

- SUBJECT:** Closed meetings for contract negotiations by the TBPC
- COMMITTEE:** State Affairs — favorable, without amendment
- VOTE:** 5 ayes — Swinford, Miller, B. Cook, Gattis, Wong
1 nay — Farrar
3 absent — J. Keffer, Martinez Fischer, Villarreal
- WITNESSES:** For — None
Against — Donnis Baggett, Texas Daily Newspaper Association, Texas Press Association; Kathy Mitchell, Consumers Union
On — 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:** HB 976 would allow the Texas Building and Procurement Commission (TBPC) to hold a closed meeting to deliberate on business or financial issues relating to a contract under negotiation if the commission 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 commission would be required to tape record these meetings.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS
SAY:

HB 976 would enable the members of the Texas Building and Procurement Commission to participate in contract negotiations. This would help ensure that the state received the best price and value possible when buying goods and services.

Although the members of the TBPC make the final decisions on contract awards and are responsible for those contracts, they now have little input into negotiation and evaluation. Instead, the staff generally presents a single, finalized contract to the commission members for their approval. The commission members are prevented from being more involved in the process by open meeting requirements, which prohibit them from considering the contracts in closed meetings.

Considering contracts in open meetings is counterproductive because it would give away the state's position to vendors and prevent the state from negotiating the best contracts possible. In some cases, it also would reveal vendors' protected proprietary information. While smaller agencies or governmental entities might be able to negotiate contracts openly, TBPC's contracts – which often are for millions of dollars, have statewide implications, and involve major policy decisions – need to be carefully considered. HB 976 would enable the commission members to bring their expertise to this process and improve the contracts negotiated by the commission. The bill would not make private anything that is currently public because these negotiations already are conducted in closed meetings by staff.

The bill would not compromise the public's ability to monitor the use of public funds. Once a contract is finalized, TBPC routinely posts information about the contract and submitted proposals on its website. The commission also would make the tape recordings of the closed meetings available to the public, so that interested parties could find out why it had chosen a particular bid. Because the public interest would be protected by access to these records, the decision to go into a closed meeting would not have to be vested in an independent party.

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 is often 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 – HB 976 would weaken the ability of citizens to monitor the use of taxpayer dollars.

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 huge 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, like the attorney general does for the Public Information Act. The commission's attorney would not meet this criterion because this person would be likely to face significant pressure to agree with the decision of the commission.

The language in HB 976 is overly broad and undefined. Neither the term "business and financial issues" nor the term "detrimental effect" is defined. However, the courts have generally interpreted the term "detrimental effect" broadly, allowing closed meetings even when transactions were nearly complete. As a result, the commission would be able to go behind closed doors on almost any issue at almost any stage of the process, regardless of whether such secrecy were truly necessary.

HB 976 also would fix a standard for closed meetings that other governing bodies would be eager to adopt because it would allow them to leave the public out of the competitive bidding process. Last session, a nearly identical bill, HB 2004 by Marchant, et al., granted this exception to commissioners courts in counties with a population of 400,000 or more. Now the TBPC wants the same exception. Meanwhile, another bill, HB 2247 by Isett, would extend this exception to all state agencies. By next session, all political subdivisions will want it. 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.