

## **BILL ANALYSIS**

Senate Research Center  
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S.B. 68  
By: Zaffirini  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

S.B. 68 seeks to improve the process by which state agencies solicit, negotiate, enter into, and manage contracts with vendors. This bill will expand the training processes for employees involved in contracting, improve contract reporting mechanisms for state agencies, and address ethical issues specific to contracting.

The manner in which state agencies engage in contracts with vendors is of vital concern for the state 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 that allege that some state agency employees engaged in improper actions while working on state contracts. Examples like these highlight the need for increased oversight and training in the contracting process.

Weaknesses exist in the statutes and regulations related to contract solicitation, negotiation, and management, which have subsequently led to alleged abuses of the contracting process throughout the past few years. What is more, there is a general need to ensure that state resources are being used for the purposes for which the legislature intended them. If left unmonitored, contracting presents numerous opportunities for abuse and waste of precious state resources.

Current law is found within Chapter 2262 (Statewide Contract Management), Government Code, which provides the majority of regulations related to statewide contract management. It addresses contracting by the creation of the contract advisory team and the contract management guide; however, the statute contains relatively little detail about specific aspects of the contracting process.

S.B. 68 addresses challenges in the state contracting process by increasing training for state employees involved in the contracting process and creating specific regulations that increase accountability, which include designated signatory authority for contracts of particular types. This bill improves the reporting mechanisms for keeping track of contracts; updates ethics provisions to hold vendors accountable for ensuring that they do not have a conflict of interest that might cause them to take advantage of the state agency; and helps to ensure that the state pays similar prices for similar goods across state agencies by requiring the solicitation of a contract that will research and renegotiate contracts as appropriate.

As proposed, S.B. 68 amends current law relating to contracting issues of state agencies, including ethics issues related to state contracting.

[**Note:** While the statutory reference in this bill is to Texas Building and Procurement Commission (TBPC), the following amendments affect Texas Facilities Commission, as the successor agency to TBPC.]

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the comptroller of public accounts in SECTION 5 (Section 2262.0015, Government Code) and SECTION 12 (Section 2262.303, Government Code) of this bill.

Rulemaking authority is expressly granted to each state agency, as defined in Section 2056.001, Government Code, in SECTION 8 (Section 2262.062, Government Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 322.020, Government Code, by amending Subsections (b), (c), and (e), and by adding Subsection (g), as follows:

(b) Requires that each state agency provide the Legislative Budget Board (LBB) with certain information regarding each major contract entered into by the agency. Makes nonsubstantive changes.

(c) Requires the LBB to post on the Internet certain information, including information provided to the LBB under Subsection (b)(2) (relating to certain information required to be submitted to the LBB) regarding a major contract. Makes nonsubstantive changes.

(e) Requires the LBB to make the information searchable by contract value, state agency, vendor, and date, including both the beginning date and the end date of the contract.

(g) Requires the LBB, in consultation with the Contract Advisory Team (CAT) and the state office of contract management, to set appropriate criteria to determine when and what information should be updated.

SECTION 2. 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 except as provided by Subsections (b) (relating to an audit of funds received from the United States government), (c) (relating to funds loaned by a state agency to an entity other than a state agency), and (d) (relating to an exception to Subsection (a)) and in accordance with Section 321.020 (Coordination of Certain Audits). Deletes existing text prohibiting a state agency, except as provided by Subsections (b), (c), and (d); Chapter 466 (State Lottery), pertaining to the state lottery; Chapter 2306 (Texas Department of Housing and Community Affairs), pertaining to the Texas Department of Housing and Community Affairs; and Chapter 361 (State Highway Turnpike Projects, pertaining to the Texas Turnpike Authority division of the Texas Department of Transportation, from using appropriated money to contract with a person to audit the financial records or accounts of the agency. Makes nonsubstantive changes.

SECTION 3. Amends Section 2162.103(a), Government Code, to require the State Council on Competitive Government, in comparing the cost of providing a service, to consider, among other costs, the installation costs and any other initial costs associated with a contract with a private contractor; other costs associated with the transition to using a private contractor's goods or services; and cost savings to the state if a private contractor were awarded the contract.

