



Watch Your Assets

May 6, 2015

Governor Abbott Confronts a Contracting Crisis

By Chris Hamborsky & Andrew Wheat

Newly elected Governor Greg Abbott sent state agencies a [memo](#) on January 28, 2015 directing them to immediately implement a pending contracting-reform bill: [Senate Bill 353](#). In the midst of a state contracting scandal, SB 353 seeks to curb potential conflicts of interest between agency representatives and their contractors and to increase contract oversight and disclosure. Abbott's directive won immediate praise as an early, firm step to confront the contracting crisis. This report takes a closer look by exploring two crucial questions. To what extent did Abbott's memo address the state's best-known contracting scandals? And how much did it alter existing agency practices?

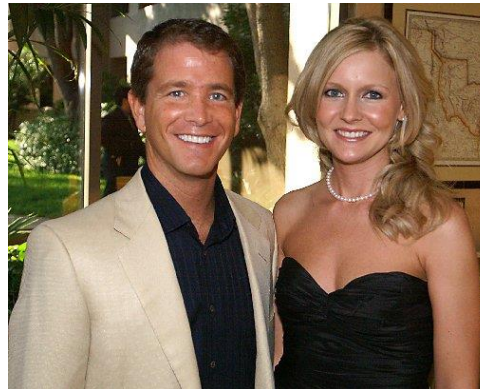
Based in part on open-records requests to 13 key state agencies, this report concludes that Abbott's directive and the Senate bill it cites are more symbolic than substantive. Had they been in effect years ago, these policies probably would not have prevented the contracting scandals that are driving new contracting bills. Fortunately, tougher reforms have been introduced. If enacted, they could preempt nefarious contracts like the no-bid doozy that the Health and Human Services Commission (HHSC) steered to tech contractor 21CT, Inc.

21CT Fraud Detection

Then-HHSC Chief Counsel Jack Stick [resigned](#) in December 2014 after Executive Commissioner Kyle Janek cancelled a major contract with Austin tech firm 21CT. *Austin American-Statesman* [exposés](#) revealed that Stick steered a \$20 million initial, no-bid contract to 21CT to detect Medicaid fraud. HHSC was poised to increase that contract another \$90 million when a media storm prompted Janek to pull the plug. The *Statesman* revealed how HHSC dodged competitive bids by abusing a preapproved Texas Department of Information Resources [program](#) that is supposed to be limited to off-the-shelf purchases of hardware and software products that look nothing like 21CT's specialized contract. Indeed, HHSC granted 21CT its first-ever contract to detect Medicaid fraud.

Had HHSC treated this custom software contract properly (as a deliverables-based IT service), it would have been subject to a \$10 million purchasing limit. The record to date indicates that former state Rep. Jack Stick—who could not have operated alone—wanted more. Stick had close ties to 21CT (which Stick [promoted](#) to other states), 21CT's lobbyist (who said the firm was [grooming Stick](#) for an executive role—which Stick denies) and to Janek (who picked [Stick's wife](#) as his chief of staff). This may explain why HHSC worked the 21CT contract through back-door channels that would permit it to inflate.

Note that, as discussed below, HHSC already *had* internal contracting safeguards that implemented much of Abbott’s reforms before he issued them. What HHSC lacked were *independent* checks to protect tax dollars even if the agency’s top political appointees were running the agency in an anesthetized state or actively steering contracts to cronies. Neither Abbott’s directive—nor SB 353—effectively address *those* problems.



Jack & Erica Stick

21CT is but the latest scandal of former Governor Rick Perry’s unprecedented 14-year reign, which also sponsored scandals at the publicly funded Texas Enterprise Fund, Emerging Technology Fund and Cancer Prevention and Research Institute of Texas (CPRIT). These scandals occurred on the 12-year watch of then-Attorney General Greg Abbott, who did little at the time to interfere with—or even criticize—such cronyism (even as he sat on CPRIT’s board and reviewed at least [eight HHSC contracts](#)). Still, Abbott’s contracting memo in his first days as governor seemed to signal an end to business as usual in this crony-capitalist state.

