



INTERIM REPORT

to the 85th Texas Legislature



HOUSE COMMITTEE ON
GENERAL INVESTIGATING AND ETHICS



JANUARY 2017

**HOUSE COMMITTEE ON GENERAL INVESTIGATING AND ETHICS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2016**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
85TH TEXAS LEGISLATURE**

**JOHN KUEMPEL
CHAIRMAN**

**COMMITTEE CLERK
BRITTNEY MADDEN**



Committee On
General Investigating and Ethics

January 4, 2017

John Kuempel
Chairman

P.O. Box 2910
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The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on General Investigating and Ethics of the Eighty-fourth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-fifth Legislature.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Kuempel", written over a horizontal line.

John Kuempel

A handwritten signature in black ink, appearing to read "Nicole Collier", written over a horizontal line.

Nicole Collier

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Lyle Larson

A handwritten signature in black ink, appearing to read "Sarah Davis", written over a horizontal line.

Sarah Davis

A handwritten signature in black ink, appearing to read "Joe Moody", written over a horizontal line.

Joe Moody

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Todd Hunter

A handwritten signature in black ink, appearing to read "Chris Turner", written over a horizontal line.

Chris Turner

Nicole Collier
Vice-Chairman

Members: Sarah Davis, Todd Hunter, Lyle Larson, Joe Moody, Chris Turner

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INTRODUCTION

On November 4, 2015, Texas House Speaker Joe Straus instructed the House Committee on General Investigating and Ethics to:

- 1) Examine the ethics laws governing public officers and employees in this state and identify areas in which the laws are inadequate to maintain the public's trust and confidence in government. Assess whether required financial disclosures by those making governmental decisions adequately inform the public of potential conflicts of interest.
- 2) Study the contracting practices at major state agencies to determine if additional reforms are needed to maintain public confidence and trust in the expenditure of state funds.
- 3) Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 84th Legislature. In conducting this oversight, the committee should:
 - a. consider any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;
 - b. identify issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;
 - c. determine whether an agency is operating in a transparent and efficient manner; and
 - d. identify opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

On June 1, 2016, Speaker Straus assigned the following additional interim charge to the General Investigating and Ethics Committee:

- 4) Examine the use by state agencies of emergency leave and settlement payments to provide supplemental compensation to departing employees. Recommend any revisions or clarifications to the law necessary to ensure that taxpayer dollars are being used prudently.

ETHICS LAWS GOVERNING PUBLIC OFFICERS AND EMPLOYEES

Examine the ethics laws governing public officers and employees in this state and identify areas in which the laws are inadequate to maintain the public's trust and confidence in government. Assess whether required financial disclosures by those making governmental decisions adequately inform the public of potential conflicts of interest.

Background

The Texas Ethic Commission (TEC) was created following the passage of a 1991 constitutional amendment adding Article III, Section 24a to the Texas Constitution. Among other responsibilities, the TEC was given responsibility of administering and enforcing laws regarding political contributions and expenditures and political advertising, as laid out in Title 15 of the Texas Election Code.¹ Texas Government Code, Section 571.001, provides the Ethics Commission with the following objective:

- (1) to control and reduce the cost of elections;
- (2) to eliminate opportunities for undue influence over elections and governmental actions;
- (3) to disclose fully information related to expenditures and contributions for elections and for petitioning the government;
- (4) to enhance the potential for individual participation in electoral and governmental processes; and
- (5) to ensure the public's confidence and trust in its government

On February 19, 2015, Governor Abbott released his list of emergency items for immediate consideration by the 84th Legislature. One item reads, in part:

