

- SUBJECT:** Management and oversight of state contracts
- COMMITTEE:** Government Transparency and Operation — committee substitute recommended
- VOTE:** 6 ayes — Elkins, Galindo, Gonzales, Gutierrez, Leach, Scott Turner
- 0 nays
- 1 absent — Walle
- WITNESSES:** For — (*Registered, but did not testify:* Michael Chatron, AGC Texas Building Branch)
- Against — None
- On — (*Registered, but did not testify:* Todd Kimbriel, Department of Information Resources; Julie Ivie and Ursula Parks, Legislative Budget Board; Kelly Linder, Cesar Saldivar, and John Young, State Auditor’s Office)
- BACKGROUND:** Government Code, ch. 2262 governs statewide contract management. Sec. 2262.101 establishes a Contract Advisory Team to review and make recommendations involving contracts valued at \$10 million or more. The team is overseen by the Texas comptroller and includes members from the Health and Human Services Commission, the comptroller’s office, the Department of Information Resources (DIR), the Texas Facilities Commission, the governor’s office, and a state agency with fewer than 100 employees.
- Government Code, ch. 2157 governs purchasing of automated information systems. Sec. 2157.068 defines a “commodity item” as commercial software, hardware, or technology services other than telecommunication services that are generally available to businesses or the public and for which a reasonable demand exists in two or more state agencies. With certain exceptions, state agencies are required to purchase IT commodity

items through the Cooperative Contracts program at DIR. Under the program, DIR establishes “master contracts” awarded through an open and competitive procurement process. Agencies may negotiate further discounts directly with a program vendor or purchase directly from vendors. Agencies are not required to report procurements made through the program to DIR.

**DIGEST:**

CSHB 15 would abolish the Contract Advisory Team at the comptroller’s office and establish a Contract Management and Oversight Team at the Legislative Budget Board (LBB). The team would coordinate and consult with the existing quality assurance team formed by the state auditor, LBB, and Department of Information Resources (DIR) on all high-risk contracts relating to a major information resources project. The contract management team also would:

- develop criteria for identifying high-risk factors in contracts;
- consult with state agencies and approve high-risk contracts, including Texas Department of Transportation contracts that did not relate to highway construction or highway engineering or were not subject to contract claims; and
- provide recommendations and assistance to state agency personnel throughout the contract management process.

**High-risk contracts.** The bill would define a “high-risk contract” as a state agency contract or purchase order that had:

- a value of at least \$10 million;
- a value of less than \$10 million but had high-risk factors identified by the quality assurance team; or
- was entered into with an entity incorporated outside of the United States.

A contract also would be considered high risk if it was entered into with an entity that, during the preceding five-year period, had had a contract with a state agency or federal governmental entity terminated or canceled for:

- a violation of, or noncompliance with, the terms of the contract;
- delivery of an ineffective product, service, or system;
- significant delays or cost overruns; or
- fraud, misconduct, or other cancellation for cause.

The quality assurance team could establish other criteria that made a contract or purchase order high-risk, including that it:

- was awarded by an agency with significant audit findings related to contracting in the previous two fiscal years;
- was expected to cost more than 20 percent of the awarding agency's budget;
- outsourced a program or key function; or
- had change orders that altered the cost or duration of a contract by more than 20 percent.

State agencies would be required to provide written notice to the contract oversight team at least 30 days before publicly releasing solicitation documents for a high-risk contract. Each agency would have to receive a separate prior approval from the team before spending money under an executed high-risk contract and to make a payment or series of payments that exceeded half of the high-risk contract value.

The Contract Management and Oversight Team could review documentation to ensure that potential risks had been identified and mitigated. If the potential risks could not sufficiently be mitigated, the team would be required to disapprove the payment.

After review and comment by the LBB, the Contract Management and Oversight Team could recommend that a state agency cancel a proposed contract that would place the state at an unacceptable risk if executed or an executed contract that was experiencing performance failure or payment irregularities. If a state agency did not implement such a recommendation, the team would be required to notify the comptroller. After notification, the comptroller would not authorize the expenditure of

funds for the contract.

