

SUBJECT: Creating a state office of contract management

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Swinford, Paxton, Van Arsdale, Christian, Flynn, Veasey
0 nays
3 absent — B. Cook, Farrar, Parker

SENATE VOTE: On final passage, May 1 — 25- 6 (Fraser, Harris, Nelson, Nichols, Patrick, Williams)

WITNESSES: No public hearing

BACKGROUND: In 2001, the 77th Legislature enacted SB 311 by Zaffirini, abolishing the General Services Commission and replacing it with the Texas Building and Procurement Commission (TBPC) to oversee acquisition and maintenance of state buildings and purchasing of goods and services for state agencies.

The bill also added Government Code, ch. 2262 to establish a contract advisory team as part of TBPC to review solicitations of major contracts by state agencies. The team includes representatives from the Attorney General’s Office, the Comptroller’s Office, the Department of Information Resources (DIR), TBPC, and the Governor’s Office.

A January 2007 Legislative Budget Board (LBB) report, *Texas State Government Effectiveness and Efficiency*, identified several concerns with the state’s contract management oversight process. The report recommended creation of an Office of Contract Management within TBPC to review and approve contracts involving more than \$10 million and to allow the office, with approval by LBB and the governor, to cancel a high-risk contract at any stage of the contract management process.

DIGEST: CSSB 769 would amend Government Code, ch. 2262 to create the State Office of Contract Management (OCM) to review and approve high-risk contracts by state agencies, those valued at more than \$25 million or

containing other risks specified in the statute or identified by OCM, with other risk factors defined in CSSB 769 or by the Office of Contract Management. The bill would require the Attorney General's Office to assist a state agency in preparing high-risk contracts by performing tasks including solicitation of documents and negotiation and drafting of contracts.

Defining high-risk contracts. A contract whose value was lower than \$25 million could be considered a high-risk contract if it involved an entity either incorporated outside the country or that within the past five years had a state or federal government contract cancelled because of:

- violation or noncompliance with terms of the contract;
- delivery of an ineffective product, service, or system;
- significant delays or cost overruns;
- fraud;
- misconduct; or
- any other event that enabled termination of the contract for cause.

Review process. OCM would be required to develop a procedure to:

- identify high-risk factors in state contracts;
- provide state agencies with a process to waive a high-risk review;
- review and approve those waivers;
- provide recommendations and assistance to state personnel during the contract management process; and
- coordinate and consult with a quality assurance team on all high-risk information resources projects.

The Attorney General's Office would be responsible for reviewing documents to determine whether high-risk factors of a contract had been identified and mitigated. If those risks were not sufficiently mitigated, OCM and the attorney general would be required to reject the contract.

Contract and solicitation cancellation. OCM would be required to consult with the Legislative Budget Board and the Governor's Office before it recommended cancellation of a solicitation or contract. The recommendation would be based on whether:

- a proposed solicitation was not in the best interest of the state;
- a proposed contract would place the state in an unacceptable risk if executed; or
- an executed contract was experiencing performance failure or payment irregularities.

The contract advisory team, with approval by the governor, would allow for the solicitation or execution of a high-risk contract if:

- OCM or the attorney general disapproved of the solicitation or execution of the high-risk contract under another provision of the bill; and
- the team determined that the proposed solicitation or high-risk contract would contain an acceptable level of risk or was in the state's best interest.

Government Code, secs. 531.018, 811.009, and 921.009 – requiring the attorney general to review health contracts worth more than \$250 million – would be repealed.

Other provisions. CSSB 769 would:

- establish a process to analyze whether a function could be outsourced;
- create a career path for professional contract managers;
- require review of contractor performance and develop a database of contractor performance;
- grant a hiring preference for state employees displaced by an outsourcing contract that was worth \$10 million or resulted in a loss of 100 or more state jobs;
- require ethics training for governing bodies of state agencies and executive directors of state agencies;
- require agencies with more than 200 employees to use more than one person to negotiate a major contract; and
- establish various conflict of interest and ethics requirements for vendors and state contract management officers.

Effective date. This bill would take effect November 1, 2007, when all state agencies would have to report any high-risk contracts for fiscal 2008-09 to OCM and the Attorney General's Office. New solicitations of bids, proposals, offers, or qualifications made on or after January 1, 2008, and

any contract signed on or after that date would require approval. Ethics training for governing bodies and agency executive directors would have to be completed by September 1, 2009. Performance evaluations and forms would have to be posted by September 1, 2009.

**SUPPORTERS
SAY:**

CSSB 769 would establish a mechanism to provide the centralized contract management oversight needed to assure consistency and mitigate the risks inherent to contracting. The bill could make contracting more efficient by creating a cadre of professional contract managers and providing procedures to minimize risk in state contracting.

