

SUBJECT: Government contracts and related professional services and public works

COMMITTEE: Government Efficiency and Reform — committee substitute recommended

VOTE: 6 ayes — Callegari, Lucio, Cain, Frullo, Munoz, Zedler
0 nays
1 absent — Harper-Brown

WITNESSES: For — Michael Chatron, AGC Texas Building Branch; Shirley Ross, CDM, Inc. (*Registered, but did not testify:* Jon Fisher, Associated Builders and Contractors of Texas; Andrew Hicks, Center for Job Order Contracting Excellence; David Lancaster, Texas Society of Architects; Jim Sewell, Gallagher Construction; Michael White, Texas Construction Association)

Against — Deryl Kratzer, Tremco (*Registered, but did not testify:* Cyd Grimes, Mark Rogers, Texas Public Purchasing Association; Monty Wynn, Texas Municipal League)

On — Fred Aus, Andrew Betz, Lower Colorado River Authority; Perry Fowler, AGC of Texas; James Hernandez, Harris County; Donald Lee, Texas Conference of Urban Counties; Gregory Smith, Center for Job Order Contracting Excellence; Peter Vaky, City of Fort Worth

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:

CSHB 628 would consolidate contracting and delivery procedures for construction projects for most governmental entities into a single chapter of the Government Code, ch. 2267. Chapter 2267 would expand the types of entities that would be allowed to use these contracting methods and the types of projects for which these contracting methods could be used.

Applicability. Ch. 2267 would apply to a government entity or quasi-governmental entity, state or local, authorized to make a public works contract. The bill also would include any other special district or authority, including hospital districts, port authorities, water districts, river authorities, and conservation and reclamation districts. The chapter would apply to public junior colleges, but not to institutions of higher education. The bill would specifically exempt TxDOT, regional toll-road authorities, regional mobility authorities, and local government corporations exempt from competitive bidding requirements under the Transportation Code ch. 43, from the requirements of ch. 2267.

Conflict of laws. In the event of a conflict with another law, ch. 2267 would prevail, with certain exceptions. Ch. 2267 would not prevail over a conflicting provision on contracting with an historically underutilized business, with river authorities under certain circumstances, or with municipally owned electric utilities under certain circumstances.

Methods for contract procurement. An entity could award a contract using the following methods:

- competitive bidding;
- competitive sealed proposal method;
- construction manager-agent method;
- design-build method;
- construction manager-at-risk method; and
- job order contracts method.

General powers and duties. The governmental body would be allowed to adopt rules to implement these contracting methods. The governmental body would be required to advertise and publish notice of requests for bids, proposals, or qualifications in the manner prescribed by law. It would not be allowed to consider in the contracting process whether a person was a member of or has another relationship with any organization. The bill would provide criteria that the governmental entity could consider in making an award and would require the governmental entity to consider

and apply any existing laws, including any criteria related to historically underutilized businesses.

Specific contracting methods in other statutes. The bill also would address a number of other procurement issues, including those that follow.

Interlocal contracts. CSHB 628 would allow an interlocal contract or another agreement between a governmental entity and a purchasing cooperative to be used for job order contracting services under certain circumstances. [See Notes.]

Job order contracts. A government entity could award 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 governing body would be required to approve each job, task, or purchase order that exceeded \$500,000.

Reverse auctions. The bill would prohibit entities from offering public work contracts through a reverse auction procedure for which a bond was required.

Lawsuits for defective design or construction. The bill would require a school district that filed a lawsuit for defective design, construction, renovation, or improvement to provide the education commissioner with written notice of the action. The school district would be required to use the net proceeds from the lawsuit to repair the faulty design or construction work, and any remaining proceeds from the lawsuit would be required to be sent to the comptroller.

Multiple award contracts. Engineering services or architectural services would not be allowed on a multiple award contract schedule under Government Code, sec. 2155.502.

The bill would take effect September 1, 2011, 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:

CSHB 628 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 would make 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.

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. CSHB 628 would allow local governments the flexibility to make those policy decisions.

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.

