

SUBJECT: Management and oversight of state contracts

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Cook, Giddings, Craddick, Farrar, Geren, Harless, Huberty,
Kuempel, Sylvester Turner

0 nays

3 absent — Farney, Oliveira, Smithee

WITNESSES: For — (*Registered, but did not testify*: Michael Chatron, AGC Texas Building Branch; Jon Fisher, Associated Builders and Contractors of Texas; Jim Sewell, Gallagher Construction Services; Tom “Smitty” Smith, Public Citizen, Inc.; Michelle Romero, Texas Medical Association; David Lancaster, Texas Society of Architects)

Against — None

On — (*Registered, but did not testify*: Robert Wood, Comptroller of Public Accounts; Ron Pigott, Health and Human Services Commission)

BACKGROUND: Government Code, sec. 2262.101 establishes a Contract Advisory Team to review and make recommendations involving contracts valued at \$10 million or more. The team is overseen by the comptroller and includes members from the Health and Human Services Commission, the comptroller’s office, the Department of Information Resources, the Texas Facilities Commission, the governor’s office, and a state agency with fewer than 100 employees.

Government Code, sec. 2157.068 defines a “commodity item” as commercial software, hardware, or technology services other than telecommunication services that are generally available to businesses or the public and for which a reasonable demand exists in two or more state agencies. With certain exceptions, state agencies are required to purchase IT commodity items through the cooperative contracts program at the

Department of Information Resources. Under the program, DIR establishes “master contracts” awarded through an open and competitive procurement process. Agencies may negotiate further discounts directly with a program vendor or purchase directly from vendors. Agencies are not required to report procurements made through the program to DIR.

The Texas Multiple Award Schedule (TxMAS) contracts developed by the comptroller adapt existing competitively awarded government contracts to the procurement needs of the state.

DIGEST: CSHB 3241 would add new requirements for state agency contracting and purchasing. The bill would:

- require agency officers or governing boards to approve contracts valued at more than \$1 million;
- require public disclosure of no-bid contracts;
- require agencies to post contracting information on their websites;
- prohibit conflicts of interest between agency officers and employees and vendors;
- require a two-year “cooling off” period for employees switching jobs between agencies and vendors; and
- require the state auditor to focus on Health and Human Services contracts exceeding \$100 million.

Contracting requirements and oversight. Agencies could enter into contracts for purchase of goods or services valued at more than \$1 million only if approved by the agency’s governing body and signed by the presiding officer or executive director. For agencies not governed by a multi-member governing body, the agency head would approve and sign a contract. The signature requirement would not apply to certain highway construction or maintenance contracts awarded by the Texas Department of Transportation (TxDOT).

For contracts valued at more than \$5 million, the agency contract management office or procurement director would be required to verify in writing that the solicitation and purchasing methods and contractor

selection process complied with state law and agency policy. The management office or procurement director also would have to submit to the governing official or body information on any potential issues that could arise in the contracting process.

Purchasing programs. The bill would add new requirements for contracts for goods and services awarded under the comptroller's multiple award contract schedule (TxMAS) and contracts for information technology commodities awarded under the Department of Information Resources (DIR) cooperative contracts program. Agencies could use the two programs to directly award a contract for purchases valued at \$50,000 or less. Agencies would be required to get three bids for purchases valued at more than \$50,000 up to \$150,000 and six bids for purchases valued at more than \$150,000 up to \$1 million.

Agencies could not purchase under either TxMAS or the cooperative contracts program if the value of the goods, services, or commodity item exceeded \$1 million.

The bill would require state agencies to consult with DIR before developing and initiating a statement of work for a contract valued at more than \$50,000. Money could not be paid to a vendor unless DIR first signed the statement of work. Agencies would be required to post each statement of work on their websites.

Contract Advisory Team. The bill would authorize the Contract Advisory Team to review agency notifications of a change order, amendment, renewal, or other proposed action that could change the value of a contract by more than 20 percent. If the team was not satisfied with an agency's justification for the contract change, it would be required to notify the comptroller, who would in turn notify the agency governing board or governing officer, the Legislative Budget Board (LBB), and each member of the Legislature.

