

By: Zaffirini, et al.

S.B. No. 543

A BILL TO BE ENTITLED

AN ACT

relating to certain requirements applicable to contracts entered into by, and the contract management process of, state agencies.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2102.005, Government Code, is amended to read as follows:

Sec. 2102.005. INTERNAL AUDITING REQUIRED. A state agency shall conduct a program of internal auditing that includes:

(1) an annual audit plan that is prepared using risk assessment techniques and that identifies the individual audits to be conducted during the year; and

(2) periodic audits of:

(A) the agency's major systems and controls, including:

(i) ~~[A]~~ accounting systems and controls;

(ii) ~~[B]~~ administrative systems and controls; ~~and~~

(iii) ~~[C]~~ electronic data processing systems and controls; and

(iv) contract management processes and controls; and

(B) one or more of the agency's contracts with high-risk factors.

SECTION 2. Section 2113.102(a), Government Code, is amended

1 to read as follows:

2 (a) A state agency may not use appropriated money to
3 contract with a person to audit [~~the financial records or accounts~~
4 ~~of~~] the agency except:

- 5 (1) as provided by~~+~~
6 [~~(1)~~] Subsections (b), (c), and (d); and
7 (2) in accordance with Section 321.020 [~~Chapter 466,~~
8 ~~pertaining to the state lottery,~~
9 [~~(3) Chapter 2306, pertaining to the Texas Department~~
10 ~~of Housing and Community Affairs; and~~
11 [~~(4) Chapter 361, Transportation Code, pertaining to~~
12 ~~the Texas Turnpike Authority division of the Texas Department of~~
13 ~~Transportation]~~.

14 SECTION 3. Section 2162.103(a), Government Code, is amended
15 to read as follows:

16 (a) In comparing the cost of providing a service, the
17 council shall consider the:

- 18 (1) cost of supervising the work of a private
19 contractor; ~~and~~
20 (2) cost of a state agency's performance of the
21 service, including:
22 (A) the costs of the comptroller, attorney
23 general, and other support agencies; and
24 (B) other indirect costs related to the agency's
25 performance of the service;
26 (3) installation costs and any other initial costs
27 associated with a contract with a private contractor;

1 (4) other costs associated with the transition to
2 using a private contractor's goods or services; and

3 (5) cost savings to the state if a private contractor
4 were awarded the contract.

5 SECTION 4. Section 2261.002, Government Code, is amended
6 read as follows:

7 Sec. 2261.002. DEFINITIONS. In this chapter:

8 (1) "Contract" includes an agreement or other written
9 expression of terms of agreement, including an amendment, a
10 modification, a renewal, or an extension, for the purchase or sale
11 of goods or services that is entered into or paid for, wholly or
12 partly, by a state agency during a fiscal year and a grant, other
13 than a grant made to a school district or a grant made for other
14 academic purposes, under which the recipient of the grant is
15 required to perform a specific act or service, supply a specific
16 type of product, or both.

17 (2) "Contract deliverable" means a unit or increment
18 of work required by a contract, including goods, services, reports,
19 or documents.

20 (3) "Contract manager" means a person who:
21 (A) is employed by a state agency; and
22 (B) has significant contract management duties
23 for the state agency.

24 (4) "Executive director" means the administrative
25 head of a state agency.

26 (5) "General counsel" means the general counsel of a
27 state agency.

1 (6) "Major contract" means a contract, including a
2 renewal of a contract, that has a value of at least \$1 million. The
3 term includes a service contract.

4 (7) "State agency" has the meaning assigned by Section
5 2151.002.

6 SECTION 5. Subchapter A, Chapter 2261, Government Code, is
7 amended by adding Sections 2261.004, 2261.005, 2261.006, and
8 2261.007 to read as follows:

9 Sec. 2261.004. STATE AGENCY REPOSITORY AND RECORDS.

10 (a) Each state agency shall maintain in a central location all
11 contracts for that agency.

12 (b) Each state agency shall maintain a comprehensive list of
13 all contracts for that agency.

14 (c) In this subsection, "contract" includes a sole-source
15 contract. Each state agency shall maintain accurate records of all
16 essential information relating to agency contracts, including
17 information on:

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

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

23 (d) Notwithstanding Section 441.185, contracts and other
24 related information required to be maintained under this section by
25 a state agency must be retained for the duration of the contract.

26 Sec. 2261.005. CONTRACT REPORTING. (a) In this section,
27 "contract" includes a construction contract.

1 (b) The following sections prescribe reporting requirements
2 for certain contracts:

3 (1) Section 322.020;

4 (2) Section 2054.008;

5 (3) Section 2166.2551;

6 (4) Section 2254.006; and

7 (5) Section 2254.0301.

