

BILL ANALYSIS

C.S.S.B. 65
By: Nelson
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

It has been suggested that the legislature, in coordination with state agencies and stakeholders, has recently made great strides in improving the state contracting process and related agency compliance. However, there have been calls to implement further reforms to aid state agencies in improving compliance with contracting requirements. C.S.S.B. 65 seeks to address these calls by providing for the implementation of a series of recommendations that will translate into increased efficiency and effectiveness in the state contracting process.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the comptroller of public accounts in SECTIONS 5, 26, 27, and 29 of this bill; to the Department of Information Resources in SECTIONS 26 and 29 of this bill; and to other applicable state agencies in SECTION 29 of this bill.

ANALYSIS

C.S.S.B. 65 amends the Government Code to change the qualifying information resources technology projects identified in state agency biennial operating plans that are subject to oversight as a major information resources project under the Information Resources Management Act by replacing the specification that the applicable projects are those whose development costs exceed \$1 million with the specification that the applicable projects are those whose development costs exceed \$5 million.

C.S.S.B. 65 requires the state auditor, before July 1 of each year, to assign one of the following ratings to each of the 25 largest state agencies in that state fiscal year as determined by the Legislative Budget Board (LBB):

- additional monitoring warranted;
- no additional monitoring warranted; or
- reduced monitoring warranted.

C.S.S.B. 65 sets out certain information the state auditor is required to consider in making those assignments and requires the state auditor, on or before September 1 of each year, to submit to the comptroller of public accounts and the Department of Information Resources (DIR) a report that lists each state agency that was assigned a rating and, for an agency that was assigned a rating of additional or reduced monitoring warranted, specifies that additional or reduced monitoring, as applicable, is required during one or more of the following periods:

- contract solicitation development;
- contract formation and award; or
- contract management and termination.

The bill makes the first such report due on or before September 1, 2020.

C.S.S.B. 65 requires the comptroller, in consultation with the Contract Advisory Team, to develop by rule guidelines for the additional or reduced monitoring of a state agency during those periods for a contract that falls under the monetary thresholds for review or monitoring by the Contract Advisory Team. The bill requires DIR, in consultation with the quality assurance team, to develop by rule guidelines for the additional or reduced monitoring of a state agency during those periods for a contract that falls under the monetary thresholds for review or monitoring by the quality assurance team. The bill provides for the administration of its provisions relating to the annual contract monitoring assessment by the state auditor.

C.S.S.B. 65 removes the requirement for the biennial DIR performance report on the use of information resources technologies by state government to examine the following:

- major information resources projects completed in the previous state fiscal biennium to determine the performance of the implementing state agency, cost and value effectiveness, timeliness, and other performance criteria necessary to assess the quality and value of the investment; and
- major information resources projects after the second anniversary of the project's completion to determine progress toward meeting performance goals and operating budget savings.

C.S.S.B. 65 revises the quality assurance team's statutory duties regarding state agency information resources technology projects by:

- specifying that the policies and procedures developed and recommended for such projects are policies and procedures to improve the development, implementation, and return on investment for the projects;
- removing the requirement for the team to develop and recommend procedures to improve the implementation of such projects by including considerations for best value and return on investment;
- requiring the team to review a state agency's business case prepared for a major information resources project and make recommendations to improve the implementation of the project but authorizing the team to waive the review for any project if the waiver is determined to be appropriate because of the project's associated risk;
- requiring the team to review and provide recommendations on the final negotiated terms of a contract for the development or implementation of a major information resources project with a value of at least \$10 million; and
- requiring the team to provide a report to the governor, lieutenant governor, speaker of the house of representatives, and presiding officer of the standing committee of each house of the legislature with primary jurisdiction over appropriations by December 1 of each even-numbered year that includes certain specified information related to major information resources projects.

C.S.S.B. 65 repeals provisions authorizing the quality assurance team to review and analyze a major information resources project's risk to determine whether to approve a project for the expenditure of funds and repeals provisions requiring a state agency proposing to spend appropriated funds for such a project to first conduct an execution capability assessment.

