contract delay or changes to a contract in which total expenditures under the contract increase by more than 35 percent from the original contract amount; and

(2) cost overruns, including a written explanation of why expenditures have increased under a contract.

(d) Requires that contracts and other related information required to be maintained under this section by a state agency, notwithstanding Section 441.185, be retained for the duration of the contract.

Sec. 2261.005. CONTRACT REPORTING. (a) Provides that, in this section, "contract" includes a construction contract.

(b) Sets forth certain sections prescribing the requirements for certain contracts.

Sec. 2261.006. PROFESSIONAL SERVICES. Requires a state agency to procure professional services in accordance with Subchapter A (Professional Services), Chapter 2254.

Sec. 2261.007. CONTRACT GUIDELINES AND PROCEDURES. Requires each state agency to establish formal guidelines and procedures for all employees involved in the contracting process regarding who may approve a contract for the agency, for contract planning and solicitation, for contract negotiations, for contract management, and for contract oversight.

SECTION 6. Amends Subchapter B, Chapter 2261, Government Code, by adding Section 2261.054, as follows:

Sec. 2261.054. BEST VALUE STANDARD FOR CONTRACTING FOR GOODS AND SERVICES. Provides that in determining the best value for the state, the purchase price and whether the goods or services meet specifications are the most important considerations. Authorizes a state agency to consider, subject to Sections 2155.074(c) (requiring a state agency to receive approval from the Texas Building and Procurement Commission for purchases) and 2155.075 (Requirement to Specify Value Factors in Request for Bids or Proposals), other relevant factors, and sets forth those factors.

SECTION 7. Amends the heading to Subchapter C, Chapter 2261, Government Code, to read as follows:

SUBCHAPTER C. CONTRACT FORMATION AND PROVISIONS

SECTION 8. Amends Subchapter C, Chapter 2261, Government Code, by adding Sections 2261.103, 2261.104, 2261.105, 2261.106, and 2261.007, as follows:

Sec. 2261.103. USE OF UNIFORM FORMS. Authorizes a state agency to use any forms developed by the comptroller of public accounts of the state of Texas (comptroller) as templates, guides, or samples for contracts entered into by the agency.

Sec. 2261.104. ESSENTIAL CONTRACT PROVISIONS. Sets forth required provisions in each contract to which the provisions are applicable, other than a grant.

Sec. 2261.105. CONTRACT PROVISIONS REQUIRED BY STATE LAW. Provides that in any contract for the acquisition of goods or services to which a state agency is a party, a provision required by applicable law to be included in the contract is considered to be a part of the executed contract without regard to whether the provision appears on the face of the contract, or the contract includes any provision to the contrary.

Sec. 2261.106. CONTRACT RENEWAL. Requires a state agency to establish a standardized process for renewing all contracts of the agency.

Sec. 2261.107. CONTRACT DURATION. (a) Requires a state agency:

(1) to establish a reasonable term for a contract before solicitation of the contract; and

(2) to make an effort to keep the maximum length of a contract to four years without reissuing a competitive solicitation, including any contract renewals or extensions.

(b) Requires that a contract term established under Subsection (a)(1) be included in a solicitation document.

(c) Prohibits a state agency from entering into a contract that has an indefinite term.

SECTION 9. Amends Subchapter D, Chapter 2261, Government Code, by adding Section 2261.152, as follows:

Sec. 2261.152. CONTRACT PAYMENT. (a) Requires a state agency to require that payment under a contract be linked to clear and measurable achievements, such as length of time of work or contract deliverables for each contract for goods or services that is subject to this chapter.

(b) Prohibits a state agency from making a final payment on a contract for goods or services that is subject to this chapter unless the agency verifies that all contract deliverables have been received.

SECTION 10. Amends the heading to Subchapter E, Chapter 2261, Government Code, to read as follows:

SUBCHAPTER E. CONTRACT MONITORING AND OVERSIGHT

SECTION 11. Amends Section 2261.202, Government Code, as follows:

Sec. 2261.202. **CONTRACT MONITORING RESPONSIBILITIES.** (a) Creates this subsection from existing text. Requires each state agency that makes procurements to which this chapter applies to establish and adopt by rule a policy that clearly defines the contract monitoring roles and responsibilities, if any, of agency staff, including internal audit staff and other inspection, investigative, or audit staff.