The team would be expanded with one member each from TxDOT, the Texas Education Agency, and the Texas Commission on Environmental

Quality. The team would submit a quarterly report to the LBB on the number of solicitation documents and contracts it reviewed and whether and why agencies might have accepted or rejected the team's recommendations.

HHSC contracts. The bill would direct the state auditor to consider the performance on HHSC contracts that exceeded \$100 million in annual value, including a contract between HHSC and a managed care organization. Such an audit could be limited in scope to target an area of the contract determined to pose the highest financial risk to the state and would determine whether the entity contracting with HHSC had spent state money in accordance with the contract purposes. The state auditor would be allowed to contract with a private auditor.

Risk analysis. Each state agency would be required to develop and comply with a risk analysis procedure. The procedure would have to assess the risk of fraud, abuse, or waste for different types of contracts and identify contracts that would require enhanced monitoring. Agencies would have to publish a contract management handbook.

Vendor performance reviews. The bill would require state agencies to review vendor performance after completion or termination of a contract. Results of the review would be reported to the comptroller. Open enrollment contracts at HHSC would be exempted from the reporting requirement.

The comptroller would be required to establish a system for tracking vendor performance, including the agency performance review. Vendors would be allowed to protest an unfavorable performance review. A state agency could use the tracking system, which would be accessible to the public on the comptroller's website, to determine whether to award a contract to a vendor.

Reporting and posting requirements. Contracts valued at more than \$1 million would be subjected to reporting requirements that provided information on compliance with financial provisions and delivery

schedules, corrective actions plans, or liquidated damages assessed or collected.

Agencies would be required to post on their websites information about contracts including:

- each executed contract, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding until the contract expired or was completed;
- the statutory or other authority under which a contract that was not competitively bid was entered into without compliance with competitive bidding procedures; and
- the request for proposals related to a competitively bid contract until the contract expired or was completed.

The bill would require agencies to adopt rules establishing a procedure to identify contracts that required enhanced monitoring and to submit that information to the agency's governing body or officer.

Agencies would be required to retain records of contracts, including all contract solicitation documents related to an executed contract, for four years.

Conflicts of interest. The bill would require a two-year waiting period before a former state officer or employee who participated in a procurement or contract negotiation could work for that vendor. Violation of this provision would be a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000). The bill also would prohibit a state agency from hiring or entering into a contract for professional services or consulting with an individual who was a former employee of a private vendor if the agency work related to the individual's former duties for the vendor within two years of the individual's last date of employment with the private vendor.

State employees or officials involved in procurement or contract management would be required to disclose to their agency any potential

conflict of interest specified by state law or agency policy with respect to any private vendor contract or bid.

An agency could not enter into a contract if there was a financial interest with a private vendor by:

- a member of the agency's governing body;
- the governing officials, executive director, general counsel, chief procurement officer, or procurement director of the agency; or
- a family member related within the second degree by affinity or consanguinity to any of the above employees or officials.

A financial interest would exist if the employee or official owned or controlled, directly or indirectly, an ownership interest of a least 1 percent, including the right to share in profits, proceeds, or capital gains; or could reasonably foresee that a contract with a vendor could result in a financial benefit.

The comptroller would be required to include ethics training for state agency personnel. The training would include selection of an appropriate procurement method by project type and training by the Department of Information Resources on technology purchasing.

Higher education contracts. The bill would include new purchasing requirements for institutions of higher education. A college or university would not be allowed to enter into a contract valued at more than \$1 million or to amend or renew a contract that increased the original value to more than \$1 million without approval from the institution's board of regents. The board would have to approve any amendment, extension, or renewal that exceeded 25 percent of the original contract value.

An institution's boards of regents would be required to establish a code of ethics for officers and employees related to contracting, policies for internal investigation of suspected fiscal irregularities, a contract management handbook, and ethics training.

The code of ethics governing an institution of higher education would have to include policies governing:

- general standards of conduct;
- conflicts of interest and conflicts of commitment;
- outside activities by officers and employees;
- the use of institutional resources; and
- prohibitions on an officer or employee acting as an agent for another person in the negotiation of agreements related to money, services, or institutional property.