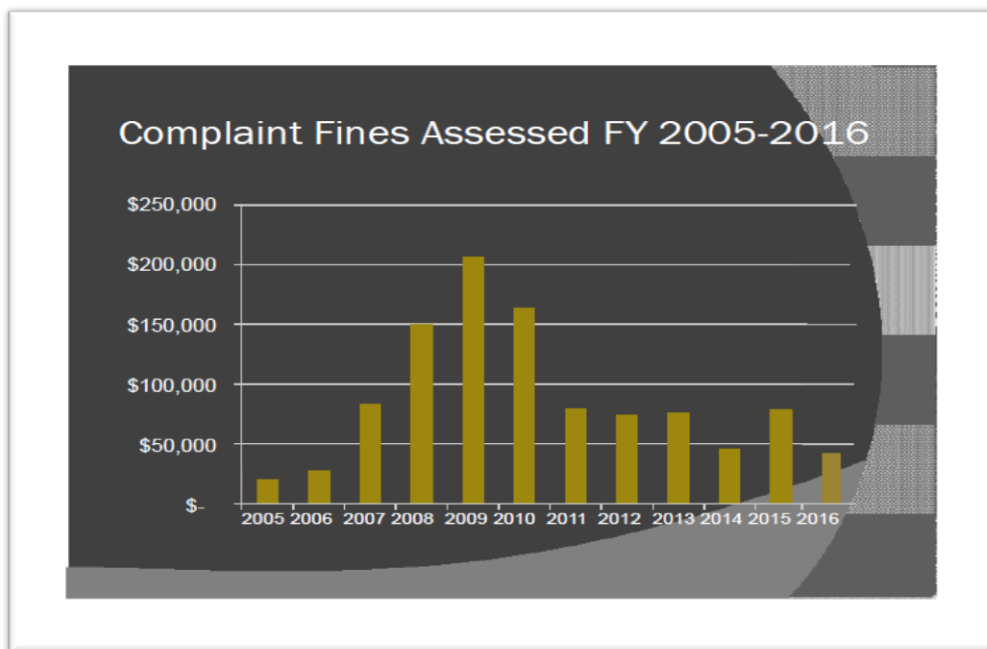
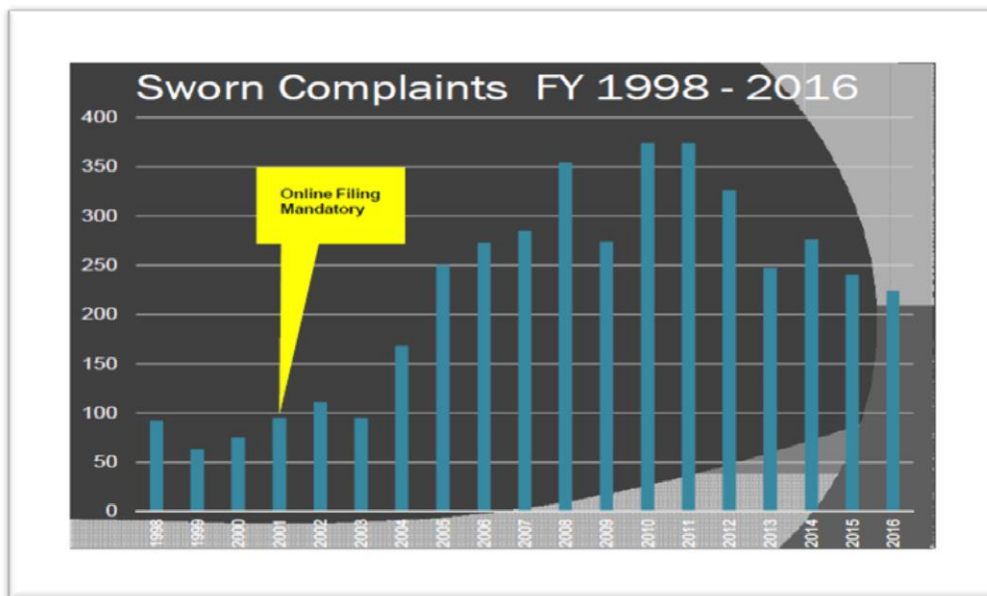
"The faith and trust that Texas citizens place in their elected officials requires each of us to conduct the business of the state in the most transparent and honest manner possible. Strengthening our ethics laws relating to disclosure of state contracts with elected officials, prohibiting lawmakers from voting on legislation from which they could profit and increasing disclosure of campaign finance information will ensure a more responsible government for Texas."²

Though the 84th Legislature debated a number of bills related to Texas ethics and disclosure laws, many failed to pass. However, one of the most consequential to receive the Governor's signature was House Bill 1295 by Rep. Capriglione. HB 1295 increased transparency in contracting by requiring all contracts with government entities, including municipalities, counties, school districts, and special purpose districts, to include a Certificate of Interested Parties; to be filed with the Texas Ethics Commission. The legislation defines "interested party" as a person who benefits financially from a contract, including a person who has a legal or equitable interest in the contract or a contracting person or a person who served as a broker, intermediary, director, adviser, or attorney for, or otherwise actively participated in, a contract.³

Of shared interest to both the Governor, through his statement, and the Speaker of the House, through the charge assigned to this Committee, is disclosure of campaign finance information. In Texas, there are no limitations on contribution and expenditures; making transparency in elections even more crucial.

Findings

The Texas Ethics Commission's reports a five-year decline in sworn complaints and the fines assessed for those complaints.⁴ The bulk of these complaints continue to be related to the filing process. This includes missing information, incomplete filings or missed filing deadlines.



Texas Election code defines a "political committee" as a group of persons that has a principal purpose accepting political contributions and making political expenditures.⁵ An example of the difficulty faced by the TEC is the discrepancy between a "political committee", a "specific-purpose committee", and a "general-purpose committee".⁶ Though each committee is differentiated by what "principal purpose" it has, what defines a "principal purpose" is much less clear and frequently has to do with where its expenditures are made. Further, if an outside group is spending money advocating for a specific issue rather than a candidate, its reporting requirements will vary.

The State of Texas does not restrict campaign contributions for state elections, but does require specific disclosures by all organizations that engage in political activity. These disclosures include all in-kind and direct contributions to candidates, and the name of the entity or individual who pays for a political advertisement. When it comes to disclosure of an organization's donors, however, there are different rules depending on the type of organization.

According to the Internal Revenue Code (IRC), social welfare organizations, also referred to as 501(c)(4), are "organizations not organized for profit but operated exclusively for the promotion of social welfare....the promotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity."⁷ It is important to note that state law does not require a 501(c)(4) to publicly disclose the identity of its donors. Federal law requires social welfare organizations to file information on Form 990, a public document. The organization is required to disclose donors who contribute \$5,000 or more, however, this donor information is only accessed by the IRS and not included in the public disclosure portion of the document.⁸

Of particular interest to the TEC is the role of financial contribution and expenditure reporting by a Political Action Committees (PAC) in the wake of *Citizens United v. The Federal Elections Commission*. While the TEC maintains that it is in the public's interest for contribution data to be public, the Commission also understands that *Citizens United* left the door open for this to be challenged if an organization can show a "reasonable probability" that disclosure of its contributors' names "will subject them to threats, harassment, or reprisals from either the government, officials, or private parties".⁹

Testimony from additional interested parties at the hearing reinforced that the disclosure of certain financial data by political committees is a divisive issue even among those committees. While some expressed concern that their donors would hesitate to contribute funds to maintain their privacy, others advocated for more transparency to prevent the organization from developing a reputation for secrecy or unethical influence.

