

BILL ANALYSIS

Senate Research Center

C.S.S.B. 65
By: Nelson
Finance
3/12/2019
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Texas has seen many procurement difficulties at our state agencies. Despite procurement reforms over the past two legislative sessions, several well-publicized instances of agencies failing to adhere to procurement laws highlight the need for further reform. S.B. 65 ensures that safeguards and consistent contracting practices are in place to achieve the best value for the state in every procurement

S.B. 65 better allocates resources to provide more oversight during the stages of procurement when agencies need it most. (Original Author's/Sponsor's Statement of Intent)

C.S.S.B. 65 amends current law relating to oversight of and requirements applicable to state agency contracting and procurement.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the comptroller of public accounts of the State of Texas in SECTION 6 (Section 2054.158, Government Code), SECTION 27 (Section 2261.258, Government Code), and SECTION 28 (Section 2262.053, Government Code) of this bill.

Rulemaking authority previously granted to the Texas Department of Information Resources is modified in SECTION 7 (Section 2054.159, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 441.1855, Government Code, as follows:

Sec. 441.1855. RETENTION OF CONTRACT AND RELATED DOCUMENTS BY STATE AGENCIES. (a) Creates this section from existing text. Provides that notwithstanding Section 441.185 (Record Retention Schedules) and 441.187 (Destruction of State Records), a state agency:

(1) and (2) makes no changes to these subdivisions.

(b) Requires a contract solicitation document that is an electronic document to be retained under Subsection (a) in the document's electronic form. Authorizes a state agency to print and retain the document in paper form only if the agency provides for the preservation, examination, and use of the electronic form of the document in accordance with Subsection (a), including any formatting or formulas that are part of the electronic format of the document.

(c) Defines "contract solicitation document" and "electronic document" for purposes of this section.

SECTION 2. Amends Section 2054.003(10), Government Code, to redefine "major information resources project" to mean any information resources technology project identified in a state agency's biennial operating plan whose development costs exceed \$5 million, rather than \$1 million, in addition to other certain criteria.

SECTION 3. Amends Section 2054.055(b), Government Code, as follows:

(b) Deletes existing text requiring a report on the use of information resources to examine major information resources projects completed in the previous state fiscal biennium to determine the performance of the implementing state agency, cost and value effectiveness, timeliness, and other performance criteria necessary to assess the quality and value of the investment and examine major information resources projects after the second anniversary of the project's completion to determine progress toward meeting performance goals and operating budget savings. Makes nonsubstantive changes.

SECTION 4. Amends Section 2054.1181, Government Code, by amending Subsection (b) and adding Subsection (j), as follows:

(b) Requires the Texas Department of Information Resources (DIR), in performing its duties under this section, to develop policies for the additional oversight of projects required by Subsection (a) and other certain actions.

(j) Prohibits a state agency from amending a contract subject to review under Section 2054.158(b)(4) if the contract is at least 10 percent over budget or the associated major information resources project is at least 10 percent behind schedule unless the agency:

(1) conducts a cost-benefit analysis with respect to canceling or continuing the project; and

(2) submits the analysis described by Subdivision (1) to the quality assurance team.

SECTION 5. Amends Subchapter F, Chapter 2054, Government Code, by adding Section 2054.137, as follows:

Sec. 2054.137. APPROVAL REQUIRED FOR ASSIGNMENT OF CERTAIN CONTRACTS. (a) Defines "sensitive personal information" for purposes of this section.

(b) Provides that this section applies only to a contract awarded by a state agency for a major information resources project or involving sensitive personal information.

(c) Prohibits a vendor from assigning the vendor's rights under a contract to which this section applies to a third party unless the assignment is approved by the quality assurance team.

(d) Requires a state agency that receives notice that a vendor proposes to make an assignment subject to approval under Subsection (c) to notify the Legislative Budget Board (LBB) and the quality assurance team of the proposed assignment.

SECTION 6. Amends Section 2054.158, Government Code, by amending Subsection (b) and adding Subsections (d) and (e), as follows:

(b) Requires the quality assurance team to:

(1) develop and recommend policies and procedures to improve the development, implementation, and return on investment for state agency information resources technology projects;

(2) except as provided by Subsection (e), review a state agency's business case prepared for a major information resources project under Section 2054.303 (Business Case and Statewide Impact Analysis) and make recommendations to improve the implementation of the project, rather than develop and recommend procedures to improve the implementation of state agency information resources

technology projects by including considerations for best value and return on investment;

(3) makes a nonsubstantive change;

(4) review and provide recommendations on the final negotiated terms of a contract for the development or implementation of a major information resources project with a value of at least \$10 million; and

(5) provide a report to the governor, lieutenant governor, speaker of the house of representatives, and presiding officer of the standing committee of each house of the legislature with primary jurisdiction over appropriations by December 1 of each even-numbered year that includes certain information.

