

Texas Conservative Coalition Research Institute

Written Testimony to the House Committee on State Affairs

August 15, 2016

Regarding the Committee's Interim Charge:

Examine procedures regarding contract monitoring, compliance, performance evaluation and notification requirements for state contracting procedures. Include recommendations to determine a "best value" for the state and prevent conflicts of interests.

Background

Through Senate Bill 20 (84R, 2015) and certain provisions in Article IX of the General Appropriations Act (HB 1, 2015), the 84th Legislature enacted a series of reforms to the process and monitoring of state agency contracts. These actions can be seen partially as a response to allegations of impropriety in the award of contracts at a state agencyⁱ, but also as part of broader efforts to improve the process of state procurement and deliver the best value possible to taxpayers.ⁱⁱ

While these were laudable efforts to improve state contracting and to improve oversight and transparency of the procurement process, many of the administrative requirements that they put in place continue a trend toward a prescriptive approach to contracting. Some of these new stipulations also appear to simply layer over, rather than repeal or reform, older statutory provisions. For instance, Section 11 of SB 20 adds that a state agency may bar a vendor from participating in a state contract for "repeated unfavorable performance reviews" or "repeated unfavorable classifications" under the Vendor Performance Tracking System.ⁱⁱⁱ However, that section of the Government Code already allows a vendor to be barred based on "substandard performance under a contract with the state or a state agency."^{iv} It is unclear how substandard performance differs materially from unfavorable performance for procurement teams tasked with choosing a vendor, or what value this new requirement adds to the process.

Section 9 of SB 20 directs the Texas Comptroller of Public Accounts (Comptroller) to adopt rules that specify how state agencies must report information on contracts using the statewide, centralized accounting and payroll system. While the legislation does not mandate specific reporting standards, it does direct the Comptroller to consider requirements including: a brief summary of each contract that is easily searchable; any contract related documents;

the criteria used in determining the contract award; whether the contract was awarded based on best value; a statement about how the selected vendor meets best value criteria; and any contract and vendor performance measurements.^v While this information on the surface would appear to be useful for certain contracts, it is doubtful that these additional reporting requirements will add any objective value to the contracting process. Best value and performance metrics are not going to improve simply by virtue of the fact that they must now be listed somewhere. At some point state leaders and the public have to place a certain level of trust in the ability of officials charged with procuring goods and services to choose the best vendor for the job, and provide competent, ethical oversight.

More broadly, however, the Legislature has passed several major pieces of legislation dealing with procurement in just the last two sessions. This raises the question: is it time to pause and give room to assess the impact of recent lawmaking on procurement? There will certainly be issues that the Legislature may not be able to avoid. For instance, the 84th Legislature directed the Comptroller to study existing purchasing practices in Texas state government and make purchasing recommendations in a report to be published before the 2017 legislative session.^{vi}

Known as the “Centralized State Purchasing Study,” the study must, among other things, include:

- an examination of the cost savings to the state that may be achieved through:
 - abolishing offices or departments of state agencies that have a dedicated office or department for purchasing; and
 - consolidating or reducing the number of vendors authorized to contract with the state to allow the state to better leverage its purchasing power;
- a detailed projection of expected savings or costs to this state in consolidating state purchasing; and
- a report on the process by which the legislature or the executive branch would implement the consolidation of state purchasing.

The Study will almost certainly yield more major legislation, and that follows on the heels of major procurement bills including HB 2472 (83R), HB 1 (84R) and SB 20 (84R). Through the General Appropriations Act (HB 1, 84R, 2015), the 84th Legislature gave new powers to the Legislative Budget Board (LBB) regarding oversight of state contracting. Originally part of HB 15, which failed to pass, language was enacted in Article IX of the state budget that puts LBB in a powerful oversight role.^{vii} SB 20 (84R) also made major changes to state contracting including conflict of interest,

contract training, and review of certain contacts. Many of the provisions of SB 20 (84R) are similar in nature to the changes made by HB 2472 (83R) and, in some cases, to existing law. For example:

- In addition to the Comptroller's 155-page *Contract Management Guide*,^{viii} HB 2472 (83R) required DIR to develop a contract management guide,^{ix} and SB 20 (84R) required each state agency to develop its own contract management handbook that must be consistent with the Comptroller's Guidebook.^x
- HB 2472, SB 20 and HB 1 increased the involvement and oversight of other agencies, such as the Contract Advisory Team (CAT) and LBB:
 - HB 2472 required DIR to either adopt any CAT recommendations or provide a written explanation as to why the recommendation was not followed;^{xi}
 - SB 20 requires that any contract that exceeds a value of \$1 million be signed by the presiding officer of an agency's governing board; the agency's governing executive; or delegated to the agency's executive director;^{xii}
 - HB 1 requires agencies to report any contract, grant, purchase order, etc., that exceeds \$50,000 to the LBB^{xiii} and requires LBB notification and review for any contract that \$10 million or \$1 million in the case of emergency or single-source contracts;^{xiv}
 - The CAT is composed of members from the Comptroller's Office, CPA, DIR and HHSC among others; the SAO and LBB already serve as technical advisers to the CAT.^{xv}
- HB 2472^{xvi} and SB 20^{xvii} added to existing conflict of interest provisions by enhancing disclosure of conflicts and outlining contracts that are prohibited.
- Both HB 2472^{xviii} and SB 20^{xix} augmented current staff training requirements related to procurement and contract management.
- SB 20 added to the existing requirement that the Comptroller evaluate vendor performance by specifying that the evaluation be given an A through F letter grade and adopt rules to implement the process.^{xx}

In successive sessions, the Legislature has passed major, far-reaching changes to state procurement laws. It can be fairly stated that the problem of over-regulation of the private economy applies equally to over-regulation of government employees. Similarly, while government employees must be held to standards that may be higher than those of private sector employees, the response to such over-regulation is similar: it can be stultifying. Exacerbating these issues is also the concern that state procurement and contracting officials are often less compensated than their private sector counterparts, creating challenges in recruiting and retaining an experienced workforce.