C.S.S.B. 65 prohibits a state agency from amending a contract whose final negotiated terms are subject to review by the quality assurance team if the contract is at least 10 percent over budget or the associated major information resources project is at least 10 percent behind schedule unless the agency conducts a cost-benefit analysis with respect to canceling or continuing the project and submits the analysis to the team.

C.S.S.B. 65 requires a state agency, for each major information resources project, to provide to the quality assurance team any verification and validation report or quality assurance report related to the project not later than the 10th day after the date the agency receives a request for the report and authorizes the team to request any information necessary to determine a major information resources project's potential risk. The bill repeals the requirement for the quality assurance team to place on a list for more intense monitoring a project the team determines is not likely to achieve its performance goals.

C.S.S.B. 65, with respect to review of a contract for a major information resources project, requires a state agency to take the following actions:

- submit the proposed contract terms to the quality assurance team before the start of negotiations and submit the final negotiated unsigned contract to the team for review for each contract for the development or implementation of a major information resources project with a value of at least \$10 million;
- comply with a recommendation made by the team or submit to the team a written explanation regarding why the recommendation is not applicable to the contract under review;
- before amending a contract related to a major information resources project, notify the governor, lieutenant governor, speaker of the house of representatives, presiding officer of the standing committee of each house of the legislature with primary jurisdiction over appropriations, and quality assurance team if the total value of the amended contract exceeds or will exceed the initial contract value by 10 percent or more or if the amendment requires the contractor to provide consultative services, technical expertise, or other assistance in defining project scope or deliverables; and
- provide to the team a justification for such an amendment.

C.S.S.B. 65 removes a major contract, defined by law as a contract that has a value of at least \$1 million under which a vendor will perform or manage an outsourced function or process, from the contracts to which provisions of the Information Resources Management Act relating to the Texas project delivery framework apply. The bill removes the requirement for DIR to consult with the LBB and state auditor's office in developing and providing the guidelines and forms required by those delivery framework provisions.

C.S.S.B. 65 revises the requirement for a state agency to prepare a business case, statewide impact analysis, and technical architectural assessment for each proposed major information resources project by:

- removing the requirement for the business case to include the anticipated return on investment in terms of cost savings and efficiency for the project;
- limiting the applicability of the requirement to prepare the statewide impact analysis and technical architectural assessment of the project to state agencies that receive from the state auditor the rating of "additional monitoring warranted" as provided under the bill's provisions;
- removing the requirement for that impact analysis to include the possibility of reusing code or other resources;
- conditioning the requirement to prepare the technical architectural assessment of the project on the quality assurance team requesting the assessment; and

- requiring a state agency to comply with a recommendation made by the team relating to the prepared business case or to submit to the team a written explanation regarding why the recommendation is not applicable to the project under review.

C.S.S.B. 65 repeals the provision prohibiting a state agency from issuing a vendor solicitation for a major information resources project or posting a vendor solicitation for the project in the state business daily unless the project plan has been filed with the quality assurance team and DIR. The bill removes the provision making a state agency's first issuance of a vendor solicitation for a major information resources project contingent on the agency first filing that plan for the project with the quality assurance team and DIR.

C.S.S.B. 65 removes the requirement for a state agency to develop a certain procurement plan for each vendor and a method to monitor changes to the scope of each contract before issuing a solicitation for a major information resources project. The bill requires the agency, before issuing a solicitation for a contract for a project whose final negotiated terms are subject to review by the quality assurance team under the bill's provisions, to develop, consistent with any acquisition plan provided in the contract management guide, a procurement plan with anticipated service levels and performance standards for each contractor and a method to monitor changes to the scope of each contract.

C.S.S.B. 65 revises the provision requiring a state agency's executive director, information resources manager, designated project manager, and the agency employee in charge of information security for the agency to approve and sign certain required documents and contract change orders by:

- removing the requirement for each approved document and change order to be signed by each of those state agency personnel;
- removing the requirement for an agency's information resources manager, designated project manager, and employee in charge of information security for the agency to approve such documents and change orders; and
- giving the option for a designee of an agency's executive director to approve the documents and change orders as an alternative to the executive director doing so.

C.S.S.B. 65 requires a state agency, in conducting the internal auditing program required of each state agency, to consider methods for ensuring compliance with contract processes and controls and for monitoring agency contracts.

