

BILL ANALYSIS

Senate Research Center

S.B. 1488
By: West
Higher Education
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

As junior and community colleges have grown, the need to establish procurement regulations to meet their unique requirements have also grown. This bill establishes a comprehensive general procurement system for junior and community colleges.

Junior and community colleges presently use the purchasing statutes established for public school systems. There are significant differences in the needs of the colleges and public schools and the present statutes do not address many of the college procurement requirements. The public school procurement statutes also include many aspects that are not applicable to the colleges.

This bill is based on and incorporates the provisions of Chapter 44 (Fiscal Management), Education Code, that are applicable to the colleges. It also incorporates language from the Government Code and Local Government Code that clarify and enhance the accountability of the procurement process.

As proposed, S.B. 1488 amends current law relating to the purchasing and contracting practices of junior college districts and provides criminal penalties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 44.0311(a), Education Code, as follows:

Sec. 44.0311. APPLICABILITY TO JUNIOR COLLEGE DISTRICTS. (a) Provides that except as provided by Education Code Chapter 130 (Junior College Districts) Subchapter K, rather than except as provided by Subsection (c), this subchapter applies to junior college districts (district).

(b) Makes no changes to this subsection.

(c) Deletes existing Subsection (c) providing that this subchapter does not apply to a purchase, acquisition, or license of library goods and services for a library operated as a part of a junior college district. Deletes existing text defining "library goods and services."

SECTION 2. Amends Subchapter A, Chapter 130, Education Code, by adding Sections 130.0104, and 130.0105, as follows:

Sec. 130.0104. POLICY AND REPORT REGARDING HISTORICALLY UNDERUTILIZED BUSINESSES. (a) Defines, in this section, "historically underutilized business."

(b) Provides that this section applies only to a district that:

(1) is located wholly or partially in a county with a population of one million or more; and

(2) had an annual enrollment of 30,000 or more full-time equivalent students in one or more of the most recent five academic years.

(c) Requires each district to adopt a policy stating its commitment to developing, maintaining, and enhancing participation by historically underutilized businesses in all phases of the district's procurement processes in order to support, to the greatest extent feasible, the efforts of historically underutilized businesses to compete for purchases of equipment, supplies, services, including professional services, and construction contracts.

(d) Requires each district, annually, to publish a report of the total number and total value of contracts awarded by the district in the preceding fiscal year and the number and total value of those contracts awarded to historically underutilized businesses. Requires that the report be published in a newspaper of general circulation in the county in which the majority of the territory or population of the district is located not later than the 60th day following the last day of the district's fiscal year.

SECTION 3. Amends Chapter 130, Education Code, by adding Subchapters K, L and M, as follows:

SUBCHAPTER K. PURCHASING CONTRACTS FOR GOODS AND SERVICES OTHER THAN CONSTRUCTION OR PROFESSIONAL SERVICES

Sec. 130.251. DEFINITIONS. Defines, in this subchapter, "board of trustees", "district," "purchase of goods and services" and "services."

Sec. 130.2511. USE OF TERMS "BIDDER," "VENDOR," AND "BID." (a) Defines, in this subchapter, "bidder" and "vendor."

(b) Defines "bid" in this subchapter.

Sec. 130.252. CONFLICT WITH OTHER LAW. Provides that to the extent of any conflict, this subchapter prevails over any other law relating to the purchase of goods and services by a district other than a law relating to:

(1) contracting with historically underutilized businesses; or

(2) the procurement of goods and services from persons with disabilities.

Sec. 130.253. PURCHASE METHODS. (a) Requires that each contract by a district with a value of \$50,000 or more that covers one or more fiscal years, except as otherwise provided by this subchapter and subject to Section 130.264, be made by the method, of the following methods, that provides the best value for the district:

(1) competitive sealed bids;

(2) competitive sealed proposals;

(3) the reverse auction procedure defined by Section 2155.062(d) (defining reverse auction procedure), Government Code; or

(4) the formation of a political subdivision corporation under Section 304.001 (Aggregation by Political Subdivisions), Local Government Code.