8 Sec. 2261.006. PROFESSIONAL SERVICES. A state agency shall
9 procure professional services in accordance with Subchapter A,
10 Chapter 2254.

11 Sec. 2261.007. CONTRACT GUIDELINES AND PROCEDURES. Each
12 state agency shall establish formal guidelines and procedures for
13 all employees involved in the contracting process:

14 (1) regarding who may approve a contract for the
15 agency;

16 (2) for contract planning and solicitation;

17 (3) for contract negotiations;

18 (4) for contract management; and

19 (5) for contract oversight.

20 SECTION 6. Subchapter B, Chapter 2261, Government Code, is
21 amended by adding Section 2261.054 to read as follows:

22 Sec. 2261.054. BEST VALUE STANDARD FOR CONTRACTING FOR
23 GOODS AND SERVICES. In determining the best value for the state,
24 the purchase price and whether the goods or services meet
25 specifications are the most important considerations. A state
26 agency may consider, subject to Sections 2155.074(c) and 2155.075,
27 other relevant factors, including:

- 1 (1) installation costs;
- 2 (2) life cycle costs;
- 3 (3) the quality and reliability of the goods and
4 services;
- 5 (4) the delivery terms;
- 6 (5) indicators of probable vendor performance under
7 the contract such as past vendor performance, the vendor's
8 financial resources and ability to perform, the vendor's experience
9 or demonstrated capability and responsibility, and the vendor's
10 ability to provide reliable maintenance agreements and support;
- 11 (6) the cost of any employee training associated with
12 a purchase;
- 13 (7) the effect of a purchase on agency productivity;
- 14 (8) the vendor's anticipated economic impact on the
15 state or a subdivision of the state, including potential tax
16 revenue and employment; and
- 17 (9) other factors relevant to determining the best
18 value for the state in the context of a particular purchase.

19 SECTION 7. The heading to Subchapter C, Chapter 2261,
20 Government Code, is amended to read as follows:

21 SUBCHAPTER C. CONTRACT FORMATION AND PROVISIONS

22 SECTION 8. Subchapter C, Chapter 2261, Government Code, is
23 amended by adding Sections 2261.103, 2261.104, 2261.105, 2261.106,
24 and 2261.107 to read as follows:

25 Sec. 2261.103. USE OF UNIFORM FORMS. A state agency may use
26 any forms developed by the comptroller as templates, guides, or
27 samples for contracts entered into by the agency.

1 Sec. 2261.104. ESSENTIAL CONTRACT PROVISIONS. The
2 following are required provisions in each contract to which the
3 provisions are applicable, other than a grant:

- 4 (1) legal authority;
- 5 (2) statement of work;
- 6 (3) indemnification or damage claims;
- 7 (4) consideration;
- 8 (5) specifications;
- 9 (6) funding out clause;
- 10 (7) antitrust;
- 11 (8) payment;
- 12 (9) dispute resolution;
- 13 (10) term of contract;
- 14 (11) confidential information;
- 15 (12) abandonment or default;
- 16 (13) right to audit;
- 17 (14) force majeure;
- 18 (15) independent contractor; and
- 19 (16) termination.

20 Sec. 2261.105. CONTRACT PROVISIONS REQUIRED BY STATE LAW.
21 In any contract for the acquisition of goods or services to which a
22 state agency is a party, a provision required by applicable law to
23 be included in the contract is considered to be a part of the
24 executed contract without regard to whether:

- 25 (1) the provision appears on the face of the contract;
- 26 or
- 27 (2) the contract includes any provision to the

1 contrary.

2 Sec. 2261.106. CONTRACT RENEWAL. A state agency shall
3 establish a standardized process for renewing all contracts of the
4 agency.

5 Sec. 2261.107. CONTRACT DURATION. (a) A state agency:

6 (1) must establish a reasonable term for a contract
7 before solicitation of the contract; and

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

11 (b) A contract term established under Subsection (a)(1)
12 must be included in a solicitation document.

13 (c) A state agency may not enter into a contract that has an
14 indefinite term.

15 SECTION 9. Subchapter D, Chapter 2261, Government Code, is
16 amended by adding Section 2261.152 to read as follows:

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

22 (b) A state agency may not make a final payment on a contract
23 for goods or services that is subject to this chapter unless the
24 agency verifies that all contract deliverables have been received.