It is clear that the State of Texas and its citizens prefer a transparent and open government to maintain the integrity of elections. However, some contributions to entities that are directly seeking to influence elections across the state are not currently subject to public disclosures. As Chief Judge David Santelle from the D.C. Court of Appeals wrote in *SpeechNow.org v. FEC* in 2010, "the public has an interest in knowing who is speaking about a candidate and who is

funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures".

In addition to the question of whether organizations should be required to disclose contributions, there remains disagreement among interested parties about which organizations, specifically, would have to meet that requirement. Some parties believe it should depend on total amount of contributions, the size of individual contributions, or how much of organization's budget is allocated to certain operations (political, administrative, fundraising, etc.). Regardless, it is imperative to the free market and the democratic process that its citizens trust the process and have faith in their government.

Recommendations

The Committee makes the following recommendations:

- Require all entities that spend funds for political activities to have the same reporting requirements and standards.
- Consider providing an option for individuals who contribute to non-profit organizations that engage in political activities to specify whether their donations may be used for political activities.

CONTRACTING PRACTICES

Study the contracting practices at major state agencies to determine if additional reforms are needed to maintain public confidence and trust in the expenditure of state funds.

Background

Both the House and Senate made state agency contracting a priority during the 84th legislative session. Senate Bill 20 was a result of the legislature's efforts to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process. Senate Bill 20 made the following changes:

- require all agencies to retain contracts for seven years after expiration date
- require agency officers or governing boards to approve contracts valued at more than \$1 million and verify compliance with state law for contracts over \$5 million;
- require public disclosure of no-bid contracts;
- require agencies to post contracting information on their websites;
- require disclosure of conflicts of interest between agency officers and employees and vendors;
- require a two-year “cooling off” period for employees switching jobs between agencies and vendors;
- create mandatory purchasing thresholds and require agencies purchasing information technology commodity items to use an approved vendor list;
- require the state auditor to focus on Health and Human Services contracts exceeding \$100 million and;
- require Comptroller of Public Accounts (CPA) to evaluate vendor's performance on an A-F scale and;
- require CPA to study feasibility of consolidating contract purchasing.¹⁰

In addition to the passage of Senate Bill 20, the legislature adopted two new provisions in the General Appropriations Act (GAA) to increase transparency in state procurements. General Appropriations Act Article IX, Section 7.04, requires all contracts over \$50,000 to be reported regardless of the funding source. This includes grants, interagency agreements, and any purchase of goods and services. Article IX, Section 7.04 of GAA, requires all contracts over \$10 million to be reported regardless of funding source, as well as emergency and sole-source contracts over \$1 million.

Findings

Comptroller of Public Accounts Purchasing Study

The 84th Legislature charged the Texas Comptroller of Public Accounts to study existing purchasing practices in Texas state government and make purchasing recommendations in a report to be published before the 2017 legislative session. In March 2016, the Comptroller executed a contract with RSM US LLP (RFP214a) to perform data analysis and consulting services for the study.

The Centralized State Purchasing Study will determine the feasibility and practicality of consolidating state purchasing functions and examine 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;
- consolidating or reducing the number of vendors authorized to contract with this state to allow this state to better leverage its purchasing power;
- a detailed projection of expected savings or costs to this state in consolidating state purchasing;
- a report on the process for the legislature or the executive branch to implement the consolidation of state purchasing;
- a list of state agencies, including dedicated offices or departments in those agencies, with purchasing responsibilities; and
- the total cost to this state of the purchasing responsibilities for each state agency, including the dedicated office or department in the agency with purchasing responsibility.¹¹

The Comptroller will study 108 agencies by analyzing expenditure data for FY 2014 and FY 2015 obtained from the Uniform Statewide Accounting System (USAS) and the Centralized Accounting and Payroll/Personnel System (CAPPS). Public institutions of higher education will not be part of the study because a majority of their funds are held outside the appropriations process and are subject to different purchasing rules.

In addition to the study required by Senate Bill 20, the Comptroller has proactively initiated a study of vendors to address procurement issues. Vendors were given a 21-question survey to obtain feedback on how to establish efficiencies and transparency in state contracting, as well as cost savings from a vendor perspective. More than 700 vendors responded and the data will be analyzed by the Comptroller to address issues.¹²

Centralized Accounting Payroll/Personnel System

The Centralized Accounting Payroll/Personnel System (CAPPS) is the statewide system for payroll processing, transactions involving human resources and accounting, as well as contracting and procurement. Senate Bill 20 required the Comptroller of Public Accounts to determine what contracting information related to purchasing, including contracts and solicitations, state agencies must report in the Centralized Accounting Payroll/Personnel System (CAPPS). The Comptroller developed standards for the entry of procurement and contracting information into CAPPS and worked in conjunction with Legislative Budget Board and Department of Information Resources to address access needs to procurement and contracting information in CAPPS.¹³

