

## **BILL ANALYSIS**

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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Currently, weaknesses exist in the statutes and regulations related to state agency contract solicitation, negotiation, and management. The manner in which state agencies engage in contracts with vendors is of vital concern because it directly affects the use of state appropriated financial resources, and, in some cases, the termination of state employee positions. In recent years, accounts have arisen alleging that some state agency employees have engaged in improper actions while working on state contracts. The announcement of this state's gradual withdrawal from its health and social services contract with Accenture's Texas Access Alliance demonstrates the need for increased oversight and training in the contracting process.

As proposed, S.B. 769 improves the processes by which state agencies solicit, negotiate, enter into, and manage contracts with vendors. This bill expands the training processes for employees involved in contracting, improves contract reporting mechanisms for state agencies, requires needed provisions to address amendments, and addresses ethical issues specific to contracting. Finally, this bill establishes a stronger, more stringent review process prior to contract approval.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the Texas Building and Procurement Commission in SECTION 5 (Section 2262.0015, Government Code) and SECTION 8 (Section 2262.065, Government Code) of this bill.

Rulemaking authority is expressly granted to each state agency in SECTION 8 (Section 2262.062, Government Code) of this bill

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 2113.102(a), Government Code, as follows:

(a) Prohibits a state agency from using appropriated money to contract with a person to audit the agency, rather than the financial records or accounts of the agency, except as provided by Subsections (b), (c), and (d), and in accordance with Section 321.020 (Coordination of Certain Audits). Deletes existing text including Chapter 466, pertaining to the state lottery, Chapter 2306, pertaining to the Texas Department of Housing and Community Affairs, and Chapter 361, pertaining to the Texas Turnpike Authority Division of the Texas Department of Transportation, as exceptions to this prohibition. Makes nonsubstantive changes.

SECTION 2. Amends Section 2162.103(a), Government Code, to include certain additional costs that the State Council on Competitive Government (council) is required to consider, in comparing the cost of providing a service. Makes nonsubstantive changes.

SECTION 3. Amends Section 2177.052, Government Code, by amending Subsections (b), (c), and (f) and adding Subsection (g), as follows:

(b) Requires each state agency to provide the Texas Building and Procurement Commission (commission) certain information regarding each major contract entered into by the agency. Makes conforming and nonsubstantive changes.

(c) Requires the commission to include in the information posted on the electronic procurement marketplace information provided to the commission under Subsection (b)(2) regarding a major contract.

(f) Requires the commission to make the information searchable by date, including both the beginning date and the end date of the contract.

(g) Requires the commission to set appropriate criteria to determine when and what information should be updated.

SECTION 4. Amends Section 2262.001, Government Code, by amending Subdivisions (3) and (4) and adding Subdivision (3-a), to define "executive director" and redefine "contract manager" and "major contract."

SECTION 5. Amends Subchapter A, Chapter 2262, Government Code, by adding Section 2262.0015, as follows:

Sec. 2262.0015. **APPLICABILITY TO CERTAIN CONTRACTS.** Requires the commission by rule to establish threshold requirements that exclude small or routine contracts, including purchase orders, from the application of this chapter.

SECTION 6. Amends the heading to Section 2262.053, Government Code, to read as follows:

Sec. 2262.053. **TRAINING FOR CONTRACT MANAGERS.**

SECTION 7. Amends Section 2262.053, Government Code, by amending Subsections (a) and (d) and adding Subsections (e) and (f), as follows:

(a) Requires the commission or a private vendor selected by the commission to develop a training program for contract managers in coordination with the comptroller of public accounts, the Department of Information Resources, the state auditor, and the Health and Human Services Commission. Deletes existing text requiring the commission to administer a training program for contract managers.

(d) Makes a nonsubstantive change.

(e) Requires the commission to certify contract managers who have completed the contract management training required under this section and keep a list of those contract managers.

(f) Requires a program developed under this section to include a separate class on ethics and contracting.

