

BILL ANALYSIS

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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Currently, weakness exists in the statutes and regulations relating 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, several reports have alleged that state agency employees have engaged in improper actions while working on state contracts. The 2007 termination of close to \$1 billion health and social services contracts with Accenture, as well as Governor Perry's more recent decision to suspend the data center contract with IBM due to serious problems with contractor performance, demonstrate the need for increased oversight and training in the contracting process.

As proposed, S.B. 953 establishes processes for tracking contractor performance, developing performance measures for use in contracting, and excluding bad contractors from future solicitations. The bill requires state agencies to establish an office of contract management to review and approve high-risk contracts, including those with a value of \$10 million or more.

[**Note:** While the statutory reference in this bill is to the Texas Building and Procurement Commission (TBPC), the following amendments affect the comptroller of public accounts, as the successor entity to the procurement functions of TBCP.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the comptroller of public accounts in SECTION 12 (Sections 2262.059, 2262.062, and 2262.068, Government Code) and SECTION 16 (Section 2262.303, Government Code) of this bill.

Rulemaking authority is expressly granted to each state agency in SECTION 12 (Section 2262.064, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2155.004(a), Government Code, to prohibit a state agency from accepting a bid or awarding a contract that includes proposed financial participation by a person who participated, to any extent, rather than received compensation from the agency to participate, in preparing the specifications or request for proposals on which the bid or contract is based.

SECTION 2. Amends Section 2155.077(b), Government Code, to require the Texas Building and Procurement Commission (TBPC) except as provided by Subsection (d) (relating to barring convicted vendors from participating in state contracts) and subject to Chapter 2262 (Statewide Contract Management), to bar a vendor from participating in state contracts under Subsection (a) (relating to barring a vendor from participating in state contracts) for a period that is commensurate with the seriousness of the vendor's action and the damage to the state's interests.

SECTION 3. Amends Section 2155.144(d), Government Code, to require the agency, rather than authorize the agency subject to Subsection (e) [*repealed*], to consider all relevant factors in determining the best value, including all start-up, installation, transition, monitoring, and administrative costs; and the total long-term cost to the agency of acquiring the vendor's goods and services, including the cost of replacing the vendor's goods or services, if the vendor fails to

fulfill its obligations under the contract and the local economic impact of any state employee job loss associated with the procurement. Makes nonsubstantive changes.

SECTION 4. Amends Section 2262.001, Government Code, to redefine "contract manager" and "major contract" and to define "executive director."

SECTION 5. Amends Section 2262.002, Government Code, by adding Subsection (c), to authorize the comptroller of public accounts (comptroller) on a case-by-case basis to exempt a state agency from the requirements of this chapter.

SECTION 6. Amends Sections 2262.051(a) and (b), Government Code, as follows:

(a) Require the comptroller, rather than TBPC, in consultation with the attorney general, the Department of Information Resources (DIR), and the state auditor, to develop or periodically update a contract management guide for use by state agencies.

(b) Makes a conforming change.

SECTION 7. Reenacts Section 2262.052, Government Code, as amended by Chapters 309 (H.B. 3042) and 785 (S.B. 19), Acts of the 78th Legislature, Regular Session, 2003, and amends it as follows:

Sec. 2262.052. COMPLIANCE WITH GUIDE. (a) Requires each state agency to review, adopt, and comply with the contract management guide.

(b) Makes no changes to this subsection.

(c) Authorizes the comptroller on a case-by-case basis exempt a state agency from complying with the contract management guide.

SECTION 8. Amends the heading to Section 2262.053, Government Code, to read as follows:

Sec. 2262.053. TRAINING FOR CONTRACT MANAGERS.

SECTION 9. Amends Section 2262.053, Government Code, by amending Subsections (a), (b) and (d), and by adding Subsections (e)-(g), as follows:

(a) Requires the comptroller or a private vendor selected by the comptroller, rather than TBPC, in coordination with DIR, the state auditor, and the Health and Human Services Commission (HHSC), to develop, rather than develop or administer, a training program for contract managers.

(b) Requires that the training provide the contract manager with information regarding how to establish rates and prices that are cost-effective and that reflect the cost of providing the service; form, monitor, oversee, and enforce a contract; and use and apply contract planning and procurement skills and advanced sourcing strategies, techniques, and tools.

(d) Requires the comptroller, rather than TBPC, to administer the training program under this section.

(e) Requires the comptroller 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 that the program developed under this section include a separate class on ethics and contracting.

(g) Authorizes a state agency or educational entity to develop qualified contract manager training to supplement the training required under this section. Authorizes the

comptroller to incorporate the training developed by the agency or entity into the training program under this section.