To attempt to ensure that the state gets the most out of the funds it expends to serve Texans, the Legislature and state agencies have promulgated a regulatory framework governing procurement and related contracting activities. The regulatory framework includes a somewhat subjective definition of best value and provides state agencies with broad authority to structure procurements to deliver results that benefit taxpayers.

State statute directs agencies to “purchase goods and services that provide the best value for the state.”^{xxi} State law goes on to advise that, while the purchase price and meeting key contract specifications are the most important considerations in determining best value, other factors may be considered such as, “the quality and reliability of the goods and services;” “indicators of possible vendor performance;” “the effect of a purchase on agency productivity;” “the vendor’s anticipated economic impact to the state or a subdivision of the state, including potential tax revenue and employment;” and “other factors relevant to determining the best value for the state...”^{xxii}

“Best value” can be defined in many different ways depending on the eye of the beholder, but generally, it speaks to guaranteeing that the state gets the best service it can for a fair price, considering both the short- and the long-term, the quality of goods and services purchased, the ability of a provider to deliver on time and under the terms of a contract, and many other factors. Taking a low bid sometimes ensures best value. But sometimes, to quote the old axiom, the state gets what it pays for—and may end up with a contract that is lacking in terms of quality and dependability.

Often, low price is confused with value and higher prices are confused with overcharging. But low prices can also represent an inferior product or service; while high prices can be the value the market sets for a superior product or service. For instance, the winning bid for the ongoing Mopac toll lane project in Austin was the lowest bid, and the project has been subject to numerous delays, with a local news outlet reporting in July that “the project, originally scheduled to open in the fall of 2015, is now delayed until the end of 2016. The Central Texas Regional Mobility Authority (CTRMA) has agreed to soften delay penalties if contractor CH2M Hill could

open at least part of the project early.” CH2M’s bid of \$137 million was \$62 million below the next-lowest bid.^{xxiii} The Mopac project is not a state project but helps illustrate the point: Despite state law demanding best value, practice often demands low price, leading, at times, to cost overruns and project failure.

These failures, of course, are what make headlines. On October 28, 2008, Governor Rick Perry suspended a \$900 million contract with IBM because of its apparent failure to back up critical state data. That suspension was eventually lifted, but the state’s relationship with the vendor continued another three years with varying degrees of success before the contract was ultimately cancelled and re-bid to select a new service provider.

Such high-profile examples often lead to conclusions that procurement reform in the form of more prescriptive requirements and rules are the panacea that will ensure the state is contracting for best value. As a result, over time, implementation of the state’s procurement and contracting practices have become more compliance and process-driven based on the assumption that if all of the rules and processes are followed it will ensure that the state receives the best value. However, this committee should evaluate certain provisions that were enacted in 2015 and determine how communication, openness, and competition are fostered in the goal of securing the best possible services for the state. To that end, the following recommendations are offered for the Committee’s consideration:

Recommendations

With implementation of SB 20 less than a year underway, caution must be exercised while critiquing the effects of the legislation. With that being said, some of the early indications of the effects of the bill are not encouraging, particularly with regard to how agencies are handling communications with the vendor community, as well as increased use of staff augmentation contracts combined with a decline in the use of cooperative contracts.

More than two years prior to enactment of SB 20, TCCRI published a white paper on state contracting, which concluded that:

To truly reform state contracting and to drive best value decisions in major contracts, removing impediments to innovation and effectiveness will provide better results than trying to legislate behavioral changes by state agencies. The one exception to this rule is in the area of contract monitoring, which should evolve into a more results-based regimen—including quantitative and qualitative measures— and less focused on process.^{xxiv}

Generally, however, legislative efforts to address state contracting issues have focused on process. This is particularly evident in the new layers of work that state agency procurement staff is required to undertake during many procurements (as discussed below). Additionally, the new oversight authority granted to the Legislative Budget Board (LBB) under HB 1 (84R, 2015) lacks both quantitative and qualitative metrics and simply requires LBB to approve certain contracts with little guidance in terms of the metrics that LBB is supposed to apply. With these concerns in mind, the following recommendations are submitted:

- 1) *The Legislature should take a long-term review of procurement, as Sunset advised in 2013, as the best course of action rather than pursuing another major legislative change in the 85th Session.*

In its 2013 review of the Department of Information Resources (DIR), out of which HB 2472 was born, the Sunset Commission offered prudent and sage advice to the Legislature:

Over time, the Legislature has made repeated attempts to study and address concerns arising from various high-profile contracting problems, but these efforts have largely been piecemeal, with no complete, in-depth evaluation of the State’s overall approach to contracting and procurement. Such an evaluation was beyond the scope of the current Sunset reviews, but the report recommends requiring such a review be performed in eight years....**While eight years may seem long, Sunset staff determined that improvements in data collection would be necessary to make the evaluation meaningful.**^{xxv}

The same report went on to find that efforts to address state contracting practices “have often been reactionary and haphazard due to the decentralized nature of state government contracting” and “have never resulted in a comprehensive evaluation of overall effectiveness and efficiency of the State’s procurement and contracting approach.”^{xxvi}

It is fair to note, in deference to the Legislature, that there are times it must react to certain high-profile failures. The appearance of doing nothing may not be option. Often times the laws in place may provide appropriate standards and guidelines, but there are not consistently applied. In these cases, amending a law because it is not being correctly interpreted by a small subset of agencies does not resolve the root problem.

Take, for example, a 2015 report by the State Auditor’s Office on recent contracting audits. Of the 14 contracting audit reports reviewed, two—involving the Texas Department of Transportation and the Texas Lottery Commission—were found to have “generally ensured compliance with all requirements in each of the contracting

management phases.”^{xxvii} Conversely, two other reports—involving the Texas Education Agency and the Health and Human Services Commission—“identified significant weaknesses in the state entities’ processes for procurement, formation, and oversight of the contract.”^{xxviii} All four agencies were subject to the same statewide contracting and procurement laws but experienced differing outcomes based on their own internal processes, or lack thereof, and implementation of said laws. The SAO went on to say, “state entities did not consistently comply with contract procurement and contract monitoring requirements.”^{xxix} It should also be noted that the scope of the auditor’s review was focused on adherence to *existing* statutes. The auditor did not find weaknesses in the requirements, but rather that weaknesses would have been avoided had the statutes in place been followed. Yet, there tends to be a perceived need to react to audit findings and a rush to adopt laws that may not be needed in order address these weaknesses. The report did not find that no requirements exist, but rather than they are not uniformly enforced.

The SAO has a major role to play in reviewing contracts after they commence, but based on most SAO reports it is fair to ask: do we have a contracting crisis? While some major contracts make big news, is there evidence that:

1. There is a systemic problem?
2. That new laws are required to fix problems identified by the SAO or other agencies?

The Legislature has already done a lot, and, other than making narrow changes to the law, it would be prudent to heed Sunset’s advice and fully evaluate the impact of current laws, including HB 2472 (83R), SB 20 (84R) and HB 1 (84R), before adopting any significant reforms to the contracting and procurement process.

2) *The state should attempt to incentivize agencies to pursue a smaller number of well-trained and compensated procurement and contract professionals.*

One factor that impacts the state’s ability to obtain the best value is that the skill sets of procurement and contracting professionals have not kept pace with the increasingly complex services and technology needed to conduct the state’s business. The skill sets required to develop effective criteria for determining best value for these complex services are very different than the skills required to follow administrative processes focused on compliance with rules and regulations. As a result, despite the statutory flexibility to consider factors other than price in making procurement decisions, price is still the primary criteria used to determine best value.

Procurement decisions tend to focus on compliance-driven factors: terms and conditions versus qualitative best value factors such as key performance requirements and how they are measured.

Serving the best interests of the state in major contracting requires a more advanced set of skills than traditional transactional purchasing practices. The need for more sophisticated contracting skills has been recognized at the national level. The National Association of State Procurement Officials (NASPO) issued a brief several years ago, examining the changing role of procurement professionals. In this brief, NASPO found that procurement professionals need to acquire an entirely new set of skills and knowledge.^{xxx} NASPO concludes:

Procurement professionals need to be creative, resourceful, imaginative, efficient, and willing to “think outside the box”. Procurement professionals must have good analytical and research skills, possess a forward thinking outlook and attitude and be able to gain an understanding of an industry as a whole and not just a particular facet.^{xxxi}

Where does Texas stand? In general, Texas state agencies do not operate in this manner. One of the contributing factors to the continued focus on compliance is that the state often still views and compensates purchasing and contracting professionals as administrative versus strategic positions. State agencies often take the position that all allocated full time equivalent (FTE) positions must be kept filled, for fear of ultimately losing these positions. This often results in spreading limited salary appropriations among as many employees as possible, with an ultimate outcome of more, but lower paid employees.

One example of an ongoing breakdown of the successful contracting process is HHSC’s attempt to procure an Enterprise Data Warehouse that has been ongoing for nine years. First funded in 2009, HHSC has twice awarded the bid, most recently valued at \$104 million, to the same company only to subsequently cancel or “pause” the contract.^{xxxii} Since the project’s inception the state has earmarked about \$100 million for the project, including about \$12 million for consultants;^{xxxiii} however, HHSC does not seem any closer to making a final decision on the Enterprise Data Warehouse than it was when the project was first passed in the 2007 legislative session. According to state leaders, “Some of the issues were the fault of the commission, while others were due to the federal government.”^{xxxiv}

