

BILL ANALYSIS

Senate Research Center

S.B. 943
By: Watson et al.
Business & Commerce
6/11/2019
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Texas Legislature adopted the Public Information Act (PIA) in the 1970s after a series of scandals eroded the public's trust in government. Two decisions from the Texas Supreme Court in 2015 interpreting the PIA—Boeing and Greater Houston Partnership—drastically reduced the public's access to information about state and local contracting. In both cases, the court overruled decades of Texas Attorney General interpretations that protected transparency.

Contracting scandals over the last ten years have illustrated that transparency and accountability are key to avoiding waste, fraud, and abuse. Unfortunately, in the three years since Boeing and Greater Houston Partnership were decided, these rulings have been used to deny over 2,600 PIA requests. Even final, taxpayer-funded contracts have been withheld from the public.

S.B. 943 restores transparency to state and local government contracting, while recognizing that some information needs to be protected from disclosure in order to foster competition. S.B. 943 strikes this balance in several ways, including by creating a new exception for contractors' proprietary information. At the same time, SB 943 ensures the public can obtain key contract terms (like overall price and deliverables) and information indicating whether or not a contractor performed its duties under the contract.

Taken together, S.B. 943's provisions protect contractors' proprietary information while ensuring the public can obtain the information it needs to understand the deals that are being done in its name with its tax dollars. (Original Author's/Sponsor's Statement of Intent)

S.B. 943 amends current law relating to the disclosure of certain contracting information under the public information law.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 552.003, Government Code, by amending Subdivision (1) and adding Subdivision (7), as follows:

(1) Provides that "governmental body":

(A) includes:

(i)-(x) makes no changes to these subparagraphs;

(xi) makes a nonsubstantive change to this subparagraph;

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

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

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

(xv) creates this subparagraph from existing text and makes no further changes.

(B) does not include:

(i) makes a nonsubstantive change to this subparagraph; or

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

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

(b) the entity:

(1) either:

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

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

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

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

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

(7) Defines "contracting information."

SECTION 2. Amends Subchapter B, Chapter 552, Government Code, by adding Section 552.0222, as follows:

Sec. 552.0222. DISCLOSURE OF CONTRACTING INFORMATION. (a) Provides that contracting information is public and is required to be released unless excepted from disclosure under this chapter (Public Information).

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

(1) a contract described by Section 2261.253(a) (relating to requiring a state agency to post certain information relating to a contract for the purchase of goods or services from a private vendor), excluding any information that was previously redacted under Subsection (e) (relating to certain information required to be redacted from a posted contract) of that section;

(2) a contract described by Section 322.020(c) (relating to requiring the Legislative Budget Board to post certain information relating to major contracts), excluding any information that was properly redacted under Subsection (d) (relating to public access to certain but not all information related to a posted major contract) of that section;

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

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

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

(C) the delivery and service deadlines;

(D) the remedies for breach of contract;

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

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

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

(H) the execution dates;

(I) the effective dates; and

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

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

(A) a breach of contract;

(B) a contract variance or exception;

(C) a remedial action;

(D) an amendment to a contract;

(E) any assessed or paid liquidated damages;

- (F) a key measures report;
- (G) a progress report; and
- (H) a final payment checklist.

(c) Prohibits, notwithstanding Subsection (b), information described by Subdivisions (3)(A) and (B) of that subsection that relates to a retail electricity contract from being disclosed until the delivery start date.

SECTION 3. Amends Section 552.104(a), Government Code, as follows:

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

SECTION 4. Amends Section 552.110, Government Code, as follows:

Sec. 552.110. EXCEPTION: CONFIDENTIALITY OF TRADE SECRETS; CONFIDENTIALITY OF CERTAIN COMMERCIAL OR FINANCIAL INFORMATION. (a) Defines "trade secret." Creates Subsection (b) from existing text of this subsection.

(b) Provides that, except as provided by Section 552.0222, information is excepted from the requirements of Section 552.021 if it is demonstrated based on specific factual evidence that the information is a trade secret, rather than providing that a trade secret obtained from a person and privileged or confidential by statute or judicial decision is exempt from the requirements of Section 552.021.

(c) Creates this subsection from existing text of Subsection (b). Provides that, except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

SECTION 5. Amends Subchapter C, Chapter 552, Government Code, by adding Section 552.1101, as follows:

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

- (1) reveal an individual approach to:
 - (A) work;
 - (B) organizational structure;
 - (C) staffing;

(D) internal operations;

(E) processes; or

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

(2) give advantage to a competitor.

(b) Provides that the exception to disclosure provided by Subsection (a) does not apply to:

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

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

(c) Authorizes the exception to disclosure provided by Subsection (a) to be asserted only by a vendor, contractor, potential vendor, or potential contractor in a manner described by Section 552.305(b) (relating to authorizing a person to appeal to the Texas attorney general (attorney general) regarding release or withholding of information) for the purpose of protecting the interests of the vendor, contractor, potential vendor, or potential contractor. Requires a governmental body to decline to release information as provided by Section 552.305(a) to the extent necessary to allow the vendor, contractor, potential vendor, or potential contractor to assert the exception to disclosure provided by Subsection (a).

