

BILL ANALYSIS

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C.S.H.B. 1886
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Intergovernmental Relations
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The design-build process is available to local governments in building construction, but other public works projects are required to be contracted through a competitive bidding process. This renders local governmental entities incapable of taking advantage of cost savings potentially available through the design-build process.

C.S.H.B. 1886 creates a design-build process for civil works projects and allows certain local governmental entities to use this process on a phased basis. This bill expands the use of competitive sealed proposals and construction manager-at-risk civil works projects. This bill requires governmental entities to designate or select architects or engineers for job order contracting projects and prohibits the procurement of design services through interlocal agreements except in certain circumstances.

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 Sections 271.111(7) and (10), Local Government Code, to redefine "facility" and "governmental entity."

SECTION 2. Amends Section 271.116, Local Government Code, by adding Subsection (a-1), to define "facility."

SECTION 3. Amends Section 271.118, Local Government Code, by adding Subsection (a-1), to define "facility."

SECTION 4. Amends Section 271.120(i), Local Government Code, as follows:

- (i) Requires a governmental entity to select or designate an architect or engineer to prepare the construction documents for a facility, rather than requiring services to be provided in accordance with applicable law, if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001 (Engineers), Occupations Code, or the practice of architecture within the meaning of Chapter 1051 (Texas Board of Architectural Examiners; General Provisions Affecting Architects, Landscape Architects, and Interior Designers; Provisions Affecting Only Architects), Occupations Code. Requires the governmental entity to select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code, if the architect or engineer is not a full-time employee of the governmental entity.

SECTION 5. Amends Chapter 271, Local Government Code, by adding Subchapter J, as follows:

SUBCHAPTER J. DESIGN-BUILD PROCEDURES FOR CERTAIN CIVIL WORKS PROJECTS

Sec. 271.181. DEFINITIONS. Defines "architect," "civil works project," "design-build firm," "design criteria package," "engineer," and "local governmental entity."

Sec. 271.182. APPLICABILITY. (a) Provides that, before September 1, 2009, this subchapter applies to a local governmental entity with a population of 500,000 or more within its geographic boundaries or service area.

(b) Provides that, on or after September 1, 2009, and before September 1, 2011, this subchapter applies to a local governmental entity with a population of more than 100,000 within its geographic boundaries or service area.

Sec. 271.183. APPLICABILITY OF OTHER LAW. (a) Provides that the purchasing requirements of Section 361.426 (Governmental Entity Preference for Recycled Products), Health and Safety Code, apply to purchases by a local governmental entity made under this subchapter.

(b) Provides that this subchapter prevails over any other law relating to the purchasing of goods and services except a law relating to contracting with historically underutilized businesses except as provided by this section, to the extent of any conflict.

Sec. 271.184. NOTICE REQUIREMENTS. (a) Requires a local governmental entity to advertise or publish notice of requests for bids, proposals, or qualifications in any manner prescribed by law.

(b) Requires the entity to publish notice of the time and place the bid or proposals or the request for qualifications will be received and opened in any manner prescribed by law for a contract entered into by a local governmental entity under any of the methods provided by this subchapter.

Sec. 271.185. CONTRACTS FOR CIVIL WORKS PROJECTS: DESIGN-BUILD. (a) Authorizes a local governmental entity to use the design-build method for the construction, rehabilitation, alteration, or repair of a civil works project. Requires the contracting local governmental entity and the design-build firm to follow the procedures provided by this subchapter in using this method and in entering into a contract for the services of a design-build firm.

(b) Authorizes a contract for a project under this subchapter to cover only a single integrated project. Prohibits a local governmental entity from entering into a contract for aggregated projects at multiple locations. Provides that for the purposes of this section, if a metropolitan transit authority created under Chapter 451 (Metropolitan Rapid Transport Authorities), Transportation Code, enters into a contract for a project involving a bus rapid transit system, the bus rapid transit system is a single integrated project, and a water treatment plant, including a desalination plant, that includes treatment facilities, well fields, and pipelines is a single integrated project.

