

## BILL ANALYSIS

Senate Research Center  
81R5994 MTB-D

S.B. 1805  
By: Zaffirini et al.  
Government Organization  
4/19/2009  
As Filed

### AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Currently, the manner in which state agencies engage in contracts with vendors is of vital concern because it directly affects the use of state-appropriated financial resources, and in some cases, the termination of state employee positions. In recent years, accounts have arisen alleging that some state agency employees have engaged in improper actions while working on state contracts. The state's lengthy and costly withdrawal from its health and social services contract with Accenture's Texas Access Alliance demonstrates the need for increased oversight and training in the contracting process.

S.B. 1805 is a re-file of S.B. 769, 80th Legislature, Regular Session, 2007.

As proposed, S.B. 1805 amends current law relating to contracting issues of state agencies, including ethics issues related to state contracting.

### RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the comptroller of public accounts in SECTION 5 (Section 2262.0015, Government Code) and SECTION 12 (Section 2262.303, Government Code) of this bill.

Rulemaking authority is expressly granted to each state agency in SECTION 8 (Section 2262.062, Government Code) of this bill.

### SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 322.020, Government Code, by amending Subsections (b), (c), and (e) and adding Subsection (g), as follows:

(b) Requires each state agency to provide the Legislative Budget Board (LBB) certain information regarding each major contract entered into by the agency. Makes nonsubstantive changes.

(c) Requires LBB to post on the Internet information provided to LBB under Subsection (b)(2) (relating to certain information required to be provided to LBB) regarding a major contract. Makes nonsubstantive changes.

(e) Requires LBB to make the information searchable by date, including both the beginning date and the end date of the contract. Makes a nonsubstantive change.

(g) Requires LBB to set appropriate criteria to determine when and what information should be updated.

SECTION 2. Amends Section 2113.102(a), Government Code, as follows:

(a) Prohibits a state agency from using appropriated money to contract with a person to audit except in accordance with Section 321.020, rather than to audit the financial records or accounts of the agency except as provided by Subsections (b), (c), and (d); and in accordance with Section 321.020. Deletes existing text referencing as provided by 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 (TxDOT).

SECTION 3. Amends Section 2162.103(a), Government Code, to require the State Council of Competitive Government (CCG), in comparing the cost of providing a service, to consider the installation costs and any other initial costs associated with a contract with a private contractor; other costs associated with the transition to using a private contractor's goods or services; and cost savings to the state if a private contractor were awarded the contract. Makes nonsubstantive changes.

SECTION 4. Amends Section 2262.001, Government Code, by amending Subdivisions (3) and (4) and adding Subdivision (3-a), to redefine "contract manager" and "major contract" and to define "executive director."

SECTION 5. Amends Subchapter A, Chapter 2262, Government Code, by adding Section 2262.0015, as follows:

Sec. 2262.0015. **APPLICABILITY TO CERTAIN CONTRACTS.** (a) Requires the comptroller of public accounts (comptroller) by rule to establish threshold requirements that exclude small or routine contracts, including purchase orders, from the application of this chapter.

(b) Provides that this chapter does not apply to an enrollment contract described by 1 T.A.C. Section 391.183 as that section existed on November 1, 2007.

SECTION 6. Amends the heading to Section 2262.053, Government Code, to read as follows:

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

SECTION 7. Amends Section 2262.053, Government Code, by amending Subsections (a) and (d) and adding Subsections (e), (f), and (g), as follows:

(a) Requires the comptroller or a private vendor selected by the comptroller, rather than the Texas Building and Procurement Commission (TBPC), in coordination with Department of Information Resources, state auditor, and Health and Human Services Commission, to develop, rather than administer, a training program for contract managers.

(d) Makes a conforming change.

(e) Requires the comptroller 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 that the program developed under this section include a separate class on ethics and contracting.

(g) Authorizes a state agency or educational entity to develop qualified contract manager training to supplement the training required under this section. Authorizes the comptroller to incorporate the training developed by the agency or entity into the training program under this section.

