

BILL ANALYSIS

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S.B. 943
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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.

As proposed, 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 adding Subdivision (7) to define "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. Provides that contracting information is public and requires such information to be released unless specially excepted from disclosure under Section 552.1101 or another provision of this chapter (Public Information).

SECTION 3. Amends Section 552.104(a), Government Code, by adding Section 552.0222, 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 interest by providing an advantage to a competitor or bidder in a particular ongoing competitive situation where the governmental body establishes the situation at issue is of a recurring nature or there is a specific and demonstrable intent to enter into the competitive situation again in the future, rather than if it is information that, if released, would give advantage to a competitor or bidder.

SECTION 4. 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 contracting information is excepted from the requirements of Section 552.021 if the vendor or contractor or potential vendor or contractor to whom the information relates demonstrates that disclosure would:

(1) reveal an individual approach to work, organizational structure, staffing, line-item pricing, pricing information that will be used in future solicitation or bid documents, or internal operations; and

(2) cause competitive harm to the vendor or contractor or potential vendor or contractor if released.

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

(1) a contract described by Section 2261.253(a) (relating to requirements regarding the posting of certain information about state agency contracts), subject to Subsection (e) (relating to a requirement that a state agency that posts a contract on its Internet website as required under this section redact certain information from the posted contract) of that section;

(2) a contract described by Section 322.020(c) (relating to the requirements the Legislative Budget Board (LBB) should post certain contract-related information on the Internet), subject to Subsection (d) (relating to the requirement that the LBB allow public access to the information posted under this section) of that section;

(3) certain contract or offer terms or their functional equivalent; or

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

(c) Provides that the exception to disclosure provided by Subsection (a) may be asserted only by a vendor or contractor in the manner described by Section 552.305(b) for the purpose of protecting the vendor or contractor's interests. Requires a governmental body to decline to release information as provided by Section 552.305(a) to the extent necessary to allow a vendor or contractor to assert the exception to disclosure provided by Subsection (a).

SECTION 5. 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 interests may be involved, including a case under Section 552.1101, among other sections, a governmental body may decline to release the information for the purpose of requesting a Texas attorney general (attorney general) decision.

(d) Requires the governmental body that requests an attorney general decision, if release of a person's proprietary information may be subject to exception under Section 552.1101, among other sections, to make a good faith attempt to notify that person of the request.

SECTION 6. 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 7. Amends Chapter 552, Government Code, by adding Subchapter J, as follows:

SUBCHAPTER J. ADDITIONAL PROVISIONS RELATED TO CONTRACTING INFORMATION

Sec. 552.371. CERTAIN ENTITIES SUBJECT TO LAW. (a) Provides that this section applies only to certain entities.

(b) Provides that an entity to which this section applies is subject to this chapter in the same manner as a governmental body for the limited purpose of the disclosure of contracting information related to a contract with a governmental entity that is in the possession or custody of the entity.

(c) Authorizes an entity to which this section applies to designate on the Internet website of the entity one mailing address and one e-mail address for receiving written requests for public information.

(d) Provides that an entity that makes the designations described by Subsection (c) is not required to respond to a written request for public information that is not received at one of those addresses.

(e) Requires an entity that does not make the designations described by Subsection (c) to respond to a written request for public information received by the entity at any valid mailing address of the entity or the e-mail address of the chief administrative officer of the entity

Sec. 552.372. CERTAIN ENTITIES SUBJECT TO REQUIREMENTS RELATED TO THE LAW. (a) Provides that this section applies to an entity not described by Section 552.371(a) that executes a contract with a governmental body for the purchase of goods or services with a value of at least \$1 million in public funds.

(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 the requirement that a governing body ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request) to determine whether contracting information subject to a 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 the requirement that a governing body that requests an attorney general decision under Subsection (a) provide certain information to the requestor within a reasonable time, but not later than the 10th business day after the date of receiving the requestor's written request) 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) (relating to the requirement that a governmental body that requests an attorney general decision under Subsection (a) provide certain information to the attorney general within a reasonable time but not later than the 15th business day after the date of receiving the written request) 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 the requirement that a governing body that submits written comments to the attorney general under Subsection (e)(1)(A) [relating to written comments stating the reasons why the stated exceptions would allow the information to be withhold] to send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request), 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).

Sec. 552.373. BIDS AND CONTRACTS. (a) Provides that a contract described by Section 552.371:

(1) is required to include a provision that outlines the responsibilities of the contracting entity under that section;

(2) is required to include contact information for the Office of the Attorney General; and

(3) is prohibited from including a provision that has the effect of limiting a requirement imposed on the contracting entity under this subchapter.

(b) Requires a contract described by Section 552.372 to require a contracting entity to:

(1) preserve all contracting information related to the contract for the duration of the contract;

(2) promptly produce 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 governmental body.

(c) Requires a bid for a contract described by Section 552.371 or 552.372 and the contract to include a certain statement.

(d) Prohibits a governmental body from accepting a bid for a contract described by Section 552.371 or 552.372 or award 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 those sections.

Sec. 552.374. **NONCOMPLIANCE WITH PROVISION OF SUBCHAPTER.** Requires a governmental entity that is the party to a contract described by Section 552.371 or 552.372 to provide 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 be in writing, state the requirement of this subchapter that the entity has violated, and 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 third business day after the date the governmental entity provides the notice.

Sec. 552.375. **TERMINATION OF CONTRACT FOR NONCOMPLIANCE.** (a) Authorizes a governmental body to terminate a contract described by Section 552.371 or 552.372 if:

(1) the governmental body provides notice under Section 552.374 to the entity that is party to the contract;

(2) the contracting entity does not cure the violation in the period prescribed by Section 552.374;

(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 purpose of Subsection (a), an entity has taken adequate steps to ensure future compliance with the requirements of 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 third 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.

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 state contract.

SECTION 8. Makes application of this Act to a request for public information prospective.

SECTION 9. Makes application of Subchapter J, Chapter 552, Government Code, as added by this Act, prospective.

SECTION. Effective date: January 1, 2020.