(b) Authorizes only one of the methods listed in Subsection (a) to be used for any individual contract. Requires the district to determine which method provides the best value for the district before publishing the notice required by Section 130.258.

(c) Requires a district, if the district uses the competitive sealed proposal method, to:

(1) reveal when the proposals are opened the names of the companies submitting proposals; and

(2) keep the contents of the proposals confidential until the district concludes negotiations and awards a contract.

(d) Authorizes a district, without complying with Subsection (a) to purchase a good or service that is available from only one source, including, an item for which competition is precluded because of the existence of a patent, copyright, secret process, or monopoly; a film, recording, periodical, manuscript, book, or computer software; a utility service, including gas or water; a captive replacement part or component for equipment; a product needed to match or work with like products; technical or specialized services, including advertising, audio/video production, and the repair and maintenance of specialized equipment; and perishable goods, vehicle fuel, advertising services, meeting and catering services, and travel services, including airfare, ground transportation, and lodging.

(e) Authorizes a district without complying with Subsection (a), to purchase a good or service under:

(1) an interlocal contract under Chapter 791 (Interlocal Cooperation Contracts), Government Code;

(2) a contract established by the state comptroller of public accounts (comptroller) or Texas Department of Information Resources (DIR), including a contract for the purchase of travel services, telephone service, computers, and computer-related equipment and service, cabling, and software; or

(3) a purchase made under Subchapter D (State Cooperation in Local Purchasing Programs), F (Cooperative Purchasing Program), or G (Purchases from Federal Schedule Sources of Supply), Chapter 271 (Purchasing and Contracting Authority of Municipalities, Counties, and Certain other Local Governments), Local Government Code.

(f) Requires that contracts for services that result in no cost to the district or that provide income greater than \$50,000 to a district be based on bids, proposals, or qualifications that are solicited and awarded in the same manner as a contract for the purchase of goods or services. Provides that such contracts include contracts for bookstore services, food services, and vending services.

(g) Authorizes contracts for the replacement or repair of the property, if district property is destroyed, stolen, severely damaged, or unusable, or a contractor is unable to fulfill its obligations in providing goods or services, and the board of trustees of a district (board of trustees), or its designee, determines that the delay posed by using the methods required by Subsection (a) would pose a material threat to personal safety or potential damage to other property or would prevent or substantially impair the conduct of classes or other essential district activities, be made by methods other than those required by Subsection (a).

(h) Authorizes a district, without complying with Subsection (a), to purchase, license, or otherwise acquire library goods and services, including in any manner

authorized by law for the purchase, license, or acquisition of library goods and services by a public senior college or university, as defined by Section 61.003 (Definitions). Defines "library goods and services."

Sec. 130.254. PURCHASE OF INSURANCE. (a) Authorizes a district to acquire insurance using a two-step process to obtain competitive sealed proposals. Requires the district, in the first step, to determine which insurance providers are represented by agents interested in providing insurance for the district. Requires the agent with the longest and most substantial relationship with the insurance provider, if more than one agent indicates a desire to represent the same provider, to be authorized to submit a proposal for the designated insurance provider. Requires a district, in the second step, to notify the interested agents in writing as to which insurance providers the agents represent and request the agents to submit proposals for providing insurance.

(b) Provides that in notifying the interested agents to begin the second step, the district is not required to comply with Section 130.258. Requires the district in the request for proposals, however, to give the interested agents notice of the date, time, and place where proposals are to be submitted. Prohibits proposals received after the date and time stated in the request for proposals from being considered.

Sec. 130.255. MULTIYEAR CONTRACT. Requires that a contract that extends past the end of a district's fiscal year include a provision that permits termination at the end of each fiscal year. Prohibits contracts solely for the purchase of goods from exceeding five years in duration.