Contracting involves three phases: solicitation and procurement; contract negotiation and execution; and contract administration and monitoring. The January 2007 LBB report notes that all three stages must be skillfully managed to mitigate risk, contain costs, and ensure high quality. A sole focus on any one stage would not prevent problems from risks or predatory practices from occurring in subsequent phases. The bill would help assure a comprehensive approach to contract solicitation, negotiation, and administration for high-risk and high-value contracts.

The LBB report recommends that Texas improve its oversight in the critical stages of contract negotiation and performance monitoring. It cites an analysis of historical audits by the state of Florida that showed 56 percent of contract management failures came during the final stages of the process, with 45 percent of all problems related to performance monitoring failures. Texas has not conducted a comprehensive historical analysis but faces similar problems in the contract negotiation and performance monitoring phases of the process.

CSSB 769 would provide for a robust role for the Attorney General's Office in advising state agencies on negotiation and writing of high-risk contracts in the development stages instead of after they are signed. The role of attorneys early in the process would help clarify potential sources of future misunderstandings and legal conflicts and would be cheaper than litigation to define the scope of the contract or performance.

The bill would provide a fair and workable balance in determining whether to outsource governmental functions and services. The Legislature is understandably risk-averse after Texas ended a five-year contract with Accenture LLP in March 2007. Many of the problems with the contract were related to negotiation and performance monitoring.

CSSB 769 would allow for a mechanism to review, and, if necessary, cancel solicitation or execution of high-risk contracts, even when the Legislature was not session. It would provide a clear basis to evaluate contracting decisions and would not preclude future outsourcing and privatization. It also would provide a hiring preference for state employees displaced by outsourcing.

CSSB 769 would help professionalize contract management by creating a career path for contract management specialists and OCM. It would add an additional check and balance by granting the contract advisory team, in conjunction with the Governor's Office, the authority to overrule a decision by OCM or the Attorney General's Office to cancel a solicitation or execution of a high-risk contract. Currently, the contract advisory team is an ad hoc body, and CSSB 769 would provide a needed measure of institutionalization for that group.

The bill also would include needed changes in ethics training and would provide for a standardized form for contracts and performance evaluations of vendors and contractors.

Setting the limit for required review at \$25 million would be a reasonable standard. In fiscal year 2006, state agencies executed about 130 contracts of \$10 million or more. It is expected that a \$25 million limit would keep the review to a manageable workload of about 65 contracts per year plus any additional lower valued contracts with certain factors that would make them eligible for review as high-risk contracts.

**OPPONENTS
SAY:**

No government office or procedure can completely eliminate risk in state contracts. It is uncertain whether professional contract managers would be able to prevent problems such as encountered with the Accenture contract. Extending the ability of the state to cancel contracts would pose its own risks. The review and approval process could increase contract costs by creating substantial delays in the contracting process.

**OTHER
OPPONENTS
SAY:**

CSSB 769 appears to give both OCM and the Attorney General's Office veto power over the solicitation or execution of a high-risk contract. The bill should be amended to clarify what the roles of the respective offices should be and whether OCM should be concerned with larger policy questions while the attorney general's review would be limited to legal matters.

CSSB 769 should keep the \$10 million limit in determining high-risk contracts that was included in the original recommendation in the LBB report, the Senate version, and HB 2733 by Gattis, which passed the House earlier.

NOTES:

According to the fiscal note, the bill would cost the state \$1.7 million in general revenue funds in fiscal 2008-09 to hire 12 OCM employees and one for the Council on Competitive Government.

The House committee substitute differs from the Senate-passed version by raising the minimum limit on high-risk contracts from \$10 million to \$25 million and adding additional criteria for designating a contract under that limit as being high risk. The substitute added requirements for the Attorney General's Office to assist state agencies in preparing solicitation documents and negotiating contracts and would allow the contract advisory team, with approval by the governor, to overrule a decision by either OCM or the Attorney General's Office to cancel the solicitation or execution of a high-risk under certain conditions.

A related bill, HB 3560 by Swinford, which passed the House by 140-2 on May 4, would transfer state procurement functions from TBPC to the Comptroller's Office along with the State Contract Management Office. The bill was reported favorably, as substituted, by the Senate Government Organization on May 18.

A similar bill, HB 2733 by Gattis was passed by the House by 143-0 on May 10 and is pending in the Senate Finance Committee.

During the 2005 regular session, the Senate passed SB 12 by Zaffirini, a similar bill that would have required standardization of the contract negotiation process and required additional training of state contract managers, but the bill died in House Calendars Committee.