SECTION 8. Amends Subchapter B, Chapter 2262, Government Code, by adding Section 2262.0535 and Sections 2262.055 through 2262.066, as follows:

Sec. 2262.0535. **TRAINING FOR GOVERNING BODIES.** (a) Requires the comptroller or a private vendor selected by the comptroller 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.

(b) 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 comptroller to set and collect a fee from state agencies that receive training under this subchapter in an amount that recovers the comptroller'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. REPORTING CONTRACTOR PERFORMANCE. (a) Requires each state agency, after a contract is completed or otherwise terminated, to review the contractor's performance under the contract.

(b) Requires the state agency, using the forms developed by the team under Sections 2262.104 and 2262.105, to report to the comptroller on the results of the review regarding the contractor's performance under the contract.

Sec. 2262.058. CONTRACTOR PERFORMANCE DATABASE. (a) Requires the comptroller to store in a database contractor performance reviews as provided by this section.

(b) Requires the comptroller to evaluate the contractor's performance based on the information reported under Section 2262.057 and criteria established by the comptroller.

(c) Requires the comptroller to establish an evaluation process that allows vendors who receive an unfavorable performance review to protest any classification given by the comptroller.

(d) Requires the comptroller to develop a database that incorporates the performance reviews and aggregates the reviews for each contractor.

(e) 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. 2262.059. 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 2262.058, 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 (Barring Vendor from Participation in State Contracts).

Sec. 2262.060. PERFORMANCE MEASURES; REPORTS. (a) 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.

(b) 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 that the report describe the agency's efforts to include performance-based provisions in the agency's contracts.

(c) Requires the state agency to make the report accessible to the public on the agency's website.

Sec. 2262.061. CONTRACT MANAGERS. (a) Requires each state agency that enters into contracts other than interagency contracts to establish a career ladder program for contract management in the agency.

(b) Authorizes an employee hired as a contract manager to engage in procurement planning, contract solicitation, contract formation, price establishment, and other contract activities.

(c) 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. 2262.062. APPROVAL OF CONTRACTS. (a) Requires each state agency to establish formal guidelines regarding who is authorized to approve a contract for the agency.

(b) Requires each state agency to adopt administrative rules to establish a monetary threshold above which agency contracts and amendments to or extensions of agency contracts require written authorization by the agency executive director.

(c) Requires the agency executive director, for state agency contracts valued in excess of \$1 million, to authorize a contract amendment in writing.

(d) Requires each state agency to annually report to the comptroller a list of each person authorized to approve contracts at the agency. Requires that the list include the person's name, position, and supervisory responsibility, if any.

Sec. 2262.063. NEGOTIATION OF CONTRACT BY SINGLE EMPLOYEE PROHIBITED. Prohibits a state agency from negotiating a contract with only one employee engaging in the negotiation.

Sec. 2262.064. DEVELOPMENT OF OPTIMIZED MODEL FOR CERTAIN CONTRACTS. (a) Requires a state agency, if the agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions, to create an optimized model for the identified functions or services to determine how and at what cost the agency could most efficiently provide the functions or services.

(b) Requires that the model show consideration of all relevant factors, including best practices in this state and other states, available technology, access to benefits and services for clients, program integrity, and assessment of state agency skills available throughout the life of the project.

(c) Requires an agency that develops an optimized model under this section to use it as the basis for cost comparison when deciding whether to outsource the identified functions or services.

(d) Provides that a model developed under this section is confidential and is not subject to disclosure under Chapter 552 (Public Information) until a final determination has been made to award the contract for which the model was developed.

Sec. 2262.065. ANALYSIS OF SERVICES AND FUNCTIONS. (a) Defines "inherently governmental in nature."

(b) Requires a state agency, if the agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, or would lead to the loss of 100 or more existing state employee positions, then

before the agency is authorized to issue a competitive solicitation for the contract or amend or extend the contract, to contract with CCG for its staff to perform an analysis to determine if any of the services or functions to be performed under the contract or contract extension or amendment are inherently governmental in nature.