Abbott’s Memo

Echoing SB 353, Abbott’s memo directed state agencies to publicly disclose no-bid contracts and to disclose any potential conflicts between contractors and agency employees or overseers. Abbott’s memo directed agencies to “prohibit contracts with businesses with which high-level agency leadership or staff have a financial interest” and require that an agency’s board chair sign off on any contracts valued at more than \$1 million. Finally, it required “the agency’s central contracting office or procurement director to sign off on the procurement method” and to report to agency overseers “any potential issue that could arise” for contracts exceeding \$5 million. On the surface these sound like tough, praiseworthy reforms.

Abbott’s directive requires “public disclosure of all no-bid contracts and a public justification for using such a procurement method.” Yet HHSC—which adamantly denied that the 21CT deal was a no-bid contract and insisted that it was appropriate for the preapproved program at the Department of Information Resources—clearly would have justified these actions in a heartbeat (indeed, it already has). Abbott’s memo also requires agency personnel to disclose certain conflicts. HHSC, like many agencies, already required such disclosures. Moreover, no evidence has surfaced that Stick or anyone else at HHSC had an equity interest in 21CT that would have triggered the required conflict disclosures.

Nor would Abbott’s requiring the executive director to sign off on major contracts have accomplished anything. HHSC Executive Director Kyle Janek appears to have been a [soft touch](#) for privatization lobbyists;¹ his 21CT defense is that he was [hoodwinked](#) by senior staff. Nothing in Abbott’s directive would have prevented the [poorly managed](#) HHSC from sealing the 21CT deal. Indeed, HHSC and many other state agencies appear to have been substantially in compliance with Abbott’s memo before it was issued.²

Abbott’s Memo Ordered Agencies to:

- Publicly disclose and justify all no-bid contracts.
- Make contracting employees disclose possible conflicts.
- Bar contracts financially tied to top agency staff/leaders.
- Make agency heads sign contracts exceeding \$1 million.
- Get contract heads to sign contracts exceeding \$5 million and flag any concerns about these big contracts.

Agency Impact

Texans for Public Justice sent open records requests in March 2015 to 13 state agencies (including five arms of the embattled Health and Human Services Commission). Those requests sought documents related to each agency's implementation of Abbott's contracting directive. In each case TPJ requested documents flagging potential conflicts of interest by any agency employee or overseer. The accompanying table summarizes the results of those records requests.

Significantly, five agencies reported that they largely complied with Abbott's directive before he issued it. But those agencies have not been immune from contracting scandals. They include the Office of the Attorney General and the Department of Information Resources (the latter oversaw an \$863 million contract with IBM, which failed to back up Attorney General Medicaid fraud-case files that crashed into oblivion in 2008).³ They also include the Department of Criminal Justice (which oversees [scandal-prone prison contractors](#)) and the Department of Public Safety (that awarded a no-bid, \$472,000 [border-security contract](#) that ballooned to almost \$20 million).⁴ The Employee Retirement System also reported that it already complied with most of Abbott's directives but is still working to disclose all its no-bid contracts.

Even the scandalized HHSC reported that well before Abbott's memo it had policies to internally disclose potential conflicts and to bar contracts benefiting agency staff or overseers. HHSC and its affiliates (Department of Aging & Disability Services, Department of Assistive & Rehabilitative Services, Department of State Health Services and the Department of Family & Protective Services) claim to have complied with Abbott's memo once HHSC began publicly disclosing no-bid contracts and requiring its leaders to sign off on big contracts.

Contracting Policies at Selected State Agencies

State Agency	Abbott Compliant? (Pre- or Post-Memo?)	Conflicts <i>Internally</i> Disclosed Pre-Abbott?	Revealed Any Conflicts to TPJ?
Health & Human Svcs Commission	Yes (post-memo)	Yes	No
Dept. of Aging & Disability Svcs	Yes (post-memo)	Yes	No
Dept. of State Health Svcs	Yes (post-memo)	Yes	No
Dept. of Assistive & Rehab. Svcs	Yes (post-memo)	Yes	No
Dept. of Family & Protective Svcs	Yes (post-memo)	Yes	No
Dept. of Public Safety	Yes (pre-memo)	Yes	No
Dept. of Transportation	No (intends to)	Yes	No
Dept. of Info. Resources	Yes (pre-memo)	Yes	No
Employee Retirement System	No (intends to)	Yes	No
TX Education Agency	Yes (pre-memo)	Yes	No
Dept. of Criminal Justice	Yes (pre-memo)	Yes	No
Commission on Enviro. Quality	Yes (pre-memo)	Yes	No
Attorney General	Yes (pre-memo)	Yes	No