On the other hand, there are agencies that have recognized the need for higher skilled employees, and have been able to accomplish this by reducing the total number of FTEs. By hiring fewer, but better skilled, employees at a higher salary, some state agencies have been successful in increasing the competency and skills in their organization without increasing total salary expenses. In response to a 2007 legislative mandate, the Comptroller's office created a strategic sourcing division and staffed it with both industry experts and high performers from its other procurement-related offices. These staff members have taken a strategic approach to contracting by (1) utilizing external subject matter experts to help define product specifications, and (2) identifying process efficiencies that significantly reduce the overall workload of their purchasing staff. In one example, they were able to reduce several hundred annually reoccurring solicitations for road materials into just four, with no disruption in the availability of products and more competitive pricing.^{xxxv}

DIR, which is responsible for negotiating large and high-profile technology contracts on behalf of the state employs 13 Contract Administration Manager I's at a mean salary of about \$83,000.^{xxxvi} However, on the national scale the average annual salary of a contract administrator, including potential bonuses, is about \$120,000.^{xxxvii}

Obviously, expectations are typically that state employment is less lucrative than either the private sector or the increasingly well-compensated federal bureaucracy, but this salary discrepancy very likely contributes to NASPO's survey finding that states list non-competitive salaries as their number two major challenge in hiring for state central procurement offices.^{xxxviii}

The SAO should undertake a classification audit of the Contract Specialist class and other procurement related professionals to determine how far Texas lags behind competitive market rates. The state should attempt to incentivize agencies to pursue a smaller number of well-trained and compensated procurement and contract professionals, as opposed to larger numbers of employees whose jobs are more administrative and process oriented. Part of this incentive, of course, would need to be in the form of reducing process requirements on state agencies.

In addition to the broader longer-term issues discussed in these first two recommendations, there are several, select issues that the Legislature should address in the meantime to correct unintended consequences of recent legislation.

3) Repeal the requirement that governing bodies or agency heads must sign any contract exceeding \$1 million

A key force behind the passage of SB 20 was to increase accountability in the state purchasing process. To that end, state law was amended to require that any contract that exceeds \$ 1 million (with a few exceptions, such as certain highway construction projects), be signed by the presiding officer of the agency's governing body; the agency head; or delegated to the agency's executive director.^{xxxix} While an agency head must be accountable for the agency's operations, including its contracts and purchases, requiring the top executive to physically sign every contract meeting the arbitrary standard of \$1 million fails to increase accountability and actually decreases the agency's efficiency.

For large agencies that contract with multiple vendors, such as the Health and Human Services Commission, the Texas Education Agency, or the Texas Department of Criminal Justice, this requirement relegates those agency heads or presiding officers to signing hundreds of contracts, including for items such as office supplies, which can easily exceed a \$1 million value when purchasing at this scale. One cannot expect an agency head to be thoroughly briefed on every one of these contracts, and the obligation to sign each one pulls the chief executive from what should be his or her primary focus of overseeing and guiding the agency's strategic and day-to-day operations. Also, as the agency's top executive, this individual is already ultimately accountable for all of the agency's operations. So, even if another employee signed a contract, likely with delegated authority, and things went terribly awry with a vendor, the agency head is still the sole person responsible to the Governor, the Legislature, and the public. Just as state leaders must place confidence in, and delegate authority to, those appointed to run state agencies, so must these agency heads be permitted to do the same with their employees.

4) Evaluate the impact of the \$1 million cap on DIR Deliverables-Based Cooperative Contracts

One of the most significant changes put into place by the 84th Legislature relate to the changes made to the Department of Information Resources' (DIR) Cooperative Contracts.^{xi} Generally speaking, state agencies are required to procure IT services contracts through DIR's Cooperative Contracts, which gives agencies access to hundreds of pre-screened and approved vendors. In FY 2014, these contracts totaled more than \$2 billion. According to DIR, Cooperative Contracts give state agencies "the bulk buying power of the State of Texas ...which means that eligible customers can buy IT products and services at aggressive discounts without the need for a lengthy procurement process."^{xi} As a result, the \$2 billion of contracts awarded through DIR's Cooperative Contracts in FY 2014 was achieved with a cost saving to taxpayers of approximately \$275 million.^{xiii} Every contract entered into through this process has already been competitively bid by DIR, so there is no additional burden on the agency seeking the contract.

SB 20 made changes to the DIR Cooperative Contracting Program which decreased the purchasing limits, making these contracting vehicles ineligible for a number of the State's technology projects. Limiting DIR Cooperative Contracts to a maximum value of \$1 million (which is significantly lower than the \$10 million limit imposed by DIR's administrative rules) was intended to "force agencies to use a more transparent and accountable bidding process for larger contracts."^{xliii} However, by capping these procurements at \$1 million, SB 20 (84R, 2015) may have curtailed the ability of state agencies to utilize this useful tool, and is subjecting both state agencies and private vendors to an increased administrative burden without direct benefit to the state.

As a result, state agencies are using alternative contracting methods, which can increase costs and risks to the state. This is especially the case for technology projects, the vast majority of which are expected to exceed \$1M over the life of the project. Agencies seeking such contracts are essentially left with two options:

- a. **Issue an RFP** – The issuance of an RFP by each individual agency for IT projects serves to increase costs by slowing down the procurement process and increases the risk that important state programs will not be implemented in a timely fashion. This option, when pursued in a significant number of procurements, negates the benefits of the state's cooperative contracting program such as volume discounts and most favored customer pricing.

