

- SUBJECT:** School district and higher education contracting procedures
- COMMITTEE:** Public Education — committee substitute recommended
- VOTE:** 9 ayes — Sadler, Dutton, Dunnam, Grusendorf, Hochberg, Lengefeld, Oliveira, Olivo, Smith
- 0 nays
- SENATE VOTE:** On final passage, March 18 — voice vote
- WITNESSES:** None
- BACKGROUND:** School districts and institutions of higher education must follow specific procedures for requesting bids or proposals for goods, services, and construction contracts. The procedures between school districts and higher education institutions are aligned so they operate very similarly. The statutes provide when a competitive bid must be used and when other methods may be employed. They allow the use of various types of construction contracting arrangements, including design-build contracts, construction manager-agents, and construction manager-at-risk.
- DIGEST:** CSSB 669 would make numerous changes to the contracting requirements of school districts and certain institutions of higher education.
- The bill would clarify which actions must be undertaken by the board of trustees and which must be performed by the district. The bill would allow a board of trustees of a district to delegate action authorized or required to be taken by a district to a designated person or committee. The district would have to provide notice of delegation in requests for bids or proposals of construction services. If notice was not given, any ranking, selection, or evaluation of bids done by a person other than the board of trustees in an open meeting would be advisory only. The board of trustees would not be allowed to delegate an action authorized or required to be taken by the board.
- An interested party would be allowed to bring an action for an injunction against a school district for the performance of a contract.

The bill would revise the professional services exclusion to the contracting requirements section. The bill would remove the architect's fees, attorney's fees, and fees for fiscal agents, and replace that with the definition of professional services under section 2254.002 of the Government Code, which includes accounting, architecture, land surveying, medicine, optometry, professional engineering, or real estate appraisal services.

Changes to construction contracting procedures would include requiring districts to evaluate the method providing the best value before evaluating bids or proposals for construction contracts, and requiring districts to document the basis for its selection of a construction bid and make that evaluation public within seven days of awarding the contract. The bill would prohibit using requests for proposal for construction services.

It would revise the two-step process for evaluation of design-build contracts for facilities, including providing the authority to interview a bidder to judge the bidder's qualifications. The bill would require districts to rank all bidders based on the selection criteria and, if unable to enter into a contract with the bidder ranked the highest, to end negotiations with that bidder and then attempt to reach a contract with the next highest ranked bidder. The penalty bonds that a design-build contractor would have to deliver would be set at the project budget if a fixed contract amount or guaranteed price had not been determined at the time of the contract award. Such bonds would have to be delivered within ten days of the execution of the contract.

For construction manager-agent contracts, the bill would allow the district to require the contractor to provide administrative personnel, equipment, and on-site management. The bill would prohibit the district's engineer or architect from serving as the construction manager-agent or construction manager-at-risk unless hired under a separate procurement.

Selection of construction manager-at-risk could be handled in a one-step or two-step process, separating the qualifications phase from the bidding phase. The two step process would be conducted similarly to the two-step process for design-build contracts. The bill would allow a construction manager-at-risk to fulfill the performance of a trade contractor or subcontractor that defaults on its performance without advertising the work.

For requests for sealed proposals, the bill would require the district to attempt to negotiate with the selected offeror and, if unsuccessful, to terminate negotiations with that person and proceed to negotiate with the next offeror in the ranked order for selection.

The provisions relating to minor repair, rehabilitation, or alteration of facilities would be applied to minor constructions projects as well. The bill would allow a district to establish contractual prices for job orders based on published price units or by providing a list of work items and asking contractors to propose multipliers to the price book or work items proposed. The base term of a contract for which the base term was not advertised could not exceed two years.

The bill would make sections 271.021, dealing with component and sequential purchases, 271.022, dealing with exempt contracts, and 271.030, dealing with removal and ineligibility of officers, of the Local Government Code, inapplicable to a district's competitive bidding process.

When a facility or personal property undergoes major structural failure as part of an unforeseen catastrophe or emergency, CSSB 669 would allow a district to use methods outside of those authorized in order to contract for replacement or repair. This would be allowed specifically when delay would impair the conduct of classes or other activities.

All school district contracting policies would be made applicable to public junior college districts under CSSB 669.

For all higher education institutions, other than junior college districts, the bill would make conforming changes that would align the statutes relating to institutions of higher education with the changes made to school district contracting procedures.

CSSB 669 would take effect September 1, 1999.

**SUPPORTERS  
SAY:**

CSSB 669 would make numerous needed changes to the statutes relating to competitive bidding and contracting procedures performed by school districts and higher education institutions. The provisions would clarify the roles of the district and board of trustees and the roles of the institution and board of the institution of higher education.

This legislation is a further clarification of SB 583 by Ratliff, enacted by the 75th Legislature, which specified various procedures to be used in contracting for certain services by school districts. The changes in this legislation would build on the concepts in SB 583 and further refine them where needed. This would ensure that contracting procedures are consistent and ensure that competitive bidding is followed to the fullest extent possible, allowing these educational entities to receive the best value for their dollars. The procedures, however, would allow these entities to have substantial flexibility in such contracting and bidding procedures.

Among the major changes for school districts would be allowing the them to contract without using competitive bids in the event of serious structural failure of a facility or damage or destruction of personal property due to a catastrophe. This provision would give districts the flexibility they need to make emergency repairs to facilities and replacement of property whenever it was needed.

The bill also would expand the definition of professional services to ensure that all such services could be excluded from the contracting procedures for school districts and institutions of higher education as they are for state agencies.

The requirement that a district formally terminate negotiations with the first choice contractor before going on to the second choice would make the bidding and selection process more structured and avoid any appearance of impropriety in selecting contractors. Entities required to rank bidders and select the number one ranked contractor should not be allowed to go behind that contractor's back and negotiate with another contractor for the project. This legislation would ensure that entities could not circumvent the competitive bidding process by negotiating with multiple bidders for the same project at the same time.

**OPPONENTS  
SAY:**

Certain provisions in CSSB 669 could cause problems for districts. These changes include the elimination of attorney's services from the exclusionary provisions under the competitive bidding chapter. Such services are excluded from competitive bidding, but the reformulated definition of professional services would not include attorney's services.

The bill also would prohibit boards from delegating actions “authorized or required” to be taken by the board. While the actions required to be taken by the board should be done by the board, those authorized to be taken by the board should not be excluded from delegation. Such exclusion could restrict the flexibility of boards in performing their duties.

Regarding the contracting procedures, requiring a district of higher education institution formally to terminate negotiations with the first choice contractor before entering negotiations with the second choice could hamper the entity’s flexibility. Often, an entity may hit an impasse with the first choice contractor and then begin negotiations with the second and third choice contractors, only to discover that the first choice was indeed better. This bill would prevent entities from going back to that first choice.

NOTES:

The committee substitute to SB 669 would:

- ! add the definition of professional services to provisions relating to school districts and institutions of higher education;
- ! specifically apply the provisions relating to school districts to junior college districts; and
- ! eliminate the applicability of certain sections of chapter 271 of the Local Government Code to school district contracting procedures.