SECTION 8. Amends Subchapter B, Chapter 2262, Government Code, by adding Section 2262.0535 and Sections 2262.055-2262.068, as follows:

Sec. 2262.0535. **TRAINING FOR GOVERNING BODIES.** (a) Requires the commission or a private vendor selected by the commission to adapt the program developed under Section 2262.053 to develop an abbreviated program for training the members of the governing bodies of state agencies. Authorizes the training to be provided together with other required training for members of state agency governing bodies.

(b) Requires all members of the governing body of a state agency to complete at least one course of the training developed under this section. Provides that this subsection does not apply to a state agency that does not enter into any contracts.

Sec. 2262.055. **FEES FOR TRAINING.** Requires the commission to set and collect a fee from state agencies that receive training under this subchapter in an amount that recovers the commission's costs for the training.

Sec. 2262.056. STATE AGENCY REPOSITORY. Requires each state agency to maintain in a central location all contracts for that agency.

Sec. 2262.057. REPORTING CONTRACTOR PERFORMANCE. Requires each state agency to review the contractor's performance under the contract after a contract is completed or otherwise terminated. Requires the state agency to report to the commission on the results of the review regarding the contractor's performance under the contract using the forms developed by the Contract Advisory Team (team) under Sections 2262.104 and 2262.105.

Sec. 2262.058. CONTRACTOR PERFORMANCE DATABASE. (a) Requires the commission to store in a database contractor performance reviews as provided by this section.

(b) Requires the commission to evaluate the contractor's performance based on the information reported under Section 2262.057 and criteria established by the commission.

(c) Requires the commission to establish an evaluation process that allows vendors who receive an unfavorable performance review to protest any classification given by the commission.

(d) Requires the commission to develop a database that incorporates the performance reviews and aggregates the reviews for each contractor.

(e) Authorizes a state agency to use the performance review database to determine whether to award a contract to a contractor reviewed in the database.

Sec. 2262.059. EXCLUDING CONTRACTOR FROM SOLICITATION PROCESS. Authorizes a state agency, based on its own contractor performance reviews and on information in the database developed under Section 2262.058, to exclude a contractor from the solicitation process for a contract if the agency determines the contractor has performed poorly on a previous state contract without regard to whether the contractor has been barred under Section 2155.077 (Barring Vendor From Participation in State Contracts).

Sec. 2262.060. PERFORMANCE MEASURES; REPORTS. (a) Requires each state agency to develop a plan for incorporating performance measures into all contracts entered into by the agency, including ensuring that performance measures are written into each contract prior to execution.

(b) Requires each state agency to report, not later than March 1 of each year, to the team, governor, lieutenant governor, and speaker of the house of representatives regarding performance measures in the agency's contracts. Requires the report to describe the agency's efforts to include performance-based provisions in the agency's contracts.

(c) Requires the state agency to make the report accessible to the public on the agency's website.

Sec. 2262.061. CONTRACT MANAGERS. (a) Requires each state agency that enters into contracts other than interagency contracts to establish a career ladder program for contract management in the agency.

(b) Requires an employee hired as a contract manager to oversee, and authorizes, as appropriate, such an employee to engage in procurement planning, contract solicitation, contract formation, price establishment, and other contract activities.

(c) Requires each state agency to determine, in consultation with the state auditor, the amount and significance of contract management duties sufficient for an employee to be considered a contract manager under this chapter.

Sec. 2262.062. APPROVAL OF CONTRACTS. (a) Requires each state agency to establish formal guidelines regarding who is authorized to approve a contract for the agency.

(b) Requires each state agency to adopt administrative rules to establish a monetary threshold above which agency contracts and amendments to or extensions of agency contracts require written authorization by the agency executive director.

(c) Requires the agency executive director to authorize a contract amendment in writing for state agency contracts valued in excess of \$1 million.

(d) Requires each state agency to annually report to the commission a list, including certain information, of each person authorized to approve contracts at the agency.

Sec. 2262.063. NEGOTIATION OF CONTRACT BY SINGLE EMPLOYEE PROHIBITED. Prohibits a state agency from negotiating a contract with only one employee engaging in the negotiation.