CPA worked with 26 agencies to deploy CAPPS HR/Payroll in August 2016 and 11 agencies to deploy CAPPS Financials in September 2016. Nine additional agencies will deploy CAPPS HR/Payroll in 2017 and 27 agencies will deploy CAPPS Financials in 2017. All CAPPS deployments are scheduled to conclude at the end of Fiscal Year 2020.¹⁴

Department of Information Resources Master Contracts

The Department of Information Resources (DIR) Cooperative Contracts program was created through House Bill 1517 of the 79th Session. This bill requires state agencies to buy commodity items through DIR Master Contracts, unless the agency obtains an exemption from DIR.¹⁵

Senate Bill 20 created mandatory purchasing thresholds for state agencies, excluding Institutions of Higher Educations, when purchasing through DIR's Master Contracts for hardware, software and services (commodities). Purchases must be made from the preferred vendor list. When purchasing information technology commodity items, the following is required:

- One quote for purchases up to \$50,000
- A minimum of 3 quotes for purchases between \$50,000-\$150,000
- A minimum of 6 quotes (or less if fewer vendors available) for purchases between \$150,000-\$1 million
- Purchases above \$1 million are prohibited from using the preferred vendor list and require a Request for Offer open solicitation to be executed by each state agency.¹⁶

For service based contracts requiring a statement of work, state agencies are required to work directly with DIR and receive approval on statements of work before awarding a contract.

DIR began implementation of Senate Bill 20 shortly after the 2015 session concluded. The agency conducted webinars and town hall meetings for agencies and vendors leading up to and after the effective date of September 1, 2015 to discuss the new rules required by SB 20. DIR continues to work with agencies to assist in complying with Senate Bill 20 requirements.¹⁷

Purchases for cooperative contracts program from the first half of FY15 compared to the same period FY16 decreased 3%.¹⁸

FY15 (Sep-Feb) compared to FY16 (Sep-Feb)- All Commodities & Services¹⁹

Customer Type	2015 Sales (Sept thru Feb)	2016 Sales (Sept thru Feb)	% Increase/Decrease
State Agency	\$267,059,794	\$280,316,913	5%
Higher Ed	177,755,193	166,758,979	-6
K-12	313,346,832	256,599,741	-21
Local Government	215,855,769	255,448,357	18
Assistance Org	3,311,418	2,790,885	-16
Out of State	8,992,797	1,670,795	-81
Grand Total	\$996,321,803	\$963,585,671	-3%

In the Departments of Information Resource's review of stage agencies' use of cooperative contracts during the first six months since implementation of SB20, compared to the same time period of the previous fiscal year, the Department found:

- an increase in purchase orders between \$50,000-\$150,000;
- an increase in use of information technology staff augmentation contracts under \$150,000 and;
- a decrease in use of services contracts that require a Statement of Work (SOW) to be approved by DIR. (Although, a recent increase in SOWs has occurred as agencies begin to internalize their approved procedures.)²⁰

Legislative Budget Board

Beginning September 1, 2015, the Legislative Budget Board (LBB) began maintaining a central database that serves as the single point of data entry for all contract information or documents that state entities are required to report to the LBB either by statute or the General Appropriations Act. This system is publicly available and searchable. The LBB Contracts Database provides a more comprehensive view of contracts which not only improves accuracy, but increases transparency.²¹

The LBB is working with agencies that have a higher volume of contracts (Texas Department of Transportation, Department of Public Safety and Health and Human Services) to find a solution to efficiently and effectively upload the large number of documents into the system. For this reason, some agencies reporting is incomplete. However, reporting has increased tenfold since the database went live on September 1, 2015 and as of May 9, 2016:

- 119 entities reporting
- Over \$55 billion in contracts reported
- Over 9800 contracts submitted²²

Shortly after the conclusion of the 84th Legislative Session, the LBB created a Contracts Oversight Team (COT) to maintain the Contracts Database and monitor reported information. COT provides training on the new database and continuously serves as a resource for agencies in using the system. In addition to maintaining the Database, COT establishes protocols for assessing risks in statewide procurement and conducts in-depth assessments of state agencies in

an effort to identify and mitigate risks.

Since implementation of SB 20 and the General Appropriations Act reporting requirements, the COT has observed the following:

- Agencies and institutions of higher education sometimes combine posting requirements of SB 20 with other statutory and GAA contract reporting requirements.
- Agencies do not always have ready access to documentation related to a vendor's selection.
- Risk to the state is often introduced during the solicitation and contract formulation phases of procurement.
- Negotiation with vendors over a contract's term and conditions can weaken protections for the state.
- Outsourcing a function or system development can limit an agency's flexibility in reallocating resources when priorities shift.²³

Texas Department of Transportation

The majority of Texas Department of Transportation's (TxDOT) contracts fall into four categories:

- Purchase Orders (Goods and Non-Professional Services);
- Professional Services and Intergovernmental Contracts;
- Highway Improvement (Construction and Maintenance) Contracts and;
- Alternative Delivery Contracts (Comprehensive Development Agreements (CDA) and Design Build (DB)).