The bill would transfer the authority of the Contract Advisory Team to the Contract Management and Oversight Team.

**Information technology contracts.** The bill would prohibit a state agency from entering into a contract to purchase certain information technology commodities if the value of the contract exceeded \$1 million. A state agency that entered into a contract for a commodity item would have to obtain at least three competitive offers from vendors selected by the DIR if at least three such vendors offered the item.

The bill would add new requirements for contracts awarded under the Cooperative Contracts program with a value of more than \$50,000 that involved a statement of work. The bill would define “statement of work” as a document stating the requirements for a contract that were specific to the vendor under the contract, including deliverables, performance specifications, and other requirements that were not specified in a contract awarded by DIR. A state agency would be required to consult with DIR before submitting a statement of work to a vendor and post each statement of work on the agency’s website. Money could not be paid to a vendor unless DIR first signed the statement of work.

The bill would increase from \$14,000 to \$50,000 the minimum threshold amount for written notice to LBB of certain construction, professional services, and consulting services contracts.

The bill would take effect September 1, 2015. Its requirements related to high-risk contracts and information technology commodities would apply only in relation to a contract for which a state agency first advertised or solicited bids, proposals, offers, or qualifications on or after that date; contracts that were extended or modified on or after that date; or contracts for which a change order was submitted on or after that date.

SUPPORTERS  
SAY:

CSHB 15 would address recent reports of abuse in certain state government contracting processes by providing increased management

and oversight of high-risk contracts. The bill would replace the multiagency Contract Advisory Team at the comptroller's office with a Contract Management and Oversight Team at the Legislative Budget Board (LBB). The LBB team would have expanded authority to review high-value contracts as well as smaller contracts that could be at risk for abuse. It could act quickly to cancel a potentially risky contract or stop payments on an existing contract that became problematic.

The bill also would tighten state agencies' use of the Cooperative Contracts program at DIR for technology purchases. The State Auditor's Office on April 2 issued an investigative report on the procurement of services and commodities from a data analytics company by the Health and Human Services Commission and the Office of Inspector General. Among the report's findings was that the commission and office improperly procured fraud detection system development services that were not authorized through DIR's cooperative contract with the company.

The bill would adopt several of the audit report's recommendations, including requiring state agencies to obtain three bids for purchases through the Cooperative Contracts program. This could prevent a state agency from picking a favored vendor over another that offered a better value. The bill also would limit an agency from using the program for contracts exceeding \$1 million. This could force agencies to use a more transparent and accountable bidding process for larger contracts.

The requirement for DIR oversight of certain purchases from vendors on the master contracts list would provide a needed layer of oversight and help ensure that agencies were purchasing only goods and services authorized under vendors' cooperative contracts.

**OPPONENTS  
SAY:**

CSHB 15 could introduce added uncertainty and risk into the already unequal contractual relationship between the state and private vendors. The state of Texas, despite some popular perceptions, enjoys significant leverage over vendors who provide goods and services. Private companies that contract with the state must agree to statutorily mandated contract

provisions and risk having a contract canceled due to lack of appropriations. They also waive or limit normal contractual rights due to the state's sovereign immunity. This bill unfairly could erode vendors' position even further.

The bill would allow a team within a legislative branch agency to determine if solicitations and "high-risk" contracts by executive branch agencies should be canceled. This could violate the division of powers in the Texas Constitution. Assigning contract management authority to a third party entity that was not statutorily responsible for administering state programs also could undermine executive branch agency accountability.

Changes to DIR's Cooperative Contracts program could increase the time — and possibly the costs — for state agencies needing to purchase information technology. Forcing agency employees to spend additional time on administrative processes could distract from the focus on the agency's mission priorities. The program changes also could lead to a possible reduction in competition from the vendor community as a result of increased cost of sales.

Clarification is needed to ensure that an agency procurement could move forward if an agency solicited, but did not receive, responses from at least three vendors.

**NOTES:**

The fiscal note estimates a cost of \$2.6 million for fiscal 2016-17 to pay for additional contract review staff.