(c) Requires a local governmental entity to use certain criteria as a minimum basis for determining the circumstances under which the design-build method is appropriate for a project.

(d) Requires a local governmental entity to make a formal finding on the criteria described by Subsection (c) before preparing a request for qualifications under Section 271.189.

Sec. 271.186. LIMITATION ON NUMBER OF PROJECTS. (a) Authorizes a local governmental entity with a population of 500,000 or more, a local governmental entity with a population of 100,000 or more but less than 500,000, and a municipally owned water utility with a separate governing body appointed by the governing body of a municipality with a population of 500,000 or more during the first four years that this subchapter applies to a local governmental entity under Section 271.182 to enter into

contracts for a certain number of projects in each fiscal year for the first four years that this subchapter applies.

(b) Authorizes a local governmental entity with a population of 500,000 or more, a local governmental entity with a population of 100,000 or more but less than 500,000, and a municipally owned water utility with a separate governing body appointed by the governing body of a municipality with a population of 500,000 or more to enter into a certain number of projects in any fiscal year after the period described by Subsection (a).

(c) Provides that, for the purposes of determining the number of eligible projects under this section, a municipally owned water utility with a separate governing board appointed by the governing body of the municipality is considered part of the municipality.

Sec. 271.187. USE OF ENGINEER. (a) Requires the local governmental entity to select or designate an engineer who is independent of the design-build firm to act as its representative for the procurement process and for the duration of the work on the civil works project. Provides that the selected or designated engineer has full responsibility for complying with Chapter 1001 (Engineers), Occupations Code.

(b) Requires the local governmental entity, if an engineer is not a full-time employee of the local governmental entity, to select an engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor), Government Code.

Sec. 271.188. USE OF OTHER PROFESSIONAL SERVICES. (a) Requires the local governmental entity to provide or contract for, independently of the design-build firm, certain services as necessary for the acceptance of the civil works project by the entity.

(b) Requires the local governmental entity to select the services for which it contracts under this section in accordance with Section 2254.004, Government Code.

Sec. 271.189. REQUEST FOR QUALIFICATIONS. (a) Requires the local governmental entity to prepare a request for qualifications that includes certain information.

(b) Requires the local governmental entity to also prepare a design criteria package as described by Section 271.190.

Sec. 271.190. CONTENTS OF DESIGN CRITERIA PACKAGE. Authorizes a design criteria package to include, as appropriate, certain information.

Sec. 271.191. EVALUATION OF DESIGN-BUILD FIRMS. (a) Requires the local governmental entity to receive proposals and evaluate each offeror's experience, technical competence, capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted at this stage.

(b) Requires each offeror to select or designate each engineer that is a member of its team based on demonstrated competence and qualifications, in the manner provided by Section 2254.004, Government Code, and certify to the local governmental entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by Section 2254.004, Government Code.

(c) Requires the local governmental entity to qualify offerors to submit additional information and, if the entity chooses, to interview for final selection.

Sec. 271.192. SELECTION OF DESIGN-BUILD FIRM. Requires the local governmental entity to select a design-build firm using a combination of technical and cost proposals as provided by Section 271.193.

Sec. 271.193. PROCEDURES FOR COMBINATION OF TECHNICAL AND COST PROPOSALS. (a) Requires a local governmental entity to request proposals from firms identified under Section 271.191(c). Requires a firm to submit a proposal not later than the 180th day after the date the local governmental entity makes a public request for the proposals from the selected firms. Requires the request for proposals to include certain information.

(b) Provides that the technical proposal is a component of the proposal under this section.

(c) Requires each proposal to include a sealed technical proposal and a separate sealed cost proposal.

(d) Requires the technical proposal to address certain designs, problems and solutions.