The TxDOT Contracts and Purchasing Division oversees contract policy and administration, and contract records retention. The Contracts and Purchasing Division is responsible for setting contract and purchasing policies and training managers, creating templates for contracts, and overseeing certain negotiated contracts. TxDOT requires all employees involved in contract management receive training related to their contract responsibilities and all employees receive ethics training annually. The agency also requires additional extensive training for contract and purchasing managers. In an effort to identify potential risks associated with the contract process, TxDOT continuously reviews their training procedures and contract requirements.

Less than 10% of TxDOT's contracts consist of purchase orders and TxDOT is required to use one of the seventeen authorized purchasing methods under the Texas Purchasing Act for purchase orders. In most cases, purchases for IT services and commodities are required to go through DIR. Most types of complex, high dollar purchase orders go through an evaluation process at TxDOT where the parties' qualifications and price are assessed and items such as costs, scope of work, required personnel, work hours and project schedule are negotiated before the award of the purchase order.²⁴

Professional Services contracts are for a limited number of identified, licensed, professional categories established by state law and are primarily for engineering, surveying and architecture services.²⁵ Because these contracts are exempt from the Purchasing Act, professional services

are procured based on qualifications and a fair and reasonable price. The process TxDOT uses to award contracts for professional services require them to advertise the services to be outsourced, develop a request for proposal (RFP) or request for qualifications (RFQ) to communicate the criteria that will be used to evaluate proposals, select a provider that best demonstrates the ability to perform the services and ensure that the provider can provide the services at a fair and reasonable price.

Most TxDOT construction and maintenance contracts are required by law to be low bid.²⁶ These contracts are managed by the Construction Division and Maintenance Division and bidding forms are issued only to prequalified firms with adequate bidding capacity. TxDOT qualifies bidders to become eligible to bid on a project using two levels of qualifications:

- Confidential Questionnaire- requires bidders to prove an audited financial statement prepared by an independent certified public account; and
- Bidder's Questionnaire- requires bidders to provide information concerning bidding capacity of a firm as determined by past performance on projects, experience, expertise, financial condition and equipment availability.

Bidders must provide an audited financial statement and complete a confidential questionnaire for contracts above \$300,000. For contracts below \$300,000, bidders must complete a bidder's questionnaire.

The alternative delivery contract category consists of comprehensive delivery agreements and design build contracts. CDAs and DBs are authorized under state law and must be approved by the TxDOT Commission. The alternative delivery procurement process is extremely rigorous and is considered by the commission three separate times before award. Interested developers first submit their experience and qualifications, known as statements of qualifications, to TxDOT for consideration. A shortlist is announced and an RFP, once approved by the Commission, is issued to shortlisted entities. RFPs are evaluated and ranked in conformance with the procurement process and the Texas Administrative Code. TxDOT then submits a recommendation to the Commission regarding approval of the proposal and the Commission may approve or disapprove the recommendation. To ensure that bidders of CDA and DB projects understand the provisions in these contracts, TxDOT will develop a programmatic template to provide consistency for bidders in future projects.²⁷

In 1991 Texas instituted the Historically Underutilized Businesses (HUB) program to increase the opportunities available to businesses owned by minorities and women in the area of state procurement and contracting. The HUB Program is applicable to state funded contracts excluding highway construction and maintenance contracts and the 2015 statewide goals are grouped by procurement category.

- Heavy Construction 11.2%
- Building 21.1%
- Special Trade 32.9%
- Professional Services 23.7%

-
- Other Services 26%
 - Commodity Purchasing 21.1%²⁸

The Disadvantaged Business Enterprises (DBE) Program is applicable to all federal-aid contracts and had a goal of 11.7% in 2015. The Small Business Enterprises (SBE) is applicable to state funded highway construction and maintenance contracts. The goal for the SBE Program in 2015 was 13%.²⁹

TxDOT has implemented a substantial portion of Senate Bill 20 and will complete implementation by the end of the year. In several instances, the Department has expanded on the original provisions of Senate Bill 20 to further increase transparency. Senate Bill 20 prohibits employees who participated on behalf of a state agency in procurement or contract negotiation with a private third party from accepting employment from that private third party within two years of ceasing employment with the state agency. TxDOT has additionally prohibited a contract with a private entity that hires a former employer in violation of SB 20.

Because of the sheer volume of contracts that TxDOT issues, uploading and posting these contracts to its website has proven to take more time and man power than anticipated. TxDOT is working with their internal IT Division and LBB to find an efficient solution.

Texas Health and Human Services Commission

The Texas health and human services system includes five agencies, four of which operate under the oversight of the Health and Human Services Commission (HHSC). On October 1, 2015, HHSC completed the consolidation of contracting services. All five HHS agencies have internal contract managers who report to the HHS Procurement and Contracting Services (PCS) division. The PCS makes administrative and client service purchases for all HHS agencies.³⁰

HHSC has successfully implemented most provisions of SB 20 without any difficulty and continues to work diligently to ensure full implementation by the end of 2016.

Texas Department of Public Safety

In an effort to enhance contract monitoring, the Texas Department of Public Safety (DPS) Commission established a Contract Review Board in 2009. The Contract Review Board reviews all contracts over \$1 million, any amendments to contracts over \$500,000 and any amendment over \$1,000 that changes the value of a contract by 50%. This review is executed prior to the inception of the contract. In 2013, DPS expanded on the Contract Review Board and created an Executive Committee. The Committee is tasked with reviewing current contracts over \$500,000 to consider renewal and rebidding decisions and whether additional stakeholders should be added. Upon review of the Executive Committee, the contract is provided to the Contract Review Board for consideration.³¹

After the passage of Senate Bill 20, DPS began to focus on ethics policy and conflicts of interest.