Abbott's memo appeared to have relatively more impact on the Department of Transportation (TxDOT), and the Texas Education Agency (TEA). The TEA indicated that after the memo it began to disclose no-bid contracts and require the commissioner to sign off on large contracts. TxDot reported that it already had policies similar to Abbott's mandate and would implement new policies if and when provisions of Abbott's directive become law. The Texas Commission on Environmental Quality may have been the most affected of the agencies surveyed. In response to Abbott's memo, it reported that it began disclosing no-bid contracts on the Internet, began making contract managers disclose potential conflicts and requiring the agency's leaders and procurement managers to certify that they have no potential conflicts with major contracts.

All 13 agencies surveyed reported that they already had required personnel to disclose potential contracting conflicts of interest before Abbott sent his memo. Yet not one of these agencies provided TPJ with a single document disclosing any potential conflicts by their employees or overseers—even though TPJ repeatedly emphasized that it sought such documents. This could mean that no employee or overseer at any of the 13 agencies had a potential conflict. It could indicate that conflicted individuals failed to disclose their conflicts as required. Or the agencies may have refused to publicly disclose such conflicts. All but the first of these scenarios leaves the door open to further contracting abuses.

Most media ignored a major weakness of Abbott’s memo. After directing agencies to immediately adopt a list of contracting reforms, the ex-attorney general added a huge caveat. “This memorandum does not change the law,” Abbott concluded. “It does not change any agency administrative rules regarding contracting or procurement.” No wonder Abbott’s memo mystified officials. “From talking with other agencies, the whole State is confused about the new purchasing initiatives,” noted an Employee Retirement System memo dated February 11, 2015.

Abbott’s contracting directive, which appears to have had a relatively modest impact on the 13 agencies surveyed, fails to safeguard taxpayer dollars at mismanaged or corrupt agencies. Abbott’s proposed reforms do nothing to address several major contracting abuses of recent decades. They do nothing to prevent an agency contractor from immediately hiring away an agency’s contracting employees. Consider [poster boy Greg Phillips](#). At Mississippi’s Department of Human Services in the 1990s Phillips helped privatize agency services, awarding a \$557,000 contract to a company that then hired him. Phillips became Texas’ No. 2 HHSC official as that agency embarked on a major reorganization in 2003, with the agency awarding the leading overhaul contract to former Phillips’ employer Deloitte Consulting. After leaving HHSC in 2004, Phillips ran computer companies that contracted with HHSC and other agencies. In fact, Stick joined HHSC after working for Phillips’ firm [AutoGov](#).⁵

Nor does Abbott’s memo address Trojan-horse plays whereby a state agency hires the employees of a major contractor. Two ex-employees of AT&T—[Texas’ No. 1 lobby power](#)—helped HHSC manage its AT&T contract that ballooned from \$1 million to [\\$100 million](#) (those HHSC employees ignored rules requiring them to disclose this potential conflict). In another abuse, recent state employees or officials morph into lobbyists who lobby their old colleagues on behalf of contractors. A prime example is former Rep. Arlene [Wohlgemuth](#), who became a lobbyist for Greg Phillips after authoring the 2003 HHSC-overhaul bill. Legislators have [shown](#) little appetite for reforming this revolving door because it would require them to constrain *themselves*.⁶



In a recent *Statesman* [Op-Ed](#), Donald Cohen of California-based [In the Public Interest](#) pitched common-sense contracting reforms missing from Abbott’s directive. Cohen argued that state agencies should retain staff trained to use cost-benefit analyses to: determine if outsourcing can save tax dollars in the first place; and monitor contracts to ensure that they do. Cohen urged the state to reserve the right to promptly cancel contracts if the Comptroller determines that contractors are not performing. Lastly, he recommended that the state—which invests heavily in testing and grading children and schools—maintain a database to track contractor performances. The database should be used to determine which contractors have earned the right to more public funds and to blacklist those who should not be entrusted with more tax dollars.

