

SUBJECT: Revising municipal purchasing procedures

COMMITTEE: Urban Affairs — committee substitute recommended

VOTE: 7 ayes — Carter, Bailey, Burnam, Callegari, Hill, E. Jones, Najera
0 nays
2 absent — Edwards, Ehrhardt

WITNESSES: For — Lawrence Scalf, City of Dallas; *Registered but did not testify:* Shanna Igo, Texas Municipal League; Pam Kirkland, Texas Municipal League and Texas Purchasing Management Association; James Polasek and Cheryl Turney, City of College Station

Against — Ken Whalen, Texas Daily Newspaper Association and Texas Press Association

BACKGROUND: Local Government Code, ch. 252 regulates the acquisition, sale, and lease of property by governmental entities.

If a city intends to make a purchase of more than \$15,000, it must use a competitive sealed bidding process. Some purchases, such as those made in times of calamity or necessary to protect the public health or safety, are exempt from this process. Cities must provide notice of the time and place that competitive sealed bids will be opened and read by placing an ad in a newspaper published in the city at least once each week for the two weeks prior to the unsealing. A city may not reduce an original contract price by more than 25 percent without the contractor's consent.

If a city intends a purchase of more than \$3,000 and less than \$15,000, it must contact at least two historically underutilized businesses (HUBs) from information provided by the General Services Commission, unless that information fails to identify a HUB in the county in which the city is based.

To determine who is a responsible bidder, a city may consider the safety record of the bidder if the city has adopted a written definition of and criteria

for who is a responsible bidder and has notified bidders that their safety record may be considered.

In case of a conflict between chapter 252 and a municipal charter of a home-rule city on certain contracting procedures, the municipal charter supersedes the chapter. The city governing body may elect to have the chapter supersede the charter.

DIGEST:

CSHB 2486 would authorize cities to use two new purchasing procedures, online competitive bidding and reverse auctions. It would set procedures for the award of special services contracts and would change other regulations concerning municipal purchasing.

Online competitive bidding. CSHB 2486 would create an online bidding procedure for contracts. These procedures could be used in place of the competitive bidding procedures already in statute. Certain competitive bidding standards, such as the responsiveness of bids, safety record, evaluation of bidder responsibility, persons prohibited from bidding, and others, would apply to bids solicited online.

A city could use its own Internet web site to conduct the online bidding or could retain the services of an online auction or bidding service. Notice of the request for bids would have to be posted on the city's web site if the city had one or on the web site of the online bidding or auction service conducting the bidding. Notice would also have to be published at least once in a newspaper published in the city at least 14 days before the bidding would conclude.

Information contained in bids could not be disclosed until after the process was completed. The contents of the bid, excluding confidential information protected by law, would become a matter of public record at the completion of the process.

The bill would create criminal penalties for a person who intentionally or knowingly damaged, tampered with, or otherwise harmed a city's online bidding document or process. The offense would be a third-degree felony, which carries a penalty of two to 10 years in prison and an optional fine of up to \$10,000.

Reverse auction. CSHB 2486 would create a reverse auction procedure for awarding contracts. These procedures could be used in place of the competitive bidding procedures already in statute. Certain competitive bidding standards, such as the responsiveness of bids, safety record, evaluation of bidder responsibility, persons prohibited from bidding, and others, would apply to bids solicited online.

A city could use its own Internet web site to conduct the reverse auction or could retain the services of an online auction or bidding service. The notice required would be the same as that required for online competitive bidding.

A city could disclose the contents of an online bid, excluding confidential information protected by law, to the other bidders during the reverse auction process. A city could not disclose the name of a bidder during the process. The contents of the bid, excluding confidential information protected by law, would become a matter of public record at the completion of the process.

Competitive bidding. CSHB 2486 would raise the threshold amount at which a city must use a competitive sealed bidding process from \$15,000 to \$25,000. It also would add a provision stating that these contracts would remain subject to the requirements of the Professional Services Procurement Act (Government Code, ch. 2254).

The bill would expand the exemptions for competitive bidding requirements to include interlocal or intergovernmental agreements, a special services contract, or food. The bill would remove the exemptions for paving or other public improvement contracts where at least one-third of the cost is to be paid through special assessments, time warrants, and from referendum provisions.

The bill would require a city to post continuous notice of the unsealing of a bid on its web site, in addition to the newspaper posting requirement, if the city had a web site. It also would remove the current provision that the original contract price may not be decreased by more than 25 percent without the contractor's consent.

Competitive bidding in relation to HUBs. CSHB 2486 would raise the purchase range in which a city must contact at least two HUBs (now \$3,000 to \$15,000) to \$5,000 to \$25,000.