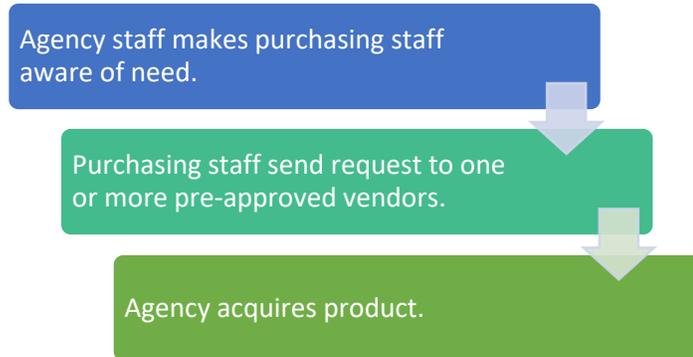
A stark example of this trend is illustrated in the appendix to this testimony, which shows part of an *actual 15-page RFP* written by an agency seeking to purchase four HDMI cables for \$17.19 each, or just \$68.76 in total. This purchase could (and should have been) purchased from existing DIR contracts, as stated above, and saved the state and its vendor a lot of time and administrative effort.

Prior to SB 20, agencies were routinely purchasing hardware, software and some services off existing contracts without writing new RFPs. Writing a 15-page RFP for such a small purchase is likely the result of the concern of state agency employees to avoid using a cooperative contract. However, relying on RFPs for such routine procurements is significantly more burdensome and complex than is necessary, and certainly adds bureaucracy compared to the cooperative contract system.

Under a cooperative contract system, state agency staff would simply inform the purchaser (the Department of Information Resources (DIR), for example) of their need for four HDMI cables, the purchaser would alert previously approved suppliers of the product, and the cables would be acquired from one of those suppliers.

The following graphics illustrate the additional layers of work that must be performed by agency staff to issue a unique RFP in comparison to utilizing a co-operative contract:

Procurement under a Cooperative Contract (common pre-SB 20):



Issuing a Unique RFP (less common since SB 20):



It is clear that undertaking an RFP process imposes greater demands on the time and skills of agency employees, many of whom will have become used to the cooperative contract system under which contracts are negotiated by specialized employees at DIR.

- b. Use a Time and Materials Based Contract** - To avoid the time delays associated with the issuance of an individual RFP, many state agencies have been turning to the DIR Information Technology Staffing

Augmentation Contracts (ITSAC). ITSAC contracts are “time and materials contracts”, which increase risks to the state by eliminating the accountability associated with the outcome/deliverables based DIR cooperative contract vehicles. This trend is evidenced in a number of ways, but particularly by the recent uptick in staff augmentation contracts, which can ultimately cost the state more in the long run but also help avoid short-term compliance burdens in the procurement process. Comparing the first three quarters of FY 16 to the first three quarters of FY 14 shows that the state is moving away from outcome/deliverables based contracts which hold the vendors accountable for delivering a specific outcome to the time and materials based ITSAC contracts. Specifically, while the use of deliverable/outcome-based contracts has decreased by 8 percent, the use of temporary staffing time and materials based contracts has increased by 21 percent.^{xliv}

As a recent analysis by CGI Group notes:

Under a staff augmentation model, the cost of hiring for temporary requirements and disengaging once those requirements have been met can more than offset the higher cost of engaging more permanent resources. Moreover, staff augmentation requires minimal contracting effort, has a simple cost model (rate times hours worked), can scale up or down quickly and has minimal impact on the existing operating model of an IT organization. Staff augmentation, however, can become problematic when it morphs into a permanent operating model. As a long-term solution, it has none of the benefits of alternative long-term external sourcing models, such as managed services (outsourcing) and, in fact, can create a number of serious risks and potentially destroy value.^{xlv}

Specifically, through the first three quarters Fiscal Year 2016, state agencies have spent almost \$80 million on IT staff augmentation Services, as compared to only \$45 million for deliverables-based IT services.^{xlvi} The increased preference for the use of IT Staff Augmentation Services, where vendors are reimbursed for the number of hours worked regardless of the outcome of the projects, versus Deliverables Based Information Technology Services, which hold vendors accountable for the delivery of specific outcomes at a fixed price regardless of the number of hours worked, increases risks and costs to state government.

Over the last 20 years (since the Joint General Investigating Committee Report on State Contracting issued 10/14/1996), the State Auditor's Office (SAO) has issued many reports emphasizing the need for state agencies to develop contracts which hold vendors accountable for specific outcomes and

performance standards. Most recently, the SAO issued an audit report of two state agencies that found that while their use of IT Staff Augmentation Services generally complied with state laws, rules, policies and procedures, contract management processes related to those contracts needed improvement.^{xlvii}

Evaluating the impact of the \$1 million cap on DIR Cooperative Contracts may focus attention again on allowing agencies to use contract vehicles, which are designed to hold vendors accountable for producing defined and measurable outcomes. This may reverse the current trend toward using time and materials-based IT staff augmentation services contracts as a workaround to the requirements imposed by the new law.

