



Contracting Challenges After Senate Bill 20 – Impact on Higher Education

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UT System - Office of General Counsel

No-Bid Contracting Scandal

Audit confirms Statesman findings that 21CT deal broke rules, misled

State audit blasts 21CT deals and former Texas official Jack Stick



HHSC Commissioner Kyle Janek resigns

UT System OGC Presentation at 2015 TASSCUBO Meeting

Contract Scandal

Texas House members launch inquiry into state contracts

State Audit: 'Operational Defects' Led to 21CT Deal

Texas Governor Orders Agencies to Boost Contract Oversight, Transparency

Governor Abbott Signs State Agency Contracting Reform Legislation

Contract Reform



UT System OGC Presentation at 2015 TASSCUBO Meeting

Summary of Procurement and Contracting Legislation

Senate Bill 20:

Conditional Authority for Institutions of Higher Education (IHE) to continue to use “Best Value” purchasing granted [§23]:

- Requires governing boards to have rules and policies on ethics, conflicts of interest, internal audit, training, contract review, and delegation
- A *Contract Management Handbook* must be required by rule
- State Auditor, in consultation with Comptroller, can suspend Best Value authority for non-compliance

SB 20 – Conflicts of Interest [§18]

Institutions (including System) may **not** enter into contracts if governing official (Chancellor, President), general counsel, chief procurement officer or procurement director (or their family members within second degree of consanguinity)



- ❑ Owns a 1% interest in the vendor (other than through blind trust, retirement plan, insurance coverage)



- ❑ Or could financially benefit

SB 20 – Internet Posting of Contracts [§18]

- All contracts (and purchase orders) for purchase of goods or services from a private vendor)



- If not competitively bid, add statutory authority used (e.g., §51.9335—“Best Value”)
- RFPs if competitively bid, until contract expires
- Contracts less than \$15,000 may be posted monthly (implies more frequent posting if >\$15,000)

SB 20 - Contract Management Handbook
(will need to be required by Regents' Rule) [§23]

- Consistent with Comptroller's contract management guide.
- Must post on internet the institution procedures for accountability and risk analysis and provide Comptroller link

SB 20 - Accountability and Risk Analysis Procedure required [§18]

Assess risk of
fraud, abuse
and waste

Identify
contracts
requiring
enhanced
monitoring

Establish
clear levels of
purchasing
accountability
and staff
responsibility

Submission of Certain Contracts to Governing Body [§18]

Information on contracts that require enhanced contract or performance monitoring

Immediately notify if serious issue or risk

Does not apply to Memoranda of Understanding, Interagency Contracts, Interlocal Agreements or no cost contracts

Contracts Over \$1 million [§18]

Requires contract reporting and verification of compliance with financial provisions and delivery schedules; corrective action plans; liquidated damages

Governing board or authorized delegate must sign


Contracts Over \$5 million [§18]

Contract management office or procurement director
must verify in writing:

Solicitation and
procurement complies
with law and policy

Inform governing
board of “potential
issues” that may arise
in procurement process

Records Retention [§3]



Each contract and all contract solicitation documents must be retained for 7 years

After contract is completed or expires;
or

All issues (litigation, claim, TPIA request or other action) are resolved

Employment of Former Officers or Employees Restricted [§4]

Employees or officers participating in a procurement or contract negotiation may not accept employment from that vendor for two years from date employment ceased



No enforcement mechanism; no obligation placed on institution

Appropriation Bill Rider — Article IX, Section 7.04

Requires IHE to report contracts,

- including interagency and interlocal grants and agreements or
- purchase orders of \$50,000 or greater each fiscal year by October 1 of next fiscal year.

This requirement only applies to contracting expending appropriated funds.

Appropriation Bill Rider — Article IX, Section 7.12

Requires IHE to report to the LBB, if appropriated funds are utilized:

- Contracts **exceeding \$10 million** (\$1 million, if emergency or no competitive process)
- Notice must be sent **10 days prior to payment** (or, if emergency, within 48 hours of payment) containing:
 - Nature, term, amount and vendor
 - Certification of procurement process used. Because IHEs will be utilizing the “conditional authority” granted by §51.9337 to continue using best value procurement, **the “alternative process” certification** should always be used
- **Certification of process** for verification of vendor performance and deliverables, payment only within scope, calculation and clarification of liquidated damages
- Any other information requested by LBB

“Contract” defined as original contract, amendment, extension, purchase order, interagency grant or agreement, interlocal grant agreement; **“purchase”** defined as any acquisition method

Written certified notice is considered a “governmental record” under Chapter 37, Penal Code

LBB Attestation Form

Effective Controls

- Vendor Performance
- Pay Only for Goods
- Liquidated Damages

Risk Statement

- Is Contract Mission Critical?
- Purpose and Major Deliverables
- Risk If Parameters Not Met Within Time Frame

Alternative Certification

- If the process to award the contract, contract extension, or procurement did not comply with the requirements of Subsection 1 a, b, or c, provide an explanation for the alternative process utilized, legal justification for the alternative process, and identify the individual(s) directing the use of an alternative process.
- **In awarding this contract, UT System complied with the best value requirements of Section 51.9335 of the Education Code, as authorized by the UT System Board of Regents.**

HB 1295 – Disclosure of Interested Parties

Effective January 1, 2016, contracts requiring governing board approval or with a value of \$1 million or more:

Before an IHE can enter into a contract with a business entity, the entity must submit a disclosure of “interested parties” on disclosure form and under rules of Texas Ethics Commission.

“**Interested party**” defined as person with controlling interest, person actively participating in facilitating or negotiating terms, including broker, intermediary, adviser or attorney for the entity.

Does not include sponsored research contracts or IACs or some contracts related to health and human services.

Texas Ethics Commission

On October 5, 2015, The Texas Ethics Commission proposed in its rules the following definition of controlling interest

(c) “**Controlling interest**” means:

- (1) an ownership interest or participating interest in a business entity by virtue of units, percentage, shares, stock, or otherwise that exceeds 10 percent;
- (2) membership on the board of directors or other governing body of a business entity of which the board or other governing body is composed of not more than 10 members;
or
- (3) service as an officer of a business entity that has four or fewer officers, or service as one of the four officers most highly compensated by a business entity that has more than four officers.

Challenges

1. Preservation of “Best Value” Authority and Autonomy for IHE
2. Increased Paperwork and Reporting
3. Increased Emphasis on Risk Assessment and Contract Management
4. Vendor Relationships
5. Allocation of Adequate Resources to Meet New Demands

RESOURCES

- SB20:
<http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/SB00020F.pdf#navpanes=0>
- HB 1295:
<http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB01295F.pdf#navpanes=0>
- General Appropriations Act:
<http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB00001F.pdf#navpanes=0>
- Texas Ethics Commission – Certificate of Interested Parties Form 1295
<http://webserver.ethics.state.tx.us/forms/1295.pdf>

Any Questions?

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