(c) Prohibits the state agency, except as provided by Subsection (e), if CCG determines that a service or function to be performed under the contract or contract extension or amendment is inherently governmental in nature, from contracting with a private entity to perform the service or function; or amending or extending the contract, if a private entity is to perform the service or function under the contract extension or amendment.

(d) Requires that the analysis required under this section use the standards and policies contained in the Office of Federal Procurement Policy, Policy Letter 92-1, or comparable guidelines developed by the CCG.

(e) Authorizes a state agency to contract with a private entity to perform a service or function or amend or extend an existing contract to allow a private entity to perform a service or function that the CCG determines to be inherently governmental in nature if the chief administrative officer of the agency issues a report stating that there is a compelling state interest in outsourcing the service or function.

Sec. 2262.066. FULL AND FAIR COST COMPARISON. (a) Requires a state agency, if the agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions, to:

(1) conduct a full and fair cost comparison to determine whether a private entity could perform the service or function with a comparable or better level of quality at a cost savings to the state; and

(2) prepare a business case providing the initial justification for the proposed contract or proposed contract extension or amendment that includes certain information.

(b) Authorizes a state agency, to perform the comparison required by Subsection (a)(1), to contract with CCG to have its staff perform the comparison or use the methodology provided in Section 2162.103.

(c) Requires a state agency to submit the business case required under Subsection (a)(2) to the governor, lieutenant governor, speaker of the house of representatives, LBB, and standing committees of the legislature that have primary jurisdiction over the agency, over state appropriations, and over state purchasing.

SECTION 9. Amends Section 2262.101, Government Code, as follows:

Sec. 2262.101. CREATION; DUTIES. (a) Creates this subsection from existing text. Creates the Contract Advisory Team (team) to assist state agencies in improving contract management practices by providing recommendations to the comptroller, rather than TBPC, regarding certain actions, and certifying that state agencies have complied with Sections 2262.064 and 2262.066. Deletes existing text that creates the team to assist by reviewing the solicitation of major contracts by state agencies. Makes nonsubstantive changes.

(b) Requires the team to consult with state agencies in developing forms, contract terms, guidelines, and criteria required under this chapter.

SECTION 10. Amends Section 2262.102(a), Government Code, to include one member from CCG, rather than one member from TBPC, in the composition of the team. Makes a nonsubstantive change.

SECTION 11. Amends Subchapter C, Chapter 2262, Government Code, by adding Sections 2262.104 and 2262.105, as follows:

Sec. 2262.104. UNIFORM DEFINITIONS AND FORMS. (a) Requires the team to develop and publish a uniform set of definitions for use as applicable in state contracts.

(b) Requires the team to develop and publish a uniform and automated set of forms that a state agency is authorized to 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 forms for use by state agencies in reporting a contractor's performance under Section 2262.057.

SECTION 12. Amends Chapter 2262, Government Code, by adding Subchapters D, E, F, and G, 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. (a) 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.

(b) 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 for the contract 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 a contractor and subcontractor, before entering into a contract with the state, 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 or subcontractor, or the contractor or subcontractor at any time during the year before the date of the 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.

Sec. 2262.155. REQUIRED CONTRACTOR DISCLOSURE STATEMENT; OUTSOURCING. (a) Requires that each contract entered into by a state agency 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 occasional, minor, or incidental to fulfilling the contract.

(b) Requires that the contract include a provision allowing the state agency to terminate the contract and solicit a new contract, except as provided by Subsection (d), if the contractor or a subcontractor of the contractor performs a service materially necessary to fulfill the contract in a country other than the United States and the contractor does not disclose in the contract that the service will be performed in a country other than the United States.

(c) 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 Subsection (b) to report this decision to the governor, the lieutenant governor, the speaker of the house of representatives, and the team.