(e) Require the local governmental entity to first open, evaluate, and score each responsive technical proposal submitted on the basis of the criteria described in the request for proposals and assign points on the basis of the weighting specified in the request for proposals. Authorizes the local governmental entity to reject as nonresponsive any firm that makes a significant change to the composition of its firm as initially submitted. Requires the local governmental entity to subsequently open, evaluate, and score the cost proposals from firms that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals. Requires the local governmental entity to select the design-build firm in accordance with the formula provided in the request for proposals. Requires the local governmental entity to select the design-build firm in accordance with the formula provided in the request for proposals.

Sec. 271.194. NEGOTIATION. Requires the local governmental entity to first attempt to negotiate a contract with the selected firm after selecting the highest ranked design-build firm under Section 271.193. Requires the local governmental the entity, if the local governmental entity is unable to negotiate a satisfactory contract with the selected firm, to, formally and in writing, end all negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked firms end.

Sec. 271.195. ASSUMPTION OF RISKS. Requires the local governmental entity to assume certain risks and costs.

Sec. 271.196. STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS. (a) Provides that the design-build firm retains all rights to the work product submitted in a proposal, unless a stipend is paid under Subsection (c). Requires the governmental entity to return all copies of the proposal and other information submitted to an unsuccessful offeror. Prohibits the local governmental entity from making use of any unique or nonordinary design element, technique, method, or process contained in the unsuccessful proposal that was not also contained in the successful proposal at the time of the original submittal, unless the entity acquires a license from the unsuccessful offeror.

(b) Requires each employee and agent of the local governmental entity to enter into a confidentiality agreement that prohibits the disclosure of the contents of the unsuccessful proposal with any other party, including the successful offeror. Authorizes any violation of a confidentiality agreement or any use by the local governmental entity of a unique or nonordinary design element, technique, method, or process covered by a confidentiality agreement to be enforced by an injunctive or delectroy action. Provides that the local governmental entity is

liable to any unsuccessful offeror, or any member of the design-build team or its assignee, for one-half of the cost savings associated with the unauthorized use of the work product of the unsuccessful offeror.

(c) Authorizes the local governmental entity to offer an unsuccessful design-build firm that submits a response to the entity's request for additional information under Section 271.193 a stipend for preliminary engineering costs associated with the development of the proposal. Requires the stipend to be one-half of one percent of the contract amount and to be specified in the initial request for proposals. Authorizes the governmental entity, if the offer is accepted and paid, to make use of any work product contained in the proposal, including the techniques, methods, processes, and information contained in the proposal. Provides that the use by the local governmental entity of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the entity and does not confer liability on the recipient of the stipend under this subsection.

Sec. 271.197. COMPLETION OF DESIGN. (a) Requires a firm's engineers to submit all design elements for review and determination of scope compliance to the local governmental entity before or concurrently with construction following selection of a design-build firm under this subchapter.

(b) Requires an appropriately licensed design professional to sign and seal construction documents before the documents are released for construction.

Sec. 271.198. FINAL CONSTRUCTION DOCUMENTS. Requires a design-build firm, at the conclusion of construction, to supply to the local governmental entity a record set of construction documents for the project prepared as provided by Chapter 1001, Occupations Code.

Sec. 271.199. PERFORMANCE OR PAYMENT BOND. (a) Provides that a payment or performance bond is not required for the portion of a design-build contract under this section that includes design services only.

(b) Requires penal sums of the performance and payment bonds delivered to the local governmental entity, if a fixed contract amount or guaranteed maximum price has not been determined at the time a design-build contract is awarded, to each be in an amount equal to the construction budget, as specified in the design criteria package.

(c) Requires a design-build firm, if the local governmental entity awards a design-build contract under Section 271.193, to deliver the bonds not later than the 10th day after the date the design-build firm executes the contract unless the design-build firm furnishes a bid bond or other financial security acceptable to the local governmental entity to ensure that the design-build firm will furnish the required performance and payment bonds before the commencement of construction.

SECTION 6. Amends Chapter 271.112, Local Government Code, by adding Subsection (g), to provide that the purchasing agreements of the appropriate state or federal funding entity apply if the contract for a facility involves the use of state or federal highway funds, unless otherwise waived by the appropriate state or federal funding entity.