(d) Requires the comptroller of public accounts of the State of Texas (comptroller) by rule to develop guidelines for the additional or reduced monitoring of major information resources projects and associated contracts of state agencies during the periods described by Sections 2261.258(c)(2)(A), (B), and (C).

(e) Authorizes the quality assurance team to waive the review authorized by Subsection (b)(2) for any project for which the team determines that a waiver of the review is appropriate because of the project's associated risk.

SECTION 7. Amends 2054.159, Government Code, by amending Subsection (b) and adding Subsections (f) and (g), as follows:

(b) Requires DIR by rule to develop the performance indicators the quality assurance team is required to monitor under Subsection (a) and obtain the approval of each member of the quality assurance team for the performance indicators.

(f) Requires a state agency, for each major information resources project, to provide the quality assurance team any verification and validation report or quality assurance report related to the project not later than the 10th day after the date the agency receives a request for the report.

(g) Authorizes the quality assurance team to request any information necessary to determine a major information resources project's potential risk.

SECTION 8. Amends Subchapter G, Chapter 2054, Government Code, by adding Section 2054.160, as follows:

Sec. 2054.160. REVIEW OF CONTRACT FOR MAJOR INFORMATION RESOURCES PROJECT. (a) Requires a state agency, for each contract for the development or implementation of a major information resources project with a value of at least \$10 million, to submit the proposed terms of the contract to the quality assurance team before the start of negotiations and submit the final negotiated unsigned contract to the quality assurance team for review under Section 2054.158(b)(4).

(b) Requires a state agency, after the quality assurance team makes a recommendation under Section 2054.158(b)(4), to comply with the recommendation or submit to the quality assurance team a written explanation regarding why the recommendation is not applicable to the contract under review.

(c) Requires a state agency, before amending a contract related to a major information resources project, to notify the governor, lieutenant governor, speaker of the house of representatives, presiding officer of the standing committee of each house of the legislature with primary jurisdiction over appropriations, and quality assurance team if the total value of the amended contract exceeds or will exceed the initial contract value by 10 percent or more or if the amendment

requires the contractor to provide consultative services, technical expertise, or other assistance in defining project scope or deliverables.

(d) Requires a state agency to provide to the quality assurance team a justification for an amendment subject to Subsection (c).

SECTION 9. Amends Section 2054.301, Government Code, as follows:

Sec. 2054.301. New heading: APPLICABILITY. Provides that this subchapter applies only to a major information resources project, rather than to a major information resources project and a major contract. Deletes existing definition of "major contract."

SECTION 10. Amends Section 2054.302, Government Code, by amending Subsection (b) and adding Subsection (d), as follows:

(b) Requires DIR, rather than requiring DIR in consultation with the LBB and the Texas State Auditor's Office, to develop and provide guidelines and forms for the documents required by this subchapter.

(d) Requires the guidelines and forms developed under Subsection (b) to be approved by each member of the quality assurance team.

SECTION 11. Amends Section 2054.303, Government Code, by amending Subsections (a) and (c) and adding Subsection (d), as follows:

(a) Requires a state agency, for each proposed major information resources project, rather than for each proposed major information resources project or major contract, to prepare:

(1) a business case providing the initial jurisdiction for the project, rather than a business case providing the initial jurisdiction for the project or contract, including the anticipated return on investment in terms of cost savings and efficiency for the project or contract; and

(2) if the state agency has been assigned to the rating under Section 2261.258(a)(1):

(A) a statewide impact analysis of the project's, rather than project's and contract's, effect on the state's common information resources infrastructure. Deletes existing text including the possibility of reusing code or other resources; and

(B) a technical architectural assessment of the project, if requested by the quality assurance team, rather than in consultation with DIR, a technical architectural assessment of the project or contract.

(c) Make a conforming change.

(d) Requires a state agency, after the quality assurance team makes a recommendation relating to a business case under Section 2054.158(b)(2), to comply with the recommendation or submit to the quality assurance team a written explanation regarding why the recommendation is not applicable to the project under review.

SECTION 12. Amends Sections 2054.304(a) and (b), Government Code, as follows:

(a) Makes a conforming change.