(b) Requires that the policy to establish clear lines of accountability, staff roles and responsibilities, and decision-making authority for program staff, contract management staff, and executive management staff.

SECTION 12. Amends Subchapter E, Chapter 2261, Government Code, by adding Sections 2261.204, 2261.205, 2261.206, 2261.207, 2261.208, 2261.209, 2261.210, 2261.211, 2261.212, 2261.213, and 2261.214, as follows:

Sec. 2261.204. **INFORMATION ON CONTRACTOR PERFORMANCE.** (a) Requires each state agency to, after a contract is completed or otherwise terminated, review the contractor's performance under the contract.

(b) Requires a state agency to report to the comptroller on the results of the review regarding a contractor's performance under a major contract using forms made available to the state agency.

(c) Authorizes a state agency to use any vendor performance tracking system available to state agencies to determine whether to award a contract to a person reviewed in the database.

Sec. 2261.205. **EXCLUDING CONTRACTOR FROM SOLICITATION PROCESS.** Authorizes a state agency to exclude a contractor from the solicitation process for a contract if the agency determines the contractor has performed poorly on a previous state contract without regard to whether the contractor has been barred under Section 2155.077 (Barring Vendor from Participation in State Contracts), based on its own contractor performance reviews and on information in any vendor performance tracking system available to state agencies.

Sec. 2261.206. **CONTRACTING STAFF.** (a) Requires each state agency that enters into contracts other than interagency contracts to establish a career ladder program for contract management in the agency.

(b) Authorizes an employee hired as a contract manager to participate in procurement planning, contract solicitation, contract formation, price establishment, and other contract activities.

(c) Requires each state agency to determine, in consultation with the state auditor, the amount and significance of contract management duties sufficient for an employee to be considered a contract manager, program staff, or a contract specialist.

Sec. 2261.207. **APPROVAL OF CONTRACTS.** (a) Requires each state agency to adopt a policy to establish a monetary threshold above which agency contracts and

amendments to or extensions of agency contracts require written authorization by the agency executive director.

(b) Requires an agency executive director to authorize a contract amendment in writing for state agency contracts valued in excess of \$1 million.

(c) Requires each state agency to annually report to the comptroller a list of persons authorized to approve contracts at the agency. Requires that the list include each person's name, position, and supervisory responsibility, if any.

Sec. 2261.208. **NEGOTIATION OF MAJOR CONTRACT BY SINGLE EMPLOYEE PROHIBITED.** Prohibits a state agency from negotiating a major contract with only one employee engaging in the negotiation.

Sec. 2261.209. **CONTRACT REVIEW; REPORTING.** (a) Requires that a contractor's performance be periodically reviewed throughout the term of a contract.

(b) Requires a state agency to ensure ongoing communication between executive management staff, contract management staff, and program staff of the results of the reviews performed under Subsection (a) with specific attention to contracts that are anticipated to be completed later than originally estimated, or expected to cost more than the amount that was originally budgeted.

(c) Requires that a state agency, to implement this section, create a system for agency-wide reporting on the status of, activity on, and contractor performance for each contract.

Sec. 2261.210. **CONTRACT ADMINISTRATION TEAM.** (a) Provides that this section applies to a state agency that has a contract with a value of \$5 million or more.

(b) Requires a state agency to which this section applies to create a contract administration team to ensure and verify the performance of agency contracts with a value of \$5 million or more, and maintain within the agency contract oversight expertise to effectively manage contractors.

Sec. 2261.211. **CONTRACT MONITORING PROCESS.** Requires a state agency to establish and implement a monitoring process for agency contracts that includes: identifying the appropriate criteria for use in measuring contract performance, creating a schedule for monitoring contract performance, comparing work accomplished to work planned to be accomplished, analyzing contract performance variances, and addressing contracting performance problems with corrective action.