(d) Authorizes a contractor to replace a subcontractor without termination of a contract under this section if the contractor determines that the subcontractor is performing a service materially necessary to fulfill the contract in a country other than the United States and did not disclose that fact to the contractor.

Sec. 2262.156. **HIRING PREFERENCE PROVISION FOR CERTAIN LARGE CONTRACTS.** Requires that a proposed contract or proposed contract amendment, if a state agency determines that the contract or contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions, to contain a provision that requires the contractor to give preference in hiring to former employees of a state agency whose employment is terminated because of the contract or contract extension or amendment, who satisfy the contractor's hiring criteria for that position, and whose salary requirements are competitive with market rates for positions with equivalent skills and experience.

#### SUBCHAPTER E. ETHICS; CONFLICT OF INTEREST

Sec. 2262.201. **CONTRACTOR CONFLICTS OF INTEREST.** (a) 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.

(b) 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(f). Provides that this section does not apply to a state agency that does not enter into any contracts.

#### SUBCHAPTER F. CHANGES TO CONTRACTS

Sec. 2262.251. **CONTRACT AMENDMENTS, EXTENSIONS, AND CHANGE ORDERS.** (a) Provides that an extension of or amendment to a contract, including a change order, is subject to the same approval processes as the original contract.

(b) Prohibits a state agency from extending or amending a contract unless the agency complies with the same approval processes for the extension or amendment as required for the original contract and a contract manager for the agency states in writing why the extension or amendment is necessary.

(c) Provides that this section does not affect whether a state agency is required to undertake a new solicitation process in the manner required for a new contract in order to extend or amend a contract.

Sec. 2262.252. **LARGE CHANGE IN CONTRACT VALUE.** (a) Requires the state agency, if a proposed contract amendment or extension changes the monetary value of a

contract by \$1 million or more, to obtain review and approval from the team and the agency's executive director before the agency amends or extends the contract.

(b) Provides that this section does not apply to a proposed contract amendment required by a state or federal statute.

Sec. 2262.253. CERTAIN CONTRACT EXTENSIONS. Provides that this subchapter does not apply to contract extensions that are specifically established as a component of the original procurement.

#### SUBCHAPTER G. STATE OFFICE OF CONTRACT MANAGEMENT

Sec. 2262.301. DEFINITIONS. Defines "high-risk contract," "major information resources project," "office," "quality assurance team," and "solicitation."

Sec. 2262.302. ESTABLISHMENT; GENERAL DUTIES. Requires the comptroller to establish a state office of contract management (office) to develop criteria for identifying high-risk factors in contracts, review and approve an action related to a high-risk contract as provided by Section 2262.303, provide recommendations and assistance to state agency personnel throughout the contract management process, and coordinate and consult with the quality assurance team on all high-risk contracts relating to a major information resources project.

Sec. 2262.303. REVIEW AND APPROVAL; WAIVER. (a) Requires each state agency to receive approval from the office before taking the following actions in relation to a high-risk contract publicly releasing solicitation documents, executing a final contract, and making a payment or a series of payments that equal half of the contract value.

(b) Requires the office, in determining whether to approve an action described by Subsection (a), to review related documentation to ensure that potential risks related to the high-risk contract have been identified and mitigated.

(c) Authorizes the comptroller by rule to adopt criteria for waiving the review and approval requirements under Subsections (a) and (b).

Sec. 2262.304. SOLICITATION AND CONTRACT CANCELLATION. Authorizes the office, after review of and comment on the matter by the LBB and the governor, to recommend the cancellation of a solicitation or a contract during the review process under Section 2262.303 if a proposed solicitation is not in the best interest of the state, a proposed contract would place the state at an unacceptable risk if executed, or an executed contract is experiencing performance failure or payment irregularities.

SECTION 13. Transfers Section 2262.003, Government Code, to Subchapter D, Chapter 2262, Government Code, as added by this Act, redesignates it as Section 2262.157, Government Code, and amends it, as follows:

Sec. 2262.157. New heading: REQUIRED PROVISION RELATING TO AUDITING. Makes no further changes to this section.