Tougher Reforms

Fortunately, other pending bills propose more meaningful reforms. More than a month after Abbott issued his memo to fast-track SB 353, that bill's author, Sen. Jane Nelson, [rolled](#) the main provisions of that bill into the tougher [SB 20](#). It would create a statewide contracting database available to certain state officials but not the public.⁷ This bill would bar agency contract personnel from becoming—or working for—agency contractors for two years. An employee of an agency contractor similarly could not be hired by that agency to do procurement work for two years. SB 20 mandates a minimum number of required bids that increases with the dollar value of a contract. It also would increase the size the state Contract Advisory Team (CAT), which is charged with reviewing high-risk contracts or those which are valued at \$10 million or higher.⁸ SB 20 would require agencies to report any contract increases of at least 20 percent. The advisory team would lack veto authority but could report troubling contracts to state officials.⁹ [SB 543](#), authored by Sen. Judith Zaffirini, has a similar provision for any contract that increases by \$1 million or 35 percent of its original value.

[House Bill 15](#) by Reps. John Otto and Armando Walle goes farther. It would create a Contracting Management and Oversight Team (CMOT) under the Legislative Budget Board. CMOT would act as an independent check to prevent even crooked or mismanaged agencies from approving “high-risk” information technology contracts through back-door channels. Under this bill, “high-risk contracts” include those that are worth at least \$10 million, “change the original cost by more than 20 percent” (21CT qualified on both counts), or involve foreign or blemished contractors. Had HB 15 been in effect, the top brass of the chummy, [inbred](#) HHSC might well have approved the 21CT contract. But it then would have had to survive an independent CMOT review. HB 15 grants CMOT veto authority. CMOT also could urge the Legislative Budget Board to cancel any contract that endangers state funds. By combining independent oversight with contract veto powers, HB 15 would protect tax dollars much more than do SB 353 and Abbott's directive.

Texas has played the eternal chump, rehiring egregiously incompetent contractors again and [again](#).¹⁰ Contractors that have swindled the state maintain an army of lobbyists to keep the tax dollars flowing. In the past decade Texas has spent billions of dollars on bungled contracts—including [almost \\$2 billion](#) at the HHSC alone. State officials have acted on a blind faith that the private sector is automatically more efficient than the public sector. In fact, many private contractors seem to be more efficient than the state at squandering or pilfering tax dollars. ●

Notes:

¹ [“Janek's Push for Urgency in Terrell State Hospital Privatization Effort Questioned,”](#) *Terrell Tribune*, January 15, 2015.

² Six state agencies sent Abbott's office a five-page memo about his directive on March 3, 2015. Among other things, that memo said that, before Abbott issued his directive, many state agencies already had policies to disclose contracts, mandate conflict disclosures and have agency leaders sign off on major contracts. The six agencies signing that memo were: HHSC, Department of Information Resources, Commission on Environmental Quality, Department of Motor Vehicles, Department of Insurance and the Higher Education Coordinating Board.

³ “Computer Crash Hinders Texas Attorney General's Medicaid Fraud Case,” *Dallas Morning News*, October 23, 2008. Department of Information Resources and Office of Attorney General documents suggest that after Abbott's memo those agencies created forms to flag potential concerns with large contracts. The DIR also created a routing slip to ensure its leadership signs off on large contracts.

⁴ DPS reported that in response to Abbott's memo it began to disclose and justify no-bid contracts.

⁵ A similar [scam](#) characterized the 1995 Bush-Bullock welfare privatization.

⁶ The Senate added a last-minute amendment to [SB19](#) imposing a two-year prohibition against lawmakers becoming lobbyists. That provision's fate in the House was not known at press time.

⁷ The State Auditor, Legislative Budget Board and Department of Information Resources.

⁸ The bill does not specify CAT membership requirements.

⁹ The Legislative Budget Board, affected agency leaders and state lawmakers.

¹⁰ [“Big-Money Contracts a Big Mess,”](#) *Austin American-Statesman*, February 8, 2015.