SECTION 10. Amends Subchapter B, Chapter 2262, Government Code, by adding Section 2262.0535, as follows:

Sec. 2262.0535. TRAINING FOR GOVERNING BODIES. (a) Requires the comptroller or a private vendor selected by the comptroller to adapt the program developed under Section 2262.053 to develop an abbreviated contract management and oversight 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.

SECTION 11. Amends Section 2262.054, Government Code, to make a conforming change.

SECTION 12. Amends Subchapter B, Chapter 2262, Government Code, by adding Sections 2262.055 through 2262.068 as follows:

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

Sec. 2262.056. CONTRACT MANAGEMENT STAFF; WORKLOAD MEASURES. Requires each state agency to identify appropriate staffing levels necessary to perform the contract management duties and activities required under this chapter and develop workload measures and standards for the contract management staff.

Sec. 2262.057. STATE AGENCY REPOSITORY. Requires each state agency to maintain in a central location all contracts for that agency.

Sec. 2262.058. REPORTING CONTRACTOR PERFORMANCE. (a) Requires each state agency, after a contract is completed or otherwise terminated, to review the contractor's performance under the contract.

(b) Requires the state agency, using the forms developed by the team under Sections 2262.104 and 2262.105, to report to the comptroller on the results of the review regarding the contractor's performance under the contract.

Sec. 2262.059. CONTRACTOR PERFORMANCE DATABASE. (a) Requires the comptroller to store in a database contractor performance reviews as provided by this section.

(b) Requires the comptroller to evaluate the contractor's performance based on the information reported under Section 2262.058 and criteria established by the comptroller by rule. Requires the comptroller, based on the results of the evaluation, to determine whether the contractor is approved or not approved under this subsection or barred under Section 2155.077 (Barring Vendor From Participating In State Contracts). Requires the comptroller by rule to state generally the reasons for which the contractor will be determined to be approved or not approved under this subsection.

(c) Requires the comptroller to establish an evaluation process that allows vendors who receive an unfavorable contractor performance review or who are the subject of an unfavorable determination made by the comptroller under Subsection (b) to protest the unfavorable review or unfavorable determination by the comptroller.

(d) Requires the comptroller to develop a database that incorporates the performance reviews and aggregates the reviews for each contractor. Requires that the database also include the determination made by the comptroller under Subsection (b) for each contractor.

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

Sec. 2262.060. 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 2262.059, 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.

Sec. 2262.061. PERFORMANCE MEASURES; REPORTS. (a) Requires each state agency to develop a plan and timeline for incorporating process-oriented and outcome-based performance measures into all contracts entered into by the agency. Provides that this includes ensuring that performance measures are written into each contract before execution.

(b) Requires a state agency, before including the performance measures in a state agency contract, to make available to the public a draft of the proposed performance measures and allow adequate time for review, comment, and incorporation of comments into the performance measures.

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

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

Sec. 2262.062. ANNUAL EVALUATION OF CERTAIN CONTRACTS. Requires a state agency that enters into a contract with a monetary value that exceeds the monetary threshold provided by comptroller rule to have an independent evaluator annually review the contract and the contractor's performance under the contract to determine whether the contractor is complying with the contract terms.

Sec. 2262.063. 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) Authorizes an employee hired as a contract manager 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.

(d) Requires a contract manager to complete the training program and become certified under Section 2262.053.

Sec. 2262.064. 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; and a monetary threshold above which a draft contract is prohibited from being entered into unless the agency complies with public notice, public comment, and the governing body approval procedures strictly analogous to rulemaking procedures under Chapter 2001 (Administrative Procedure) before the contract is entered into.

(c) Prohibits a state agency from entering into a contract unless the contract is approved and signed by at least two persons authorized to approve contracts for the agency and approved by the agency's governing body in an open meeting.

(d) Requires a person authorized to approve contracts for a state agency to sign a conflict-of-interest statement agreeing to disclose any potential conflict of interest before approving a contract.

(e) Requires that a state agency contract include a provision designating who may authorize amendments to the contract for the state agency. Requires the agency executive director to authorize a contract amendment in writing for state contracts valued in excess of \$1 million.

(f) Requires each state agency to annually report to the comptroller a list of persons authorized to approve contracts at the agency. Requires that the list include each person's name, position, and supervisory responsibility, if any.

Sec. 2262.065. NEGOTIATION OF CONTRACT BY SINGLE EMPLOYEE PROHIBITED. Prohibits a state agency from negotiating a contract with only one employee engaging in the negotiation.

Sec. 2262.066. DEVELOPMENT OF OPTIMIZED MODEL FOR CERTAIN CONTRACTS. (a) Requires the agency, if a state agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, 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.

(b) Requires that the model show consideration of all relevant factors, including best practices in Texas and other states, available technology, access to benefits and services for clients, program integrity and assessment of state agency skills available throughout the life of the project.

(c) Requires an agency that develops an optimized 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) Provides that if a state agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value of \$10 million or more, then before the agency is authorized to issue a competitive solicitation for the contract or amend or extend the contract, the agency is required to contract with the State Council on Competitive Government (CCG) 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.

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

(d) Requires that the analysis required under this section use the guidelines developed by CCG.

(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 CCG 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 the agency, if a state agency determines that a proposed contract or proposed contract extension or amendment would outsource existing services or functions performed by the agency that have a value greater than \$10 million or another amount provided by comptroller rule, to:

(1) 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

(2) prepare a business case providing the initial justification for the proposed contract or proposed contract extension or amendment that includes the results of the comparison required under Subdivision (1); and the anticipated return on investment in terms of cost savings and efficiency for the proposed contract or proposed contract extension or amendment.

(b) Authorizes the state agency, to perform the comparison required by Subsection (a)(1), to contract with CCG to have its staff perform the comparison or use the methodology provided in Section 2162.103 (Cost Comparison and Contract Consideration). Requires a state agency to submit the business case required under Subsection (a)(2) to the governor, lieutenant governor, speaker of the house of representatives, Legislative Budget Board (LBB), and standing committees of the legislature that have primary jurisdiction over the agency, over state appropriations, and over state purchasing.

SECTION 13. Amends Section 2262.101, Government Code, as follows:

Sec. 2262.101. CREATION; DUTIES. (a) Creates this subsection from existing text. Provides that the Contract Advisory Team (team) is created to assist state agencies in improving contract management practices by providing recommendations to the comptroller, rather than TBPC, regarding any state agency that should be exempt under Section 2262.002(c) or 2262.052(c) from complying with the contract management guide; certifying that state agencies have complied with Sections 2262.002 and 2262.068; and setting standards for outsourcing state services and prescribing methods for monitoring those services. Makes nonsubstantive changes.

(b) Requires the team to consult with state agencies in developing forms, contract terms, guidelines, and criteria required under this chapter.

SECTION 14. Amends Section 2262.102(a), Government Code, to provide that the team consists of five members, including two members, rather than one, from the comptroller's office.

Deletes existing text providing that one member of the team is from TBPC. Makes nonsubstantive changes.

SECTION 15. Amends Subchapter C, Chapter 2262, Government Code, by adding Sections 2262.104 and 2262.105, as follows:

Sec. 2262.104. UNIFORM DEFINITIONS AND FORMS. (a) Requires the team established under Section 2262.101 to develop and publish a uniform set of definitions for use as applicable in state contracts. Requires that each state agency use the terminology as applicable in the contracts entered into by the agency.

(b) Requires the team to develop and publish a uniform and automated set of definitions set of forms that a state agency must use in the different stages of the contracting process.

Sec. 2262.105. FORMS FOR REPORTING CONTRACTING PERFORMANCE. Requires the team, as part of the uniform forms published under Section 2262.104, to develop forms for use by state agencies in reporting a contractor's performance under Section 2262.058.

SECTION 16. Amends Chapter 2262, Government Code, by adding Subchapters D, E, F, and G, as follows:

SUBCHAPTER D. CONTRACT PROVISIONS

Sec. 2262.151. USE OF UNIFORM FORMS. Requires 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. (a) Requires a state agency contract to include provisions authorizing the agency to impose clearly defined penalties for noncompliance with contract terms. Requires that the provisions include mechanisms from identifying when a contractor fails to comply with the contract terms, remedies to compel compliance, and remedies available for persons affected by the noncompliance.

(b) 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.

(c) 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 for the contract 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. LANGUAGE CONTAINED IN REQUEST FOR PROPOSALS. Requires each state agency contract to incorporate the language used in the request for proposals for the contract.

Sec. 2262.155. PROVISION RELATED TO POLITICAL CONTRIBUTIONS. Requires that each contract entered into by a state agency include a provision that

prohibits the contractor from making a campaign contribution to an elected official during the term of the contract.

Sec. 2262.156. **REQUIRED CONTRACTOR DISCLOSURE STATEMENT; OUTSOURCING.** (a) Requires that each contract entered into by a state agency include a provision requiring disclosure of any services materially necessary to fulfill the contract, including services performed in a country other than the United States. Provides that this section does not apply to services that are occasional, minor, or incidental to fulfilling the contract.

(b) Requires that the contract include a provision allowing the state agency to terminate the contract and solicit a new contract, except when a contractor takes prompt corrective action described by Subsection (c), if the contractor or a subcontractor of the contractor performs a service materially necessary to fulfill the contract in a country other than the United States and the contractor does not disclose in the contract that the service will be performed in a country other than the United States.