Sec. 130.256. EVALUATION AND AWARD OF CONTRACT. (a) Requires a district, except as otherwise provided by this subchapter, to award a contract to the lowest responsible bidder offering the best value to the district according to the selection criteria established by the district. Requires the district to publish in the request for bids, proposals, or qualifications the criteria the district will use to evaluate the offers.

(b) Requires the district in determining the lowest responsible bidder, to consider the purchase price, including delivery and installation charges; the reputation of the bidder and of the bidder's goods or services; the quality of the bidder's goods or services; the extent to which the offered goods or services meet the district's needs; the bidder's past relationship with the district; the total long-term cost to the district to acquire the bidder's goods or services; the extent to which the offers comply with the requirements of the request for bids, proposals, or qualifications; any other relevant factor specifically listed in the request for bids or proposals; and the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses.

(c) Authorizes a district to reject any or all bids, proposals, or qualifications, or parts of bids, proposals, or qualifications if the rejection serves the district's interest.

(d) Requires the district to provide all bidders with the opportunity to bid to provide the same goods or services on equal terms and to have bids judged according to the same standards as those set forth in the request for bids.

(e) Authorizes bids to be opened only by the district in a district-owned or district-controlled facility. Requires that the meeting or other occasion at which bids are opened be open to the public. Requires the appropriate employee or officer of the district, at the time the district opens a bid, if one or more members of the public are present, to read aloud the name of the bidder and the total bid amount, if the bid is of a type that should contain a single bid amount. Requires the appropriate employee or officer, when opening proposals or qualifications, to read aloud only the name of the respondents and is prohibited from disclosing the contents of a proposal or qualification on opening or during negotiations with competing

bidders. Requires that at least two district employees or members of the district's board of trustees be present at the bid, proposal, or qualification opening.

(f) Prohibits a bid that has been opened to be changed for the purpose of correcting an error in the bid price. If there is a discrepancy between the total price and the unit price of a bid, the unit price prevails. If there is a discrepancy between the written price and the numerical price of a bid, the written price prevails.

(g) Provides that this subchapter does not change the common law right of a bidder to withdraw a bid due to a material mistake in the bid.

(h) Requires the district to document the basis of its selection and to make its evaluations public not later than the seventh day after the date the contract is awarded. Requires the district to state in writing the reasons for making an award.

(i) Provides that a contract awarded in violation of this subchapter is void.

(j) Authorizes a district that has its central administrative office located in a municipality with a population of less than 250,000, in awarding a contract by competitive sealed bid under this section, to consider a bidder's principal place of business in the manner provided by Section 271.9051 (Consideration of Location of Bidder's Principal Place of Business in Certain Municipalities), Local Government Code. Provides that this subsection does not apply to the purchase of telecommunications services or information services, as those terms are defined by 47 U.S.C. Section 153.

Sec. 130.257. RULES AND PROCEDURES; AUDITS BY STATE AUDITOR. (a) Authorizes the board of trustees to adopt rules and procedures for the acquisition of goods or services by the district.

(b) Provides that district purchases of goods or services are subject to audit by the state auditor in accordance with Chapter 321 (State Auditor), Government Code.

Sec. 130.258. NOTICE. (a) Requires the district, within a seven-day period, except as otherwise provided by this subchapter, for any method of contracting selected under Section 130.253(a), to publish the notice required by this section in at least two issues of any newspaper of general circulation in the county in which the district's central administrative office is located. Prohibits the deadline for receiving bids or proposals from being less than 10 business days after the date of the publication of the first newspaper notice. Prohibits the deadline for receiving responses to a request for qualifications from being less than five business days after the date of the publication of the last newspaper notice. Requires that the notice, if there is not a newspaper of general circulation in the county in which the district's central administrative office is located, be published in a newspaper of general circulation in a location nearest the district's central administrative office. Provides that in a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be included in the notice.