SECTION 6. Amends Section 552.131, Government Code, adding Subsection (b-1), as follows:

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

SECTION 7. Amends Sections 552.305(a) and (d), Government Code, as follows:

(a) Provides that, in a case in which information is requested under this chapter and a person's privacy or property interest may be involved, including a case under Section 552.101, 552.110, 552.1101, 552.114, 552.131, or 552.143, rather than under Sections 552.101, 552.104, 552.110, or 552.114, a governmental body is authorized to decline to release the information for the purpose of requesting an attorney general decision.

(d) Requires the governmental body that requests an attorney general decision under Section 552.301 (Request For Attorney General Decision), if release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.1101, 552.113, 552.131, or 552.143, rather than under 552.101, 552.110, 552.1101, 552.113, or 552.131, to make a good faith attempt to notify the person of the request for the attorney general decision.

SECTION 8. Amends Section 552.321, Government Code, by adding Subsection (c) to authorize a requestor to file suit for a writ of mandamus compelling a governmental body or an entity to comply with the requirements of Subchapter J.

SECTION 9. Amends Chapter 552, Government Code, by adding Subchapter J, as follows:

SUBCHAPTER J. ADDITIONAL PROVISIONS RELATED TO CONTRACTING
INFORMATION

Sec. 552.371. CERTAIN ENTITIES REQUIRED TO PROVIDE CONTRACTING INFORMATION TO GOVERNMENTAL BODY IN CONNECTION WITH REQUEST. (a) Provides that this section applies to an entity that is not a governmental body that executes a contract with a governmental body that:

(1) has a stated expenditure of at least \$1 million in public funds for the purchase of goods or services by the governmental body; or

(2) results in the expenditure of at least \$1 million in public funds for the purchase of goods or services by the governmental body in a fiscal year of the governmental body.

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

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

(d) Provides that, notwithstanding Section 552.301:

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

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

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

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

(e) Provides that Section 552.302 (Failure to Make Timely Request For Attorney General Decision; Presumption That Information is Public) does not apply to information described by Subsection (b) if the governmental body:

(1) complies with the requirements of Subsection (c) in a good faith effort to obtain the information from the contracting entity;

(2) is unable to meet a deadline described by Subsection (d) because the contracting entity failed to provide the information to the governmental body not later than the 13th business day after the date the governmental body received the written request for the information; and

(3) if applicable and notwithstanding the deadlines prescribed by Sections 552.301(b), (d), (e), and (e-1), complies with the requirements of those subsections not later than the eighth business day after the date the governmental body receives the information from the contracting entity.

(f) Provides that nothing in this section affects the deadlines or duties of a governmental body under Section 552.301 regarding information the governmental body maintains, including contracting information.

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

(1) preserve all contracting information related to the contract as provided by the records retention requirements applicable to the governmental body for the duration of the contract;

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

(3) on completion of the contract, either:

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

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

(b) Requires a bid for a contract described by Section 552.371 and the contract, unless Section 552.374(c) applies, to include the following statement: "The requirements of Subchapter J, Chapter 552, Government Code, may apply to this (include "bid" or "contract" as applicable) and the contractor or vendor agrees that the contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter."

(c) Prohibits a governmental body from accepting a bid for a contract described by Section 552.371 or awarding the contract to an entity that the governmental body has determined has knowingly or intentionally failed to comply with this subchapter in a previous bid or contract described by that section unless the governmental body determines and documents that the entity has taken adequate steps to ensure future compliance with the requirements of this subchapter.

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

(1) be in writing;

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

(3) unless Section 552.374(c) applies, advise the entity that the governmental body is authorized to terminate the contract without further obligation to the entity if the entity does not cure the violation on or before the 10th business day after the date the governmental body provides the notice.

Sec. 552.374. **TERMINATION OF CONTRACT FOR NONCOMPLIANCE.** (a) Authorizes a governmental body, subject to Subsection (c), to terminate a contract described by Section 552.371 if:

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

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

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

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

(b) Provides that, for the purposes of Subsection (a), an entity has taken adequate steps to ensure future compliance with this subchapter if:

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

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

(c) Prohibits a governmental body from terminating a contract under this section if the contract is related to the purchase or underwriting of a public security, the contract is or is authorized to be used as collateral on a loan, or the contract's proceeds are used to pay debt service of a public security or loan.

Sec. 552.375. **OTHER CONTRACT PROVISIONS.** Provides that nothing in this subchapter prevents a governmental body from including and enforcing more stringent requirements in a contract to increase accountability or transparency.

Sec. 552.376. **CAUSE OF ACTION NOT CREATED.** Provides that this subchapter does not create a cause of action to contest a bid for or the award of a contract with a governmental body.

SECTION 10. Makes application of this Act prospective.

SECTION 11. Makes application of Subchapter J, Chapter 552, Government Code, as added by this Act, prospective.

SECTION 12. Effective date: January 1, 2020.