To ensure that the same vendor is not consistently being awarded a contract, DPS re-solicits contracts so that competition remains open and fair. In addition, DPS is open to and actively participates in market research to familiarize the agency with vendors and the goods or services they offer so that the Department utilizes the current market to the full extent. To address conflicts of interest, DPS requires all executive level employees to complete and sign a form disclosing all financial, real and/or perceived conflicts of interest prior to consideration of a contract.³²

DPS has implemented all provisions of Senate Bill 20 and is in full compliance with the requirements.

General Land Office

In an effort to attain transparency and efficiency, the General Land Office (GLO) has reformed their contracting processes. A Compliance Division was established to address conflicts of interest and information was obtained from all agency employees regarding real and perceived conflicts of interest. A process was established to check all vendor information with the employee information to determine any potential conflicts of interest.³³

The GLO has made efforts to consolidate the agency's contracting processes to a centralized contract management division. In this process the division is implementing a redefined needs assessment, procurement risk assessment, procurement and grants oversight committee, new draft project plan and a centralized contract filing system. The GLO has also added a personnel position responsible for LBB and vendor performance reporting.³⁴

The General Land Office has three employee positions focused on HUB inclusion in procurement. Procedures have been established for the inclusion of HUB Subcontracting Plans with a value of \$100,000 or more, over the term of the contract, including any renewal options.³⁵

GLO has successfully implemented Senate Bill 20 and the required provisions.

Recommendations

The Committee finds that state agencies have diligently worked to successfully implement Senate Bill 20. The Committee makes the following recommendations:

- Review the Texas Comptroller of Public Account's Purchasing Study and consider recommendations for consolidating state purchasing functions and related cost savings to the state.
- Review the definition of conflicts of interests to ensure that the state's procurement process remains fully transparent while still maximizing contract value.
- Continue to monitor and review state contracting procedures to ensure consistency among agencies.

EMERGENCY LEAVE AND SETTLEMENT PAYMENTS

Examine the use by state agencies of emergency leave and settlement payments to provide supplemental compensation to departing employees. Recommend any revisions or clarifications to the law necessary to ensure that taxpayer dollars are being used prudently.

Background

On June 1, 2016, Governor Abbott and Comptroller Hegar issued a policy directing state agencies to refrain from using emergency or other leave for the purposes of severance or settlement with departing or departed state employees. The directive prohibited the use of emergency leave, administrative leave or other mechanisms to continue paying state employees who have ceased to work.³⁶

Following Governor Abbott and Comptroller Hegar's directive, the Office of the Comptroller of Public Accounts (CPA) began reviewing emergency leave determinations on a post payment audit basis. The CPA implemented additional audit steps to verify agency documentation by the agency head or other authorizing official that all emergency leave is being used in compliance with the joint directive.³⁷

Texas law provides various leave to state employees and requires each state agency to keep a record of time and attendance for each of its employees. These records must include the accrual and use of vacation and sick leave, the reason an employee takes leave if the law requires the employee to inform the agency of the reason and whether any leave taken is accounted for as sick leave, vacation leave, other paid leave, leave without pay, or other absence.³⁸

Sick Leave

Sick leave is an accrued benefit to state employees that allows for a paid absence from work under certain conditions.³⁹ A full-time employee accrues sick leave at a rate of eight hours per month; beginning on the first day of state employment and ending on the last duty day of state employment.⁴⁰ An employee may use accrued sick leave immediately upon employment when the employee is unable to perform his or her job due to sickness, injury, pregnancy or confinement. In addition, sick leave may also be used to care for an employee's immediate family member who is ill.

Vacation Leave

State employees begin to accrue vacation leave on their first day of employment and on the first calendar day of each succeeding month of state employment.⁴¹ However, an employee cannot take vacation leave until the employee has been employed with the State for at least six consecutive months.⁴² The amount of vacation leave an employee accrues is determined by the length of state service and whether the employee is considered full-time or part-time.

Employees who separate from employment are entitled to be paid for their accrued balance of vacation leave as of the date of separation.⁴³ State law allows for two options for employees separating from employment. An employee may remain on the payroll after separation to use accrued vacation leave or they may receive a lump-sum payment. The employee may not use sick leave or accrue sick leave or vacation leave while exhausting vacation leave but is entitled to receive all compensation and benefits that the employee was receiving on the employees last day of duty.⁴⁴

Administrative Leave

In addition to sick and vacation leave, the State offers various leave for specific situations. One

particular type of leave is administrative leave. The Texas Government Code authorizes administrative leave under Section 661.911 and requires this type of leave to be issued by the head of an agency and only for the purpose of outstanding performance. Administrative leave may not exceed 32 hours in a fiscal year. Outstanding performance is not defined in statute, however, an employee receiving administrative leave is required to have a performance appraisal on file. Because the term “outstanding performance” is not defined by law, the head of an agency is given full discretion in determining the criteria for outstanding performance in the workplace.