(b) Authorizes the district to, as an alternative to publishing notice in a newspaper exclusively under Subsection (a), publish on a publicly accessible Internet site the notice required by this section. Requires the district, before or at the same time the district first publishes the Internet notice, to publish a notice in a newspaper of general circulation, as described by Subsection (a), that includes the name of the goods or services to be purchased, the date, time, and place for receiving and opening bids, proposals, or statements of qualifications, and the Internet address of the Internet site where detailed requirements may be found. Requires that the notice posted on the Internet under this subsection be posted every day for at least:

(1) five business days before the deadline for receiving the bids or proposals; or a request for qualifications.

(c) Requires that the notice required by this subsection, except as otherwise provided by Subsection (b) include:

(1) the location where the request for bid, proposal, or qualification documents may be obtained or examined;

(2) the date, time, and place for receiving and opening bids, proposals, or statements of qualifications;

(3) a general description of the goods or services;

(4) the location and time of any mandatory site inspections or pre-bid meetings; and

(5) the amount of any required bid bond, payment bond, or performance bond.

Sec. 130.259. DISCUSSION AND REVISION OF PROPOSALS. (a) Authorizes the district, as provided in a request for proposals and under rules adopted by the district, to discuss acceptable or potentially acceptable proposals with bidders to assess a bidder's ability to meet the solicitation requirements.

(b) Authorizes a district, after receiving a proposal but before making an award, to permit the three highest-ranking bidders to revise their proposals, within the scope of the published specifications, to obtain the best final offer.

Sec. 130.260. PRE-BID CONFERENCE OR SITE VISIT. (a) Authorizes the district to require a principal, officer, or employee of each prospective bidder to attend a mandatory pre-bid conference or site visit, or both, as a condition of a request for bid or proposal. Requires that notice of a requirement under this subsection be included in the notice published under Section 130.258.

(b) Authorizes the district, after the district conducts a mandatory pre-bid conference or site visit, to send any additional required notice for the proposed contract only to prospective bidders who attended or were represented at the conference or who are documented as having visited the site.

Sec. 130.261. IDENTICAL BIDS. Requires the district, if, after considering the factors described by Section 130.256, the district determines that the district has received identical bids, to cast lots to determine which bidder will be awarded the contract. Requires the district to invite the bidders to witness the selection process under this section. Requires that the selection process be conducted by at least two district employees or members of the district's board of trustees.

Sec. 130.262. BID DEPOSIT. (a) Authorizes the district, as the district determines necessary, to require a bid deposit in an amount determined by the district. Requires that the amount of the deposit, if any, be stated in the notice required by Section 130.258 of the invitation to bid.

(b) Requires the district, on the award of a contract or the rejection of all bids, to return the bid deposit of an unsuccessful bidder. Authorizes the bid deposit of the successful bidder to be retained until the contract is signed by the district. Prohibits a bid deposit from being held longer than 90 days.

(c) Requires that the bid deposit required by the district, if any, be in the form of a cashier's check, certified check, or bid bond written by a surety authorized to

conduct business in this state. Authorizes a district to elect to require a bid deposit to be in the form of a bid bond.

Sec. 130.263. PERFORMANCE BOND. Authorizes a district to require a contractor to provide a performance bond in the amount of the contract before executing a contract for the purchase or use of goods or services with a value of \$100,000 or more. Requires that the bond be written by a surety authorized to conduct business in this state and generally comply with the performance bond requirements of Chapter 2253 (Public Work Performance and Payment Bonds), Government Code.

Sec. 130.264. ENFORCEMENT OF PURCHASING PROCEDURES: CRIMINAL PENALTIES; REMOVAL; INELIGIBILITY; INJUNCTION. (a) Defines, in this section, "component purchases," "separate purchases," and "sequential purchases."

(b) Provides that an officer, employee, or agent of a district commits an offense if the person with criminal negligence makes or authorizes separate, sequential, or component purchases for the purpose of avoiding the requirements of Section 130.253, 130.256, or 130.266. Provides that an offense under this subsection is a Class B misdemeanor and is an offense involving moral turpitude that results in a forfeiture of an officer's public office.

