

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 510  
By: Armbrister  
Intergovernmental Relations  
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Committee Report (Substituted)

### **DIGEST AND PURPOSE**

Under current law, no authority exists for municipalities or counties to utilize design-build procedures in order to provide flexibility in constructing needed facilities and possibly save time in design and construction. C.S.S.B. 510 authorizes governmental entities to use design-build procedures.

### **RULEMAKING AUTHORITY**

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

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Sections 252.021(a) and (c), Local Government Code, to require a municipality, before entering into a contract that requires an expenditure of more than \$15,000 from one or more municipal funds, to comply with the procedure prescribed by this subchapter and Subchapter C, rather than this chapter, for competitive sealed bidding or competitive sealed proposals or with a method described by Subchapter H, Chapter 271. Authorizes a municipality to use the competitive sealed proposal procedure for high technology procurements and, in a municipality with a population of 75,000 or more, for the purchase of insurance.

SECTION 2. Amends Section 252.022, Local Government Code, by adding Subsection (d) to provide that this chapter does not apply to an expenditure described by Section 252.021 if the governing body of a municipality determines that a method described by Subchapter H, Chapter 271 provides a better value for the municipality with respect to that expenditure than the procedures described in this chapter and the municipality adopts and uses a method described in that subchapter with respect to that expenditure.

SECTION 3. Amends Sections 262.023(a) and (c), Local Government Code, to require the commissioners court of a county, before the county is authorized to purchase one or more items under a contract that will require an expenditure exceeding \$25,000, to comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter or with a method described by Subchapter H, Chapter 271. Deletes existing text pertaining to a limited application of competitive bidding and competitive proposal requirements.

SECTION 4. Amends Chapter 271, Local Government Code, by adding Subchapter H, as follows:

#### **SUBCHAPTER H. ALTERNATIVE PROJECT DELIVERY METHODS FOR CERTAIN MUNICIPAL AND COUNTY PROJECTS**

Sec. 271.111. DEFINITIONS. Defines “architect,” “contractor,” “design-build contract,” “design-build firm,” “design criteria package,” “engineer,” “facility,” “fee,” “general conditions,” and “governmental entity.”

Sec. 271.112. APPLICABILITY; OTHER LAW. (a) Provides that any provision in the

charter of a home-rule municipality or any county regulation that requires the use of competitive bidding or competitive sealed proposals or that prescribes procurement procedures and that is in conflict with this subchapter controls over this subchapter unless the governing body of the municipality or county elects to have this subchapter supersede the charter or regulation.

(b) Provides that the purchasing requirements of Section 361.426 (Governmental Entity Preference for Recycled Products), Health and Safety Code, apply to purchases by a governmental entity made under this subchapter.

(c) Provides that, except as provided by this section, to the extent of any conflict, this subchapter prevails over any other law relating to the purchasing of goods and services except a law relating to contracting with historically underutilized businesses.

(d) Requires a municipality, for a contract entered into under any of the methods provided in this subchapter by the municipality, to publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened in the county in which the municipality's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses. Requires the notice, if there is not a newspaper in that county, to be published in a newspaper in the county nearest the county seat of the county in which the municipality's central administrative office is located. Provides that in a two-step procurement process, the time and place the second step bids, proposals, or responses will be received are not required to be published separately.

(e) Requires a county, for a contract entered into under any of the methods provided in this subchapter by the county, to publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses. Requires the notice, if there is not a newspaper in the county, to be posted at the courthouse door of the county and to be published in a newspaper published in the nearest county.

(f) Provides that a contract entered into or an arrangement made in violation of this subchapter is contrary to public policy and is void. Authorizes a court to enjoin performance of a contract made in violation of this subchapter. Authorizes certain specific persons to bring an action for an injunction. Provides that a party who prevails in an action brought under this subsection is entitled to reasonable attorney's fees as approved by the court.

Sec. 271.113. **PROCUREMENT PROCEDURES.** (a) Authorizes a governmental entity, in entering into a contract for the construction of a facility, to use any of a number of stated methods that provides the best value for the governmental entity.