5) End Legislative Budget Board Involvement in the Procurement Process

Through the General Appropriations Act (HB 1, 84R, 2015), the 84th Legislature gave new powers to the Legislative Budget Board (LBB) regarding oversight of state contracting. Originally part of HB 15, which failed to pass, language was enacted in Article IX of the state budget that puts LBB in a powerful oversight role. This oversight is granted in two sections of Article IX:

- In Section 7.12 a notification requirement is imposed, requiring agencies to inform the LBB of any contract they propose to enter into that exceeds \$10 million in value, as well as all purchases or contracts that exceed \$1 million in value that will be awarded without issuing a request for proposals.^{xlviii} However there is no language explaining what LBB is required to do with this information and the language does not address whether LBB is required to approve these contracts.
- In Section 9.01 the bill prohibits state agencies from expending funds for IT major projects costing more than \$1 million “unless the project has been reviewed and approved by the Legislative Budget Board.” The language further prohibits the Comptroller of Public Accounts from authorizing the expenditure of appropriated funds on a major IT project unless the LBB and State Auditor have provided written approval through the Quality Advisory Team (QAT).

This new authority breaks new ground for LBB. Contract oversight neither relates to existing core responsibilities of the LBB nor is an area in which it has competency.^{xlix} The following is a summary of significant responsibilities assigned by statute to the LBB (taken directly from its website):

- Adopt a constitutional spending limit (Section 316, Government Code; Article 8, Section 22, Texas Constitution);
- Prepare a General Appropriations Bill draft (Section 322.008(a), Government Code);

- Prepare a budget estimates document (Section 322.008(c), Government Code);
- Prepare a performance report (Section 322.011(c), Government Code);
- Guide, review, and finalize agency strategic plans (Section 2056, Government Code);
- Prepare fiscal notes, impact statements (Section 314, Government Code); and
- Take necessary budget execution actions (Section 317, Government Code).

None of these core responsibilities suggests that LBB is the appropriate body to oversee contracts, but it could become a major distraction from its place as a reliable and reputable source of matters related to the budget. Indeed, other agencies involved in overseeing state contracting include the Comptroller’s Office, the State Auditor’s Office, the Department of Information Resources are objectively more appropriate entities to assist and provide oversight of agency procurement. Placing LBB in this role also places the agency at risk of being lobbied by contractors seeking favor, depriving LBB of its credibility as an independent arbiter of matters related to the budget. Rather than improving contracting, it may undermine the traditional status of LBB. Indeed, empowering LBB with contract oversight may simply be inappropriate given the skillset and responsibilities of the agency.

Most importantly, however, thrusting LBB into a contract oversight role has created a significant amount of uncertainty among the vendor community and the state agencies with which they contract, as evidenced, for example, by the shift from cooperative contracts to time and materials/staff augmentation contracts as discussed above. This committee should consider the merits of assigning this role to LBB staff and should ask how involvement of LBB staff creates value in the procurement process. Delays during the procurement and contracting process also have cost to the state, not least if interest is charged on payments related to contracts that LBB staff decide to scrutinize before approving payment.

6) Establish a New Framework for Collaboration between the Public and Private Sector

Building on the previous recommendation, it is time to reevaluate the state’s approach to agency-vendor relations. Many state agencies have adopted rigid rules prohibiting communications and dialogue with the vendor community. While these requirements were not part of SB 20, many of the state’s purchasers now enforce a “zero tolerance” approach to communicating with the vendor community, even outside of the proposal process. For instance the Department of Public Safety (DPS) has informed incumbent and potential vendors that:

Texas Department of Public Safety personnel are unable to meet with you to discuss the agency’s potential needs relating to your service or product. State procurement laws and related guidelines require transparency in the procurement process and discourage even the appearance of favoritism in an agency’s interactions with

potential vendors. To that end, the Texas Department of Public Safety has a policy in place strongly discouraging agency personnel from meeting with potential vendors. This policy helps us avoid any appearance that we are providing you a competitive advantage on products or services we may procure in the future and helps ensure your ability to participate in future procurement opportunities with the agency.ⁱ

Similarly, at its April 14, 2016 meeting, the DPS Commission made a presentation regarding new vendor communication policies. The presentation noted that the new policy “discourages contact outside the formal procurement process,” and:

Requires the requestor to gain approval from the Procurement Director if the requestor deems the contact is necessary, requires the vendor to certify that the meeting is not part of the competitive procurement process and that no agency decisions will be based on the interaction, [and] ensures that if a Deputy Assistant Director or above has such an interaction with a vendor, they must recuse themselves from any future procurement where that vendor, product or services is involved.ⁱⁱ

The need to ensure transparency and fairness is fundamental to public sector contracting and procurement. However, by not allowing a meaningful dialogue between the vendor community and state personnel, the state is missing opportunities to tap into private sector expertise to solve complex state business problems through innovation. Even the federal government recognizes the need for strong communication between vendors and federal agencies, with the Office of Federal Procurement Policy (OFPP) finding that “early, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements, including (but not limited to) those for large information technology (IT) projects.”ⁱⁱⁱ OFPP also notes that:

... information gathered from industry sources plays an invaluable role in the acquisition process. For this reason, agencies must develop practices that will ensure early, frequent, and constructive communication during key phases of the process.ⁱⁱⁱ

Similarly, the Comptroller’s Office recently noted that “**Without the cooperation of vendors**, it would be impossible for the state to find efficient and effective opportunities to purchase commodities and services. In light of the other changes SB 20 brought to the state contracting, **input from vendors** ... will help inform state government and the Legislature during consideration of future decisions about state purchasing.”^{iv} [Emphasis added]

In the name of preventing conflicts or malfeasance, reticence to engage with private sector vendors places state agencies in a weaker position with regard to the overall procurement landscape. In addition, a lack of communication between the state and the vendor community gives an inherent advantage to incumbent providers

since it is hard for new vendors to communicate with state agencies regarding the products and services that they may be able to offer. This can also lead to state agencies retaining the use of outdated technologies even when new and more effective ones exist. In short, communication does not guarantee success, but isolation and insulation almost certainly breeds an adversarial culture that will not benefit the state.

