

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 669
By: Ratliff
Education
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Committee Report (Substituted)

DIGEST

Currently, Texas law establishes guidelines for school districts to follow when utilizing design and building contracts for permanent improvements. Procedures were established in legislation during the 75th Legislature for school districts to follow when entering into contracts with construction manager-agents and construction managers-at-risk, as well as entering into job contracts. The legislation also provided that institutions of higher education would be able to utilize the design/build process for their permanent improvements. C.S.S.B. 669 sets forth new procedural guidelines to clarify and streamline the alternative construction methods used by school districts and universities.

PURPOSE

As proposed, C.S.S.B. 669 regulates school district purchases and contracts and construction and repair of improvements by institutions of higher education.

RULEMAKING AUTHORITY

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 44.31(a), (d), (f), (g), (h), (i), (j), and (l), Education Code, to require all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period to be made by the method that provides the best value for the district, including a request for proposals, for services other than construction services and a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility. Authorizes the board of trustees of the district to adopt rules and procedures for the acquisition of goods or services. Provides that this section does not apply to contracts, rather than fees received, for professional services. Provides that in a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately. Authorizes the board of trustees to determine if the delay posed by the procurement, rather than competitive bidding, process prescribed by this subchapter would prevent or substantially impair the conduct of classes or other essential school activities, then contracts for the replacement or repair of the equipment or facilities be made on terms the board of trustees determines to be appropriate under the circumstances, if school equipment or facilities are destroyed or severely damaged. Authorizes a school district, rather than board of trustees, to acquire computers and computer-related equipment, including computer software, through the General Services Commission under contracts entered into in accordance with Chapter 2157, Government Code. Deletes text regarding architect's fees, attorney fees, and fees for fiscal agents and text regarding competitive bidding as otherwise required by this section. Makes conforming and nonsubstantive changes.

SECTION 2. Amends Chapter 44B, Education Code, by adding Section 44.0311, as follows:

Sec. 44.0311. DELEGATION. Authorizes the board of trustees of the district, as appropriate, to delegate its authority under this subchapter regarding an action authorized or required by this subchapter to be taken by a school district to a designated person, representative, or committee. Requires the district to provide notice of the delegation and the limits of the delegation in the request for bids, proposals, or qualifications, or in an addendum to the request. Provides that if the district fails to provide that notice, a ranking, selection, or evaluation of bids, proposals, or qualifications other than by the board of trustees in an open public meeting is advisory only. Prohibits the board from delegating the authority to act regarding an action authorized or required by this subchapter to be taken by the board of trustees of a school district.

SECTION 3. Amends Section 44.032(f), Education Code, to authorize a court to enjoin performance of a contract made in violation of this subchapter, rather than Section 44.031(a) or (b). Authorizes any interested party to bring an action for an injunction. Entitles a party, rather than citizen, who prevails in an action brought under this subsection to reasonable attorney's fees as approved by the court.

SECTION 4. Amends Section 44.035, Education Code, as follows:

Sec. 44.035. New heading: EVALUATION OF BIDS AND PROPOSALS FOR CONSTRUCTION SERVICES. Requires the board of trustees of a school district that is considering a construction contract using a method specified by Section 44.031(a), before advertising, to determine which method provides the best value for the district. Requires the district to base its selection among offerors on criteria authorized to be used under Section 44.031(b). Requires the district to publish in the request for bids, proposals, or qualifications the specific criteria that will be used to evaluate the offerors and the relative weights, if any, given to the criteria. Requires the district to document the basis of its selection and to make the evaluations public on or before awarding the contract. Deletes text regarding a school district using competitive sealed proposals to select a contractor for construction services, to select a construction manager to base its selection or award on a combination of price and other factors that the district determines. Deletes text authorizing competitive sealed proposals to discuss proposals with offerors after proposals have been opened to allow for clarification and changes. Deletes text authorizing the district to take adequate precautions to ensure that information from competing proposals is not disclosed to other offerors.

SECTION 5. Amends Section 44.036(a)(3), Education Code, to redefine "design criteria package."