Emergency Leave

Emergency leave is authorized under Texas Government Code, Section 661.902. State agencies and institutions of higher education are authorized to grant employees emergency leave for a death in the employee’s family.⁴⁵

In addition to granting employees emergency leave for the death of an employee’s family member, an agency head may grant emergency leave for any reason determined to be for good cause.⁴⁶ Statute does not define the term “good cause”; giving broad authority to an agency head to make a determination in providing emergency leave to an employee. State law also does not provide for any limitation on the amount of emergency leave that may be awarded, however, agencies may limit the type of leave to a specific amount of days and include this in their policies.

Statewide Leave Accounting Systems

There are several leave accounting systems available to state agencies to track leave granted and used. Agencies are authorized to use one of the centralized, statewide leave accounting systems or they may also report leave through their own internal leave accounting system. According to the Comptroller, all state agencies will eventually use CAPPS HR/Payroll.⁴⁷

Uniform Statewide Payroll/Personnel System (USPS)

USPS is the Uniform Statewide Payroll/Personnel System, which was established in 1994 to process payrolls for state employees using a centralized and standardized payroll calculation. USPS was mandated by the 70th Legislature in 1987.⁴⁸

Centralized Accounting and Payroll/Personnel System (CAPPS)

Centralized Accounting and Payroll/Personnel System is the official name of the statewide Enterprise Resource Planning system created by the Comptroller of Public Accounts. CAPPS provides state agencies with a single financials and human resources (HR)/payroll administration software solution. CAPPS provides the Comptroller with more complete and reliable time keeping and leave data for agencies using the system.⁴⁹

Findings

Separation Agreements

The Committee requested information from the State Auditor's Office (SAO) regarding the use of separation agreements by certain state agencies. There is no statutory definition for "separation agreement" for state employment. For purposes of the SAO analysis, the SAO defined a separation agreement as a documented arrangement through which an employee receives a benefit from the separation of employment. This could include (1) a one-time, lump-sum payment or (2) remaining on the payroll between the employees last day in the office and the employee's effective termination date, notwithstanding the exhaustion of accrued vacation leave.

The following seven agencies were asked to provide information on their use of separation agreements during the time period between September 1, 2014 and July 18, 2016.

- Texas Department of Agriculture (TDA)
- Office of the Attorney General (OAG)
- Department of Family and Protective Services (DFPS)
- General Land Office (GLO)
- Health and Human Services Commission (HHSC)
- Texas Parks and Wildlife Department (TPWD)
- Texas Water Development Board (TWDB)

The compensation for all separation agreements at these seven agencies totaled \$1,569,042.28. The SAO concluded that separation agreements were entered into for numerous reasons and were characterized in a variety of ways by agencies such as: reductions in force, retirement incentives and settlement of legal claims. The inherent ambiguity present in the state's leave accounting codes are significant and as a result, coding for these separation agreements varied depending on whether the reporting was made to a statewide leave accounting system, USPS, or an internal reporting system. Those separation agreements reported in USPS were categorized as either "Emergency Leave- Other" or "One-time Merit Increases" while the agreements reported to an internal accounting system were coded as "Emergency Leave-Other" by DFPS or "AL" by OAG.

The total cost of emergency leave used in separation agreements for these agencies was \$432,677.98. It is important to note that since January 2014, there have been over 120 employment cases filed against state agencies and universities; exposing the state to potential liability of over \$23 million. The cost of representation by the Office of the Attorney General in employment cases is over \$2.9 million. This figure does not include dollars and resources expended by the staff of the individual agencies.⁵⁰

- **State Agency Use of Administrative and Emergency Leave**

In a full review by the State Auditor's Office, 86 state agencies were surveyed to determine how they administered and reported emergency and administrative leave. Legislative agencies, the

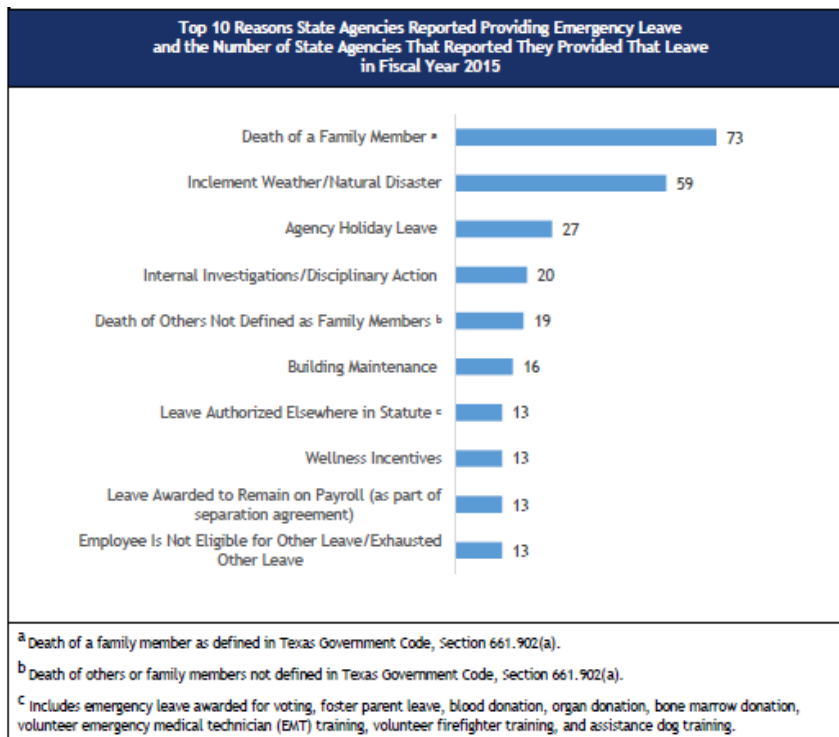
office of the governor, quasi-governmental agencies, the courts and higher education institutions were not included in this review.⁵¹ The results of the review supported testimony delivered to the Committee and highlighted several areas in need of clarification by the legislature.

