

SUBJECT: Government contracts and related professional services and public works

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 11 ayes — Solomons, Cook, Craddick, Farabee, Gallego, Geren, Harless, Hilderbran, Jones, Lucio, Swinford

0 nays

4 absent — Menendez, Maldonado, Oliveira, S. Turner

SENATE VOTE: On final passage, April 16 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — (*Registered, but did not testify*: Jack Baxley, TEXO Chapter Associated General Contractor and the Associated Building Contractors; Michael Chatron, AGC Texas Building Branch; Jon Fisher, Associated Builders and Contractors of Texas; Harold Freeman, Texas Construction Association; David Lancaster, Texas Society of Architects; Fred Orr, Gallagher Construction Services)

Against — Gordon Bowman, City of Austin; Patrick Eno, KBR; (*Registered, but did not testify*: Don Elder, Jr., City of Katy; Cyd Grimes, Texas Public Purchasing Association; Gregory Smith, Williams & Thomas, L.P.)

On — (*Registered, but did not testify*: Steve Collins, University of Texas System)

BACKGROUND: Under the Education Code and the Local Government Code, school districts, universities, and local government entities may award contracts using the design-build method, the competitive sealed proposal method, the construction manager-agent method, the construction manager-at-risk method, or the job order contracts method. Under the Government Code, a government entity may award a contract using the design-build method, the competitive sealed proposal method, the construction manager-agent method, or the construction manager-at-risk method. The Government Code currently does not authorize the use of the job order contracts method.

DIGEST:

CSSB 1110 would:

- consolidate alternate project delivery methods for most governmental entities into a single chapter of the Government Code and expand the types of entities that would be allowed to use these procedures and the types of projects for which these procedures could be used;
- prohibit the use of reverse auctions for certain contracts where bonds would be required;
- reform bidding procedures and contract requirements;
- redefine “public works contract”;
- authorize school districts to use competitive bidding and competitive sealed proposals for services other than construction services;
- require government entities to consider historically underutilized businesses when awarding contracts;
- limit the use of interlocal agreements for design and construction services;
- establish a maximum contract price of \$500,000 for job-order contracting; and
- codify the ability of counties that issue certificates of obligation to pay for construction projects to use alternative bidding procedures.

CSSB 1110 would add Government Code, ch. 2267, to consolidate statutes on government entities’ contracting methods under one chapter. Ch. 2267 would apply to a government entity or quasi-government entity authorized to make a public works contract. The bill also would include hospital districts and transit authorities as entities that would be allowed to use these contracting methods. While CSSB 1110 would allow public junior colleges to use these contracting methods, the bill would not allow the use of these contracting methods for water, wastewater, transportation, or utility projects. In the event of a conflict with another law, ch. 2267 would prevail, with certain exceptions.

An entity could award a contract using the following methods in addition to competitive bidding:

- competitive sealed proposal method;
- construction manager-agent method;
- design-build method;

- construction manager-at-risk method; and
- job order contracts method.

The bill would prohibit entities from offering construction contracts through a “reverse auction procedure” allowed in Government Code, sec. 2155.062, where bidders submit anonymous bids to an Internet location.

CSSB 1110 would prohibit the use of an interlocal contract to purchase engineering or architectural services unless the contract was for the design or construction of a facility to be owned, used, or financed jointly by the entities signing the interlocal contract. Interlocal contracts would not be allowed for construction projects unless:

- the services were part of a job order contract;
- the governing body received the work approved the contract; and
- public notice was given for the contract for the project.

A government entity could award job contracts for minor construction under the job order contracts method if the work was of a recurring nature but the delivery times were indefinite, and if indefinite quantities and orders were awarded substantially on the basis of pre-described and pre-priced tasks. The bill would restrict job order contracts to buildings and associated structures and would set a limit of \$500,000 or a lesser amount approved by the entity’s governing board for each job order under the contract.

The bill would change the definition of “facility” to cover any improvement to real property.

Ch. 2267 would not prevail over a conflicting provision relating to contracting with a historically underutilized business or a conflicting provision in a charter of a home-rule municipality or a rule of a county, river authority, or defense base development authority that required the use of competitive bidding. The governing body of a municipality, county, river authority, or defense base development could choose to have ch. 2267 overrule a conflicting provision in its charter or rules.

Ch. 2267 would not apply to a contract entered into by TxDOT, toll-road authorities, and institutions of higher education.

CSSB 1110 also would amend Education Code, sec. 51.923, to revise the required qualifications of certain entities to enter into contracts with an institution of higher education. The bill would expand the requirements to make them applicable to all business entities, not just corporations. CSSB 1110 also would apply to all kinds of university contracts. The bill also would address when regents would have to rescue themselves from votes when they had an equity interest in a firm that might enter into a contract with an institution of higher education.

The bill would take effect September 1, 2009, and would apply only to a contract or construction project for which a government entity first requested bids on or after that date.