(c) Provides that an officer, employee, or agent of a district commits an offense if the person with criminal negligence violates Section 130.253, 130.256, or 130.266 other than by conduct described by Subsection (b). Provides that an offense under this subsection is a Class B misdemeanor and is an offense involving moral turpitude that results in a forfeiture of an officer's public office.

(d) Provides that an officer or employee of a district commits an offense if the officer or employee knowingly violates Section 130.253, 130.256, or 130.266 other than by conduct described by Subsection (b) or (c). Provides that an offense under this subsection is a Class C misdemeanor.

(e) Provides that the final conviction of a person other than a member of the board of trustees for an offense under Subsection (b) or (c) results in the immediate removal from office or employment of that person. Provides that a trustee who is convicted of an offense under this section is subject to removal as provided by Chapter 66 (Quo Warranto), Civil Practice and Remedies Code. Provides that for four years after the date of the final conviction, the removed person is ineligible to be a candidate for or to be appointed or elected to a public office in this state, is ineligible to be employed by or act as an agent for this state or a political subdivision of this state, and is ineligible to receive any compensation through a contract with this state or a political subdivision of this state. Provides that this subsection does not prohibit the payment of retirement benefits to the removed person or the payment of workers' compensation benefits to the removed person for an injury that occurred before the commission of the offense for which the person was removed. Provides that this subsection does not make a person ineligible for an office for which the federal or state constitution prescribes exclusive eligibility requirements.

(f) Authorizes a court to enjoin performance of a contract made in violation of this subchapter. Authorizes a county attorney, district attorney, criminal district attorney, citizen of the county in which the district is located, or an interested party to bring an action for an injunction. Entitles a party who prevails in an action brought under this subsection to reasonable attorney's fees as approved by the court.

Sec. 130.265. NOTIFICATION OF CRIMINAL HISTORY OF CONTRACTOR.

(a) Requires a person or business entity that enters into a contract with a district to give advance notice to the district if the person or an owner or operator of the business entity

has been convicted of a felony. Requires that the notice include a general description of the conduct resulting in the conviction of a felony.

(b) Authorizes a district to refuse to enter into a contract or other transaction with a person who has been convicted of a felony or with a business entity if an owner or operator of the entity has been convicted of a felony.

(c) Authorizes a district to terminate a contract with a person or business entity if the district determines that the person or business entity failed to give notice as required by Subsection (a) or misrepresented the conduct resulting in the conviction. Requires the district compensate the person or business entity for goods delivered or services performed before the termination of the contract.

(d) Provides that this section does not apply to a publicly held corporation.

Sec. 130.266. EFFICIENCY AND SAVINGS. Requires a district, in order to increase efficiency of operations and to achieve savings through volume purchases, on an annual basis to identify common types of goods and services to be purchased from the district's budget and, to the extent the district determines practicable, consolidate the purchase of those goods or services under contracts entered into under this subchapter.

Sec. 130.267. DELEGATION. (a) Authorizes the board of trustees, except as provided by Subsection (b), to, as appropriate, delegate its authority under this subchapter to a designated person, representative, or committee. Requires the district in procuring goods or services, to provide notice of the delegation and the limits of the delegation in the request for bids, proposals, or qualifications or in an addendum to the request. Provides that if the district fails to provide that notice, a ranking, selection, or evaluation of bids, proposals, or qualifications other than by the board of trustees in an open public meeting is advisory only.

(b) Prohibits the board from delegating the authority to act regarding an action specifically authorized or required by this subchapter to be taken by the board of trustees.

[Reserves Sections 130.271-130.350 for expansion.]

SUBCHAPTER L. DISPOSAL OF SURPLUS PERSONAL PROPERTY

Sec. 130.351. SALE OF PERSONAL PROPERTY. Requires a district to dispose of surplus personal property in an accountable manner that best serves the interest of the district. Requires that a sale or transfer of personal property that is not covered by Chapter 791 (Interlocal Cooperation Contracts), Government Code, be solicited and awarded in the same manner as a contract for the purchase of goods or services under Subchapter K.