Colleges and universities would be required to establish contract review procedures and standards for internal audits related to risk management of contracting. The state auditor would be required to determine whether an institution had adopted the required rules and policies and would report noncompliance to the Legislature and comptroller. Institutions that failed to comply with a remediation plan would have their purchasing authority suspended.

Purchasing study. The comptroller, in cooperation with the governor's budget and policy staff, would be required to conduct a study examining the feasibility and practicality of consolidating state purchasing functions into fewer state agencies or one state agency. The study would examine cost savings that could be achieved through abolishing state agency purchasing offices and consolidating or reducing the number of vendors authorized to contract with the state to allow the state to better leverage its purchasing power.

The study would be due by December 31, 2016, to the governor, lieutenant governor, and Legislature and be posted on the comptroller's website. It would include:

- a detailed projection of savings or costs in consolidating purchasing;
- a report on the process for implementing the consolidation;
- a list of state agencies with purchasing responsibilities; and

- the cost of the purchasing responsibilities.

The bill's provisions for ethics, reporting, and approval requirements would apply to TxDOT and to an institution of higher education acquiring goods and services under specified Education Code provisions.

The bill would take effect September 1, 2015, and would apply only to contracts entered into on or after that date.

**SUPPORTERS
SAY:**

CSHB 3241 would address recent reports of problems in certain state government contracting processes by providing increased management, oversight, and reporting of contracts.

Over the past few decades, state government has shifted from directly delivering services to contracting for the delivery of many of those services. This shift has resulted in an increasing percentage of the state's budget being spent through contracts, including some contracts involving millions of dollars.

Contracting requirements. The bill would increase agency oversight by requiring the agency head to sign off on contracts exceeding \$1 million. The agency governing officer or board also would receive regular progress reports. Some state agencies are large, and this required oversight by agency leaders could help avoid contracting malfeasance. Additionally, the state auditor would be required to consider auditing any HHSC contract exceeding \$100 million.

Vendor performance reviews. The bill would establish a publicly available system to track vendor performance, including an evaluation by the comptroller's office. Agencies could use the tracking system to determine whether to award a contract to a vendor. The system would provide a process for vendors who received an unfavorable review to protest.

Reporting and performance requirements. State agencies would be required to post on their websites each contract the agency entered into,

including no-bid contracts and the authority under which a contract was not competitively bid. Agencies also would have to retain records related to any solicitations and contracts for at least four years after the contract expired.

Conflicts of interest. The bill contains strong conflict-of-interest provisions, including disclosure requirements. An agency could not enter into a contract with a private vendor in which any of the agency's leadership or their families had a financial interest.

The bill would end the "revolving door" that sometimes occurs between agency employees and vendor employees. A former employee of a state agency who participated in a procurement or contract negotiation with a certain entity could not then accept employment from that entity until two years after leaving the state agency. A state agency could not hire an individual who was a former employee of a private vendor and performed duties involving a previous contract between that vendor and the state until two years after leaving that vendor.

OPPONENTS
SAY:

CSHB 3241 could curtail the ability of state agencies to choose contracting vehicles that best met their needs for specific goods and services. When agencies have greater latitude to choose contractors, they have more choices, which leads to increased competition.

Contracting requirements. The \$1 million limit on commodity purchases substantially could increase the number of solicitations required by state agencies. This increase could put a strain on agency contracting and information technology staff. The requirement that DIR sign off on agency contracts involving statements of work would be impractical and cumbersome and could lead to delays in approving and administering contracts.

Conflicts of interest. The bill contains an overly broad "revolving door" prohibition that could prevent a person who merely worked for a division or agency from being barred from future employment with a vendor when that employee had no role in deciding whether a contract was awarded to

the vendor.

Vendor performance reviews. Instead of creating a new vendor performance tracking system, state agencies need to use the existing system.

The state's interactions with vendors should be defined by an open exchange of information and transparency. The state performance reviews required in the bill should include feedback from all individuals involved in the administration and supervision of a contracted project. This could open a dialogue about the next steps for continuous improvement.

Purchasing study. The bill should require as part of its centralized purchasing study the identification of best practices in purchasing and contract management, as well as ways the state could encourage greater competition.

NOTES:

The Legislative Budget Board's fiscal note estimates that CSHB 3241 would have a negative impact of about \$5 million for fiscal 2016-17.