(b) Authorizes the governmental entity, except as provided by this subchapter, to consider a number of stated factors in determining to whom to award a contract.

Sec. 271.114. **EVALUATION OF BIDS AND PROPOSALS FOR CONSTRUCTION SERVICES.** (a) Requires the governing body of a governmental entity that is considering a construction contract using a method specified by Section 252.113(a) other than a competitive bidding, before advertising, to determine which method provides the best value for the governmental entity.

(b) Requires the governmental entity to base its selection among offerors on criteria authorized to be used under Section 252.113(b). Requires the governmental entity to publish in the request for bids, proposals, or qualifications all of the criteria that will be

used to evaluate the offerors and the relative weights.

(c) Requires the governmental entity to document the basis of its selection and to make the evaluations public not later than the seventh day after the date the contract is awarded.

**Sec. 271.115. SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE BIDDING.**

(a) Authorizes a governmental entity, except to the extent prohibited by other law and to the extent consistent with this subchapter, to use competitive bidding to select a contractor to perform certain services.

(b) Provides that, except as otherwise specifically provided by this subsection, Chapter 271B does not apply to a competitive bidding process under this section. Provides that Sections 271.026, 271.027(a), and 271.0275 apply to a competitive bidding process under this section.

(c) Requires a governmental entity to award a competitively bid contract at the bid amount to the bidder offering the best value to the governmental entity according to the selection criteria that were established by the municipality. Authorizes the selection criteria to include the factors listed in Section 252.113(b).

**Sec. 271.116. SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS.**

(a) Requires a governmental entity to follow the procedures prescribed by this section in selecting a contractor to perform certain services for a facility through competitive sealed proposals.

(b) Requires the governmental entity to select or designate an engineer or architect to prepare construction documents for the project. Provides that the selected or designated engineer or architect has full responsibility for complying with The Texas Engineering Practice Act (Article 3271a, V.T.C.S.) or Chapter 478 (Regulation of Practice of Architecture), Acts of the 45th Legislature, Regular Session, 1937 (Article 249a, V.T.C.S.), as applicable. Requires the governmental entity, if the engineer or architect is not a full-time employee of the governmental entity, to select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor), Government Code.

(c) Requires the governmental entity to provide or contract for, independently of the contractor, certain inspection and testing services necessary for acceptance of the facility by the governmental entity. Requires the governmental entity 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.

(d) Requires the governmental entity to prepare a request for competitive sealed proposals that includes certain elements that contractors may require to respond to the request. Requires the governmental entity to state in the request for proposals the selection criteria that will be used in selecting the successful offeror.

(e) Requires the governmental entity 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 proposals. Requires the governmental entity, not later than the 45th day after the date of opening the proposals, to evaluate and rank each proposal submitted in relation to the published selection criteria.

(f) Requires the governmental entity to select the offeror that offers the best value based on the published selection criteria and on its ranking evaluation. Requires the

governmental entity to first attempt to negotiate a contract with the selected offeror. Authorizes the governmental entity 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 modification. Requires the governmental entity, if unable to negotiate a contract with the selected offeror, formally and in writing, to end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected.

(g) Provides that, in determining best value, the governmental entity is not restricted to considering price alone, but is authorized to consider any other factor stated in the criteria.

Sec. 271.117. CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT. (a) Authorizes a governmental entity to use the construction manager-agent method for the construction, rehabilitation, alteration, or repair of a facility. Requires a governmental entity to follow the procedures prescribed by this section in using that method and in entering into a contract for the services of a construction manager-agent.

(b) Sets forth boundaries for the term “construction manager-agent” and establishes the capacity in which such an entity represents the governmental entity. Authorizes a governmental entity using the construction manager-agent method, under the contract between the governmental entity and the construction manager-agent, to require the construction manager-agent to provide certain services specified in the contract. Provides that a construction manager-agent represents the governmental entity in a fiduciary capacity.