(b) Deletes existing text creating an exception under Subsection (c) requiring a state agency to file the project plan with the quality assurance team and DIR before the agency first issues a vendor solicitation for the project or contract. Makes a conforming change.

SECTION 13. Amends Section 2054.305, Government Code, as follows:

Sec. 2054.305. **PROCUREMENT PLAN AND METHOD FOR MONITORING CONTRACTS.** Requires a state agency, before issuing a solicitation, rather than before issuing a vendor solicitation for a contract, for a contract subject to review under Section 2054.158(b)(4), to develop, consistent with any acquisition plan provided in the guide developed under Section 2262.051, rather than consistent with DIR guidelines:

(1) a procurement plan with anticipated service levels and performance standards for each contractor, rather than for each vendor; and

(2) makes no changes to this subdivision.

SECTION 14. Amends Section 2054.307(a), Government Code, as follows:

(a) Requires a state agency's executive director, or the executive director's designee, to approve certain documents. Deletes existing text requiring an information resources manager, designated project manager, and the agency employee in charge of information security for the agency to approve if DIR requires signatures.

SECTION 15. Amends Section 2102.005, Government Code, as follows:

Sec. 2102.005. **INTERNAL AUDITING REQUIRED.** (a) Creates this subsection from existing text.

(b) Requires a state agency, in conducting the internal auditing program under Subsection (a), to consider methods for ensuring compliance with contract processes and controls and for monitoring agency contracts.

SECTION 16. Amends Section 2155.089, Government Code, as follows:

Sec. 2155.089. **REPORTING VENDOR PERFORMANCE.** (a) Requires a state agency, if the value of the contract exceeds \$5 million, to review the vendor's performance:

(1) at least once each year during the term of the contract; and

(2) at each key milestone identified for the contract.

(b) Requires the state agency to report to the comptroller, using the tracking system established by Section 2262.055 (Vendor Performance Tracking System), on the results of each review conducted under Subsection (a) regarding a vendor's performance under a contract.

(b-1) Prohibits a state agency from extending a vendor's contract until after the agency reports the results of each review of the vendor conducted under Subsection (a)(1) or (2), as applicable, in the manner prescribed by Subsection (b).

(c) Provides that this section does not apply to:

(1) makes a nonsubstantive change;

(2) a contract of the Employees Retirement System of Texas (ERS), rather than a contract of ERS or the Teacher Retirement System of Texas (TRS), except for a contract with a nongovernmental entity for claims administration of a group health benefit plan under Subtitle H (Health

Benefits and Other Coverages for Governmental Employees), Title 8, Insurance Code; or

(3) a contract entered into by the comptroller under Section 2155.061 (Commission Purchasing System) or DIR under Section 2157.068 (Purchase of Information Technology Commodity Items).

SECTION 17. Amends Section 2155.144, Government Code, by adding Subsection (b-2), as follows:

(b-2) Provides that the Health and Human Services Commission is delegated the authority to procure goods and services related to a contract for:

(1) a project to construct or expand a state hospital operated by a health and human services agency or a state supported living center as defined by Section 531.002 (Definitions), Health and Safety Code; or

(2) a deferred maintenance project for a health facility described by Subdivision (1).

SECTION 18. Amends Section 2254.024(a), Government Code, as follows:

(a) Deletes existing text creating an exception requiring the governing board of a retirement system trust fund to comply with Section 2254.030 (Publication in Texas Register After Entering Into Major Consulting Services Contract).

SECTION 19. Amends the heading to Section 2254.029, Government Code, to read as follows:

Sec. 2254.029. PUBLICATION IN STATE BUSINESS DAILY BEFORE ENTERING INTO MAJOR CONSULTING SERVICES CONTRACT.

SECTION 20. Amends Section 2254.029(a), Government Code, as follows:

(a) Requires a state agency, not later than the 30th day before the date it enters into a major consulting services contract, to post in the state business daily under Section 2155.083 (State Business Daily; Notice Regarding Procurements Exceeding \$25,000), rather than to file with the secretary of state (SOS) for publication in the Texas Register, certain information.

SECTION 21. Amends 2254.031(a), Government Code, as follows:

(a) Requires a state agency that intends to renew, amend, or extend a major consulting services to comply with Sections 2254.028 (Notice of Intent: Major Consulting Services Contract) and 2254.029 (Publication in Texas Register Before Entering Into Major Consulting Services Contract) if the contract after the renewal, amendment, or extension is a major consulting services contract. Deletes existing text requiring a state agency that intends to renew a major consulting services to file with SOS for publication in the Texas Register the information required by Section 2254.030 (Publication in Texas Register After Entering Into Major Consulting Services Contract) not later than the 20th day after the date the contract is renewed if the renewal contract is not a major consulting services contract. Makes nonsubstantive changes.