**SUPPORTERS
SAY:**

CSSB 1110 would streamline government operations by bringing various statutes governing contracting authority that are spread over different codes into one chapter of the Government Code. Bringing contracting methods under one section would simplify the bidding process for government entities and for design and construction professionals. School districts, cities, counties, state agencies, and other governmental entities all are authorized to award contracts using several methods. Over the years, the separate codes have been amended so that there is little consistency among them. It makes sense for all government entities and professionals to operate under a single set of rules.

Requiring local governing bodies to approve the contracts and to provide public notice would provide transparency to the process.

CSSB 1110 would place additional restrictions on interlocal job order contracts among government entities. In 2005, Galveston ISD executed a job-order contract through an interlocal agreement managed by Houston ISD for a large middle school building renovation project. A district judge later ruled that Galveston ISD used the interlocal agreement to bypass competitive procurement requirements and violated the law. CSSB 1110 could help prevent potential future misuse of interlocal agreements.

Management of job order contracts requires the fostering of long-term relationships between the manager of the contractor and the government entity, as compared to the narrow focus on the lowest bid for a one-time contract. CSSB 1110 would require that the government entity, rather than the manager of the project, be responsible for hiring engineers and architects. Otherwise, it would not change existing requirements on when

those professionals would have to be retained. Skilled and state-licensed professionals are needed to design and build the facilities that will serve Texans for many decades to come.

The bill also would not change current requirements to encourage government entities to contract with historically underutilized businesses. Expanding the use of alternative-contracting methods could give these firms additional methods to obtain work on government contracts.

CSSB 1110 would provide for innovation and flexibility in contracting for buildings as well as other forms of infrastructure, even as it recognized the unique nature of their design and construction. It properly would restrict the use of Internet-based “reverse auctions.” Building a school building is different from purchasing textbooks or tires, and a West Texas school district would have different requirements for a new facility compared with one being built in Houston.

Statewide standards — including statutory limits on contract changes requiring government body approval — are necessary for consistency across Texas. Allowing too many local exemptions would defeat the purpose of bringing all the procedures into one code and would make it difficult and costly for design and construction firms to operate statewide. CSSB 1110 would allow local governments the flexibility to make those policy decisions.

CSSB 1110 would not discourage competition in public sector capital project development, nor would it increase the cost or time needed to develop those projects. Generally, CSSB 1110 would make no substantive changes in existing law other than to provide additional transparency and safeguards to the contracting process.

**OPPONENTS
SAY:**

The enactment of CSSB 1110 would not necessarily speed up construction time for public buildings or save additional money. Government entities still would have to meet the same notice and bidding schedules.

No “bright line” exists on when a job-order contract ceases to be a repair or renovation and becomes essentially a new construction project. The situation involving the interlocal agreement between the Galveston and Houston school districts demonstrates how quickly the line can be crossed. CSSB 1110 would not provide clarification.

The \$500,000 limit for interlocal agreements is too low. The limit should be at least \$1 million in order to maximize the cost-saving efficiencies that interlocal agreements can offer.

The bill would remove some of the freedoms of local governments to consider certain non-monetary factors when considering bids, such as environmental factors like green-building techniques. It is important to allow local governments the freedom to contract as they see fit. They are accountable to local voters, and their actions should be allowed to reflect the desires and interests of their communities.

CSSB 1110 would be a full employment act for architects and engineers. Government and non-profit entities can use interlocal agreements to manage projects successfully and at lower cost because they do not have to factor in the profit required by a large firm. Making minor repairs to a bathroom does not require the hiring of a structural engineer to supervise or review the work. Just because someone has a state license does not mean that he or she is a more competent manager for a construction project.

Historically underutilized businesses have struggled for many years to gain a share of government contracts offered through the competitive bidding process. Use of alternative bidding methods and reliance on new relationships could freeze historically underutilized businesses out of construction and professional contracts. Owners of these businesses pay taxes, and equity requires that they have fair opportunity to provide goods and services to government entities.

Alternative methods of contracting could interfere with free-market competition, where buyers make the decision based on the lowest price. These methods also could increase costs and delays on taxpayer-funded projects.

OTHER
OPPONENTS
SAY:

Provisions of CSSB 1110 should apply to the Texas Department of Transportation and universities. These entities spend millions of public dollars on large construction projects.

NOTES:

The House committee substitute to the Senate-passed version of the bill added several provisions that would:

- raise the competitive bidding threshold from \$25,000 to \$50,000;
- require that a school's job-order contract with an original contract price of \$1 million or more may not be increased by more than 25 percent;
- change how an institution of higher education contracts with different business entities and how regents vote on those contracts;
- make the purchase of certain services through purchasing cooperatives consistent with existing law;
- add high-efficiency standards to the list of existing energy conservation measures used by the state and would grant state agencies have better access to procurement terms;
- remove the exemption for DFW airport; and
- make two conforming amendments to statutes that are going through the recodification process.

A similar bill HB 447 by Callegari, was enacted by the 80th Legislature during the 2007 regular session, but was vetoed by Gov. Perry. The 79th Legislature in 2005 also passed a similar bill, HB 2525 by Callegari, which Gov. Perry also vetoed.