

SUBJECT: Expanding disclosure requirements for certain government contracts

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Phelan, Guerra, Harless, Holland, Hunter, P. King, Raymond, Smithee, Springer

0 nays

4 absent — Hernandez, Deshotel, Parker, E. Rodriguez

SENATE VOTE: On final passage, April 10 — 29-1 (Creighton)

WITNESSES: *On House companion bill, HB 2189:*

On — John Bridges, Austin-American Statesman, FOI Foundation, TPA; Rob Johnson, Clients of the firm Foley Gardere; James Hemphill, Freedom of Information Foundation of Texas; Jaie Avila, Texas Association of Broadcasters; Bill Patterson, Texas Press Association; (*Registered, but did not testify:* Matt Simpson, American Civil Liberties Union of Texas; Adam Cahn, Cahnman's Musings; Dick Lavine, Center for Public Policy Priorities; Dave Jones, Clean Elections Texas; Anthony Gutierrez, Common Cause Texas; Iain Vasey, Corpus Christi Regional EDC; Priscilla Camacho, Dallas Regional Chamber; Kelley Shannon, Freedom of Information Foundation of Texas; Amber Pearce, Pfizer; Michael Coleman, Public Citizen; Michael Schneider, Texas Association of Broadcasters; Lauren Fairbanks, Texas Association of Manufacturers; Tom Kowalski, Texas Healthcare and Bioscience Institute; Bay Scoggin, TexPIRG; Donnis Baggett, Texas Press Association; Tyler Schroeder, The Boeing Company; Mance Zachary, Vistra Energy; Stephanie Ingersoll)

Against — Tracy Schieffer, Association of General Contractors of Texas - Highway Heavy Branch; (*Registered, but did not testify:* Steven Albright, Association of General Contractors of Texas - Highway Heavy Branch; Tara Snowden, Zachry Corporation)

On — Gary Huddleston, Irving-Las Colinas Chamber of Commerce;

Zenobia Joseph; (*Registered, but did not testify*: Dana Harris, Austin Chamber of Commerce; Holli Davies, North Texas Commission; Justin Gordon, Office of the Attorney General; Richard Meyer, Texas Association of Nonprofit Organizations; Troy Alexander, Texas Medical Association; Perry Fowler, Texas Water Infrastructure Network)

BACKGROUND: Government Code ch. 552, the Public Information Act, requires governmental bodies to disclose information to the public upon request, unless that information is excepted from disclosure.

Sec. 552.104 creates an exception from disclosure for information that, if released, would give advantage to a competitor or bidder.

Sec. 552.110 creates an exception from disclosure for privileged or confidential trade secrets and for commercial or financial information whose disclosure would cause substantial competitive harm to the person from whom the information was obtained.

DIGEST: CSSB 943 would expand public disclosure requirements related to government contracts under the Public Information Act and impose recordkeeping requirements on certain entities in possession of such information. The bill would revise exceptions from disclosure based on competitive advantage and trade secrets, create a new exception from disclosure for proprietary information, and expand the definition of a governmental body.

Contracting information. Unless otherwise excepted under the Public Information Act, the bill would require public disclosure of the following types of contracting information maintained by a governmental body or sent between a governmental body and contractor:

- information in vouchers or contracts relating to the receipt or expenditure of public funds by governmental bodies;
- solicitation or bid documents relating to a contract with a governmental body;
- communications between a governmental body and a vendor or

- contractor during the solicitation, evaluation, or negotiation of a contract;
- documents showing the criteria by which a governmental body evaluated responses to a solicitation; and
 - communications and other information related to the performance of a final contract with a governmental body or work performed on behalf of the governmental body.

Excluding information that was properly redacted under current law, the following types of contracting information could not be excepted from disclosure as trade secrets, commercial or financial information that would cause competitive harm, or proprietary information:

- contracts with a state agency required to be posted on the agency's website;
- contracts required to be included in the Legislative Budget Board's major contract database;
- contract or offer terms describing price, items or services subject to the contract, delivery and service deadlines, remedies for breach of contract, identity of parties or subcontractors, affiliate overall or total pricing for the contractor, execution and effective dates, and duration dates; and
- information indicating whether a contractor performed its duties under a contract.

Contracting information held by certain entities. The bill would require nongovernmental entities that executed a contract with a governmental body that had a stated expenditure of at least \$1 million in public funds or that resulted in the expenditure of at least \$1 million in public funds in a fiscal year to be subject to certain recordkeeping and disclosure requirements.

Written requests for contracting information. If a governmental body received a written public information request for contracting information related to a contract that was in the contracting entity's custody and not maintained by the governmental body, the governmental body would be

required to request that the entity provide the information to the governmental body. This request would have to be made in writing within three business days after the governmental body received the request for information.

Attorney general's opinion. CSSB 943 would provide specific deadlines for requesting an attorney general's opinion to determine whether contracting information fell within an exception to disclosure and for providing notice to the requestor of such information.

Failure to comply with these deadlines would lead to the presumption that the requested information was subject to disclosure unless the governmental body:

- had made a good faith effort to obtain the contracting information from the contracting entity;
- was unable to meet a deadline prescribed by the bill because the entity had failed to provide the information within 13 business days after the date the governmental body received the request for information; and
- had complied with the applicable deadlines within eight business days after receiving the information from the contracting entity.