(c) Authorizes a contractor to replace a subcontractor without termination of a contract under this section if the contractor determines that the subcontractor is performing a service materially necessary to fulfill the contract in a country other than the United States and did not disclose that fact to the contractor.

SUBCHAPTER E. ETHICS; CONFLICT OF INTEREST; PROHIBITIONS

Sec. 2262.201. **CONTRACTOR CONFLICTS OF INTEREST.** (a) 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.

(b) 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.

Sec. 2262.203. **PROHIBITIONS RELATED TO STATE CONTRACTS.** (a) Prohibits a state agency from entering into or renewing a contract with a person who has as an employee a former state agency employee who was involved in contracting for the agency in the preceding six months.

(b) Prohibits a state agency from employing an individual who was employed by a person that conducts business with the state agency before the last day of the sixth month after the date the individual was last employed by the person.

(c) Authorizes the team to exempt a state agency from prohibition provided by Subsection (a) or (b).

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 rules and approval processes as the original contract.

(b) Prohibits a state agency from extending or amending a contract unless the agency complies with the same rules and approval processes for the extension or amendment as required for the original contract and a contract manager for the agency states in writing why the extension or amendment is necessary.

(c) Provides that this section does not affect whether a state agency states in writing why the extension or amendment is necessary.

Sec. 2262.252. AMENDMENT REQUIRING SIGNIFICANT ALTERATION. Prohibits a state agency from amending a contract to significantly alter the original terms or monetary value of the contract awarded through a competitive bidding process unless the state agency conducts another competitive bidding process for the goods or services under the new terms.

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.

SUBCHAPTER G. OFFICE OF CONTRACT MANAGEMENT; HIGH RISK CONTRACTS

Sec. 2262.301. DEFINITIONS. Defines "high-risk contract," "major information resources project," "quality assurance team," and "solicitation."

Sec. 2262.302. ESTABLISHMENT; GENERAL DUTIES. Requires each state agency subject to this chapter to establish an office of contract management to develop criteria for identifying high-risk factors in contracts; review and approve an action related to a high-risk contract as provided by Section 2262.303; provide recommendations and assistance to agency personnel throughout the contract management process; and coordinate and consult with the quality assurance team on all high-risk contracts relating to a major information resources project.

Sec. 2262.303. REVIEW AND APPROVAL; WAIVER. (a) Requires a state agency to receive approval from the agency's office of contract management before taking certain actions in relation to a high-risk contract.

(b) Requires the agency's office of contract management, in determining whether to approve an action described by Subsection (a), to review related documentation to ensure that potential risks related to the high-risk contract have been identified and mitigated.

(c) Authorizes the comptroller by rule to adopt criteria for waiving the review and approval requirements under Subsections (a) and (b).

Sec. 2262.304. SOLICITATION AND CONTRACT CANCELATION. Authorizes a state agency's office of contract management, after review of and comment on the matter by LBB and the governor, to recommend the cancelation of a solicitation or a contract during the review process under Section 2262.303 if a proposed solicitation is not in the best interest of the state; a proposed contract would place the state at an unacceptable risk if executed; or an executed contract is experiencing performance failure or payment irregularities.

Sec. 2262.305. AUDIT OF HIGH-RISK CONTRACT. Requires the state auditor to conduct an audit of a state agency contract identified as high-risk by a state agency or the team.

SECTION 17. Repealer: Sections 2155.004(e) (relating to not prohibiting a bidder or contract participant from providing free technical assistance), 2262.001(1-a) (relating to the definition of commission), and 2262.0011 (Transfer of Duties; Reference), Government Code.

SECTION 18. (a) Provides that Sections 2262.065 through 2262.068, Government Code, and Subchapter G, Chapter 2262, 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 in relation to a contract for which a state agency first advertises or otherwise solicits bids,

proposals, offers, or qualifications on or after the date that the team's guidelines regarding potential conflicts of interest take effect.

SECTION 19. Requires the comptroller, not later than May 1, 2010, 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.

SECTION 20. 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, 2011.

SECTION 21. 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, 2011.

SECTION 22. Provides that a contract manager is not required to be certified under Chapter 2262, Government Code, as amended by this Act, until September 1, 2011.

SECTION 23. (a) Requires the team, as soon as practicable, and not later than May 1, 2010, to develop forms, criteria, recommendations, and provisions required by this Act, including Sections 2262.104, 2262.105, 2262.152, and 2262.201(b), Government Code, as added by this Act.

(b) Provides that a state agency is not required to comply with Sections 2262.057 through 2262.064 and Sections 2262.151, 2262.152, 2262.153 and 2262.156, Government Code, as added by this Act until September 1, 2011. Authorizes a state agency to comply earlier if the forms, electronic requirements, database, or other items are available before that date.

SECTION 24. Effective date: November 1, 2009.