

BILL ANALYSIS

Senate Research Center

C.S.S.B. 12
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Finance
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Committee Report (Substituted)

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

The manner in which state agencies engage in contracts with private and not-for-profit vendors is of vital concern for the state because it directly affects the use of state appropriated financial resources and, in some cases, the termination of state employee positions. In recent months, accounts have arisen that allege that some state agency employees engaged in improper actions when engaging in contracts on behalf of the state and investigations are currently underway by the Health and Human Services Commission. Examples like these highlight the need for increased oversight and training in the contracting process.

C.S.S.B. 12 improves the processes by which the state solicits, negotiates, enters into, and manages contracts with private and not-for-profit vendors by improving the training processes for employees involved in contracting; improving contract reporting mechanisms for state agencies; requiring needed provisions to address amendments; and addressing ethical issues specific to contracting.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Building and Procurement Commission in SECTION 1.02 (Section 2262.0015, Government Code) and SECTION 1.05 (Section 2262.066, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

ARTICLE 1. CHANGES TO LAW ON STATEWIDE CONTRACT MANAGEMENT

SECTION 1.01. Amends Section 2262.001, Government Code, by amending Subdivision (3) and adding Subdivision (3-a), to redefine "contract manager" and to define "executive director."

SECTION 1.02. Amends Subchapter A, Chapter 2262, Government Code, by adding Section 2262.0015, as follows:

Sec. 2262.0015. **APPLICABILITY TO CERTAIN CONTRACTS.** Requires the Texas Building and Procurement Commission (commission), by rule, to establish threshold requirements that exclude small or routine contracts, including purchase orders, from the application of this chapter.

SECTION 1.03. Amends the heading to Section 2262.053, Government Code, to read as follows:

Sec. 2262.053. **TRAINING FOR CONTRACT MANAGERS.**

SECTION 1.04. Amends Section 2262.053, Government Code, by amending Subsections (a) and (d) and adding Subsections (e) and (f), as follows:

(a) Requires the commission, in coordination with the comptroller of public accounts (comptroller), Department of Information Resources (department), state auditor, and the Health and Human Services Commission (HHSC), to develop, rather than develop or administer, a training program for contract managers.

(d) Makes a nonsubstantive change.

(e) Requires the commission to certify contract managers who have completed the contract management training required under this section and keep a list of those contract managers.

(f) Requires the program developed under this section to include a separate class on ethics and contracting.

SECTION 1.05. Amends Subchapter B, Chapter 2262, Government Code, by adding Sections 2262.0535 and Sections 2262.055-2262.066, as follows:

Sec. 2262.0535. TRAINING FOR GOVERNING BODIES. Requires the commission to adapt the program developed under Section 2262.053 to develop an abbreviated program for training the members of the governing bodies of state agencies. Authorizes the training to be provided together with other required training for members of state agency governing bodies. Requires all members of the governing body of a state agency to complete at least one course of the training developed under this section. Provides that this subsection does not apply to a state agency that does not enter into any contracts.

Sec. 2262.055. FEES FOR TRAINING. Requires the commission to set and collect a fee from state agencies that receive training under this subchapter in an amount that recovers the commission's costs for the training.

Sec. 2262.056. STATE AGENCY REPOSITORY. Requires each state agency to maintain in a central location all contracts for that agency.

Sec. 2262.057. CONTRACTS DATABASE. Requires the commission to store in a database information on contracts provided by state agencies under this section. Requires each state agency to periodically provide to the commission information regarding contracts entered into by the agency, including certain information. Requires the commission to set appropriate criteria to determine when and what information should be updated. Requires the commission to make the database available to state agencies and searchable by specific categories.

Sec. 2262.058. REPORTING CONTRACTOR PERFORMANCE. Requires each state agency, after a contract is completed or otherwise terminated, to review the contractor's performance under the contract. Requires the state agency, using the form and criteria developed by the team under Sections 2262.104 and 2262.105, to report to the commission on the results of the review regarding the contractor's performance under the contract.

Sec. 2262.059. CONTRACTOR PERFORMANCE DATABASE. Requires the commission to store in a database contractor performance reviews, as provided by this section. Requires the commission to evaluate the contractor's performance based on the information reported under Section 2262.058 and criteria established by the commission. Requires the commission to develop a database that incorporates the performance reviews and aggregates the reviews for each contractor. Authorizes a state agency to use the performance review database to determine whether to award a contract to a contractor reviewed in the database.