- **Use of Administrative Leave for Reasons Other than Outstanding Performance**

The use of administrative leave is authorized under Texas Government Code, Section 661.911 and statute requires this type of leave to be issued only for the purpose of outstanding performance. However, the use of the phrase “administrative leave” to describe leave granted for reasons other than outstanding employee performance has been a long standing practice prevalent among state agencies.⁵² In fact, the State Auditor’s survey revealed 20 state agencies that reported using “administrative leave” for other reasons such as inclement weather, volunteer work and teambuilding.⁵³ These types of leave should have been more appropriately coded as “emergency leave” for “good cause” because they are not authorized elsewhere in statute and are reasons left to the discretion of the head of a state agency.⁵⁴

- **Discretionary Granting of Emergency Leave**

State statute specifies the circumstances in which emergency leave may be granted to a state employee. Texas Government Code, Section 661.902(a) provides that a state agency employee is entitled to emergency leave with pay for a death in the employee’s family. However, Texas Government Code, Section 661.902(b) allows the administrative head of a state agency full discretion in granting emergency leave for “good cause”. The SAO survey indicated that state agencies’ interpretations of “good cause” vary widely.⁵⁵



- **Inconsistency in Leave Accounting Codes**

Accounting codes for employee leave differ among state agencies depending on which leave accounting system the agency reports. Leave accounting codes in the USPS are different than the leave accounting codes in CAPPs and also vary among state agencies that use their own internal leave accounting systems. For example, CAPPs has a leave accounting code for time off to vote; however, USPS does not. Because of this, some state agencies that use USPS, reported using emergency leave and administrative leave to record leave for voting.⁵⁶ Even though the Comptroller's office has established standardized leave accounting codes for CAPPs HR/Payroll, Hub agencies are authorized to modify these codes and can even add additional codes. In some instances Hub agencies that used CAPPs HR/Payroll, coded certain leave as emergency leave even though it was authorized elsewhere in the law and could have been coded differently.⁵⁷

Due to the inconsistencies in coding, it is difficult to track and determine statewide information on emergency and administrative leave.⁵⁸ Therefore, providing agencies with standardized coding, as well as, coding for more specific reasons for emergency and administrative leave will help minimize the opportunity for misclassification and abuse.

- **Use of Multiple Leave Accounting Systems**

State agencies use multiple leave accounting systems to report emergency and administrative leave which makes tracking of leave difficult. Of the 86 state agencies reviewed by the State Auditor's Office:

- Sixty state agencies reported use of USPS for accounting and reporting. Although, some of those agencies have since converted to CAPPs HR/Payroll.⁵⁹
- Four state agencies reported use of CAPPs HR/Payroll.⁶⁰
- Seven state agencies reported use of CAPPs HR/Payroll as Hub agencies.⁶¹
- Fifteen state agencies reported use of their own internal leave accounting system to report emergency and administrative leave.⁶²

Nine agencies are scheduled to deploy CAPPs HR/Payroll in 2017 and according to the Comptroller, all state agencies will eventually use CAPPs.⁶³ As more agencies implement CAPPs HR/Payroll, we should begin to see more consistency in leave reporting across the board.

Recommendations

The Committee makes the following recommendations:

- The Legislature should clarify the provisions related to emergency and administrative leave and consider the addition of other specific categories of leave acceptable for use as emergency and administrative leave.
- The Committee acknowledges the need for a unified leave accounting system to be used by all state agencies and recommends swift implementation of the Centralized Accounting and Payroll/Personnel System by all state agencies. The Committee also recommends that the Comptroller of Public Accounts audit employee leave data reported to CAPPs HR/Payroll to ensure that employee leave is being used in compliance with state law.
- Time reporting codes among state agencies lack consistency and uniformity which leads to difficulty in determining whether employee leave is being used in accordance to state law. The Committee recommends standardized codes of leave for emergency and administrative leave so that there is a consistent application over all state agencies. The Committee also recommends adding leave accounting codes for specific reasons determined to be for “good cause.”
- Employment practice lawsuits can be extremely costly to the state. Agencies should be provided the tools necessary to deal with employees separating from employment while mitigating financial risks. The Committee recommends establishing parameters for the use of emergency leave in such circumstances.

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- ²⁰ Id.
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- ²² Id.
- ²³ Id.
- ²⁴ Mullenix, Janice. Texas Department of Transportation. Texas House of Representatives Committee on General Investigating and Ethics Public Hearing. 11 May 2016. Texas Capitol, Austin, Texas. Testimony.
- ²⁵ Texas Government Code, Chapter 2254, Professional and Consulting Services.
- ²⁶ Texas Transportation Code, Chapter 223, Bids and Contracts for Highway Projects.
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- ⁵⁶ Texas State Auditor’s Office. “*A Report on State Agency Administration of Emergency and Administrative Leave, SAO Report No. 17-702*”. Page 2.
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