Two potential strategies the state could employ to more effectively engage the vendor community on solutions to the state's challenges could be to 1) publish potential interest areas or upcoming RFP's (similar to HHSC's selective practice of posting "notices of intent") and 2) affirmatively encourage communication with vendors outside of any formal "quiet period" or "cone of silence" in advance of or during a procurement.

A further opportunity to address this shortcoming may come with the Vendor Advisory Committee (VAC). Created by statute (Government Code 2155.081), the committee pulls together members of the vendor community (private sector) to advise the Comptroller on procurement practices and the impact those practices have on business. The VAC should consider working with the Office of the Comptroller to establish a framework that allows for a more collaborative approach to communicating with the vendor community regarding addressing agency requirements, but still provides assurances that all ethical and conflict of interest requirements are satisfied. In addition, the VAC could be expanded to include technology and IT contractors, rather than just commodities. This broader approach would reap more extensive benefits for the state.

The state should take a more collaborative approach to communicating with the vendor community, addressing agency requirements while ensuring that ethical and conflict of interest requirements are satisfied. Agencies have become increasingly risk-averse to having open communication with the private sector and have doubled-down on these efforts following the legislation enacted in 2015. Rules should be established, or existing rules clarified, to encourage more communication between government and business outside of the open procurement process. If utilizing DIR cooperative contracts becomes too burdensome, state agencies will continue to look for workarounds and alternatives, which are likely to be more costly in the long run.

Conclusion

Generally, implementation of the state's procurement and contracting practices have become more compliance and process-driven based on the assumption that if all of the rules and processes are followed it will ensure that taxpayers receive the best value. Prescriptive regulation tends to have the opposite effect, and implicit in the assumption is that if public employees merely follow the rules, the same result will be achieved each time.

The success of the procurement, however, is more dependent upon the skills and abilities of the state employees who implement the statutes and the quality of the contractor, not necessarily the rules and processes. Instead, contract negotiator and contract management positions at the major state agencies should be paid commensurate with experience and the responsibility of the job, while also being competitive with similar private sector positions, so that the state has the personnel necessary to procure and implement large-scale projects, which are necessary in certain programs and agencies. A purely compliance-driven approach may prevent some bad actors from winning contracts or some mismanaged projects, but it will warp agency culture away from achieving the value in contracting that the state truly needs.

Appendix: Sample RFP Issued May 2016



Request for Quotation

This Request for Quotation must be received on or before the return date and time specified below:

Reference Number:	5101
Return by:	May 27, 2016 @ 2:00 pm (CST)

A scan of the signed RFQ must be received by the OAG email server prior to the "Return by" above.

Line no.	Class and Item code	Description	Qty.	Unit	Unit Price	Extended Price	ETA
1	204-13.	StarTech.com 15 ft. high speed HDMI cable. Part No. 26824646.	4	Ea	\$ 17.19	\$ 68.76	5-7 Business Days
2	Shipping Charge (if applicable)	N/A					