Definition of a responsible bidder. In determining which bidder was the lowest responsible bidder, a city could consider the bidder's:

- ! performance on previous or ongoing contracts for similar goods or services, including any nonconformity of goods or services to standard specifications, inability or refusal to honor warranties, timeliness of contract completion, poor workmanship, filing of fraudulent or meritless claims, or incompetence or dishonesty;
- ! financial resources;
- ! competence;
- ! experience;
- ! ability; or
- ! integrity.

The city would not have to award a contract to the lowest bidder if the city determined that the bidder was not a responsible bidder or was disqualified under the bill's disqualification procedures.

Disqualification procedures. CSHB 2486 would allow a city to disqualify a person from bidding on a contract if that person had defaulted on a contract with the city, demonstrated a history of poor or untimely performance, or violated safety record standards. A first disqualification could not be for more than one year. Each subsequent disqualification could be for up to three years. Cities would have to provide reasonable notice and an opportunity for a hearing for a person who was disqualified or who sought reinstatement.

Persons prohibited from bidding. A person who had volunteered or been hired by the city to draft the city's bid specification, evaluate the bid specifications, or evaluate the bids could not submit a bid for that project.

Direct solicitation of proposals. CSHB 2486 would set guidelines for the direct solicitation of proposals. The city could notify whoever it determined to be appropriate for solicitation, and notice of the request for a proposal

would be sufficient if it described the goods or services required and the city's expectations under the contract. A city would have to award the contract to the most responsible, most qualified offeror whose proposal was determined to be the most advantageous to the city.

Special services contract procedures and best value. CSHB 2486 would create a special procedure for special services contracts, which would be for purchases of more than \$25,000 for:

- ! a high-technology item;
- ! insurance or insurance-related services;
- ! management consulting, training, or recruiting services;
- ! administrative services relating to the administration of legal claims, workers' compensation benefits, or employee health, life, or dental benefits;
- ! management services provided for city vehicles, buildings, facilities, or utilities by a nonprofit corporation;
- ! surveillance, robotic, or other highly technical equipment for use by a police or fire department;
- ! solid waste collection, disposal, or management services;
- ! books, manuscripts, magazines, and other materials for a public library;
- ! films or electronic audiovisual media;
- ! services performed in connection with a community development program created under the Texas Community Development Act of 1975;
- ! custom-manufactured goods necessary for a specialized operation;
- ! construction management services;
- ! municipal code publication services;
- ! travel services;
- ! marketing or advertising services;
- ! temporary use or occupancy of a hotel, conference, or other business center facilities; or
- ! any purchase of goods or services for which the preparation of detailed specifications was impractical or impossible.

To award a contract, a city could use a competitive sealed proposal process or proposals received by direct solicitation, competitive bidding, online bidding, reverse auction, cooperative purchasing agreement, interlocal agreement or any other intergovernmental agreement authorized by law, or a

catalog purchase. A city could prequalify vendors to determine their eligibility. To determine the best value of the proposals received, a city could consider the:

- ! purchase price;
- ! reputation of the vendor and of the vendor's goods and services;
- ! extent to which the goods or services met the municipality's needs;
- ! vendor's past history of performance on similar contracts and past relationship with the community;
- ! need to comply with laws relating to historically underutilized or disadvantaged businesses;
- ! total long-term cost;
- ! reasonableness of the contract terms and conditions; and
- ! any other relevant factor that a private business entity would consider in selecting a vendor.

Conflicts between a municipal charter and ch. 252. CSHB 2486 would amend sec. 252.002 to state that the chapter would supersede any conflicting provisions in a municipal charter of a home-rule city. If the provisions in the city's charter were more restrictive, a city could elect to have those provisions supersede the chapter.

Miscellaneous provisions. The bill also would:

- ! specify that the chapter's requirements would not apply if another law provided specific procedures for acquiring goods or services;
- ! amend the circumstances in which current funds were to be set aside to reflect current case law and financial practice;
- ! specify that contracts that could be split under common law were not prohibited by the provisions prohibiting bid splitting; and
- ! apply a number of regulations regarding competitive bids to the competitive sealed proposal process.

This bill would take effect September 1, 2001, and would apply only to a contract for which the notice soliciting bids or proposals was first published or posted on or after that date.

SUPPORTERS
SAY:

CSHB 2486 would give cities more flexibility to contract for goods and services by creating two new procedures — online competitive bidding and reverse auction — and by giving cities clearer authority to consider the past history of a contractor in awarding bids. It would set and clarify guidelines to give cities more guidance in their purchasing. It also would modernize parts of the purchasing code and make a number of clarifications.

Online competitive bidding and reverse auctions. These new contracting procedures would allow cities to take advantage of the opportunities now available on the Internet for bidding and would give cities more choices in contracting so that they could choose the best methods for their needs. These new procedures would be permissive; cities could continue following their current procedures.

The bill would ensure the same integrity of the online competitive bidding as for the paper competitive bidding process by prohibiting the disclosure of the contents of an online bid while the process was ongoing.