C.S.S.B. 65 requires a state agency to review the performance of a vendor under a contract with a value in excess of \$5 million at least once each year during the term of the contract and at each key milestone identified for the contract. The bill prohibits an agency from extending a vendor's contract until after the agency reports the results of each review of the vendor in the manner prescribed by law. The bill removes the exception from the vendor performance reporting requirements for a contract of the Teacher Retirement System of Texas (TRS) and creates an exception from those requirements for a contract entered into by the comptroller to acquire all goods and services for a state agency and a contract entered into by DIR to purchase information technology commodity items.

C.S.S.B. 65 delegates to the Health and Human Services Commission the authority to procure goods and services related to a contract for a project to construct or expand a state hospital operated by a health and human services agency or a state supported living center or a deferred maintenance project for such a health facility.

C.S.S.B. 65 replaces the requirement for a state agency entering into a major consulting services contract to file certain related information with the secretary of state for publication in the Texas Register not later than the 30th day before it enters into the contract with a requirement for the

agency to post that information in the state business daily. The bill repeals the requirement for a state agency that enters into a major consulting services contract to file certain information related to the contract with the secretary of state after entering into the contract for publication in the Texas Register.

C.S.S.B. 65 requires a state agency's procurement director to review the process and all documents used by the agency to assess each vendor who responded to the vendor solicitation for a contract before awarding the contract to a vendor. The procurement director must certify in writing that the agency assessed each vendor's response to the solicitation using the evaluation criteria published in the solicitation or, if applicable, the written evaluation criteria established by the agency and that the final calculation of scoring of responses was accurate. The bill requires a state agency to justify in writing any change in the scoring of a vendor that occurs following the initial assessment and scoring of responses. The bill requires the written justification to be reviewed by the agency's procurement director, who must certify in writing that the change in scoring was appropriate. The bill provides for the delegation of certification authority under certain circumstances. A written certification or justification required by these provisions must be placed in the contract file. The bill requires a state agency that awards a contract to a vendor who did not receive the highest score in an assessment process certified under the bill's provisions to state in writing in the contract file the reasons for making the award.

C.S.S.B. 65 requires each state agency to include in the contract file for each of its contracts for goods or services subject to state contracting standards and oversight a written explanation of the agency's decision to include or not include in the contract a provision for liquidated damages or another form of liability for damages caused by the contractor. If an extension of a state agency's contract modifies a provision for liquidated damages or another provision relating to a contractor's liability for damages, the agency must amend the written explanation or justification required by these provisions to include a justification for the modification. The contract file must also include, if applicable, a written justification for any provision in the contract that limits the liability of a contractor for damages.

C.S.S.B. 65 subjects a contract of TRS to statutory provisions establishing ethics, reporting, and approval requirements for certain state agency contracts. The bill authorizes the governing body or governing official of a state agency, as appropriate, to delegate to the agency's deputy executive director the authority to approve and sign off on a contract for the purchase of goods or services that has a value exceeding \$1 million.

C.S.S.B. 65 requires a state agency that uses the centralized accounting and payroll system authorized under applicable state law or an alternative computer software system for compliance requirements related to the procurement of goods or services to electronically submit to the comptroller using that computer software system a written justification, verification, notification, or acknowledgement required under statutory provisions governing state contracting standards and oversight or statutory provisions establishing general rules and procedures for state purchasing.

C.S.S.B. 65 requires each state agency to include in the contract file for each of its contracts a checklist to ensure the agency's compliance with state laws and rules relating to the acquisition of goods and services by the agency. The bill requires the comptroller to develop and periodically update a model contract file checklist and make the checklist available for use by state agencies. The bill authorizes the comptroller to adopt rules necessary to develop or update the model contract file checklist and sets out requirements for the contents of the model checklist. A state agency may develop its own contract file checklist based on the procurement and contracting needs of that agency, provided that the checklist developed by the agency is consistent with the comptroller's model contract file checklist and meets any requirements established by comptroller rule.