25 SECTION 10. The heading to Subchapter E, Chapter 2261,
26 Government Code, is amended to read as follows:

1 SUBCHAPTER E. CONTRACT MONITORING AND [CONTRACTOR] OVERSIGHT

2 SECTION 11. Section 2261.202, Government Code, is amended
3 to read as follows:

4 Sec. 2261.202. CONTRACT MONITORING RESPONSIBILITIES.

5 (a) As one of its contract management policies, each state agency
6 that makes procurements to which this chapter applies shall
7 establish and adopt by rule a policy that clearly defines the
8 contract monitoring roles and responsibilities, if any, of agency
9 staff, including internal audit staff and other inspection,
10 investigative, or audit staff.

11 (b) The policy must establish clear lines of
12 accountability, staff roles and responsibilities, and
13 decision-making authority for program staff, contract management
14 staff, and executive management staff.

15 SECTION 12. Subchapter E, Chapter 2261, Government Code, is
16 amended by adding Sections 2261.204, 2261.205, 2261.206, 2261.207,
17 2261.208, 2261.209, 2261.210, 2261.211, 2261.212, 2261.213, and
18 2261.214 to read as follows:

19 Sec. 2261.204. INFORMATION ON CONTRACTOR PERFORMANCE.

20 (a) After a contract is completed or otherwise terminated, each
21 state agency shall review the contractor's performance under the
22 contract.

23 (b) Using forms made available to the state agency, a state
24 agency shall report to the comptroller on the results of the review
25 regarding a contractor's performance under a major contract.

26 (c) A state agency may use any vendor performance tracking
27 system available to state agencies to determine whether to award a

1 contract to a person reviewed in the database.

2 Sec. 2261.205. EXCLUDING CONTRACTOR FROM SOLICITATION
3 PROCESS. Based on its own contractor performance reviews and on
4 information in any vendor performance tracking system available to
5 state agencies, a state agency may exclude a contractor from the
6 solicitation process for a contract if the agency determines the
7 contractor has performed poorly on a previous state contract
8 without regard to whether the contractor has been barred under
9 Section 2155.077.

10 Sec. 2261.206. CONTRACTING STAFF. (a) Each state agency
11 that enters into contracts other than interagency contracts shall
12 establish a career ladder program for contract management in the
13 agency.

14 (b) An employee hired as a contract manager may participate
15 in procurement planning, contract solicitation, contract
16 formation, price establishment, and other contract activities.

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

21 Sec. 2261.207. APPROVAL OF CONTRACTS. (a) Each state
22 agency shall adopt a policy to establish a monetary threshold above
23 which agency contracts and amendments to or extensions of agency
24 contracts require written authorization by the agency executive
25 director.

26 (b) For state agency contracts valued in excess of \$1
27 million, the agency executive director must authorize a contract

1 amendment in writing.

2 (c) Each state agency shall annually report to the
3 comptroller a list of persons authorized to approve contracts at
4 the agency. The list must include each person's name, position, and
5 supervisory responsibility, if any.

6 Sec. 2261.208. NEGOTIATION OF MAJOR CONTRACT BY SINGLE
7 EMPLOYEE PROHIBITED. A state agency may not negotiate a major
8 contract with only one employee engaging in the negotiation.

9 Sec. 2261.209. CONTRACT REVIEW; REPORTING. (a) A
10 contractor's performance must be periodically reviewed throughout
11 the term of a contract.

12 (b) A state agency shall ensure ongoing communication
13 between executive management staff, contract management staff, and
14 program staff of the results of the reviews performed under
15 Subsection (a) with specific attention to contracts that are:

16 (1) anticipated to be completed later than originally
17 estimated; or

18 (2) expected to cost more than the amount that was
19 originally budgeted.

20 (c) To implement this section, a state agency shall create a
21 system for agency-wide reporting on the status of, activity on, and
22 contractor performance for each contract.

23 Sec. 2261.210. CONTRACT ADMINISTRATION TEAM. (a) This
24 section applies to a state agency that has a contract with a value
25 of \$5 million or more.

26 (b) A state agency to which this section applies shall
27 create a contract administration team to:

1 (1) ensure and verify the performance of agency
2 contracts with a value of \$5 million or more; and

3 (2) maintain within the agency contract oversight
4 expertise to effectively manage contractors.

5 Sec. 2261.211. CONTRACT MONITORING PROCESS. A state agency
6 shall establish and implement a monitoring process for agency
7 contracts that includes:

8 (1) identifying the appropriate criteria for use in
9 measuring contract performance;

10 (2) creating a schedule for monitoring contract
11 performance;

12 (3) comparing work accomplished to work planned to be
13 accomplished;

14 (4) analyzing contract performance variances; and

15 (5) addressing contracting performance problems with
16 corrective action.

17 Sec. 2261.212. RISK MANAGEMENT PROCESS. (a) A state
18 agency shall establish and implement a:

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

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

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

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

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

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

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

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

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

15 (b) In creating the process required by Subsection (a)(1),
16 the state agency shall consider:

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

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

22 (3) the anticipated payment methodology;

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

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

27 (6) time constraints or the expected duration of the

1 procurement; and

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

4 (c) Based on the assessed risk of a state agency contract,
5 the agency shall, for each contract:

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

8 (2) allocate contract monitoring resources; and

9 (3) develop a contract auditing plan.

10 Sec. 2261.213. CONTRACT COMMUNICATION. (a) A state agency
11 shall maintain effective communication procedures regarding
12 contract performance.

13 (b) The chief financial officer of a state agency, or an
14 individual designated by the executive director with similar duties
15 and skills as a chief financial officer, shall report at least
16 monthly to the executive director on the status of agency
17 contracts. The report must include a clear indication of:

18 (1) any contract cost overruns or contracts that are
19 performing poorly; and

20 (2) contracts that may cause the state to delay or
21 default on service delivery.

22 Sec. 2261.214. REPORT ON CERTAIN PURCHASES. (a) Not later
23 than August 1 of each year, the comptroller shall publish a report
24 on the number and dollar value of sole source and emergency
25 purchases made in the previous calendar year.

26 (b) Each state agency shall timely provide to the
27 comptroller the information the comptroller requires for the

1 purpose of creating the report under Subsection (a) in the manner
2 and form specified by the comptroller.

3 (c) The comptroller shall establish requirements for the
4 provision of information under Subsection (b) in consultation with
5 the Contract Advisory Team created under Subchapter C, Chapter
6 2262, the Health and Human Services Commission, and the Texas
7 Department of Transportation.

8 (d) The comptroller may not require a state agency to
9 provide information under Subsection (b) on a contract related to
10 health and human services if:

11 (1) the value of the contract cannot be determined at
12 the time of execution of the contract; and

13 (2) any qualified vendor is eligible for the contract.

14 SECTION 13. Chapter 2261, Government Code, is amended by
15 adding Subchapters F, G, H, and I to read as follows:

16 SUBCHAPTER F. CHANGES TO CONTRACTS

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

21 (b) A state agency may not extend or amend a contract unless
22 the agency complies with the same agency approval processes for the
23 extension or amendment as required for the original contract and
24 the agency states in writing why the extension or amendment is
25 necessary or advantageous to the state.

26 (c) This section does not affect whether a state agency is
27 required to undertake a new solicitation process in the manner

1 required for a new contract in order to extend or amend a contract.

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

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

10 (c) The executive director shall be timely notified of any
11 unanticipated contract cost overrun.

12 Sec. 2261.253. CERTAIN CONTRACT EXTENSIONS. This
13 subchapter does not apply to contract extensions that are
14 specifically established as a component of the original
15 procurement.

16 SUBCHAPTER G. TRAINING

17 Sec. 2261.301. TRAINING FOR CONTRACT MANAGERS. (a) A
18 state agency shall require a contract manager to complete the
19 training program for contract managers developed and administered
20 by the comptroller.

21 (b) A state agency shall maintain a list of contract
22 managers who have completed the training program for contract
23 managers.

24 (c) A state agency may develop qualified contract manager
25 training to supplement the training required under this section.

26 Sec. 2261.302. TRAINING FOR GOVERNING BODIES. All members
27 of the governing body of a state agency shall complete at least one

1 abbreviated course of the training program for contract managers
2 developed and administered by the comptroller. This section does
3 not apply to a state agency that does not enter into any contracts.

4 SUBCHAPTER H. CONTRACT PLANNING AND SOLICITATION

5 Sec. 2261.351. CONTRACT PLANNING. Before a state agency
6 solicits a contract, the agency must:

7 (1) identify, justify, and document the need for the
8 good or service;

9 (2) identify general contracting objectives,
10 assumptions, and constraints;

11 (3) consider alternatives to soliciting the contract;
12 and

13 (4) determine the preferred method of delivery for the
14 good or service.

15 Sec. 2261.352. SOLICITATION OF CONTRACT. (a) A
16 solicitation for a contract must include the following:

17 (1) a description of the work;

18 (2) a specific and measurable standard of performance;

19 (3) a list of the test conditions, method, or
20 procedure for verifying that the contract deliverable meets the
21 standard;

22 (4) a method or process to monitor and ensure quality
23 in the contract deliverable;

24 (5) an acceptance process for each contract
25 deliverable that is expected to be delivered;

26 (6) a compensation structure that is consistent with
27 the type and value of work performed; and

1 (7) a remedy, if appropriate, for failure to meet
2 contract deliverables.

3 (b) In preparing a contract solicitation, a state agency
4 must include in the requirements for the contract deliverables:

5 (1) the quality level of the good or service;

6 (2) the amount of completion that is required;

7 (3) the suitability of the good or service for the work
8 to be done for the agency; and

9 (4) a defined and documented method of evaluation to
10 be used in making the award and in determining the best value bid
11 for the procurement.

12 SUBCHAPTER I. CONTRACT CLOSING

13 Sec. 2261.401. CLOSING PROCEDURE. A state agency shall
14 create and follow a procedure for contract closing that includes
15 procedures for:

16 (1) verification that all:

17 (A) required goods or services have been
18 delivered or performed, inspected, and accepted; and

19 (B) existing options have been exercised or have
20 expired;

21 (2) issuance of a contract completion notice by one
22 of the parties;

23 (3) acquisition of all required forms, reports, and
24 clearances;

25
26 (4) verification that other applicable terms have been
27 met;

1 (5) verification that there are no outstanding claims
2 or disputes; and

3 (6) final payment.

4 SECTION 14. Sections 2262.051(c) and (d), Government Code,
5 are amended to read as follows:

6 (c) The guide must provide required and recommended
7 contracting processes and procedures and information regarding the
8 primary duties of [a] contract management [~~manager~~], including how
9 to:

10 (1) develop and negotiate a contract;

11 (2) fairly and objectively select a contractor; [~~and~~]

12 (3) monitor contractor and subcontractor performance
13 under a contract and ensure compliance with provisions in a
14 contract that hold the contractor accountable for performance
15 results;

16 (4) develop an accurate and comprehensive statement of
17 work and conform contract documents to the statement of work;

18 (5) evaluate and ensure compliance with contract
19 deliverables and performance metrics and any associated remedies
20 and incentives;

21 (6) maintain required documentation for contracting
22 decisions, contract changes, and problems with a contract;

23 (7) communicate any serious issue or risk that is
24 identified with a contract in a timely manner to the agency's
25 governing body or the single state officer who governs the agency;

26 (8) create a risk management process under Section
27 2261.212;

1 (9) build and maintain a working relationship with the
2 contractor, including instruction on communication and timely
3 management of problems;

4 (10) create a procedure for selecting and applying a
5 preferred dispute resolution method;

6 (11) implement an escalation process to address
7 contract disagreements;

8 (12) evaluate and approve requests for payments that
9 are consistent with the contract; and

10 (13) develop a process for contract closure and
11 performance evaluation of a contractor under a contract.

12 (d) The guide must include model provisions for state agency
13 contracts. The guide must:

14 (1) distinguish between essential provisions that a
15 state agency must include in a contract to protect the interests of
16 this state and recommended provisions that a state agency may
17 include in a contract;

18 (2) recognize the unique contracting needs of an
19 individual state agency or program and provide procedures for
20 documenting agency decisions that do not follow required
21 contracting processes and procedures but are [sufficient
22 ~~flexibility to accommodate those needs,~~] consistent with
23 protecting the interests of this state;

24 (3) include maximum contract periods under which a new
25 competitive solicitation is not necessary; and

26 (4) include the model contract management process
27 developed under Section [2262.104](#) and recommendations on the

1 appropriate use of the model.

2 SECTION 15. Sections 2261.104, 2261.105, 2261.107,
3 2261.208, 2261.351, and 2261.352, Government Code, as added by this
4 Act, apply only to a contract for which a state agency first
5 advertises or otherwise solicits bids, proposals, offers, or
6 qualifications on or after the effective date of this Act.

7 SECTION 16. A contract manager is not required to complete
8 the training required under Section 2261.301, Government Code, as
9 added by this Act, until September 1, 2017.

10 SECTION 17. A member of a governing body of a state agency
11 is not required to complete the training required under Section
12 2261.302, Government Code, as added by this Act, until September 1,
13 2017.

14 SECTION 18. A state agency is not required to comply with
15 Section [2261.202](#), Government Code, as amended by this Act, and
16 Section 2261.004 and Sections 2261.204 through 2261.213,
17 Government Code, as added by this Act, until September 1, 2017.

18 SECTION 19. This Act takes effect November 1, 2015.