ENDNOTES

- ⁱ <http://www.texastribune.org/2015/01/26/jane-nelson-looks-strengthen-contracting-oversight/>.
- ⁱⁱ See for e.g.: <http://www.txccri.org/wp-content/uploads/2013/03/TCCRI-Best-Value-White-Paper-3.25.13.pdf> and <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1681>.
- ⁱⁱⁱ Senate Bill 20 (84R, 2015).
- ^{iv} Government Code Section 2155.077 (a)(1).
- ^v Senate Bill 20 (84R, 2015); see also Government Code 2101.041(b).
- ^{vi} Senate Bill 20 (84R, 2015)
- ^{vii} 2016-2017 General Appropriations Act, Article IX, Sec. 7.12 and Sec. 9.02.
- ^{viii} "State of Texas Contract Management Guide," version 1.6, Texas Comptroller of Public Accounts, available at http://comptroller.texas.gov/procurement/pub/contractguide/CMG_Version_1_6.pdf.
- ^{ix} House Bill 2472 (83R, 2013); see also Government Code 2054.554.
- ^x Senate Bill 20 (84R, 2015); see also Government Code 2261.256(b).
- ^{xi} House Bill 2472 (83R, 2013); see also Government Code 2054.065.
- ^{xii} Senate Bill 20 (84R, 2015); see also Government Code 2261.254.
- ^{xiii} House Bill 1, Article IX, Sec. 7.04.
- ^{xiv} House Bill 1, Article IX, Sec. 7.12.
- ^{xv} See Comptroller of Public Accounts website, "Contract Advisory Team," available at <http://comptroller.texas.gov/procurement/res/CAT/>.
- ^{xvi} House Bill 2472 (83R, 2013); see also Government Code 2054.552.
- ^{xvii} Senate Bill 20 (84R, 2015); see also Government Code 2261.252.
- ^{xviii} House Bill 2472 (83R, 2013); see also Government Code 2054.021(g) and 2054.553.
- ^{xix} Senate Bill 20 (84R, 2015); see also Government Code 2155.078.
- ^{xx} Senate Bill 20 (84R, 2015); see also Government Code 2262.055.
- ^{xxi} Government Code Section 2155.074 (a).
- ^{xxii} Government Code Section 2155.074 (c).
- ^{xxiii} "Partial Opening of Mopac Toll Delayed Again," KVUE.com, July 2016: <http://www.kvue.com/news/traffic/partial-opening-of-mopac-toll-lane-pushed-back/276176541>.
- ^{xxiv} "Contracting for Best Value" TCCRI, January 2013.
- ^{xxv} "Final Report with Legislative Action: Department of Information Resources and Comptroller Procurement and Support Services Division," Texas Sunset Advisory Commission, July 2013, p. 2, emphasis added, available at <https://www.sunset.texas.gov/public/uploads/files/reports/DIR%20and%20Procurement%20Staff%20Report%202013%2083rd%20Leg.pdf>.
- ^{xxvi} *Ibid.* p. 18.
- ^{xxvii} "A Report on Recent Contracting Audits," Texas State Auditor, January 23, 2015, p. 2, available at <http://www.sao.texas.gov/reports/main/15-019.pdf>.
- ^{xxviii} *Ibid.*
- ^{xxix} *Ibid.* p. 2.
- ^{xxx} "Responding to an Aging and Changing Workforce: Attracting, Retaining and Developing New Procurement Professionals," National Association of State Procurement Professionals, March 2008, available at http://www.naspo.org/dnn/portals/16/documents/Responding_to_an_Aging_and_Changing_Workforce_-_FINAL_compressed.pdf.
- ^{xxxi} *Ibid.*
- ^{xxxii} "Problem-plagued Texas data project delayed again," by Brian Rosenthal, Houston Chronicle, June 28, 2016, available at <http://www.chron.com/news/politics/texas/article/Problem-plagued-Texas-data-project-delayed-again-8330500.php>.
- ^{xxxiii} *Ibid.*
- ^{xxxiv} "Texas awards \$104 million for contract for long-delayed data project," by Brian Rosenthal, Houston Chronicle, February 19, 2016, available at <http://www.chron.com/news/politics/texas/article/Texas-health-agency-awards-104-million-contract-6843177.php>.
- ^{xxxv} Texas Comptroller of Public Accounts, "About Strategic Sourcing": http://comptroller.texas.gov/procurement/strategic_sourcing/about.html
- ^{xxxvi} Salary information obtained from February 2016 update of the Texas Tribune State Salaries Database.
- ^{xxxvii} See salary.com, "U.S. National Average Median Salary + Bonus for Contract Administration Manager," available at <http://swz.salary.com/SalaryWizard/Contracts-Administration-Manager-Salary-Details.aspx?&hdcxbonus=on>.
- ^{xxxviii} "Rising to the Challenge: Recruitment and Retention in State Procurement Offices," NASPO, April 2014, p. 10, available at <http://naspo.org/Publications/ArtMID/8806/ArticleID/2186>.
- ^{xxxix} Senate Bill 20 (84R, 2015); see also Government Code 2261.254.

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- ^{xi} Senate Bill 20 (84R, 2015).
- ^{xlii} Department of Information Resources, Cooperative Contracts, online at: <http://dir.texas.gov/View-About-DIR/Pages/Content.aspx?id=41>.
- ^{xlii} *Ibid.*
- ^{xliii} House Research Organization Analysis of House Bill 15 (84R, 2015).
- ^{xliv} State of Texas Open Data Portal - www.data.texas.gov.
- ^{xlv} "Why Managed Services and Not Staff Augmentation?", CGI Group, 2015: <https://www.cgi.com/sites/default/files/white-papers/cgi-why-managed-services-why-not-staff-augmentation.pdf>
- ^{xlvi} State of Texas Open Data Portal - www.data.texas.gov.
- ^{xlvii} "An Audit Report on Selected Agencies' Use of Department of Information Resources Information Technology Staffing Services Contracts," Texas State Auditor, March 2016.
- ^{xlviii} House Bill 1, (84R, 2015), Article IX, Section 7.12.
- ^{xlix} Though LBB does have responsibility for the online State Contract Database, per Government Code Section 322.020, this responsibility merely requires LBB to post state contracts online. LBB has no authority over these contracts; Section 322.020 is simply a transparency requirement.
- ⁱ Email circulated to vendors requesting meetings with DPS contracting personnel.
- ⁱⁱ Slide presentation, Public Safety Commission meeting, April 14, 2016.
- ⁱⁱⁱ "Memorandum for Chief Acquisition Officers," Daniel, I. Gordon, Administrator for Federal Procurement Policy, Executive Office of the President, February 2, 2011.
- ⁱⁱⁱ *Ibid.*
- ^{liv} Texas Comptroller of Public Accounts, Senate Bill 20: Centralized State Purchasing Study, online at: http://www.cpa.state.tx.us/procurement/sb20_info/study.html.