Sec. 130.352. METHODS OF DISPOSAL. (a) Authorizes a district to use any of the following methods to dispose of surplus personal property:

- (1) the use of a licensed auctioneer to conduct live or Internet-based auctions;
- (2) a direct sale by the district to a person submitting the highest and best bid through a competitive process, including an Internet-based bidding system;
- (3) the trade-in of items when purchasing new items;
- (4) a sale or transfer to another governmental entity at a mutually agreed price; or
- (5) a donation to a governmental entity in this state.

(b) Authorizes the property, if the junior college district is unable to find a buyer or governmental entity that wants the surplus property, to be:

(1) discarded in accordance with applicable federal, state, and local laws, ordinances, and rules; or

(2) removed by an interested party at no charge or for a nominal charge.

(c) Prohibits a district, except as provided by this section, from giving, donating, loaning, or transferring surplus property to any person or entity.

[Reserves Sections 130.353-130.400 for expansion.]

SUBCHAPTER M. PROFESSIONAL SERVICES AND CONSULTANT SERVICES

Sec. 130.401. PROFESSIONAL SERVICES. (a) Defines, for purposes of this section, "professional service provider."

(b) Requires a district to select and enter into contracts for professional services in accordance with Subchapter A (Professional Services), Chapter 2254 (Professional and Consulting Services), Government Code. Requires the district, if the estimated value of a contract for professional services is \$50,000 or more during a fiscal year, or during the contract's term if the contract is a multiple year contract, to publish notice of the request for qualifications as provided by Section 130.258.

(c) Authorizes a professional service provider selected by the junior college district to be selected for a specific project or for various projects that arise during the term of the provider's contract. Prohibits the term of a contract with a professional service provider from exceeding five years, except that the professional service provider is required to complete services for projects started before the end of the contract term.

Sec. 130.402. CONSULTANTS. (a) Defines, for purposes of this section, "consultant."

(b) Requires a district to select and enter into contracts with consultants in accordance with Section 130.253 or Subchapter B (Professional and Consulting Services), Chapter 2254, Government Code. Requires the district, if the estimated value of a contract for consulting services is \$50,000 or more during a fiscal year, or during the contract's term if the contract is a multiple year contract, to advertise the request for qualifications, bids, or proposals as provided by Section 130.258.

(e) Authorizes a consultant selected by the district to be selected for a specific project or for various projects that arise during the term of the consultant's contract. Prohibits the term of a contract with a consultant from exceeding five years, except that the consultant is required to complete services for projects started before the end of the contract term.

Sec. 130.403. RULES AND PROCEDURES; AUDITS BY STATE AUDITOR.

(a) Authorizes the board of trustees to adopt rules and procedures for the acquisition of professional services and consultants by the district.

(b) Provides that district contracts for professional services or consultants are subject to audit by the state auditor in accordance with Chapter 321, Government Code.

SECTION 4. Amends Section 271.023, Local Government Code, as follows:

Sec. 271.023. CONFLICT OF LAWS. Provides that to the extent of any conflict, the provisions of Subchapter B, Chapter 44, Education Code, relating to the purchase of

goods and services under contract by a school district and the provisions of Subchapters K and L, Chapter 130, Education Code, relating to the purchase of goods and services under contract by a junior college prevail over this subchapter.

SECTION 5. Repealer: Sections 130.010 (Purchasing Contracts) and 130.0101 (Acquisition of Library Materials), Education Code.

SECTION 6. Makes application of this Act prospective.

SECTION 7. Provides that this Act does not make an appropriation. Provides that a provision in this Act that creates a new governmental program, creates a new entitlement, or imposes a new duty on a governmental entity is not mandatory during a fiscal period for which the legislature has not made a specific appropriation to implement the provision.

SECTION 8. Effective date: September 1, 2011.