Contractual requirements. Under the bill, certain contracts between a governmental body and another entity would have to require the contracting entity to preserve all contracting information related to the contract as provided by the governmental body's applicable record retention requirements for the duration of the contract.

The entity would have to promptly provide to the governmental body any related contracting information in the entity's custody or possession on request by the governmental body. Upon the contract's completion, the entity either would be required either to provide at no cost to the governmental body all contracting information in the entity's custody or preserve such information as provided by the governmental body's recordkeeping requirements.

A bid for a contract or a contract described above also would be required to state that the contract could be subject to the above requirements and that the contractor agreed that the contract could be terminated for an intentional or knowing failure to comply with the bill's requirements.

A governmental body could not accept a bid for contract or award a contract to an entity that the governmental body determined to have failed intentionally or knowingly to comply with the bill's requirements in a previous bid or contract unless the governmental body determined that the entity had taken adequate steps to ensure future compliance.

Notice and termination. A governmental body would be required to provide written notice to a contracting entity that failed to comply with any of the above requirements. The notice would have to state the requirement that had been violated and advise the entity that the contract could be terminated without further obligation if the entity did not cure the violation within 10 business days after the notice was provided.

The contract could be terminated after the governmental body had provided notice to the entity if:

- the contracting entity did not cure the violation within the prescribed period;
- the governmental body determined that the contracting entity had failed intentionally or knowingly to comply with one of the above requirements; and
- the governmental body determined that the entity had not taken adequate steps to ensure future compliance with the bill's requirements.

Adequate steps to ensure future compliance would be considered to have been taken if the entity produced requested contracting information requested within 10 business days after the governmental body made the request and the entity established a records management system to enable it to comply with the above requirements.

A governmental body could not terminate a contract for any of the reasons above if the contract related to the purchase or underwriting of a public security, was or could be used as collateral on a loan, or the contract's proceeds were used to pay debt service of a public security or loan.

Writ of mandamus. Requestors could file suit for a writ of mandamus compelling a governmental body to comply with the bill's requirements.

Competitive advantage exception. CSSB 943 would except information from disclosure if a governmental entity demonstrated that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation that was set to reoccur or if there was a specific and demonstrable intent to enter into the competitive situation again in the future.

Trade secrets exception. The bill would except from disclosure certain information that was shown by specific factual evidence to be a trade secret. A trade secret would be defined as all forms and types of information if the owner of the information had taken reasonable measures to keep it secret and if the information derived independent economic value from not being generally known to or readily accessible by another person who could obtain economic value from its use or disclosure.

Proprietary information exception. CSSB 943 would except from disclosure certain information submitted to a governmental body by a vendor, contractor, or potential vendor or contractor in response to a request for a bid, proposal, or qualification if the vendor or contractor demonstrated that disclosure of the information would give an advantage to a competitor by revealing an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing information. This exception could be asserted only by a contractor, vendor, or potential vendor or contractor for the purpose of protecting its interests.

Economic development entities. The bill would allow certain economic development entities whose purpose was to develop and promote the economic growth of state agencies or political subdivisions with which the entities had contracted to assert that information relating to economic development negotiations in the entities' custody or control was excepted from disclosure.

Definition of governmental body. CSSB 943 would expand the definition of a governmental body to include:

- a confinement facility operated under contract with the Texas Department of Criminal Justice;
- a civil commitment housing facility owned, leased, or operated by a vendor under contract with the state under provisions relating to the civil commitment of sexually violent predators; and
- an entity that received public funds in the current or preceding fiscal year to manage daily operations or restoration of the Alamo or an entity that oversees such an entity.

The bill also would specify that certain economic development entities whose mission or purpose was to develop and promote the economic growth of a state agency or political subdivision and that met certain requirements as listed in the bill would not be considered governmental bodies.

The bill would take effect January 1, 2020, and would apply only to a request for public information received on or after that date and to contracts described by the bill that were executed on or after that date.

**SUPPORTERS
SAY:**

SB 943 would improve the transparency and accountability of state and local governments by removing court-created loopholes from the Public Information Act and would strike a balance between promoting competition and providing taxpayers with information about how their money is being spent.

Recent Texas Supreme Court decisions have given contractors significant leeway to claim that information related to their government contracts should be kept secret, essentially overruling decades of attorney general interpretations promoting transparency. In some cases, even the contracts themselves and the amount of taxpayer money at issue were held to be exempt from public disclosure. As a result, the public's ability to keep informed about government spending and contracting has been greatly reduced.

SB 943 would help restore transparency to government and protect taxpayer dollars from waste, fraud, and abuse while recognizing that some information is proprietary and needs to be protected from disclosure. The bill would return certain exceptions under the Public Information Act back to their longstanding interpretation while providing a new exception to disclosure for truly proprietary information.

The bill would improve accountability by requiring certain contractors to maintain information associated with their government contracts and to provide that information in response to public information requests. Maintaining these records simply would be part of the cost of doing business with state or local governments.

**OPPONENTS
SAY:**

CSSB 943 would impose recordkeeping requirements on entities that contracted with governmental bodies that could prove burdensome for smaller contractors.