Sec. 2261.212. **RISK MANAGEMENT PROCESS.** (a) Requires a state agency to establish and implement a:

(1) process for evaluating the potential risk to the state, such as product risk, process risk, financial risk, and schedule risk, if contract implementation or performance problems occur, including a process for

(A) risk identification or identifying items that may prevent the agency from achieving contracting goals or objectives;

(B) risk analysis or assessing the impact and likelihood of a risk;

(C) risk evaluation or developing strategies or approaches to address risks that have been identified and analyzed;

(D) risk treatment or the managerial approach to risk;

(E) risk reduction or planning and performing actions to mitigate risk due to a managerial decision to reduce risk;

(F) contingency planning or developing plans for corrective action to be taken if a potential risk occurs; and

(G) risk monitoring or tracking the implementation of a risk reduction plan until the risk is sufficiently mitigated; and

(2) procedure for corrective action to be used when contract implementation or performance problems occur.

(b) Requires the state agency, in creating the process required by Subsection (a)(1), to consider:

(1) the complexity and subject matter of agency contracts;

(2) the dollar value of agency contracts, including contract extensions and amendments, and whether the procurement will result in a major contract;

(3) the anticipated payment methodology;

(4) the experience of agency staff with the type of procurement;

(5) whether the results of the procurement will impact the public or only impact the agency;

(6) time constraints or the expected duration of the procurement; and

(7) the type, availability, and experience of staff resources required to implement the objectives of the procurement.

(c) Requires the state agency, based on the assessed risk of an agency contract, to, for each contract:

(1) determine the appropriate frequency and method of contract monitoring;

(2) allocate contract monitoring resources; and

(3) develop a contract auditing plan.

Sec. 2261.213. **CONTRACT COMMUNICATION.** (a) Requires a state agency to maintain effective communication procedures regarding contract performance.

(b) Requires the chief financial officer of a state agency, or an individual designated by the executive director with similar duties and skills as a chief financial officer, to report at least monthly to the executive director on the status of agency contracts. Requires that the report include a clear indication of any contract cost overruns or contracts that are performing poorly and contracts that may cause the state to delay or default on service delivery.

Sec. 2261.214. **REPORT ON CERTAIN PURCHASES.** (a) Requires the comptroller, not later than August 1 of each year, to publish a report on the number and dollar value of sole source and emergency purchases made in the previous calendar year. Requires that the report compare the total dollar value of all sole source and emergency purchases made with the total dollar value of all competitively awarded contracts.

(b) Requires each state agency to timely provide to the comptroller the information the comptroller requires for the purpose of creating the report under Subsection (a).

(c) Requires the comptroller to establish requirements for the provision of information under Subsection (b) in consultation with the Contract Advisory Team created under Subchapter C (Contract Advisory Team), Chapter 2262, the Health and Human Services Commission (HHSC), and the Texas Department of Transportation (TxDOT).

(d) Prohibits the comptroller from requiring a state agency to provide information under Subsection (b) on a contract related to health and human services if the value of the contract cannot be determined at the time of execution of the contract and any qualified vendor is eligible for the contract.

SECTION 13. Amends Chapter 2261, Government Code, by adding Subchapters F, G, H, and I, as follows:

SUBCHAPTER F. CHANGES TO CONTRACTS

Sec. 2261.251. CONTRACT AMENDMENTS, EXTENSIONS, AND CHANGE ORDERS. (a) Provides that an extension of or amendment to a state agency contract, including a change order, is subject to the same agency approval processes as the original contract.

(b) Prohibits a state agency from extending or amending a contract unless the agency complies with the same agency approval processes for the extension or amendment as required for the original contract and the agency states in writing why the extension or amendment is necessary or advantageous to the state.

(c) Provides that this section does not affect whether a state agency is required to undertake a new solicitation process in the manner required for a new contract in order to extend or amend a contract.

Sec. 2261.252. LARGE CHANGE IN CONTRACT VALUE; COST OVERRUNS. (a) Provides that if a proposed contract amendment or extension changes the monetary value of a major contract by at least 35 percent or \$1 million, the state agency must submit the amendment or extension for review to the agency's executive director before the agency amends or extends the contract.

(b) Provides that Subsection (a) does not apply to a proposed contract amendment required by a state or federal statute.

(c) Requires that the executive director be timely notified of any unanticipated contract cost overrun.

Sec. 2261.253. CERTAIN CONTRACT EXTENSIONS. Provides that this subchapter does not apply to contract extensions that are specifically established as a component of the original procurement.

