

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 298
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State Affairs
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Committee Report (Substituted)

DIGEST AND PURPOSE

Currently, the only public entities that have design-build as an option are school districts and state universities. Design-build allows for an architect, engineer, and builder to form a team and bid on a construction project together with the contractor heading up the team. One firm handles all of the aspects of the project, from planning and preliminary design to construction. In this process, projects are not necessarily awarded to the lowest bidder, but are also evaluated on factors such as the design-build firm's experience, technical competence, and performance record. By combining various factors in the award process, the state can select a proposal that reflects the greatest value, not just the lowest cost. C.S.S.B. 298 permits the Texas Department of Transportation (TxDOT) and the Texas Turnpike Authority (TTA) to use the design-build program on a pilot program basis. TxDOT and TTA will have eight years to "test" the use of design-build under this subchapter and then TxDOT, TTA, and the state auditor will be required submit a final report on their findings to the legislature as part of the sunset review of TxDOT. The legislature will then be able to determine if TxDOT and TTA should continue to have the option to contract for design-build contracts.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Department of Transportation and the Texas Turnpike Authority in SECTION 1 (Section 223.172, Transportation Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 223, Transportation Code, by adding Subchapter E, as follows:

SUBCHAPTER E. DESIGN-BUILD CONTRACTS FOR TRANSPORTATION PROJECTS

Sec. 223.161. DEFINITIONS. Defines "authority," "design-build contract," "design-build firm," "design criteria package," and "transportation project."

Sec. 223.162. POWER TO ENTER INTO DESIGN-BUILD CONTRACTS. Authorizes the Texas Department of Transportation (department) or the Texas Turnpike Authority (authority), notwithstanding any other law of this state, for a transportation project that has an estimated total cost of more than \$50 million, to use the design-build method for the development of a transportation project and enter into one or more design-build contracts for the services of a design-build firm.

Sec. 223.163. REQUEST FOR QUALIFICATIONS. Requires the department or the authority to prepare a request for qualifications that includes certain information that may assist design-build firms in submitting qualifications for the transportation project.

Sec. 223.164. EVALUATION AND SELECTION OF DESIGN-BUILD FIRM.
(a) Requires the department or the authority to evaluate and select a design-build firm in two phases.

(b) Requires the department or authority, in phase one, to prepare a request for qualifications and evaluate each responding design-build firm according to certain appropriate (excepting cost-related or price-related) factors submitted by that firm.

(c) Requires each design-build firm that responds to the request for qualifications to certify to the department or authority that each engineer or architect who is a member of the firm was selected on the basis of demonstrated competence and qualifications in the manner required by Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor), Government Code.

(d) Authorizes the department or authority to interview the design-build firms that respond to the request for qualifications and requires the department or authority, if interviewing, to qualify at least two, but not more than four, firms for phase two of the evaluation and selection process.

(e) Requires the department or authority, in phase two, to prepare and provide to qualified firms a design criteria package and a request for proposals seeking additional information regarding certain specific factors and any other factor the department or authority considers relevant or necessary.

(f) Authorizes the department or the authority to interview one or more of the design-build firms responding to the request for proposals.

(g) Requires the department or authority to rank each responding design-build firm on the basis of the criteria in the request for proposals and select the design-build firm submitting the proposal that offers the best value considering price, time for project completion, technical evaluation factors, and any other factor described in the request for proposals.

Sec. 223.165. NEGOTIATIONS WITH SELECTED DESIGN-BUILD FIRM.

(a) Requires the department or the authority to first attempt to negotiate a contract with the selected design-build firm.

(b) Requires the department or the authority, if a satisfactory contract with the selected design-build firm cannot be negotiated, to end negotiations with that firm formally and in writing and attempt to negotiate with the next design-build firm in the order of the selection ranking until either a contract is entered into, negotiations with all ranked firms end, or the department or authority determines that it is no longer in the best interest of this state to enter into a design-build contract for the proposed transportation project.

Sec. 223.166. COMPLETION OF DESIGN BY SELECTED DESIGN-BUILD FIRM.

(a) Requires the engineers or architects of the design-build firm with which the department or authority contracts to complete the design of the transportation project and submit all design elements for review and determination of scope compliance to the department or the authority before or concurrently with construction of the transportation project.

(b) Requires an engineer to have responsibility for compliance with the engineering design requirements and all other applicable requirements of the Texas Engineering Practice Act (Article 3271a, V.T.C.S.).

Sec. 223.167. INSPECTION AND TESTING SERVICES. Requires the department or the authority to provide or contract for, independently of the design-build firm, any inspection services, testing of construction materials, or verification of testing services necessary for acceptance of the transportation project. Provides that Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor)

Government Code, applies to the procurement of services contracted for under Subsection (a).

Sec. 223.168. PERFORMANCE AND PAYMENT BONDS. (a) Requires that, if a fixed contract amount or guaranteed maximum price has not been determined when a design-build contract is awarded, the penal sums of the performance and payment bonds or equivalent security or collateral delivered by the design-build firm be in an amount equal to the transportation project budget, as specified in the request for proposals.

(b) Requires the design-build firm to deliver the bonds not later than the 10th day after the date the design-build firm executes a contract unless the design-build firm furnishes a bid bond or other financial security acceptable to the department or authority to ensure that the design-build firm will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Sec. 223.169. PAYMENT TO UNSUCCESSFUL DESIGN-BUILD FIRMS. (a) Requires the department or the authority to pay an unsuccessful design-build firm that submits a response to a request for proposals the stipulated amount of at least one-half of one percent of the final contract price for any costs incurred in preparing that proposal.