(c) Makes a conforming change regarding a governmental entity being required, before or concurrently with the selection a construction manager-agent, to select or designate an engineer or architect who is required to prepare the construction documents and regarding the basis of selection. Prohibits the governmental entity’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 conducted in accordance with this subchapter. Provides that this subsection does not prohibit the governmental entity’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.

(d) Makes a conforming change regarding a governmental entity’s selection of a construction manager-agent, except to provide that notice must be published as provided by Section 252.112(d).

(e) Requires a governmental entity using the construction manager-agent method to procure, an accordance with applicable law, a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work

(f) Makes a conforming change requiring the governmental entity or the construction manager-agent to procure certain inspection and testing services necessary for acceptance of the facility by the governmental entity.

Sec. 252.118. CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK. (a) Makes a conforming change regarding a governmental entity’s use of the construction manager-at-risk method.

- (b) Sets forth boundaries for the term “construction manager-at-risk.”
- (c) Makes a conforming change regarding the governmental entity selecting or designating an engineer or architect before or concurrently with the selection of a construction manager-at-risk. Makes a conforming change prohibiting the governmental entity’s engineer, architect, or construction from serving as the construction manager-at-risk except under certain conditions.
- (d) Makes a conforming change requiring the governmental entity to procure, independently of the construction manager-at-risk, certain inspection and testing services.
- (e) Requires the governmental entity to select the construction manager-at-risk in either a one-step or two-step process. Requires the governmental entity to prepare a request for proposals, in the case of a one-step process, or a request for qualification, in the case of a two-step process, that includes certain stated information, including the selection criteria. Authorizes the selection criteria to include certain factors that demonstrate the capability of the construction manager-at-risk. Sets forth guidelines regarding both the one-step and the two-step processes.
- (f) Makes conforming changes regarding the names of the offerors and the fees and prices stated in each proposal and the evaluation and ranking of proposals.
- (g) Makes conforming changes regarding the selection of the offeror and the successful or unsuccessful negotiation of a contract with the offeror.
- (h) Requires a construction manager-at-risk to publicly advertise, as prescribed for a governmental entity by Section 271.025, and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. Authorizes a construction manager-at-risk to seek to perform portions of the work itself if the construction manager-at-risk submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the governmental entity determines that the construction manager-at-risk’s bid or proposal provides the best value for the governmental entity.
- (i) Requires the construction manager-at-risk and the governmental entity or its representative to review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the construction manager-at-risk, engineer, architect, or governmental entity. Requires all bids or proposals to be made public after the award of the contract or not later than the seventh day after the date of final selection of bids or proposals, whichever is later.
- (j) Requires the governmental entity, if the construction manager-at-risk reviews, evaluates, and recommends to the governmental entity a bid or proposal from a trade contractor or subcontractor but the governmental entity requires another bid or proposal to be accepted, to compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk may incur because of the governmental entity’s requirement that another bid or proposal be accepted.
- (k) Authorizes the construction manager-at-risk, 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, without advertising, to fulfill the

contract requirements itself or select a replacement trade contractor or subcontractor to fulfill the contract requirements.

(l) Requires the penal sums of the performance and payment bonds delivered to the governmental entity, if a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, to be in an amount equal to the project budget, as specified in the request for qualifications. 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 governmental entity to ensure that the construction manager will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Sec. 252.119. DESIGN-BUILD CONTRACTS FOR FACILITIES. (a) Makes a conforming change regarding a governmental entity's use of the design-build method.

(b) Requires the governmental entity to designate an engineer or architect independent of the design-build firm to act as its representative for the duration of the project. Makes a conforming change regarding the selection of an engineer or architect who is not a full-time employee of the governmental entity in accordance with Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor), Government Code.

(c) Requires the governmental entity to prepare a request for qualifications that includes certain information that may assist potential design-build firms in submitting proposals for the project. Requires the governmental entity to also prepare a design criteria package that includes more detailed information on the project. Requires that, if the design-criteria package requires certain engineering or architectural services, those services be provided in accordance with the applicable law.

