

SUBJECT: Valuing price in bids for government civil works and construction projects

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 12 ayes — Phelan, Hernandez, Deshotel, Guerra, Harless, Holland,
Hunter, P. King, Parker, E. Rodriguez, Smithee, Springer

0 nays

1 absent — Raymond

WITNESSES: For — Ken Stringer, LEM Construction, Texas Water Infrastructure Network; Perry Fowler, Texas Water Infrastructure Network; (*Registered, but did not testify*: Steven Albright, AGC of Texas-Highway Heavy Branch; Jon Fisher, Associated Builders and Contractors of Texas; Melissa Shannon, Bexar County Commissioners Court; Jim Keffer, Keffer Konsulting; Jennifer Fagan, Texas Construction Association; Donnis Baggett and Mike Hodges, Texas Press Association; Chris Keffer, The Iron Group LLC; Aryn James, Travis County Commissioners Court; Andrew Harris; Andrew Scott; Fred Shannon; Clayton Utkov)

Against — Scott Oliver, San Antonio Water System: (*Registered, but did not testify*: Jamaal Smith, City of Houston Mayor's Office; and seven individuals)

On — Veronica Ocanas, City of Austin; (*Registered, but did not testify*: Clifford Sparks, City of Dallas; Scott Houston, Texas Municipal League)

BACKGROUND: Government Code ch. 2269 establishes requirements for awarding contracts for construction projects using various procurement methods, including competitive sealed proposals and competitive bidding.

DIGEST: CSHB 2585 would add a price value weighting requirement and a prequalification process to Government Code ch. 2269 provisions on evaluating contractor qualifications in certain procurement and project delivery methods for civil works and other construction projects.

Price value and scoring. The bill would require governmental entities preparing a request for competitive sealed proposals for construction projects to assign a weighted value to price of at least 50 percent of the total weighted value of all selection criteria. If an entity's governing body determined that assigning a lower weighted value to price would be in the public interest, the entity could assign a value to price of not less than 40 percent of the total weighted value of all selection criteria.

The bill would require governmental entities that were using a method other than competitive bidding for construction services to publish in the request for proposals a detailed methodology for scoring each criterion used to evaluate the offerors.

Prequalification process. A governmental entity would be allowed to implement a prequalification process to eliminate unqualified offerors and to prequalify potential offerors meeting minimum standards for a competitively bid civil works project. In implementing a prequalification process, the entity would have to establish minimum qualification requirements and a scoring process with a final pass or fail determination to identify qualified potential offerors who would be allowed to submit competitive bids. The entity could not short-list or rank potential offerors or combine qualification scores with competitive bids in awarding the contract.

During the prequalification process, a governmental entity could consider the potential offeror's:

- experience with similar projects;
- commercial and financial history, stability, and capability;
- ability to self-perform the construction project services;
- familiarity and experience with area subcontractors and suppliers;
- involvement in litigation or arbitration with a governmental entity related to a construction project during the preceding five years;
- failure to complete a project for a governmental entity;
- management or project team qualifications and experience; and
- safety record for the previous three years.

A potential offeror that had been involved in litigation or arbitration with a governmental entity over a construction project in the preceding five years would have to provide the name of the parties involved and a brief description of the nature and outcome of the litigation or arbitration.

A governmental entity that implemented a prequalification process would have to advertise or publish notice of the prequalification process along with a request for qualifications 30 days before the invitation for bids was issued. In addition, the entity could directly solicit qualifications from potential offerors if competitive requirements and other applicable law were followed.

The implementation of a prequalification process would not affect the authority of a governmental entity to determine the responsiveness of any subsequent bids or to reject any and all bids.

Bid evaluations. CSHB 2585 would allow an offeror who submitted a bid, proposal, or response to a request for qualifications for a construction contract to make a request in writing for documents related to the evaluation of the offeror's submission after the contract was awarded. The documents would have to be delivered not later than 30 days after such a request was made.

A governmental entity using the competitive sealed proposal method of contracting would have to make its evaluations, including any scores, public and provide them to all offerors not later than the seventh business day after the date the contract was awarded.

The bill would extend the deadline for enforcing provisions of Government Code ch. 2269 through the filing of an action for declaratory or injunctive relief from the 10th day to the 15th calendar day after the date on which the contract was awarded.

Effective date. The bill would take effect September 1, 2019, and would apply only to contracts for which a governmental entity first advertised or solicited bids, proposals, offers, or qualifications on or after that date.

**SUPPORTERS
SAY:**

CSHB 2585 would promote competition, transparency, and accountability in public civil works contracting law. By establishing price as a key factor in evaluating proposals submitted through requests for competitive sealed proposals, the bill would ensure the best value for public dollars invested in public works projects. Allowing governmental entities flexibility to use price weights of 40 percent to 50 percent would ensure they gave appropriate minimum consideration to price so that competitive sealed proposals would not be awarded on an overly subjective basis.

The permissible use of contractor prequalification would standardize this valuable tool across the state by requiring consideration of certain items such as previous project experience, financial stability, safety records, litigation history, and other factors.

Contractors not selected for a project should expect a reasonable explanation of the factors that resulted in the winning award. The bill would provide a mechanism for debriefing unsuccessful bidders within a reasonable time period without the need for bid protests or protracted legal discovery. This could help unsuccessful bidders be more competitive in future procurements and help the governmental entity improve its processes.

**OPPONENTS
SAY:**

The Legislature has recognized that not all public utility projects should be awarded based on the lowest price through a traditional competitive bidding process. In such cases, governmental entities are allowed to use the procurement method known as requests for competitive sealed proposals. CSHB 2585 would defeat that purpose by requiring that price be valued at a minimum of 40 percent and in some instances 50 percent of the selection criteria. The effect would be to deny a governmental entity the ability to decide when selection criteria besides price were more important for the public welfare.

Prequalifying contractors is a reasonable practice, but the bill would restrain governmental entities as to what factors they could consider when

making their selection. While the factors listed in the bill are relevant, they could be too limiting for certain projects. Governmental entities should be allowed to consider any other factor that might help them select the most qualified contractor for a specific project.