SECTION 22. Amends Subchapter B, Chapter 2261, Government Code, by adding Sections 2261.0525 and 2261.054, as follows:

Sec. 2261.0525. CERTIFICATION OF VENDOR ASSESSMENT PROCESS. (a) Requires a state agency's procurement director, before the state agency may award a contract to a vendor, to review the process and all documents used by the agency to assess each vendor who responded to the solicitation. Requires the procurement director to certify in writing that the agency assessed each vendor's response to the solicitation

using the evaluation criteria published in the solicitation or, if applicable, the written evaluation criteria established by the agency and that the final calculation of scoring of responses was accurate.

(b) Requires a state agency to justify in writing any change in the scoring of a vendor that occurs following the initial assessment and scoring of responses. Requires the written justification to be reviewed by the agency's procurement director. Requires the procurement director to certify in writing that the change in scoring was appropriate.

(c) Authorizes a state agency's procurement director to delegate to a person whose position in the agency's procurement office is at least equal to the position of contract manager the certification authority under this section if the agency has met the conditions prescribed by the comptroller under Section 2262.053(h).

(d) Requires a written certification or justification required by this section to be placed in the contract file.

Sec. 2261.054. STATEMENT REGARDING VENDOR SELECTION REQUIRED FOR CERTAIN CONTRACT AWARDS. Requires a state agency, if the state agency awards a contract to a vendor who did not receive the highest score in an assessment process certified under Section 2261.0525, to state in writing in the contract file the reasons for making the award.

SECTION 23. Amends the heading to Subchapter E, Chapter 2261, Government Code, to read as follows:

SUBCHAPTER E. CONTRACTOR OVERSIGHT AND LIABILITY

SECTION 24. Amends Subchapter E, Chapter 2261, Government Code, by adding Section 2261.204, as follows:

Sec. 2261.204. LIABILITY PROVISIONS. (a) Requires each state agency to include in the contract file for each of its contracts for goods or services subject to this chapter a written explanation of the agency's decision to include or not include in the contract a provision for liquidated damages or another form of liability for damages caused by the contractor.

(b) Requires a contract file to also include, if applicable, a written justification for any provision in the contract that limits the liability of a contractor for damages.

(c) Requires a state agency, if an extension of the state agency's contract described by Subsection (a) modifies a provision for liquidated damages or another provision relating to a contractor's liability for damages, to amend the written explanation or justification required by this section to include a justification for the modification.

SECTION 25. Amends Section 2261.251(b), Government Code, to delete existing text providing that this subchapter does not apply to a contract of TRS.

SECTION 26. Amends Section 2261.254(d), Government Code, to authorize the governing body or governing official of a state agency, as appropriate, to delegate to the executive director or a deputy executive director of the agency the approval and signature authority under Subsection (c).

SECTION 27. Amends Subchapter F, Chapter 2261, Government Code, by adding Sections 2261.258 and 2261.259, as follows:

Sec. 2261.258. MONITORING ASSESSMENT BY STATE AUDITOR. (a) Requires the state auditor, before July of each year, to assign one of the following ratings to each of the 25 largest state agencies in that state fiscal year as determined by the LBB:

- (1) additional monitoring warranted;
- (2) no additional monitoring warranted; or
- (3) reduced monitoring warranted.

(b) Requires the state auditor, in assigning a rating to a state agency as required under Subsection (a), to consider certain information, as applicable.

(c) Requires the state auditor, on or before September 1 of each year, to submit to the comptroller a report that:

(1) lists each state agency that was assigned a rating under Subsection (a); and

(2) for a state agency that was assigned a rating under Subsection (a)(1) or (3), specifies that additional or reduced monitoring, as applicable, is required during one or more of the following periods:

(A) contract solicitation development;

(B) contract formation and award; or

(C) contract management and termination.

(d) Requires the comptroller by rule to develop guidelines for the additional or reduced monitoring of a state agency during the periods described by Subsections (c)(2)(A), (B), and (C) for a contract that falls under the monetary thresholds for review or monitoring by the Contract Advisory Team or the quality assurance team.

(e) Authorizes the state auditor to request any information necessary from a state agency, the Contract Advisory Team, or the quality assurance team to comply with the requirements of this section, and requires the agency or team, as applicable, to provide the requested information.