Sec. 2262.064. CONSISTENT PRICING BY CONTRACTORS. (a) Authorizes the commission to solicit a contract for the creation of a mechanism for tracking and comparing prices that state agencies pay for similar products or services.

(b) Authorizes a contractor awarded a contract under Subsection (a), on behalf of the state, to renegotiate state agency contracts for products or services to obtain the best value for the state when the tracking and comparing mechanism shows a disparity in the price paid for similar products or services. Authorizes a contract under Subsection (a) to allow the selected contractor to keep a percentage of the savings obtained in the renegotiated contracts.

(c) Requires a state agency to give a contractor selected under Subsection (a) the information the contractor requires for the purpose of tracking and comparing prices that state agencies pay for similar products and services.

(d) Prohibits a contractor selected under Subsection (a) from selling information it receives under Subsection (c) or otherwise making use of the information for a purpose other than performing its contract with the state.

Sec. 2262.065. EXCEPTION TO RENEGOTIATION REQUIREMENT. (a) Authorizes a state agency to exclude a contract from the application of Section 2262.064 if it determines that renegotiation of the contract under that section will affect the state negatively. Requires the state agency to notify certain individuals regarding this determination and explain why renegotiation of the contract is contrary to the state's overall interest.

(b) Requires the commission to adopt rules and procedures to document this process, including a requirement that the executive directors of the commission and the state agency making the determination formally approve the determination by signature or other appropriate method.

Sec. 2262.066. DEVELOPMENT OF OPTIMIZED MODEL FOR CERTAIN CONTRACTS. (a) Requires a state agency to create an optimized model for the identified functions or services to determine how and at what cost the agency could most efficiently provide the functions or services if a state agency determines that a proposed contractor or proposed contract extension or amendment would outsource existing services or functions performed by the state agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions.

(b) Requires the model to show consideration of certain relevant factors.

(c) Requires an agency that develops a model under this section to use it as the basis for cost comparison when deciding whether to outsource the identified functions or services.

(d) Provides that a model developed under this section is confidential and is not subject to disclosure under Chapter 552 (Public Information) until a final determination has been made to award the contract for which the model was developed.

Sec. 2262.067. ANALYSIS OF SERVICES AND FUNCTIONS. (a) Defines "inherently governmental in nature."

(b) Requires a state agency, before the agency is authorized to issue a competitive solicitation for the contract or amend or extend the contract, to contract with the council for its staff to perform an analysis to determine if any of the services or functions to be performed under the contract or contract extension or amendment are inherently governmental in nature, if a state agency determines that a proposed contractor or proposed contract extension or amendment would outsource existing services or functions performed by the state agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions.

(c) Prohibits the state agency, except as provided by Subsection (e), from contracting with a private entity to perform a service or function or amending or extending the contract, if a private entity is to perform the service or function under the contract extension or amendment, if the staff of the council determines that a service or function to be performed under contract or contract extension or amendment is inherently governmental in nature.

(d) Requires the analysis required under this section to use the standards and policies contained in the Office of Federal Procurement Policy, Policy Letter 92-1, or comparable guidelines developed by the council.

(e) Authorizes a state agency to contract with a private entity to perform a service or function or amend or extend an existing contract to allow a private entity to perform a service or function that the staff of the council determines to be inherently governmental in nature if the chief administrative officer of the agency issues a report stating that there is a compelling state interest in outsourcing the service or function.

Sec. 2262.068. FULL AND FAIR COST COMPARISON. (a) Requires a state agency to conduct a full and fair cost comparison to determine whether a private entity could perform the service or function with a comparable or better level of quality at a cost savings to the state and prepare a business case, including certain information, providing the initial justification for the proposed contract or proposed contract extension or amendment, if a state agency determines that a proposed contractor or proposed contract extension or amendment would outsource existing services or functions performed by the state agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions.

(b) Authorizes a state agency to contract with the council to have its staff perform the comparison or use the methodology provided in Section 2162.103 (Cost Comparisons and Contract Consideration) to perform the comparison required by Subsection (a)(1).

(c) Requires a state agency to submit the business case required under Subsection (a)(2) to certain persons and entities.

SECTION 9. Amends Section 2262.101, Government Code, to provide that certifying that state agencies have complied with Sections 2262.066 and 2262.068 is a duty to be performed by the

team to assist state agencies in improving contract management practices. Makes nonsubstantive changes.

SECTION 10. Amends Section 2262.102(a), Government Code, to add one member of the council as a member of the team. Makes conforming and nonsubstantive changes.

SECTION 11. Amends Subchapter C, Chapter 2262, Government Code, by adding Sections 2262.104, 2262.105, and 2262.106, as follows:

Sec. 2262.104. UNIFORM DEFINITIONS AND FORMS. Requires the team to develop and publish a uniform set of definitions for use as applicable in state contracts and a uniform and automated set of forms that a state agency is authorized to use in the different stages of the contracting process.

Sec. 2262.105. FORMS FOR REPORTING CONTRACTOR PERFORMANCE. Requires the team to develop forms, as a part of the uniform forms published under Section 2262.104, for use by state agencies in reporting a contractor's performance under Section 2262.057.

Sec. 2262.106. INDEPENDENT REVIEW AND ASSISTANCE. (a) Specifies the types of proposed contracts, contract amendments, or contract extensions for which this section applies.

(b) Requires the team to review a proposed contract, contract amendment, or contract extension to determine whether the contract terms contain certain provisions, recommend revisions if the team determines that such a contract does not contain the provisions required, and assist contract managers during negotiations with a contractor on such a contract.

SECTION 12. Amends Chapter 2262, Government Code, by adding Subchapters D, E, and F, as follows:

#### SUBCHAPTER D. CONTRACT PROVISIONS

Sec. 2262.151. USE OF UNIFORM FORMS. Authorizes a state agency to use the forms developed under Section 2262.104 as templates, guides, or samples for contracts entered into by the agency.

Sec. 2262.152. CONTRACT TERMS RELATING TO NONCOMPLIANCE. Requires the team to develop recommendations for contract terms regarding penalties for contractors who do not comply with a contract, including penalties for contractors who do not disclose conflicts of interest under Section 2262.201. Authorizes the team to develop recommended contract terms that are generally applicable to state contracts and terms that are applicable to important types of state contracts. Authorizes a state agency to include applicable recommended terms in a contract entered into by the agency.

Sec. 2262.153. REQUIRED PROVISION RELATING TO SUBCONTRACTOR COMPLIANCE. Requires each state agency contract to require that each contractor provide a list of all subcontractors and include a provision that holds the contractor responsible for the conduct of all subcontractors in complying with the contractor's contract with the state agency and requires each subcontractor to disclose all potential conflicts of interest to the state agency, according to guidelines developed under Section 2262.201(b), when the subcontractor contracts with or is otherwise hired by the contractor.

Sec. 2262.154. REQUIRED CONTRACTOR DISCLOSURE STATEMENT; STATE AGENCY EMPLOYEES. (a) Requires the team to develop a standard contract provision requiring a contractor and subcontractor to disclose certain employees.

(b) Requires a state agency to include the provision in a contract entered into by the agency.

Sec. 2262.155. **REQUIRED CONTRACTOR DISCLOSURE STATEMENT; OUTSOURCING.** (a) Requires each contract entered into by a state agency to include a provision requiring disclosure of any service materially necessary to fulfill the contract, including services performed by a subcontractor, that will be or are performed in a country other than the United States. Provides that this section does not apply to services that are incidental to fulfilling the contract.

(b) Requires the contract to include a provision allowing the state agency to terminate the contract and solicit a new contract if certain circumstances occur.

(c) Requires a state agency that decides not to solicit a new contract under circumstances in which the agency is authorized to do so under a contract provision required by Subsection (b) to report this decision to certain persons.