SECTION 6. Amends Sections 44.036(e), (f) and (j), Education Code, to require the district to evaluate statements of qualifications, rather than proposals, and select a design-build firm in two phases. Requires the district in phase one to prepare a request for qualifications. Requires the district to qualify a maximum of five offerors to submit additional informational and, if the district chooses, to interview for final selection. Requires the district in phase two to evaluate the information submitted by the offerors on the basis of the selection criteria stated in the request for qualifications and the results of any interview. Authorizes the district to request additional information regarding certain items. Requires the district to rank each proposal submitted on the basis of the criteria set forth in the request for qualifications. Requires the district to select the design-build firm that submits the proposal offering the best value for the district on the basis of the published selection criteria and on its ranking evaluations. Requires the district to first attempt in good faith to negotiate with the selected offeror a contract on fair and reasonable terms. Requires the district to formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end, if the district is unable to negotiate a satisfactory contract with the selected offeror. Requires the firm's engineers or architects to complete the design, submitting all design elements for review and determination of scope compliance to the district or district's engineer or architect before or concurrently with construction. Requires the penal sums of the performance and payment bonds delivered to the district each to be in an amount equal to the project budget, as specified in the design criteria package, if a fixed contract amount or guaranteed maximum price has not been determined at the time a design-build contract is awarded. Requires the design-build firm to deliver the bonds not later than the 10th day after the date the design-build firm executes the contract unless the design-build firm furnishes a bid bond or other financial security acceptable to the district to ensure that the design-build firm will furnish the required performance and payment bonds when a guaranteed maximum price is established. Deletes text regarding technical proposals, implementation, and costing methodologies in response to a formal request for proposals based on the design criteria package.

SECTION 7. Amends Sections 44.037(b) and (c), Education Code, to authorize a district using the construction manager-agent method, under contract between the district and the construction manager agent, to require the construction manager-agent to provide administrative personnel, equipment necessary to perform duties under this section, and on-site management and other services specified in the contract. Prohibits the district's engineer or architect from serving alone or in combination with another person, as the construction manager-agent unless the engineer or architect is hired to serve as the construction manager-agent under a separate or concurrent procurement process conducted in accordance with this subchapter. Provides that this subsection does not prohibit the district's engineer or architect from providing customary construction phase services under the engineer's or architect's original professional service agreement in accordance with applicable licensing laws.

SECTION 8. Amends Sections 44.038 and 44.039, Education Code, as follows:

Sec. 44038. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK.** Prohibits the district's engineer, architect, or construction manager-agent for a project from serving alone or in combination with another, as the construction manager-at-risk. Requires the district to select the construction manager-at-risk in either a one-step or two-step process. Requires the district to prepare a request for proposals, in the case of a one-step process, or a request for qualifications, in the case of a two-step process that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, and the time and place for receipt of proposals or qualifications, as applicable, a statement as to whether the selection process is a one-step or two-step process, and other information that may assist the district in its selection of a construction manager-at-risk. Requires the district to state the selection criteria in the request for proposals or qualifications, as applicable. Authorizes the selection criteria to include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the construction manager-at-risk. Authorizes the district to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions, if a one-step process is used. Prohibits the district from requesting fees or prices in step one, if a two-step process is used. Authorizes the district in step two to request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the construction manager-at-risk's proposed fee and its price for fulfilling the general conditions. Requires the district to receive at each step to receive, publicly open, and read aloud the names of the offerors. Requires the district, at the appropriate step, to also read aloud the fees and prices stated in each proposal. Requires the district to select the offeror that submits the proposal that offers the best value for the district based on the published selection criteria and on its ranking evaluation. Requires the district to first attempt in good faith to negotiate with the selected offeror a contract on fair reasonable terms. Requires the district to formally and in writing, end negotiations with that offeror, rather than terminate further discussions, and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. Requires a construction manager-at-risk to publicly advertise, in accordance with Section 44.031(g), and receive bids, rather than solicit either competitive bids or competitive sealed proposals. Requires the construction manager-at-risk and the district or its representative to review, rather than receive and open, all trade contractor or subcontractor bids or proposals in a manner that does not disclose the content of the bid or proposal during the selection process to a person not employed by the construction manager-at-risk, engineer, architect, or district. Authorizes the construction manager-at-risk, without advertising, to itself fulfill the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements, if a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section. Requires penal sums of performance and payment bonds delivered to the district to be in an amount equal to the project budget, as specified in the request for qualifications, if a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded. Requires the construction manager to deliver the bonds not later than the 10th day after the date the construction manager executes the contract unless the construction manager furnishes a bid bond or other financial security acceptable to the district to ensure that the construction manager will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Sec. 44.039. **SELECTING CONTRACTS FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS.** Requires the district to select those services for which it contracts in accordance with Section 2254.004, Government Code, and to identify them in the request for proposals. Requires the district to state in the request for proposals the selection criteria that will be used in selecting the successful offeror, rather than in the request for proposals. Requires the district to receive, publicly open, and read aloud the names of the offerors and, if any are required to be stated, all prices, stated in each proposal. Requires the district to first attempt in good faith to negotiate with the selected offeror a contract on fair and reasonable terms. Authorizes the district and its engineer or architect to discuss with the selected offeror options for a scope or time modification and any price change associated with the modifications, rather than cost reduction. Requires the district to formally in writing, end negotiations with that offeror, rather than terminate further discussions, and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected, if the district is unable to negotiate a contract with the selected offeror. Deletes text regarding selection criteria and

prequalifications. Makes conforming changes.