(b) Authorizes, after the payment of the stipulated amount, the department or the authority to make use of any design contained in the proposal, including the technologies, techniques, methods, processes, and information contained in the design. Provides that use of such design elements contained in an unsuccessful proposal is at the sole risk and discretion of the department or the authority and does not confer liability on the recipient of the stipulated amount under this section.

(c) Requires the methodology for computing the stipulated amount to be stated in the request for proposals.

Sec. 223.170. DISADVANTAGED AND SMALL BUSINESSES. Requires the department and the authority to ensure that disadvantaged and small businesses have an opportunity to participate in the performance of contracts under this subchapter and to use the same procedures that exist for removing barriers to participation by disadvantaged and small businesses in other department and authority construction and design contracts.

Sec. 223.171. PROJECTS FUNDED BY FEDERAL FUNDS. Requires that, if a transportation project procured under this subchapter is funded in whole or in part by federal funds and subject to federal procurement laws, rules, regulations, and procedures, the requirements of this subchapter be applied in a manner consistent with the applicable federal procurement laws, rules regulations, and procedures.

Sec. 223.172. RULES. Requires the department and the authority to adopt rules to implement and administer this subchapter.

Sec. 223.173. PILOT PROGRAM; INTERIM STUDY; REPORTS. (a) Provides that the use of design-build contracts by the department and the authority under this subchapter is a pilot program.

(b) Prohibits (before December 31, 2009) the department and the authority from using design-build contracts under this subchapter for more than 24 transportation projects.

(c) Provides that money spent by the department or the authority for a project under the pilot program is not included in computing the amount required to be spent for engineering and design contracts under Section 223.041 in any fiscal year.

(d) Requires the department and the authority, not later than February 1 of each odd-numbered year, to each submit a report to the legislature relating to the use of design-

build contracts under this subchapter during the preceding two years.

(e) Requires the state auditor, the department, and the authority to each submit, not later than December 1, 2008, a final report to the legislature relating to the use of design-build contracts under this subchapter as part of the review of the department in 2009 by the Sunset Advisory Commission under Chapter 325, Government Code (Texas Sunset Act).

(f) Provides that this section expires December 31, 2009.

SECTION 2. Effective date: September 1, 2001.

SUMMARY OF COMMITTEE CHANGES

SECTION 1. Amends As Filed S.B. 298, Chapter 223, Transportation Code by amending newly added Subchapter E, as follows:

Sec. 223.161. Differs from original As Filed S.B. 298 by defining “design criteria package.”

Sec. 223.162. No changes in text.

Sec. 223.163. Differs from original As Filed S.B. 298 by omitting language requiring the Texas Department of Transportation (department) or the Texas Turnpike Authority (authority) to prepare a request for proposals. Omits Subsection (b) requiring that, if the preparation of the request for qualifications or request for proposals requires certain types of engineering or architectural services, those services be provided in accordance with the applicable law.

Sec. 223.164. Differs from original As Filed S.B. 298 by: adding a reference in Subsection (c) to Section 2254.004, Government Code; authorizing the department or authority in Subsection (d), if interviewing firms, to qualify no more than four firms for phase two of the evaluation and selection process; requiring the department or the authority in Subsection (e) to provide to qualified firms a design criteria package and adding “conceptual engineering plans and designs” to the list of information sought after in a request for proposals; and omitting from Subsection (f) language authorizing the department or authority to require the design-build firms to submit certain designs as part of the proposal.

Sec. 223.165. No changes in text.

Sec. 223.166. Differs from original As Filed S.B. 298 by omitting Subsection (c) regarding an architect’s responsibility for compliance with Chapter 478, Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, V.T.C.S.).

Sec. 223.167. Differs from original As Filed S.B. 298 by replacing “testing of construction materials engineering” with “testing of construction materials.”

Sec. 223.168. No changes in text.

Sec. 223.169. Differs from original As Filed S.B. 298 by requiring the department or authority to pay an unsuccessful design-build firm the stipulated amount “of at least one-half of one percent of the final contract price for any” design costs incurred rather than the stipulated amount “computed using the stated methodology for any design” costs incurred. Omits text in Subsection (b) providing that the department or authority owns all of the rights to reproduce, transfer, publish, or otherwise use designs contained in a proposal, but does authorize, after the payment of the stipulated amount, the department or the authority to make use of any design contained in the proposal, including the technologies,

techniques, methods, processes, and information contained in the design. Provides that use of such design elements contained in an unsuccessful proposal is at the sole risk and discretion of the department or the authority and does not confer liability on the recipient of the stipulated amount under this section.

Sec. 223.170. No changes in text.

Sec. 223.171. No changes in text.

Sec. 223.172. No changes in text.

Sec. 223.173. Differs from original As Filed S.B. 298 by prohibiting, in Subsection (b), the department from using design-build contracts under this subchapter for more than 24 (rather than 16) projects. Omits all language in Subsection (e) regarding the department and the authority conducting a study to examine the use of design-build contracts under this subchapter. Requires the state auditor, along with the department and the authority, to submit a final report to the legislature no later than December 1, 2008, rather than February 1, 2009.

SECTION 2. No changes in text.