In contrast, the reverse auction process would contain the distinctive feature of being able to disclose the contents of a bid to others, thereby encouraging other bidders to provide a lower price.

The city would receive the same guarantees under these new procedures as in standard competitive bidding regarding the responsiveness of bids, safety record, evaluation of bidder responsibility, people prohibited from bidding, and others. The bill also would provide the same confidentiality guarantees to bidders as they have under the current competitive bidding process.

The criminal penalties proposed by the bill would protect the city from “hackers” and other unscrupulous people who might try to damage the city’s computer network, records, databases, or bidding process or reverse auction. Providing penalties will help to deter these offenses and ensure that people who interfered in the process were punished.

HUBs would not be placed at a disadvantage in these new procedures, because the general provision requiring cities to contact at least two HUBs still would apply. HUBs would receive the same guarantees under this bill as they now receive in the competitive bidding process.

Competitive bidding. CSHB 2486 would raise the threshold to correspond with inflation since 1987, when the threshold last was increased. The bill would exempt special services contracts from competitive bidding because those contracts would be subject to their own set of procedures added by this bill. CSHB 2486 would exempt food because cities often must buy small amounts of food for activities like city council meetings, and it is impractical to require them to bid out these purchases. This is the same exception already allowed for counties. The exemption for paving or other public improvement contracts would be removed because this option no longer is used. The exemptions for time warrants and from referendum provisions would be removed because they are obsolete.

Since a city legally may terminate a contract entirely without a contractor's consent, it is an unreasonable restriction to require a contractor's consent for a partial reduction of contract work.

Competitive bidding in relation to HUBs. CSHB 2486 would raise the range to correspond with the competitive bidding threshold increase. HUBs would have a larger price range of goods and services for which they would have to be contacted, benefitting these businesses.

Definition of a responsible bidder. This section would codify existing case law and attorney general's opinions. It draws on similar provisions in the Government Code for purchasing by state entities in order to provide cities with clearer guidelines about what they may consider in determining whether a bidder is responsible and whether contracting with that bidder would be in the city's best interest.

Disqualification procedures. Current interpretation of the term "lowest responsible bidder" emphasizes the word "lowest." As a result, cities have found it difficult to determine how much consideration they may give to the past performance history of a bidder in awarding a contract. Contractors with a history of poor performance or default should not be allowed to escape the consequences by underbidding better-quality contractors in the next process. CSHB 2486 would set standards by which a city could prevent irresponsible bidders from participating, while affording an affected contractor sufficient due process to contest a debarment. This process would be similar to that conducted by the state under Government Code, ch. 2155.

People prohibited from bidding. This section would codify an attorney general's opinion that a person or firm involved in designing plans, drafting specifications, or evaluating bids for a government agency has an advantage over other bidders that legally prohibits that person from submitting a bid on the project.

Special services contract procedures and best value. This section would apply to items that already must be purchased through a competitive sealed proposal process, have been previously recognized as non-bid items, or defy effective competitive bidding because these goods do not always generate the best purchase under a "lowest reasonable cost" principle. For example, some goods or services are very specialized and may be provided only by one firm or a limited number of firms, and thus a competitive bidding process is not effective. This section would allow the city to negotiate with these providers to receive the best price and "best value" for the city. The best value section would clarify that cities may take factors other than price and a contractor's history into consideration in awarding a bid. The process in the bill is derived from the best value process already established in state law for school districts.

Conflicts between a municipal charter and ch. 252. Most cities' charters do not include the provisions relating to new technologies or procedures that CSHB 2486 would add to statute, such as online bidding. Because these procedures are not authorized, the charters are more restrictive than the bill's provisions. By providing that the statute would supersede a city's charter, the bill would allow cities to use these new procedures without having to amend their charters, thus making the process easier. A city still could elect to have its charter supersede the statute if the charter's provisions were more restrictive.

OPPONENTS
SAY:

Notice for online competitive bidding and reverse auction. By only requiring a city to place a notice in a newspaper once when the city held online competitive bidding or a reverse auction, CSHB 2486 would provide less notice to contractors about contracting opportunities than for current competitive bidding procedures. Although the bill would add provisions requiring the posting of these notices on city web sites, not all contractors have regular access to the Internet, particularly small contractors and HUBs.

The notice requirement for these new procedures should be as strong as that now required by law.

HUB participation. CSHB 2486 could reduce participation by HUBs. These small businesses are less likely to be online compared to other businesses. By allowing cities to move their contracting procedures online, many of these businesses effectively would be excluded. Although the city still would have the same requirements to contact HUBs, fewer HUBs would be likely to contact the city on their own and participate.

NOTES:

The committee substitute made many changes to the filed version, including adding the provisions that the same guarantees regarding responsibility criteria, disqualification of bidders, persons prohibited from bidding, and others would apply to online bidding. The substitute also removed a provision that would prohibit a person from bidding on a contract if the person prepared the advertisement for the bid.