Sec. 2262.060. EXCLUDING CONTRACTOR FROM SOLICITATION PROCESS. Authorizes a state agency, based on its own contractor performance reviews and on information in the database developed under Section 2262.059, 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.

Sec. 2262.061. PERFORMANCE MEASURES; REPORTS. Requires each state agency to develop a plan for incorporating performance measures into all contracts entered into by the agency. Provides that this includes ensuring that performance measures are written into each contract prior to execution. Requires each state agency,

not later than March 1 of each year, to report to the team, governor, lieutenant governor, and speaker of the house of representatives regarding performance measures in the agency's contracts. Requires the report to describe the agency's efforts to include performance-based provisions in the agency's contracts. Requires the agency to make the report accessible to the public on the agency's website.

Sec. 2262.062. **CONTRACT MANAGERS.** Requires each state agency that enters into contracts other than interagency contracts to establish a career ladder program for contract management in the agency. Requires an employee hired as a contract manager to oversee, and authorizes said employee, as appropriate, to engage in procurement planning, contract solicitation, contract formation, price establishment, and other contract activities. 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 under this chapter.

Sec. 2262.063. **APPROVAL OF CONTRACTS.** Requires each state agency to establish formal guidelines regarding who may approve a contract for the agency. Requires said guidelines to require that at least two persons approve the contract, including a supervisor and a contract manager certified under Section 2262.053. Provides that this subsection applies to both contracts that agency staff are authorized to enter into without further approval by the governing body and to contracts that must be approved by the governing body. Requires a state agency's executive director, for state agency contracts valued in excess of \$1 million, to authorize a contract amendment in writing. Requires each state agency to annually report to the commission a list of each person authorized to approve contracts at the agency. Sets forth requirements for information to be included on the list.

Sec. 2262.064. **NEGOTIATION OF CONTRACT BY SINGLE EMPLOYEE PROHIBITED.** Prohibits a state agency from negotiating a contract with only one employee engaging in the negotiation.

Sec. 2262.065. **CONSISTENT PRICING BY CONTRACTORS.** Requires the commission to solicit a contract for the creation of a mechanism for tracking and comparing prices that state agencies pay for similar products or services. Authorizes a contractor awarded a contract, on behalf of the state, to renegotiate state agency contracts for products or services to obtain the best value for the state when the tracking and comparing mechanism shows a disparity in the price paid for similar products or services. Authorizes a contract under this section to allow the selected contractor to keep a percentage of the savings obtained in the renegotiated contracts. Requires a state agency to give a contractor selected this section the information the contractor requires for the purpose of tracking and comparing prices that state agencies pay for similar products and services. Prohibits a contractor selected under this section from selling information it receives from a state agency under this section or otherwise making use of such information for a purpose other than performing its contract with the state.

Sec. 2262.066. **EXCEPTION TO RENEGOTIATION REQUIREMENT.** Authorizes a state agency to exclude a contract from the application of Section 2262.065 if it determines that renegotiation of the contract under that section will affect the state negatively. Requires the state agency to notify the commission, lieutenant governor, and speaker of the house of representatives regarding this determination and explain why renegotiation of the contract is contrary to the state's overall interest. Authorizes the commission to overrule the determination. Requires the commission to notify the lieutenant governor and speaker of the house of representatives if it overrules the determination. Requires the commission to adopt rules and procedures to document this process, including a requirement that the executive directors of the commission and the state agency making the determination formally approve the determination by signature or other appropriate method.

SECTION 1.06. Amends Subchapter C, Chapter 2262, Government Code, by adding Sections 2262.104 and 2262.105, as follows:

Sec. 2262.104. UNIFORM DEFINITIONS AND FORMS. Requires the Contract Advisory Team created to assist state agencies in improving contract management practices (team) to develop and publish a uniform set of definitions for use as applicable in state contracts and a uniform and automated set of forms for use in the different stages of the contracting process.

Sec. 2262.105. FORMS FOR REPORTING CONTRACTOR PERFORMANCE. Requires the team, as part of the uniform forms published under Section 2262.104, to develop a form for use by state agencies in reporting a contractor's performance under Section 2262.058.