C.S.S.B. 65 requires a state agency's contract manager or procurement director, before awarding a contract to a vendor for the purchase of goods or services, to do the following:

- review the contents of the contract file for the contract, including the checklist, to ensure that all documents required by state law or applicable agency rules are complete and present in the file; and
- certify in a written document to be included in the contract file that the review was completed.

The bill authorizes a state agency's contract manager or procurement director to delegate that certification authority to a person in the agency's procurement office and requires the comptroller to prescribe by rule the conditions under which a state agency's contract manager or procurement director must make the requisite certification and may delegate the certification authority.

C.S.S.B. 65 prohibits a vendor awarded a services contract by a state agency from assigning the vendor's rights under the contract to a third party unless the assignment is approved by the state agency. The bill requires a state agency to notify the LBB of the proposed assignment at least 14 days before the agency rejects or approves it if the contract subject to the assignment is for a major information resources project or involves storing, receiving, processing, transmitting, disposing of, or accessing sensitive personal information, as that term is defined under the Identity Theft Enforcement and Protection Act, in a foreign country.

C.S.S.B. 65 requires a state agency contract solicitation document that is an electronic document to be retained in the document's electronic form until at least the seventh anniversary of the date the contract is completed or expires or all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents are resolved. A state agency may print and retain the document in paper form if the agency appropriately provides for the preservation, examination, and use of the electronic form of the document, including any formatting or formulas that are part of the electronic format of the document.

C.S.S.B. 65 repeals provisions that:

- exempt TRS from statutory provisions governing state contracting standards and oversight and statutory provisions governing statewide contract management;
- grant TRS exclusive authority over the purchase of goods and services using money other than money appropriated from the general revenue fund, including specifically money from trust funds administered by TRS;
- exempt TRS from the State Purchasing and General Services Act with respect to that money; and
- establish certain other requirements and authorizations with respect to TRS procurement.

C.S.S.B. 65 requires the comptroller, DIR, and each affected state agency as necessary to adopt the rules, processes, and procedures and take the actions necessary to implement the changes in law made by the bill's provisions.

C.S.S.B. 65 repeals the following provisions of the Government Code:

- Sections 825.103(d) and (g)
- Section 2054.1181(f)
- Section 2054.1184
- Sections 2054.159(c) and (d)

- Section 2054.304(c)
- Section 2254.030
- Section 2254.031(c)
- Section 2254.033(b)

EFFECTIVE DATE

September 1, 2019.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 65 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute revises provisions requiring approval for the assignment of the rights of a contractor under certain state contracts to a third party by:

- making the provisions applicable to all state agency services contracts instead of to an agency contract for a major information resources project or involving sensitive personal information;
- replacing a requirement for the assignment of vendor's rights under the contract to a third party to be approved by the quality assurance team with a provision requiring the assignment to be approved by the contracting agency;
- removing the requirement for a contracting agency to notify the quality assurance team of a proposed assignment;
- limiting the contracts involving sensitive personal information for which the contracting agency must notify the LBB to those involving the storing, receiving, processing, transmitting, disposing of, or accessing sensitive personal information in a foreign country; and
- requiring the notification provided to the LBB with respect to such a contract or a contract for a major information resources project to be given at least 14 days before the contracting agency rejects or approves the vendor's proposed assignment.

The substitute does not include a provision revising the requirement for DIR to develop by rule the performance indicators the quality assurance team is required to monitor for the entire life cycle of each major information resources project by requiring each member of the team to approve the indicators.

The substitute does not include a provision requiring the guidelines and forms developed for the documents required for the Texas project delivery framework to be approved by each member of the quality assurance team.

The substitute includes DIR among the recipients of the report from the state auditor regarding state agency monitoring assessments.

The substitute revises the requirement for the comptroller to develop guidelines for additional or reduced monitoring of a state agency during certain periods to require the comptroller to develop those guidelines in consultation with the Contract Advisory Team.

The substitute includes a provision requiring DIR to develop by rule guidelines for the additional or reduced monitoring of a state agency during applicable periods for a contract that falls under the monetary thresholds for review or monitoring by the quality assurance team.

The substitute includes the repeal of Sections 825.103(d) and (g), relating to the procurement methods of TRS and the applicability of certain related state law to TRS.