(d) Requires the governmental entity to evaluate statements of qualifications and select a design-build firm in two phases and sets forth specific guidelines for the requirements involved in each phase.

(e) Requires that, following selection of a design-build firm under Subsection (d), the firm's engineers complete the design, submitting all design elements for review and determination of scope compliance to the governmental entity or the governmental entity's engineer or architect before or concurrently with construction.

(f) Makes conforming changes regarding an engineer's and/or architect's responsibility for compliance with applicable laws.

(g) Makes a conforming change requiring the governmental entity to procure, independently of the design-build firm, certain inspection and testing services.

(h) Requires the design-build firm to supply a signed and sealed set of construction documents for the project to the governmental entity at the conclusion of construction.

(i) Provides that a payment or performance bond is not required for, and prohibits such from providing coverage for, the portion of a design-build contract under this section that includes design services only. Makes a conforming change regarding the delivery of penal sums of the performance and payment bonds.

Sec. 271.120. JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR. (a) Authorizes a governmental entity to award job order contracts for the minor

construction, repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of prescribed and prepriced tasks.

- (b) Establishes procedures by which the governmental entity is authorized to establish contractual unit prices for a job order contract.
- (c) Requires the governmental entity to advertise for, receive, and publicly open sealed proposals for job order contracts.
- (d) Authorizes the governmental entity to require offerors to submit certain types of additional information besides certain stated types.
- (e) Authorizes the governmental entity to award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals.
- (f) Requires an order for a job or project under the job order contract to be signed by the governmental entity's representative and the contractor. Authorizes the order to be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or a unit price based on the quantities and line times delivered.
- (g) Requires the contractor to provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.
- (h) Provides that the base term of a job order contract is for the period and with any renewal options that the governmental entity sets forth in the request for proposals. Prohibits the base term, if the governmental entity fails to advertise that term, from exceeding two years and provides that the term is not renewable without further advertisement and solicitation of proposals.
- (i) Makes a conforming change requiring that engineering or architectural services required by a job order contract or an order issued under the contract be provided in accordance with applicable law.

Sec. 271.121. RIGHT TO WORK. Prohibits a governmental entity, when engaged in procuring products or services, awarding a contract, or overseeing procurement or construction for a public improvement, notwithstanding any other provisions of this chapter, from considering a vendor's membership or nonmembership or other relationship with any organization. Requires the governmental entity to ensure that its bid specifications and any subsequent contract or other agreement do not deny or abridge the right of a person to work because of membership or nonmembership in any organization.

SECTION 5. Amends Section 2254.002(1), Government Code, to redefine "governmental entity."

SECTION 6. Makes application of this Act prospective.

SECTION 7. Effective date: September 1, 2001.

### **SUMMARY OF COMMITTEE CHANGES**

SECTION 1. Differs from the original by adding additional applicable statute citations.

SECTION 2. Differs from the original by making a conforming change.

Moves previously proposed text of SECTION 3 to SECTION 4 with changes, and adds a new

proposed SECTION 3 as follows:

SECTION 3. Adds amended provisions pertaining to the application of certain bidding methods.

SECTION 4. Differs from previously proposed SECTION 3 by adding Chapter 271H (Alternative Project Delivery Methods for Certain Municipal and County Projects), rather than 252E (Alternative Project Delivery Methods for Certain Municipal Projects), Local Government Code. Amends previously proposed subchapter to broaden its application from municipalities to government entities. Redefines “facility” and defines “governmental entity.” Adds provisions pertaining to the specific application of Subchapter H to both municipalities and counties. Adds provisions pertaining to contracts or arrangements made in violation of Subchapter H. Adds provisions pertaining to notification regarding selection of a construction manager-agent. Adds provisions pertaining to a governmental entity’s designation of an engineer or architect independent of the design-build firm. Adds provisions pertaining to a person’s right to work regardless of membership or nonmembership in an organization.

Redesignates previously proposed SECTIONS 4 - 6 as SECTIONS 5 - 7 with no change.