SECTION 1.07. Amends Chapter 2262, Government Code, by adding Subchapters D, E, and F, as follows:

SUBCHAPTER D. CONTRACT PROVISIONS

Sec. 2262.151. USE OF UNIFORM FORMS. Authorizes a state agency to use the forms developed under Section 2262.104 as templates, guides, or samples for contracts entered into by the agency.

Sec. 2262.152. CONTRACT TERMS RELATING TO NONCOMPLIANCE. Requires the team to develop recommendations for contract terms regarding penalties for contractors who do not comply with a contract, including penalties for contractors who do not disclose conflicts of interest under Section 2262.201. Authorizes the team to develop recommended contract terms that are generally applicable to state contracts and terms that are applicable to important types of state contracts. Authorizes a state agency to include applicable recommended terms in a contract entered into by the agency.

Sec. 2262.153. REQUIRED PROVISION RELATING TO SUBCONTRACTOR COMPLIANCE. Requires each state agency contract to require that each contractor provide a list of all subcontractors and include a provision that holds the contractor responsible for the conduct of all subcontractors in complying with the contractor's contract with the state agency and requires each subcontractor to disclose all potential conflicts of interest to the state agency, according to guidelines developed under Section 2262.201(b), when the subcontractor contracts with or is otherwise hired by the contractor.

Sec. 2262.154. REQUIRED CONTRACTOR DISCLOSURE STATEMENT; STATE AGENCY EMPLOYEES. Requires the team to develop a standard contract provision requiring a contractor and subcontractor to disclose each employee who was employed by the state at any time during the two years before the date of the disclosure and is now employed by the contractor and each state employee who was employed by the contractor at any time during the year before the date of disclosure and is now employed by the state and who is materially involved in the development of the contract terms or the management of the contract or employed at the executive level with the contractor. Requires a state agency to include the provision in a contract entered into by the agency.

Sec. 2262.155. REQUIRED CONTRACTOR DISCLOSURE STATEMENT; OUTSOURCING. Requires each contract entered into by a state agency to include a provision requiring disclosure of any services materially necessary to fulfill the contract, including services performed by a subcontractor, that will be or are performed in a country other than the United States. Provides that this section does not apply to services that are incidental to fulfilling the contract. Requires the contract to include a provision allowing the state agency to terminate the contract and solicit a new contract if certain situations occur. Requires a state agency that decides not to solicit a new contract under circumstances in which the agency is authorized to do so under a contract provision required by this section to report that decision to the governor, the lieutenant governor, the speaker of the house of representatives, and the team.

[Reserves Sections 2262.157-2262.200 for expansion.]

SUBCHAPTER E. ETHICS; CONFLICT OF INTEREST

Sec. 2262.201. **CONTRACTOR CONFLICTS OF INTEREST.** Requires each contractor who responds to a state agency's contract solicitation to disclose in its response all potential conflicts of interest to the agency. Requires the team to develop guidelines to aid contractors and state agencies in identifying potential conflicts of interest.

Sec. 2262.202. **EXECUTIVE DIRECTORS; ETHICS IN CONTRACTING CLASS.** Requires each executive director of a state agency to annually complete the ethics and contracting class developed under Section 2262.053. Provides that this section does not apply to a state agency that does not enter into any contracts.

[Reserves Sections 2262.203-2262.250 for expansion.]

SUBCHAPTER F. CHANGES TO CONTRACTS

Sec. 2262.251. **CONTRACT AMENDMENTS AND CHANGE ORDERS.** Provides that an amendment to a contract, including a change order, is subject to the same approval processes as the original contract. Prohibits a state agency from amending a contract unless the agency complies with the same approval processes for the amendment as required for the original contract and a contract manager for the agency states in writing why the amendment is necessary. Provides that this section does not require a new solicitation for a new contract.

Sec. 2262.252. **LARGE CHANGE IN CONTRACT VALUE.** Requires the state agency, if a proposed contract amendment or extension changes the monetary value of a contract by more than ten percent, to obtain review and approval from the team and the agency's executive director before the agency amends or extends the contract.

SECTION 1.08. Transfers Section 2262.003, Government Code, to Subchapter D, Chapter 2262, Government Code, as added by this Act, redesignates it as Section 2262.156, Government Code, and amends it as follows:

Sec. 2262.156. New heading: **REQUIRED PROVISION RELATING TO AUDITING.** Redesignated from existing Section 2262.003.

SECTION 1.09. (a) Makes application of Section 2262.064, Government Code, as added by this article, prospective.

(b) Makes application of Section 2262.201(a), Government Code, as added by this article, prospective.

SECTION 1.10. Requires the commission, not later than March 1, 2006, to develop the training program, including the ethics and contracting class, required by Section 2262.053, Government Code, as amended by this article, and Section 2262.0535, Government Code, as added by this article.

SECTION 1.11. Provides that a member of a governing body of a state agency is not required to complete the training developed under Section 2262.0535, Government Code, as added by this article, until September 1, 2007.

SECTION 1.12. Provides that an executive director of a state agency is not required to comply with Section 2262.202, Government Code, as added by this article, until September 1, 2007.

SECTION 1.13. Provides that a contract manager is not required to be certified under Chapter 2262, Government Code, as amended by this article, until September 1, 2007.

SECTION 1.14. (a) Requires the team, as soon as practicable and not later than March 1, 2006, to develop the forms, criteria, recommendations, and provisions required by this article, including Sections 2262.104, 2262.105, 2262.152, 2262.154, and 2262.201(b), Government Code, as added by this article.

(b) Provides that a state agency is not required to comply with Sections 2262.056-2262.063 and Sections 2262.153-2262.155, Government Code, as added by this article, until September 1, 2007. Authorizes a state agency to comply earlier if the forms, electronic requirements, database, or other items are available before that date.

ARTICLE 2. CHANGES TO LAW ON PERSONAL FINANCE DISCLOSURE, STANDARDS OF CONDUCT, AND CONFLICT OF INTEREST

SECTION 2.01. Amends Subchapter C, Chapter 572, Government Code, by adding Section 572.060, as follows:

Sec. 572.060. CONFLICT OF INTEREST OF STATE OFFICER OR EMPLOYEE OR LEGISLATIVE CONSULTANT; CIVIL PENALTY. (a) Defines "legislative consultant," "legislative employee," "member of the governor's executive staff," "state agency legislative liaison," and "state agency procurement agent."

(b) Provides that this section applies to an appointed officer, executive head of a state agency, member of the governor's executive staff, legislative employee, state agency legislative liaison, state agency procurement agent, or legislative consultant.

(c) Provides that, for purposes of this section, a person to whom this section applies has a conflict of interest if the person has a personal financial or other interest in the subject matter of a governmental decision or action that compromises or has the appearance of compromising the person's professional judgment or integrity.

(d) Requires a person to whom this section applies who has a conflict of interest with respect to a governmental decision or action to disclose the conflict in writing delivered to the state officer or state agency employing or contracting with the person and abstain from further participation in the governmental decision or action.

(e) Provides that a person who violates this section is liable for a civil penalty of not less than \$500 and not more than the value of a monetary gain the person receives because of the governmental decision or action.

(f) Provides that Subsection (e) does not prohibit the imposition of a civil penalty under Chapter 571 or removal of an appointed officer under Section 572.058 for conduct that violates both this section and Section 572.058.

SECTION 2.02. Makes application of Section 572.060, Government Code, as added by this article, prospective.

ARTICLE 3. CHANGES RELATED TO STATE AUDIT CONTRACTS

SECTION 3.01. Amends Section 321.020(a), Government Code, to authorize a state agency or a corporation that is dedicated to the benefit of a state agency and that meets the criteria specified by Section B, Article 2.23B, Texas Non-Profit Corporation Act (Article 1396-2.23B, V.T.C.S.), notwithstanding any other law, to employ a private auditor to audit the state agency or corporation only if the agency or corporation is authorized to contract with a private auditor, rather than to do so by law, through a delegation of authority from the state auditor.

SECTION 3.02. Amends Section 2113.102(a), Government Code, to prohibit a state agency from using appropriated money to contract with a person to audit the agency, rather than the financial records or accounts of the agency, except in accordance with Section 321.020, rather than 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.

SECTION 3.03. Makes application of Section 321.020(a), Government Code, as amended by this article, prospective.

ARTICLE 4. EFFECTIVE DATE

SECTION 4.01. Effective date: September 1, 2005.