SECTION 9. Amends Section 44.040(b), Education Code, to provide that Section 271.027(b), Local Government Code, does not apply to a bid or proposal submitted under this section.

SECTION 10. Amends Section 44.041, Education Code, as follows:

Sec. 44.041. New heading: JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR. Authorizes a school district to award job order contracts for the minor construction, repair, rehabilitation, or alteration of a facility. Authorizes the school district to establish contractual unit prices for a job order contract by certain procedures. Authorizes the district to award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals. Authorizes the order to be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or to be a unit price order based on the quantities and line items delivered. Provides that the base term of a job order contract is for the period and with any renewal option that the district sets forth in the request for proposals. Prohibits the base term from exceeding two years and is not renewable without further advertisement and solicitation of proposals, if the district fails to advertise that term. Requires those services to be provided in accordance with applicable law, if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of the Texas Engineering Practice Act or the practice of architecture within the meaning of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937. Deletes text regarding time and material rates for various types and classifications of work. Deletes text regarding experienced, past performance, proposed personnel and methodology, safety record, and other appropriated factors. Deletes text regarding a statement of work negotiated between the district or its representative and the contractor.

SECTION 11. Amends Section 51.779, Education Code, as follows:

Sec. 51.779. New heading: EVALUATION OF BIDS AND PROPOSALS FOR CONSTRUCTION SERVICES. Requires an institution of higher education (institution) that is considering a construction contract, before advertising, to determine which method provides the best value for the institution. Requires the institution to base its selection among the offerors on criteria established by the institution. Requires the institution to publish in the request for bids, proposals, or qualifications the specific criteria that will be used to evaluate the offerors and the relative weights, if any, given to the criteria. Requires the institution to document the basis of its selection and to make the evaluation public on or before the award of the contract. Deletes text regarding competitive sealed proposals.

SECTION 12. Amends Section 51.780(a)(3), Education Code, to redefines “design criteria package.”

SECTION 13. Amends Sections 51.780(f) and (k), Education Code, to require the board or its representative to evaluate statements of qualifications, rather than proposals, and select a design-build firm in two phases. Requires the board or its representative to prepare a request for qualifications. Requires the board or its representative to qualify a maximum of five offerors to submit additional information and, if the board or its representative chooses, to interview for final selection. Requires the board or its representative to evaluate the information submitted by the offerors on the basis of selection criteria stated in the request for qualifications and the results of any interview. Authorizes the board or its representative to request additional information regarding demonstrated competence and qualifications. Prohibits the board or its representative from requiring offerors to submit detailed engineering or architectural designs as part of the proposal. Requires the board or its representative to rank each proposal submitted on the basis of the criteria specified in the request for qualifications. Requires the board or its representative to select the design-build firm that submits the proposal offering the best value for the institution on the basis of the published selection criteria and on ranking evaluations. Requires the board or its representative to first attempt in good faith to negotiate with the selected offeror a contract on fair and reasonable terms. Requires the institution formally and in writing, to end all negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end, if the board or its representative is unable to negotiate a satisfactory contract with the selected offeror. Makes conforming and nonsubstantive changes.

SECTION 14. Amends Sections 51.781(b) and (c), Education Code, to authorize an institution using the

construction manager-agent, under the contract between the institution and the construction manager-agent, to require the construction manager-agent to provide administrative personnel, equipment necessary to perform duties under this section, and on-site management and other services specified in the contract. Prohibits the institution's engineer or architect from serving, alone or in combination, as the construction manager-agent, unless the engineer or architect is hired to serve as the construction manager-agent under a separate or concurrent procurement conducted in accordance with this subchapter. Provides that this subsection does not prohibit the institution's engineer or architect from providing customary construction phase services under the engineer's or architect's original professional service agreement in accordance with applicable licensing laws. Makes conforming changes.

SECTION 15. Amends Sections 51.782-51.784, Education Code, as follows:

Sec. 51.782. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK.** Prohibits the institution's engineer, architect, or construction manager-agent for a project from serving alone or in combination with another, as the construction manager-at-risk. Requires the governing body of an institution (board) to select the construction manager-at-risk in either a one-step or two-step process. Requires the board to prepare a request for proposals, in the case of a one-step process, or request for qualifications, in the case of a two-step process that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, and the time and place for receipt of proposals or qualifications, as applicable, a statement as to whether the selection process is a one-step or two-step process, and other information that may assist the board in its selection of a construction manager-at-risk. Requires the board to state the selection criteria in the request for proposals or qualifications, as applicable. Authorizes the selection criteria to include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the construction manager-at-risk. Authorizes the board to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions, if a one-step process is used. Prohibits the board from requesting fees or prices in step one, if a two-step process is used. Authorizes the board in step two to request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the construction manager-at-risk's proposed fee and its price for fulfilling the general conditions. Requires the board, at each step, to receive publicly open, and read aloud the names of the offerors. Requires the board, at the appropriate step, to also read aloud the fees and prices stated in each proposal. Requires the board to select the offeror that submits the proposal that offers the best value for the board based on the published selection criteria and on its ranking evaluation. Requires the board to first attempt in good faith to negotiate with the selected offeror a contract on fair and reasonable terms. Requires the board to formally and in writing, end negotiations with that offeror, rather than terminate further discussions, and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. Requires a construction manager-at-risk to publicly advertise, in accordance with Section 44.031(g), and receive bids, rather than solicit either competitive bids or competitive sealed proposals. Requires the construction manager-at-risk and the board or its representative to review, rather than receive and open, all trade contractor or subcontractor bids or proposals in a manner that does not disclose the content of the bid or proposal during the selection process to a person not employed by the construction manager-at-risk, engineer, architect, or district. Authorizes the construction manager-at-risk, without advertising, to itself fulfill the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements, if a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section. Requires penal sums of performance and payment bonds delivered to the district to be in an amount equal to the project budget, as specified in the request for qualifications, if a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded. Requires the construction manager to deliver the bonds not later than the 10th day after the date the construction manager executes the contract unless the construction manager furnishes a bid bond or other financial security acceptable to the district to ensure that the construction manager will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Sec. 51.783. **SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS.** Requires the board to select those services for which it contracts in accordance with Section 2254.004, Government Code, and to identify them in the request for proposals. Requires the board to state in the request for proposals the selection criteria

that will be used in selecting the successful offeror, rather than in the request for proposals. Requires the board to receive, publicly open, and read aloud the names of the offerors and, if any are required to be stated, all prices, stated in the proposal. Requires the board to first attempt in good faith to negotiate with the selected offeror a contract on fair and reasonable terms. Authorizes the board and its engineer or architect to discuss with the selected offeror options for a scope or time modification and any price change associated with the modifications, rather than cost reduction. Requires the board to formally and in writing, end negotiations with that offeror, rather than terminate further discussions, and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected, if the district is unable to negotiate a contract with the selected offeror. Deletes text regarding selection criteria and prequalifications. Makes conforming changes.

Sec. 51.784. New heading: **JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR.** Authorizes an institution to award job order contracts for the minor construction, repair, rehabilitation, or alteration of a facility. Authorizes the institution to establish contractual unit prices for a job order contract by certain procedures. Authorizes the board to award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals. Authorizes the order to be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or to be a unit price order based on the quantities and line items delivered. Provides that the base term of a job order contract is for the period and with any renewal option that the institution sets forth in the request for proposals. Prohibits the base term from exceeding two years and is not renewable without further advertisement and solicitation of proposals, if the institution fails to advertise that term. Requires those services to be provided in accordance with applicable law, if a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering within the meaning of the Texas Engineering Practice Act or the practice of architecture within the meaning of Chapter 478, Acts of the 45th Legislature, Regular Session, 1937. Deletes text regarding time and material rates for various types and classifications of work. Deletes text regarding experience, past performance, proposed personnel and methodology, safety record, and other appropriated factors. Deletes text regarding a statement of work negotiated between the district or its representative and the contractor.

SECTION 16. Effective date: September 1, 1999.
Makes application of this Act prospective.

SECTION 17. Emergency clause.

SUMMARY OF COMMITTEE CHANGES

SECTION 7.

Amends Section 44.037(b), Education Code, to authorize a district using the construction manager-agent method, under contract between the district and the construction manager agent, to require the construction manager-agent to provide administrative personnel, equipment necessary to perform duties under this section, and on-site management and other services specified in the contract. Provides that this subsection does not prohibit the district's engineer or architect from providing customary construction phase services under the engineer's or architect's original professional service agreement in accordance with applicable licensing laws. Deletes the provision regarding a construction manager-agent's services that are services other than the design services customarily performed by an engineer or architect.

SECTION 8.

Amends Section 44.038, Education Code, to authorize the district to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions, if a one-step process is used.

SECTION 10.

Amends Section 44.041, Education Code, to provide a new heading: JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR

SECTION 14.

Amends Sections 51.781(b) and (c), Education Code, to authorize an institution using the construction manager-agent, under the contract between the institution and the construction manager-agent, to require the construction manager-agent to provide administrative personnel, equipment necessary to perform duties under this section, and on-site management and other services specified in the contract. Provides that this subsection does not prohibit the institution's engineer or architect from providing customary construction phase services under the engineer's or architect's original professional service agreement in accordance with applicable licensing laws. Deletes a provision regarding a construction manager-agent's services that are services other than the design services customarily performed by an engineer or architect.

SECTION 15.

Amends Section 51.782(e), Education Code, to authorize the board to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions, if a one-step process is used.

Amends Section 51.784. to provide a new heading: JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR.