

SUBJECT: Purchasing methods available to a county when paying with certain funds

COMMITTEE: County Affairs — committee substitute recommended

VOTE: 6 ayes — W. Smith, Bolton, Farabee, Heflin, Leibowitz, T. Smith

0 nays

3 absent — Naishtat, Coleman, Harless

WITNESSES: For — Kristen Klein, William Jeffrey Kuhn, Duane Westerman, Jim O. Wolverton, Guadalupe County

Against — None

BACKGROUND: Local Government Code, sec. 262.023(a) requires counties making an expenditure exceeding \$25,000 to comply with competitive bidding procedures, use reverse auction procedures, or comply with a method described by Local Government Code, ch. 271, subch. H.

Local Government Code, ch. 271, subch. H requires a government entity to use one of the following procurement procedures listed in sec. 271.113 when planning a construction project:

- competitive bidding;
- competitive sealed proposals for construction services;
- a design-build contract;
- a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or
- a job order contract for the minor repair, rehabilitation, or alteration of a facility.

Local Government Code, ch. 271, subch. C establishes procedures for issuing certificates of obligation, which are debt obligations issued by a municipality, county, or hospital district for a term not to exceed 40 years in anticipation of future tax collections and/or revenues. Sec. 271.054 requires governmental entities intending to use certificates of obligation to pay for a contract exceeding \$25,000 to submit the contract to competitive bidding.

Government Code, ch. 1431 establishes procedures for issuing anticipation notes, which are short-term debt obligations issued by a municipality, county, school district, or countywide district for a term not to exceed seven years in anticipation of future tax revenue, and/or bond proceeds collections. Sec. 1431.012 requires counties to comply with the competitive bidding requirements under Local Government Code, sec. 271.054 when issuing anticipation notes to pay for a contract.

DIGEST:

CSHB 1764 would allow some county contracts paid for by anticipation notes to be subject to Local Government Code, sec. 262.023(a), which allows government entities to use one of the alternative procurement procedures listed in Local Government Code, ch. 271, subch. H.

The bill also would limit the size of anticipation notes issued by counties under Local Government Code, sec. 262.023(a) to the lesser of:

- 20 percent of the county's budget for the fiscal year in which the county enters into the contract; or
- \$10 million.

The bill would take effect September 1, 2007.

**SUPPORTERS
SAY:**

CSHB 1764 would allow counties to use procurement procedures that are in the best interest of their constituents. When a county builds a new building, competitive bidding makes the most sense because the project is clearly defined in advance and the submitted proposals for the project include all expected costs. In contrast, when renovating an existing building, competitive bidding becomes more complicated and costly because of unexpected impediments to project completion. For example, a contractor may tear down a wall during construction and find asbestos or may realize the existing pipes are inadequate to serve the new function of the building. At that time, the competitive bid would have to be amended with a change order, which adds to the contract any additional expenses arising from an unexpected contingency. This can prove to be very expensive for taxpayers, since the county is not in a position to negotiate cost increases at that time.

While the county can be price-conscious during the competitive bidding process, once a project is underway the contractor has an advantage because it is in the county's best interest to pay any costs that will get the job completed. While some counties choose to include cost overruns in

their competitive bids to account for contingencies, this unnecessarily inflates the price of a project before it even begins. This may be an accepted practice in larger counties that can afford price overruns, but in smaller counties, every dollar counts.

This bill instead would allow counties to leverage a wider range of procurement methods, which are more fiscally responsible. When a county uses a competitive bid, it puts itself in financial peril due to potential cost overruns. If a county instead could use a construction manager-at-risk contract, the contractor would be locked into a price up front and would have to assume any risk should unintended problems arise. In this way, a county could avoid expensive change orders and pass on the savings to taxpayers.

CSHB 1764 would allow counties to determine the best financing method for their constituents. Currently, if a county wants to make use of a procurement method other than competitive bidding, it must use cash or general obligation bonds. Counties do not always have available cash to pay for a construction project up front or may not want to sacrifice liquid capital on a public works project when it could be used for other priorities. At that time, a county might want to issue general obligation bonds, which would require it to hold an election in May or November for voter approval to issue the debt. This may be impractical for several reasons, including the fact that bond measures are unpopular in some counties, that elections require costly additional administrative support, and that construction costs may have risen while waiting for election day to arrive. To avoid these problems, a county may issue a certificate of obligation or an anticipation note, but then it would be locked into a competitive bidding process. The bill instead would allow counties to turn to alternative procurement methods.

CSHB 1764 would not give counties special powers. Currently, school districts, health care districts, and municipalities all can leverage anticipation notes to fund projects without being limited to the competitive bidding procurement process. Government Code, sec. 1431.012 singles out counties to follow the competitive bidding requirement in Local Government Code, sec. 271.054. While some may be concerned that counties would use anticipation notes as a means of circumventing voter approval for raising taxes, it is impractical for a county to enter into an anticipation note simply for the authority to raise taxes. Because ad valorem taxes can be raised only once a year, a county would have to wait

a considerable length of time to have the taxing authority to effectively finance anticipation notes. As time is of the essence in construction projects, a county more likely would opt to put the bond issue to the voters in the hopes of gaining financing within six months rather than 12.

Finally, CSHB 1764 is designed to cover the costs of a courthouse construction project specific to Guadalupe County. While this bill would affect all counties, it would limit the size of the projects that could use alternative procurement procedures enough so that only small counties likely would use anticipation notes for this reason.

OPPONENTS
SAY:

Using anticipation notes to secure alternative procurement procedures could be abused. With competitive bidding, there is an open process for selection of the architect and contractor for a given project. If a county instead were to use a design-build contract, it would be possible for the county to choose a favored architect without a public process, claiming that this person was an expert consultant. Counties that issue anticipation notes currently must comply with competitive bidding requirements to protect their constituents from the risk of an insider deal between an outside consultant and a government entity.

In addition, counties with better bond ratings are more likely to use bonds than anticipation notes. Counties seeking to use anticipation notes may have limited reserve funds available to support debt service or are looking for a means to circumvent a public vote about issuing new public debt. While government entities often want to add public services they think will benefit their constituents, it is ultimately up to the voters whether or not a public works project should be built. Should a county truly wish to finance a construction project without the consent of its constituents, it should have to work within the current law, which supports over-sizing a certificate of obligation to pay for any cost overruns, with the remaining funds for use in accelerating debt service payments.

OTHER
OPPONENTS
SAY:

CSHB 1764 should not limit anticipation notes using alternative procurement procedures to the lesser of 20 percent of a county's budget or \$10 million. This unfairly would limit use of this mechanism to small counties seeking to finance small projects. In addition, Government Code, sec. 1431.006 already limits a county from issuing anticipation notes that exceed 50 percent of the revenue or taxes that will be collected that year. This bill should respect existing law and leave the limit at 50 percent of the revenues or taxes collected.

CSHB 1764 actually might not enable counties to use alternative procurement procedures when issuing anticipation notes. Government Code, sec. 1431.012 specifically requires counties using anticipation notes to comply with the competitive bidding requirements of Local Government Code, sec. 271.054. Even though this bill would amend Local Government Code, sec. 262.023(a) to allow alternative procurement procedures when issuing anticipation notes, it would not address the limit imposed in the Government Code. In order to rectify this possible conflict, this bill should amend Government Code, sec. 1431.012 to specifically address alternative and preferred procurement procedures for anticipation notes issued by counties.

NOTES:

The committee substitute added the limitation on the amount of anticipation notes authorized to be issued under Local Government Code, sec. 262.023(a).