SECTION 14. Amends Section 51.923, Education Code, as follows:

Sec. 51.923. QUALIFICATIONS OF CERTAIN BUSINESS ENTITIES TO ENTER INTO CONTRACTS WITH AN INSTITUTION OF HIGHER EDUCATION. (a) Redefines "business entity," "governing board," and "institution of higher education."

(b) Provides that a nonprofit corporation is not disqualified from entering into a contract or other transaction with an institution of higher education even though one or more members of the governing board of the institution of higher education also serves as a member, director, or officer of the nonprofit corporation. Makes nonsubstantive changes.



(c) Provides that a business entity, rather than a corporation, is not disqualified from entering into a contract or other transaction with an institution of higher education even though one or more members of the governing board of the institution of higher education has a substantial interest in the business entity, rather than also serves as a stockholder or director of the corporation provided that no member of the governing board owns or has a beneficial interest in more than five percent of the corporation's outstanding capital stock and further provided that the contract or transaction is an affiliation, licensing, or sponsored research agreement; or awarded by competitive bidding or competitive sealed proposals.

(d) Provides that an institution of higher education is not prohibited from entering into a contract or other transaction with a business entity in which a member of the governing board of the institution has a substantial interest if the board member discloses that interest in a certain meeting, rather than transaction described in this section if any board member having an interest described in this section in the contract or transaction discloses that interest.

(e) Provides that for purposes of this section, a member of a governing board has a substantial interest in a business entity if:

(1) the member owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity;

(2) funds received by the member from the business entity exceed 10 percent of the member's gross income for the previous year; or

(3) an individual related to the member in the first degree by consanguinity or affinity, as determined by Chapter 573 (Degrees of Relationship; Nepotism Prohibitions), Government Code, has an interest in the business entity as described by Subdivision (1) or (2).

(f) Provides that a violation of this section does not render an action of the governing board voidable unless the contract or transaction that was the subject of the action would not have passed the governing board without the vote of the member who violated this section.

(g) Provides that this section preempts the common law of conflict of interests as applied to members of a governing board of an institution of higher education.

SECTION 15. Repealer: Section 2262.051(f) (relating to the requirement of the guide to establish certain procedures), Government Code.

SECTION 16. (a) Makes application of Sections 2262.063 through 2262.066 and 2262.154, Government Code, and Subchapter G, Chapter 2262, Government Code, as added by this Act, prospective.

(b) Provides that Section 2262.201(a), Government Code, as added by this Act, applies only in relation to a contract for which a state agency first solicits bids, proposals, offers, or qualifications on or after the date that the team's guidelines regarding potential conflicts of interest take effect.

SECTION 17. Requires the comptroller of public accounts, not later than May 1, 2010, to develop the training program, including the ethics and contracting class, required by Section 2262.053, Government Code, as amended by this Act, and Section 2262.0535, Government Code, as added by this Act.

SECTION 18. 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 Act, until September 1, 2011.

SECTION 19. Provides that an executive director of a state agency is not required to comply with Section 2262.202, Government Code, as added by this Act, until September 1, 2011.

SECTION 20. Provides that a contract manager is not required to be certified under Chapter 2262, Government Code, as amended by this Act, until September 1, 2011.

SECTION 21. (a) Requires the team, as soon as practicable, and not later than May 1, 2010, to develop the forms, criteria, recommendations, and provisions required by this Act, including Sections 2262.104, 2262.105, 2262.152, and 2262.201(b), Government Code, as added by this Act.

(b) Provides that a state agency is not required to comply with Sections 2262.056 through 2262.062 and Sections 2262.153, 2262.155, and 2262.156, Government Code, as added by this Act, until September 1, 2011. Authorizes a state agency to comply earlier if the forms, electronic requirements, database, or other items are available before that date.

SECTION 22. Effective date: November 1, 2009.