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

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

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

(b) Provides that this chapter does not apply to an enrollment contract described by 1 T.A.C. Section 391.183 (Enrollment Contracts) as that section existed on November 1, 2007.

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), (f), and (g), as follows:

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

(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 to keep a list of those contract managers.

(f) Requires the program developed under this section to 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 8. Amends Subchapter B, Chapter 2262, Government Code, by adding Section 2262.0535 and Sections 2262.055-2262.066, 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 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 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 for the training.

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

Sec. 2262.057. 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 CAT under Sections 2262.104 and 2262.105, to report to the comptroller, governor, lieutenant governor, and speaker of the house of representatives on the results of the review regarding the contractor's performance under the contract.

Sec. 2262.058. 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 2262.057 and criteria established by the comptroller.

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

(d) Requires the comptroller 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.

(f) Requires the comptroller to make the performance review database accessible to the public on the comptroller's Internet website.

Sec. 2262.059. EXCLUDING CONTACTOR 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. Provides that this includes ensuring that performance measures are written into each contract prior to execution.

(b) Requires that each state agency, not later than March 1 of each year, to report to CAT, 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.

(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) 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.

Sec. 2262.062. APPROVAL OF CONTRACTS. (a) Requires each state agency to establish formal guidelines regarding who may 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 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 comptroller a list of each person authorized to approve contracts at the agency. Requires that the list include the person's name, position, and supervisory responsibility, if any.

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. DEVELOPMENT OF OPTIMIZED MODEL FOR CERTAIN CONTRACTS. (a) Requires a state agency, if the 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, or that would lead to the loss of 100 or more existing state employee positions, 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 this state or 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 under Section 2262.066 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. 2262.065. ANALYSIS OF SERVICES AND FUNCTIONS. (a) Defines "inherently governmental in nature" in this section.

(b) Requires a state agency, if the 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, or that would lead to the loss of 100 or more existing state employee positions, then before the agency may issue a competitive solicitation for the contract or amend or extend the contract, to contract with the State Council on Competitive Government 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 the state agency, if the State Council on Competitive Government determines that a service or function to be performed under the contract or contract extension or amendment is inherently governmental in nature, except as provided by Subsection (e), from contracting with a private entity to perform the 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.

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

(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 State Council on Competitive Government 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. 2262.066. FULL AND FAIR COST COMPARISON. (a) Requires a state agency, if the 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, or that would lead to the loss of 100 or more existing state employee positions, 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 a state agency, to perform the comparison required by Subsection (a)(1), to contract with the State Council on Competitive Government to have its staff perform the comparison or use the methodology provided in Section 2162.103 (Cost Comparison and Contract Considerations).

(c) Requires a stage agency, before executing a final contract, to submit the business case required under Subsection (a)(2) to the governor, lieutenant governor, speaker of the house of representatives, LBB, state office of contract management, and standing committees of the legislature that have primary jurisdiction over the agency, over state appropriations, and over state purchasing.

SECTION 9. Amends Section 2262.101, Government Code, as follows:

Sec. 2262.101. CREATION; DUTIES. (a) Creates this subsection from existing text. Provides that CAT is created to assist state agencies in improving contract management practices by certain activities, including providing recommendations to the comptroller, rather than TBPC, regarding the development of the contract management guide, and the training under Section 2262.053, and certifying that state agencies have complied with Sections 2262.064 and 2262.066. Deletes existing text relating to improving contract management practices by reviewing the solicitation of major contracts by state agencies. Makes nonsubstantive changes.

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

SECTION 10. Amends Section 2262.102(a), Government Code, as follows:

(a) Provides that CAT consists of five members, including one member from the attorney general's office, one member from the comptroller's office, one member from the DIR, one member from the governor's office, and one member from the State Council on Competitive Government. Deletes existing text relating to one member being from TBPC.

SECTION 11. 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 CAT to develop and publish a uniform set of definitions for use as applicable in state contracts.

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

Sec. 2262.105. FORMS FOR REPORTING CONTRACTOR PERFORMANCE. Requires CAT, 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 2262.057.

SECTION 12. 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. 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. (a) Requires CAT 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 CAT to develop recommended contract terms that are generally applicable to state contracts and terms that are applicable to important types of state contracts.

