

SUBJECT: Negotiation and management of state contracts

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Swinford, Gattis, B. Cook, Martinez Fischer, Villarreal, Wong

1 nays — Farrar

2 absent — Miller, J. Keffer

WITNESSES: For — None

Against — Kathy Mitchell, Consumers Union

On — Dustin Lanier, Department of Information Resources; Cindy Reed, Texas Building and Procurement Commission

BACKGROUND: Government Code, ch. 551, also known as the Open Meetings Act, generally requires meetings of governmental entities to be open to the public. Closed meetings are allowed under certain specified circumstances, including for some consultations with the governmental entity's attorney, deliberations regarding real property, and contract negotiations of some county commissioners courts, among others. Before conducting a closed meeting, the governmental entity must convene an open meeting and announce the provision under which the closed meeting will be held. The body must keep either a certified agenda or make a tape recording of the proceedings. Final actions and votes cannot be taken in a closed meeting.

DIGEST: CSHB 2247 would make numerous changes in the state's contract negotiation and management processes.

A state agency's governing body would be allowed to hold a closed meeting to deliberate on business or financial issues relating to a contract under negotiation if the governing body voted unanimously, and its attorney issued a written determination, that deliberation in an open meeting would have a detrimental effect on the state's position in negotiations with a third person. The governing body would be required to tape record these meetings.

The bill would require state agencies to follow certain procedures for proposed state contracts of \$1 million or more or projects that were likely to result in a major contract. Under certain circumstances, which would be determined by the Texas Building Procurement Commission (TBPC) in consultation with certain other agencies, an agency would have to prepare a business case or project plan for proposed contracts. A business case would have to provide the initial justification for the contract, including the anticipated return on investment, and be filed with TBPC and the Legislative Budget Board (LBB) at the same time the agency filed its legislative appropriations request. A project plan would have to include a procurement plan with anticipated service levels and performance standards for each contractor and a method for monitoring changes to the scope of a related contract. A state agency would have to file a project plan with TBPC before it spent more than 10 percent of allocated funds for the related major contract or first issued a contractor solicitation and would not be able to post a contractor solicitation in the state business daily unless the project plan had been filed.

For a major contract, the designated contract manager and the executive director of the agency or the director's designee would have to approve and sign each document required by the bill. The agency's executive director would have to approve contract amendments or change orders that changed the value of a contract by more than 10 percent or significantly changed the contract's completion date. A state agency would be required periodically to review and report on a contractor's performance throughout the term of the contract and provide that review to the agency's director and TBPC. The commission would store these reviews in a searchable database available to state agencies. If a state agency determined that it had a substantial need for contract negotiation services or advice and it could not adequately perform the negotiation services with its own personnel or without that advice, a state agency could contract for those services. The agency would be allowed to contract with a private entity only if it determined that it could not obtain those services through a contract with a state governmental entity.

The bill would require TBPC to:

- establish minimum qualifications for certifying contract managers and set guidelines, based on the size of the contract and its risk, for when contract managers must be involved in the process;
- develop and implement a continuing education course on cost

analysis and price negotiation for state agency purchasing personnel;

- establish an information-sharing portal on contract management and administration if it would be cost effective;
- develop uniform and automated set of forms for contracts;
- publish an annual report on the number and value of certain kinds of purchases made for which there were fewer than three responses to the contract solicitation; and
- analyze, in coordination with the LBB, the Department of Information Resources, and the comptroller, current automated information systems of state agencies to determine how the systems may be combined to more effectively standardize and synchronize state contract management, and report back by December 31, 2005.

The bill also would:

- require state agencies to incorporate performance measures into their contracts for services; and
- allow TBPC to establish a system of charges to cover the cost of state agency purchasing personnel training.

The bill would take effect September 1, 2005. A contract manager would not be required to be certified until September 1, 2007. TBPC would be required to develop the continuing education course on cost analysis and price negotiation by March 1, 2006. State agencies would not be required to prepare business cases or project plans until TBPC revised its contract management guide to include criteria for determining when these cases and plans were necessary.

**SUPPORTERS  
SAY:**

CSHB 2247 would ensure that the state received the best price and value possible when buying goods and services by increasing board participation in contract negotiations, putting into place additional oversight mechanisms, and enhancing the capabilities of contract managers. The bill would expand on contract negotiations put in place during the last few legislative sessions to further improve the state's procurement process. It would enhance the expertise of persons involved in the contracting process by requiring additional training and certification of contract managers. Including performance measures in contracts would enable the state to better determine whether a vendor had met the contract's requirements and hold the vendor to those requirements. The bill also would ensure that potential major contracts thoroughly were considered to ensure they were

in the state's best interest by requiring business cases and project plans for certain contracts with a value of \$1 million or more.

The bill also would increase the expertise available during the contracting process by enabling a state agency's governing body to participate in contract negotiations. Although members of an agency's governing body generally are required to make the final decision on contract awards and are responsible for those contracts, they often have little input into negotiation and evaluation. Instead, agency staff generally present a single, finalized contract to the members for their approval. Members of the governing body are prevented from being more involved in the process by open meeting requirements, which prohibit them from considering the contracts in closed meetings. In these situations, taxpayers may be the ultimate losers because of the inability of an agency's governing board to fully consider all contract bids.

Considering contracts in open meetings is counterproductive because it gives away the state's position to vendors and prevents the state from negotiating the best contracts possible. In some cases, it also would reveal vendors' protected proprietary information. These contracts, which in some cases may be for millions of dollars, need to be carefully considered before being approved. CSHB 2247 would enable the members of a governing body to bring their expertise to this process and improve the negotiation of contracts. The bill would not make private anything that currently is public because these negotiations already are conducted in closed meetings by staff.

The language in the bill is drawn directly from exemptions to the Open Meetings Act already in statute. This broad language is necessary to ensure that all contracts are covered. No two contracts are exactly alike, and it often is hard to categorize them.

**OPPONENTS  
SAY:**

Openness and transparency are essential to maintaining the confidence of citizens in their government and to ensuring the ethical use of taxpayer funds. By allowing the state to go behind closed doors on the most important issue to taxpayers — how much public funds will be spent and what the state will get for that money — CSHB 2247 would weaken the ability of citizens to monitor the use of taxpayer dollars. The state must hold firm to the principle that the people's business should be conducted in the open and not further expand exceptions to open meetings requirements.

By vesting the decision to go behind closed doors in the parties that may have something to gain from secrecy, the bill would create a potential for abuse. This kind of decision ought to be placed with someone who could balance the public's right to transparency with the need for privacy, as the attorney general does for the Public Information Act. The commission's attorney would not meet this criterion because this person likely would to face significant pressure to agree with the decision of the governing board.

The language in CSHB 2247 is overly broad and undefined. Neither the term "business and financial issues" nor the term "detrimental effect" is defined. However, the courts generally have interpreted the term detrimental effect broadly, allowing closed meetings even when transactions were nearly complete. As a result, agency governing bodies would be able to go behind closed doors on almost any issue at almost any stage of the process, regardless of whether such secrecy truly was necessary.

NOTES:

The committee substitute differs from the bill as filed by:

- removing language requiring TBPC to review its training programs;
- requiring TBPC to consult with the Health and Human Services Commission and the Texas Department of Transportation in preparing certain guidelines and forms; and
- allowing TBPC to bill agencies for training costs, among other changes.