CSHB 628 would not discourage competition in public sector capital project development, nor would it increase the cost or time needed to develop those projects. Generally, CSHB 628 would make no substantive changes in existing law other than to provide additional transparency and safeguards to the contracting process.

Methods for contract procurement under ch. 2267. The construction manager-at-risk method of contracting is already in law. This bill would not change the substance of that law. In addition, two contracts are required: one for the design firm and one for the construction firm. Because there are two separate, fair procurement processes, it is not a problem for the design and construction firms to be related. The government entity prepares the specifications for the construction procurement process, not the design firm.

Interlocal contracts. CSHB 628 would place additional restrictions on interlocal contracts among government entities. The main concern has been the lack of transparency when an entity is part of a purchasing cooperative. A government entity's board should have to specifically

approve a job order contract rather than have an employee be able to just use the job order contractor approved by the purchasing cooperative.

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. CSHB 628 could help prevent potential future misuse of interlocal agreements.

Job order contracts. Job order contracts used for repairs, such as to replace or repair roofs, make sense for school districts, especially smaller school districts. Job order contracts enable small school districts to get the same price as large school districts for repair work. It would not be feasible to re-bid every time a hail storm came through, and small repairs are needed on a recurring basis. For transparency, fairness and to encourage competition, however, CSHB 628 would require the governing body to approve each job, task, or purchase order that exceeded \$500,000.

Reverse auctions. The bill properly would restrict the use of Internet-based reverse auctions. The process entails a government entity first putting out specifications and a request for qualifications, and then the chosen finalists bid through the Internet going from high to low bids until bidding is closed. During the process, all the finalists can see the bids but they do not know who is bidding. This bidding process could result in government entities not getting the best deal compared to competitive bidding of other types.

Lawsuits for defective design or construction. The bill would require the school districts to repair their schools with lawsuit proceeds and then send the remaining proceeds to the comptroller. This provision is necessary because school districts were collecting settlement amounts for design or construction problems in excess of the costs of the original design or construction projects. This abusive practice was causing insurance premiums to skyrocket for these types of projects. This provision would curb that abuse.

OPPONENTS
SAY:

The enactment of CSHB 628 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.

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.

Applicability of ch. 2267. The application of ch. 2267 to quasi-governmental entities could have some unfortunate consequences. First, the bill does not contain a definition of a quasi-governmental entity, so it would be very difficult to legally determine if the chapter did apply. If entities like community development or economic development corporations were considered quasi-governmental, the application of this chapter could hinder their effectiveness. Corporations like these are generally created to be more flexible for a reason.

Methods for contract procurement under ch. 2267. Although already in law, the construction manager-at-risk method of procurement should be changed. Although two separate contracts are required, this method unfairly allows the design firm to write the specifications such that the design firm's related party is chosen for the construction contract. This stifles competition, and the abuse is most prevalent in the wastewater management arena.

Interlocal contracts. Achieving the right balance between fairness, transparency, and providing the best possible value to government entities has been difficult to achieve. In addition, there is no definition given for a purchasing cooperative and that could cause even more unintended consequences than the current system.

Job-order contracts. No “bright line” exists on when a job-order contract ceases to be a repair or renovation and becomes essentially a new construction project. CSHB 628 would not provide clarification.

Reverse auctions. Reverse auctions have the potential to save government entities millions of dollars, and limiting their use in cases where a bond was required would not make good business sense. For some entities, the bond amount is \$25,000, which is a very low trigger amount. One river authority in the state was able to use the reverse auction method on a wastewater plant solar array and saved a considerable amount of money.

OTHER
OPPONENTS
SAY:

Provisions of CSHB 628 should apply to the Texas Department of Transportation and universities. These entities spend millions of public dollars on large construction projects.

NOTES:

The author plans to offer an amendment to strike Sec. 2.06 of the bill related to interlocal contracts.

In 2009, a similar bill, SB 1110 by Jackson, passed the Senate, but died on the Major State Calendar in the House. HB 447 by Callegari, a similar bill, was enacted by the 80th Legislature in 2007, but was vetoed by Gov. Perry. The 79th Legislature in 2005 also enacted a similar bill, HB 2525 by Callegari, which Gov. Perry also vetoed.