(f) Requires the state auditor and the comptroller to share information as necessary to fulfill their respective duties under this section.

(g) Requires the state auditor's duties under this section to be included in the audit plan and approved by the legislative audit committee under Section 321.013 (Powers and Duties of State Auditor).

Sec. 2261.259. ELECTRONIC COMPLIANCE SUBMISSIONS. Authorizes a state agency that uses the centralized accounting and payroll system authorized under Sections 2101.035 (Administration of USAS) and 2101.036 (State Agency Internal Accounting Systems) or an alternative computer software system for compliance requirements related to the procurement of goods or services to electronically submit to the comptroller using that computer software system a written justification, verification, notification, or acknowledgement required under this chapter or Subchapter B (General Purchasing Requirements, Procedures, and Programs), Chapter 2155.

SECTION 28. Amends Subchapter B, Chapter 2262, Government Code, by adding Section 2262.053, as follows:

Sec. 2262.053. CONTRACT FILE CHECKLIST; CERTIFICATION OF AGENCY COMPLIANCE. (a) Requires each state agency to include in the contract file for each of its contracts a checklist to ensure the agency's compliance with state laws and rules relating to the acquisition of goods and services by the agency.

(b) Requires the comptroller to develop and periodically update a model contract file checklist and make the checklist available for use by state agencies. Requires the comptroller to periodically update the checklist.

(c) Authorizes the comptroller to adopt rules necessary to develop or update the model contract file checklist.

(d) Requires the model contract file checklist to address each stage of the procurement process and to include, at a minimum, a description of:

(1) the documents that are required to be maintained during each stage of the procurement process in accordance with applicable state laws and comptroller rules; and

(2) the procedures and documents that are required to be completed during the following stages of the procurement process:

(A) contract solicitation development;

(B) contract formation and award; and

(C) contract management.

(e) Authorizes a state agency to develop its own contract file checklist based on the procurement and contracting needs of that agency, provided that the checklist developed by the agency is consistent with the comptroller's model contract file checklist and meets any requirements established by comptroller rule.

(f) Requires a state agency's contract manager or procurement director, before the state agency awards a contract to a vendor for the purchase of goods and services to:

(1) review the contents of the contract file for the contract, including the checklist, to ensure that all documents required by state law or applicable agency rules are complete and present in the file; and

(2) certify in a written document to be included in the contract file that the review required under Subdivision (1) was completed.

(g) Authorizes a state agency's contract manager or procurement director to delegate to a person in the agency's procurement office the certification authority under this section.

(h) Requires the comptroller by rule to prescribe the conditions under which a state agency's contract manager or procurement director:

(1) is required to make the certification required by Subsection (f); and

(2) is authorized to delegate the certification authority under this section.

SECTION 29. Repealer: Section 2054.1181(f) (relating to authorizing the quality assurance team to review and analyze a project's risk to determine whether to approve a project for the expenditure of funds), Government Code.

Repealer: Section 2054.1184 (Assessment of Major Information Resources Project), Government Code.

Repealers: Sections 2054.159(c) (relating to requiring the quality assurance team to place a major resources project on a list for more intensive monitoring if the quality assurance team determines that the project is not likely to achieve performance objectives) and (d)

(relating to requiring the quality assurance team to monitor monthly reports for each major information resources project), Government Code.

Repealer: Section 2054.304(c) (relating to prohibiting certain actions unless the project plan has been filed under this section), Government Code.

Repealer: Section 2254.030 (Publication in Texas Register After Entering Into Major Consulting Services Contract), Government Code.

Repealer: Section 2254.031(c) (relating to the requirement that a state agency intending to amend or extend a major consulting services contract take certain actions), Government Code.

Repealer: Section 2254.033(b) (relating to the requirement that a state agency accepting an offer from an individual include certain information in the information it files), Government Code.

SECTION 30. Requires the comptroller, DIR, and each affected state agency as necessary, as soon as practicable after the effective date of this Act, to adopt the rules, processes, and procedures and take the actions necessary to implement the changes in law made by this Act.

SECTION 31. (a) Provides that, except as provided by Subsections (b) and (c), this Act applies only in relation 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, that is extended or modified on or after the effective date of this Act, or for which a change order is submitted on or after the effective date of this Act.

(b) Makes application of Section 2054.137, Government Code, prospective.

(c) Makes application of this Act to a major consulting services contract prospective.

SECTION 32. Provides that, notwithstanding Section 2261.258, Government Code, as added by this Act, the first report required under that section is due on or before September 1, 2020.

SECTION 33. Effective date: September 1, 2019.