Sec. 2262.156. **HIRING PREFERENCE PROVISION FOR CERTAIN LARGE CONTRACTS.** Requires the contract or contract amendment to contain a provision that requires the contractor to give preference in hiring to certain former employees of a state agency if a state agency determines that a proposed contractor or proposed contract extension or amendment would outsource existing services or functions performed by the state agency that have a value of \$10 million or more, or that would lead to the loss of 100 or more existing state employee positions.

[Reserves Sections 2262.157-2262.200 for expansion.]

#### SUBCHAPTER E. ETHICS; CONFLICT OF INTEREST

Sec. 2262.201. **CONTRACTOR CONFLICTS OF INTEREST.** Requires each contractor who responds to a state agency's contract solicitation to disclose in its response all potential conflicts of interest to the agency. Requires the team to develop guidelines to aid contractors and state agencies in identifying potential conflicts of interest.

Sec. 2262.202. **EXECUTIVE DIRECTORS; ETHICS IN CONTRACTING CLASS.** Requires each executive director of a state agency to annually complete the ethics and contracting class developed under Section 2262.053(f). Provides that this section does not apply to a state agency that does not enter into any contracts.

[Reserves Sections 2262.203-2262.250 for expansion.]

#### SUBCHAPTER F. CHANGES TO CONTRACTS

Sec. 2262.251. **CONTRACT AMENDMENTS, EXTENSIONS, AND CHANGE ORDERS.** (a) Provides that an extension of or amendment to a contract, including a change order, is subject to the same approval processes as the original contract.

(b) Prohibits a state agency from extending or amending a contract unless certain conditions are met.

(c) Provides that this section does not affect whether a state agency is required to undertake a new solicitation process in the manner required for a new contract in order to extend or amend a contract.

Sec. 2262.252. **LARGE CHANGE IN CONTRACT VALUE.** Requires the state agency to obtain review and approval from the team and the agency's executive director before the agency amends or extends the contract if a proposed contract amendment or extension changes the monetary value of a contract by more than 10 percent.

Sec. 2262.253. **CERTAIN CONTRACT EXTENSIONS.** Provides that this subchapter does not apply to contract extensions that are specifically established as a component of the original procurement.

SECTION 13. Transfers Section 2262.003, Government Code, to Subchapter D, Chapter 2262, Government Code, as added by this Act, redesignates it as Section 2262.157, Government Code, and amends Section 2262.157, Government Code, as follows:

Sec. 2262.157. New heading: REQUIRED PROVISION RELATING TO AUDITING.

SECTION 14. (a) Provides that Sections 2262.063, 2262.066-2262.068, and 2262.106, Government Code, as added by this Act, apply only to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after the effective date of this Act.

(b) Provides that Section 2262.201(a), Government Code, as added by this Act, applies only in relation to a contract for which a state agency first solicits bids, proposals, offers, or qualifications on or after the date that the team's guidelines regarding potential conflicts of interest takes effect.

SECTION 15. Requires the commission to develop the training program, including the ethics and contracting class, required by Section 2262.053, Government Code, as amended by this Act, and Section 2262.0535, Government Code, as added by this Act, not later than May 1, 2008.

SECTION 16. Provides that a member of a governing body of a state agency is not required to complete the training developed under Section 2262.0535, Government Code, as added by this Act, until September 1, 2009.

SECTION 17. Provides that an executive director of a state agency is not required to comply with Section 2262.202, Government Code, as added by this Act, until September 1, 2009.

SECTION 18. Provides that a contract manager is not required to be certified under Chapter 2262, Government Code, as amended by this Act, until September 1, 2009.

SECTION 19. (a) Requires the team to develop the forms, criteria, recommendations, and provisions required by this Act, including Sections 2262.104, 2262.105, 2262.152, 2262.154, and 2262.201(b), Government Code, as added by this Act, as soon as practicable, and not later than May 1, 2008.

(b) Provides that a state agency is not required to comply with Sections 2262.056-2262.062 and Sections 2262.153-2262.156, Government Code, as added by this Act, until September 1, 2009. Authorizes a state agency to comply earlier if the forms, electronic requirements, database, or other items are available before that date.

SECTION 20. Effective date: November 1, 2007.