SECTION 7. Amends Section 271.904(a), Local Government Code, as follows:

(a) Provides that a covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which a governmental agency is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must indemnify, hold harmless, or defend the governmental agency against liability for damage, other than liability for damage that is caused by or results from an act of negligence, intentional tort,

intellectual property infringement, or failure to pay a subcontractor or supplier committed by the indemnitor or the indemnitor's agent, consultant under contract, or another entity over which the indemnitor exercises control, rather than a governmental agency or its agent or employee.

SECTION 8. Amends Section 44.041(i), Education Code, as follows:

(i) Requires a governmental entity to select or designate an architect or engineer to prepare the construction documents for a facility, rather than requiring services to be provided in accordance with applicable law, if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Occupations Code. Requires the governmental entity to select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code, if the architect or engineer is not a full-time employee of the governmental entity.

SECTION 9. Amends Section 46.008, Education Code, as follows:

Sec. 46.008. STANDARDS. (a) Creates this subsection from existing text.

(b) Requires any portable, modular building capable of being relocated that is purchased or leased after September 1, 2007, for use as a school facility, regardless of whether the building is an industrialized building as defined by Section 1202.003 (Definition of Industrialized Building), Occupations Code, to be inspected as provided by Subchapter E (Inspections), Chapter 1202, Occupations Code, to ensure compliance with the mandatory building codes or approved designs, plans, and specifications.

SECTION 10. Amends Section 51.784(i), Education Code, as follows:

(i) Requires the governing board of an institution of higher education (board) to select or designate an architect or engineer to prepare the construction documents for the facility if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Occupations Code. Requires the board to select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code, if the architect or engineer is not a full-time employee of the institution.

SECTION 11. Amends Subchapter A, Chapter 2254, Government Code, by adding Section 2254.007, as follows:

Sec. 2254.007. DECLARATORY OR INJUNCTIVE RELIEF. (a) Authorizes this subchapter to be enforced through an action for declaratory or injunctive relief filed not later than the 10th day after the date a contract is awarded.

(b) Provides that this section does not apply to the enforcement of a contract entered into by a state agency as that term is defined by Section 2151.002. Defines "state agency."

SECTION 12. Amends Section 2254.003(b), Government Code, as follows:

(b) Prohibits professional fees under a contract from exceeding any maximum provided by law. Deletes existing text requiring professional fees to be consistent with and not higher than the recommended practices and fees published by the applicable professional associations.

SECTION 13. Amends Section 431.101(g), Transportation Code, to require a local government corporation, rather than a local government corporation created by a navigation district, to comply with all state law related to the design and construction of projects, including the procurement of design and construction services, that applies to the local government that created the corporation. Makes a conforming change.

SECTION 14. Amends Subchapter D, Chapter 431, Transportation Code, by adding Section 431.110, as follows:

Sec. 431.110. COMPETITIVE BIDDING EXCEPTION FOR CERTAIN IMPROVEMENTS. Provides that any competitive bidding requirement or restriction on a local government that created a local government corporation does not apply to an expenditure by the local government corporation for a certain improvement, or an improvement constructed by the corporation for which more than 50 percent of the construction is funded by a private entity.

SECTION 15. Amends Section 60.452, Water Code, by adding Subsection (c), to provide that Subchapter J (Design-Build Procedures for Certain Civil Works Projects), Chapter 271, Local Government Code, does not apply to this subchapter.

SECTION 16. Amends Section 60.464(i), Water Code, as follows:

(i) Requires a navigation district or port authority created or operating under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, to select or designate an architect or engineer to prepare the construction documents for the facility if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051 (Texas Board of Architectural Examiners; General Provisions Affecting Architects, Landscape Architects, and Interior Designers; Provisions Affecting Only Architects), Occupations Code. Requires the board to select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code, if the architect or engineer is not a full-time employee of the institution.

SECTION 17. Makes application of this Act prospective.

SECTION 18. Effective date: September 1, 2007.