SUBCHAPTER G. TRAINING

Sec. 2261.301. TRAINING FOR CONTRACT MANAGERS. (a) Requires a state agency to require a contract manager to complete the training program for contract managers developed and administered by the comptroller.

(b) Requires a state agency to maintain a list of contract managers who have completed the training program for contract managers.

(c) Authorizes a state agency to develop qualified contract manager training to supplement the training required under this section.

Sec. 2261.302. TRAINING FOR GOVERNING BODIES. Requires all members of the governing body of a state agency to complete at least one abbreviated course of the training program for contract managers developed and administered by the comptroller. Provides that this section does not apply to a state agency that does not enter into any contracts.

SUBCHAPTER H. CONTRACT PLANNING AND SOLICITATION

Sec. 2261.351. CONTRACT PLANNING. Requires a state agency, before it solicits a contract, to: identify, justify, and document the need for the good or service; identify general contracting objectives, assumptions, and constraints; consider alternatives to soliciting the contract; and determine the preferred method of delivery for the good or service.

Sec. 2261.352. SOLICITATION OF CONTRACT. (a) Requires a state agency to include certain provisions in a contract solicitation and sets forth those provisions.

(b) Requires a state agency to include certain requirements for the contract deliverables in preparing a contract solicitation and sets forth those requirements.

SUBCHAPTER I. CONTRACT CLOSING

Sec. 2261.401. CLOSING PROCEDURE. Requires a state agency to create and follow a procedure for contract closing that includes procedures for verification that all required goods or services have been delivered or performed, inspected, and accepted; and existing options have been exercised or have expired; issuance of a contract completion notice by one of the parties; acquisition of all required forms, reports, and clearances; verification that other applicable terms have been met; verification that there are no outstanding claims or disputes; and final payment.

SECTION 14. Amends Sections 2262.051(c) and (d), Government Code, as follows:

(c) Requires that the guide provide required and recommended contracting processes and procedures and information regarding the primary duties of contract management, rather than a contract manager, including how to:

- (1) develop and negotiate a contract;
- (2) fairly and objectively select a contractor;
- (3) monitor contractor and subcontractor performance under a contract and ensure compliance with provisions in a contract that hold the contractor accountable for performance results;
- (4) develop an accurate and comprehensive statement of work and conform contract documents to the statement of work;
- (5) evaluate and ensure compliance with contract deliverable and performance metrics and any associated remedies and incentives;
- (6) maintain required documentation for contracting decisions, contract changes, and problems with a contract;
- (7) communicate any serious issue or risk that is identified with a contract in a timely manner to the agency's governing body or the single officer who governs the agency;

- (8) create a risk management process under Section 2261.212;
- (9) build and maintain a working relationship with the contractor, including instruction on communication and timely management of problems;
- (10) create a procedure for selecting and applying a preferred dispute resolution method;
- (11) implement an escalation process to address contract disagreements;
- (12) evaluate and approve requests for payments that are consistent with the contract; and
- (13) develop a process for contract closure and performance evaluation of a contractor under a contract.

(d) Requires that the guide include model provisions for state agency contracts. Requires that the guide:

- (1) Makes no change to this subdivision;
- (2) recognize the unique contracting needs of an individual state agency or program and provide procedures for documenting agency decisions that do not follow required contracting processes and procedures, rather than sufficient flexibility to accommodate those needs, but are consistent with protecting the interests of this state;
- (3) and (4) Makes no change to these subdivisions.

SECTION 15. Provides that Sections 2261.104, 2261.105, 2261.107, 2261.208, 2261.351, and 2261.352, Government Code, as added by this Act, apply only to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after the effective date of this Act.

SECTION 16. Provides that a contract manager is not required to complete the training required under Section 2261.301, Government Code, as added by this Act, until September 1, 2017.

SECTION 17. Provides that a member of a governing body of a state agency is not required to complete the training required under Section 2261.302, Government Code, as added by this Act, until September 1, 2017.

SECTION 18. Provides that a state agency is not required to comply with Section 2261.202, Government Code, as amended by this Act, and Section 2261.004 and Sections 2261.204 through 2261.213, Government Code, as added by this Act, until September 1, 2017.

SECTION 19. Effective date: November 1, 2015.