86R23586 TJB-D

By:  Capriglione, Phelan, Wilson, et al. H.B. No. 2189

Substitute the following for H.B. No. 2189:

By:  Holland C.S.H.B. No. 2189

A BILL TO BE ENTITLED

AN ACT

relating to the disclosure of certain contracting information under the public information law.

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

SECTION 1.  Section 552.003, Government Code, is amended by amending Subdivision (1) and adding Subdivision (7) to read as follows:

(1)  "Governmental body":

(A)  means:

(i)  a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

(ii)  a county commissioners court in the state;

(iii)  a municipal governing body in the state;

(iv)  a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(v)  a school district board of trustees;

(vi)  a county board of school trustees;

(vii)  a county board of education;

(viii)  the governing board of a special district;

(ix)  the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;

(x)  a local workforce development board created under Section 2308.253;

(xi)  a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; [~~and~~]

(xii)  a confinement facility operated under a contract with any division of the Texas Department of Criminal Justice;

(xiii)  a civil commitment housing facility owned, leased, or operated by a vendor under contract with the state as provided by Chapter 841, Health and Safety Code;

(xiv)  an entity that receives public funds in the current or preceding state fiscal year to manage the daily operations or restoration of the Alamo, or an entity that oversees such an entity; and

(xv)  the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(B)  does not include:

(i)  the judiciary; or

(ii)  an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts if:

(a)  the entity does not receive $1 million or more in public funds from a single state agency or political subdivision in the current or preceding state fiscal year; or

(b)  the entity:

(1)  either:

(A)  does not have the authority to make decisions or recommendations on behalf of a state agency or political subdivision regarding tax abatements or tax incentives; or

(B)  does not require an officer of the state agency or political subdivision to hold office as a member of the board of directors of the entity;

(2)  does not use staff or office space of the state agency or political subdivision for no or nominal consideration, unless the space is available to the public;

(3)  to a reasonable degree, tracks the entity's receipt and expenditure of public funds separately from the entity's receipt and expenditure of private funds; and

(4)  provides at least quarterly public reports to the state agency or political subdivision regarding work performed on behalf of the state agency or political subdivision.

(7)  "Contracting information" means the following information maintained by a governmental body or exchanged between a governmental body and a vendor, contractor, potential vendor, or potential contractor:

(A)  information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body;

(B)  solicitation or bid documents relating to a contract with a governmental body;

(C)  communications sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor during the solicitation, evaluation, or negotiation of a contract;

(D)  documents, including bid tabulations, showing the criteria by which a governmental body evaluates each vendor, contractor, potential vendor, or potential contractor responding to a solicitation and, if applicable, an explanation of why the vendor or contractor was selected; and

(E)  communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

SECTION 2.  Subchapter B, Chapter 552, Government Code, is amended by adding Section 552.0222 to read as follows:

Sec. 552.0222.  DISCLOSURE OF CONTRACTING INFORMATION. (a) Contracting information is public and must be released unless excepted from disclosure.

(b)  The exceptions to disclosure provided by Sections 552.110 and 552.1101 do not apply to the following types of contracting information:

(1)  a contract described by Section 2261.253(a), subject to Subsection (e) of that section;

(2)  a contract described by Section 322.020(c), subject to Subsection (d) of that section;

(3)  the following contract or offer terms or their functional equivalent:

(A)  any term describing the overall or total price the governmental body will or could potentially pay, including overall or total value, maximum liability, and final price;

(B)  a description of the items or services to be delivered with the total price for each if a total price is identified for the item or service in the contract;

(C)  the delivery and service deadlines;

(D)  the remedies for breach of contract;

(E)  the identity of all parties to the contract;

(F)  the identity of all subcontractors in a contract;

(G)  the affiliate overall or total pricing for a vendor, contractor, potential vendor, or potential contractor;

(H)  the execution dates;

(I)  the effective dates; and

(J)  the contract duration terms, including any extension options; or

(4)  information indicating whether a vendor, contractor, potential vendor, or potential contractor performed its duties under a contract, including information regarding:

(A)  a breach of contract;

(B)  a contract variance or exception;

(C)  a remedial action;

(D)  an amendment to a contract;

(E)  any assessed or paid liquidated damages;

(F)  a key measures report;

(G)  a progress report; and

(H)  a final payment checklist.

(c)  Notwithstanding Subsection (b), information described by Subdivisions (3)(A) and (B) of that subsection that relates to a retail electricity contract may not be disclosed until the delivery start date.

SECTION 3.  Section 552.104(a), Government Code, is amended to read as follows:

(a)  Information is excepted from the requirements of Section 552.021 if a governmental body demonstrates that release of the [~~it is~~] information [~~that, if released,~~] would harm its interests by providing an [~~give~~] advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.

SECTION 4.  Section 552.110, Government Code, is amended to read as follows:

Sec. 552.110.  EXCEPTION:  CONFIDENTIALITY OF TRADE SECRETS; CONFIDENTIALITY OF CERTAIN COMMERCIAL OR FINANCIAL INFORMATION. (a) In this section, "trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or however stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(1)  the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(2)  the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

(b)  Except as provided by Section 552.0222, information [~~A trade secret obtained from a person and privileged or confidential by statute or judicial decision~~] is excepted from the requirements of Section 552.021 if it is demonstrated based on specific factual evidence that the information is a trade secret.

(c)  Except as provided by Section 552.0222, commercial [~~(b)  Commercial~~] or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

SECTION 5.  Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.1101 to read as follows:

Sec. 552.1101.  EXCEPTION: CONFIDENTIALITY OF PROPRIETARY INFORMATION. (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1)  reveal an individual approach to:

(A)  work;

(B)  organizational structure;

(C)  staffing;

(D)  internal operations;

(E)  processes; or

(F)  discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2)  give advantage to a competitor.

(b)  The exception to disclosure provided by Subsection (a) does not apply to:

(1)  information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

(2)  communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

(c)  The exception to disclosure provided by Subsection (a) may be asserted only by a vendor, contractor, potential vendor, or potential contractor in the manner described by Section 552.305(b) for the purpose of protecting the interests of the vendor, contractor, potential vendor, or potential contractor. A governmental body shall decline to release information as provided by Section 552.305(a) to the extent necessary to allow a vendor, contractor, potential vendor, or potential contractor to assert the exception to disclosure provided by Subsection (a).

SECTION 6.  Section 552.131, Government Code, is amended by adding Subsection (b-1) to read as follows:

(b-1)  An economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts may assert the exceptions under this section in the manner described by Section 552.305(b) with respect to information that is in the economic development entity's custody or control.

SECTION 7.  Sections 552.305(a) and (d), Government Code, are amended to read as follows:

(a)  In a case in which information is requested under this chapter and a person's privacy or property interests may be involved, including a case under Section 552.101, [~~552.104,~~] 552.110, 552.1101, [~~or~~] 552.114, 552.131, or 552.143, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

(d)  If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.1101, 552.113, [~~or~~] 552.131, or 552.143, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision. Notice under this subsection must:

(1)  be in writing and sent within a reasonable time not later than the 10th business day after the date the governmental body receives the request for the information; and

(2)  include:

(A)  a copy of the written request for the information, if any, received by the governmental body; and

(B)  a statement, in the form prescribed by the attorney general, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10th business day after the date the person receives the notice:

(i)  each reason the person has as to why the information should be withheld; and

(ii)  a letter, memorandum, or brief in support of that reason.

SECTION 8.  Section 552.321, Government Code, is amended by adding Subsection (c) to read as follows:

(c)  A requestor may file suit for a writ of mandamus compelling a governmental body or an entity to comply with the requirements of Subchapter J.

SECTION 9.  Chapter 552, Government Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. ADDITIONAL PROVISIONS RELATED TO CONTRACTING INFORMATION

Sec. 552.371.  CERTAIN ENTITIES REQUIRED TO PROVIDE CONTRACTING INFORMATION TO GOVERNMENTAL BODY IN CONNECTION WITH REQUEST. (a) This section applies to an entity that executes a contract with a governmental body that includes the receipt or expenditure of at least $1 million in public funds for the purchase of goods or services.

(b)  This section applies to a written request for public information received by a governmental body that is a party to a contract described by Subsection (a) for contracting information related to the contract that is in the custody or possession of the entity and not maintained by the governmental body.

(c)  A governmental body that receives a written request for information described by Subsection (b) shall request that the entity provide the information to the governmental body. The governmental body must send the request in writing to the entity not later than the third business day after the date the governmental body receives the written request described by Subsection (b).

(d)  Notwithstanding Section 552.301:

(1)  a request for an attorney general's decision under Section 552.301(b) to determine whether contracting information subject to a written request described by Subsection (b) falls within an exception to disclosure under this chapter is considered timely if made not later than the 13th business day after the date the governmental body receives the written request described by Subsection (b);

(2)  the statement and copy described by Section 552.301(d) is considered timely if provided to the requestor not later than the 13th business day after the date the governmental body receives the written request described by Subsection (b);

(3)  a submission described by Section 552.301(e) is considered timely if submitted to the attorney general not later than the 18th business day after the date the governmental body receives the written request described by Subsection (b); and

(4)  a copy described by Section 552.301(e-1) is considered timely if sent to the requestor not later than the 18th business day after the date the governmental body receives the written request described by Subsection (b).

Sec. 552.372.  BIDS AND CONTRACTS. (a) A contract described by Section 552.371 must require a contracting entity to:

(1)  preserve all contracting information related to the contract for the duration of the contract;

(2)  promptly produce any contracting information related to the contract that is in the custody or possession of the entity on request of the governmental body; and

(3)  on completion of the contract, either:

(A)  provide at no cost to the governmental body all contracting information related to the contract that is in the custody or possession of the entity; or

(B)  preserve the contracting information related to the contract as provided by the records retention requirements applicable to the governmental body.

(b)  A bid for a contract described by Section 552.371 and the contract must include the following statement: "The requirements of Subchapter J, Chapter 552, Government Code, may apply to this (include "bid" or "contract" as applicable) and the contractor or vendor agrees that the contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter."

(c)  A governmental body may not accept a bid for a contract described by Section 552.371 or award the contract to an entity that the governmental body has determined has knowingly or intentionally failed to comply with this subchapter in a previous bid or contract described by that section unless the governmental body determines and documents that the entity has taken adequate steps to ensure future compliance with the requirements of this subchapter.

Sec. 552.373.  NONCOMPLIANCE WITH PROVISION OF SUBCHAPTER. A governmental body that is the party to a contract described by Section 552.371 shall provide notice to the entity that is a party to the contract if the entity fails to comply with a requirement of this subchapter applicable to the entity. The notice must:

(1)  be in writing;

(2)  state the requirement of this subchapter that the entity has violated; and

(3)  advise the entity that the governmental body may terminate the contract without further obligation to the entity if the entity does not cure the violation on or before the 10th business day after the date the governmental body provides the notice.

Sec. 552.374.  TERMINATION OF CONTRACT FOR NONCOMPLIANCE. (a) A governmental body may terminate a contract described by Section 552.371 if:

(1)  the governmental body provides notice under Section 552.373 to the entity that is party to the contract;

(2)  the contracting entity does not cure the violation in the period prescribed by Section 552.373;

(3)  the governmental body determines that the contracting entity has intentionally or knowingly failed to comply with a requirement of this subchapter; and

(4)  the governmental body determines that the entity has not taken adequate steps to ensure future compliance with the requirements of this subchapter.

(b)  For the purpose of Subsection (a), an entity has taken adequate steps to ensure future compliance with this subchapter if:

(1)  the entity produces contracting information requested by the governmental body that is in the custody or possession of the entity not later than the 10th business day after the date the governmental body makes the request; and

(2)  the entity establishes a records management program to enable the entity to comply with this subchapter.

Sec. 552.375.  CAUSE OF ACTION NOT CREATED. This subchapter does not create a cause of action to contest a bid for or the award of a contract with a governmental body.

SECTION 10.  The changes in law made by this Act apply only to a request for public information that is received by a governmental body or an officer for public information on or after the effective date of this Act.

SECTION 11.  Subchapter J, Chapter 552, Government Code, as added by this Act, applies only to a contract described by that subchapter that is executed on or after the effective date of this Act.

SECTION 12.  This Act takes effect January 1, 2020.