(b) 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 that each state agency contract require that each contractor provide a list of all subcontractors for the contract and include a provision that:

(1) holds the contractor responsible for the conduct of all subcontractors in complying with the contractor's contract with the state agency; and

(2) 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. Requires a contractor and subcontractor, before entering into a contract with the state, to disclose each employee:

(1) who was employed by the state at any time during the two years before the date of the disclosure and is now employed by the contractor or subcontractor, or the contractor or subcontractor at any time during the year before the date of the disclosure and is now employed by the state; and

(2) who is materially involved in the development of the contract terms or the management of the contract.

Sec. 2262.155. 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 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 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 as provided by Subsection (d), if the contractor or 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) 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 the governor, the lieutenant governor, the speaker of the house of representatives, and CAT.

(d) 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.

Sec. 2262.156. **HIRING PREFERENCE PROVISION FOR CERTAIN LARGE CONTRACTS.** Requires that a contract or contract amendment, if a state agency determines that the 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, or that would lead to the loss of 100 or more existing state employee positions, contain a provision that requires the contractor to give preference in hiring to former employees of a state agency whose employment is terminated because of the contract or contract extension or amendment; who satisfy the contractor's hiring criteria for that position; and whose salary requirements are competitive with market rates for positions with equivalent skills and experience.

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

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 CAT to develop guidelines to aid contractors and state agencies in identifying potential conflicts of interest.

Sec. 2262.202. **EXECUTIVE DIRECTORS; ETHICS AND 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.

#### 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 the agency complies with the same 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 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. (a) Requires a state agency, if a proposed contract amendment or extension changes the monetary value of a contract by \$1 million or more, to obtain review and approval from CAT and the agency's executive director before the agency amends or extends the contract.

(b) Provides that this section does not apply to a proposed contract amendment required by a state or federal statute.

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. STATE OFFICE OF CONTRACT MANAGEMENT

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

Sec. 2262.302. ESTABLISHMENT; GENERAL DUTIES. Requires the comptroller to establish a state office of contract management (office) to:

- (1) develop criteria for identifying high-risk factors in contracts;
- (2) review and approve an action related to a high-risk contract as provided by Section 2262.303;
- (3) provide recommendations and assistance to state agency personnel throughout the contract management process; and
- (4) 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 each state agency before taking actions in relation to a high-risk contract, to receive approval from the office before publicly releasing solicitation documents, executing a final contract, and making a payment or a series of payments that equal half of the contract value.

(b) Requires the office, in determining whether to approve an action described by Subsection (a), to review related documentation, including, for a contract that would outsource existing services or functions performed by the agency that have a value of at least \$10 million, or that would lead to the loss of at least 100 existing state employee positions, the optimized model developed under Section 2262.064 and the cost comparison conducted under Section 2262.066, 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 CANCELLATION. Authorizes the office, after review of and comment on the matter by LBB and the governor, to recommend the cancellation 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.

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, and amends it, as follows:

Sec. 2262.157. New heading: REQUIRED PROVISION RELATING TO AUDITING. Redesignates existing Section 2262.003 as Section 2262.157. Makes no further changes to this section.

SECTION 14. Repealer: Section 2262.0521(f) (relating to the procedures by which a state agency issues a solicitation for a major contract), Government Code.

SECTION 15. (a) Makes application of Sections 2262.063, 2262.066, and 2262.154, Government Code, and Subchapter G, Chapter 2262, Government Code, as added by this Act, prospective.

(b) Makes application of Section 2262.201(a), Government Code, as added by this Act, prospective.

SECTION 16. Requires the comptroller, not later than May 1, 2012, 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 17. 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, 2013.

SECTION 18. 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, 2013.

SECTION 19. Provides that a contract manager is not required to be certified under Chapter 2262, Government Code, as amended by this Act, until September 1, 2013.

SECTION 20. (a) Requires CAT, as soon as practicable, and not later than May 1, 2012, to develop the 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 2262.056 through 2262.062 and Sections 2262.153, 2262.155, and 2262.156, Government Code, as added by this Act, until September 1, 2013. Authorizes a state agency to comply earlier if the forms, electronic requirements, database, or other items are available before that date.

SECTION 21. Effective date: November 1, 2011.