

BILL ANALYSIS

Senate Research Center

C.S.S.B. 1396
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Natural Resources
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Committee Report (Substituted)

DIGEST AND PURPOSE

Currently, Texas ports are authorized to use the same procurement procedures as school districts; however, this provision fails to permit Texas' ports to use design-build construction for docks, wharfs and other important infrastructure. Design-build is a method of contracting in which an owner hires a competent contractor who in turn hires an architect, structural engineer, mechanical or electrical engineer, civil engineer, and any specialty consultants. All design and construction is handled under one contract. C.S.S.B. 1396 amends the Water Code to allow ports to use the design-build method of contracting.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the district commission of certain port authority and navigation districts in SECTION 1 (Section 60.453, Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 60, Water Code, by adding Subchapter O, as follows:

SUBCHAPTER O. PURCHASE CONTRACTS

Sec. 60.451. DEFINITIONS. Defines "architect," "contractor," "construction manager-agent," "construction manager-at-risk," "design-build contract," "design-build firm," "design criteria package," "district," "engineer," "facility," "fee," and "general conditions."

Sec. 60.452. APPLICABILITY OF SUBCHAPTER; OTHER LAW. (a) Provides that this subchapter does not apply to a contract solely for professional services rendered, including services of an architect, attorney, or fiscal agent.

(b) Provides that if a district elects to make a procurement under this subchapter, then this subchapter prevails over any other law relating to a purchase contract for goods and services by the navigation district (district) that is in conflict with or inconsistent with this subchapter.

Sec. 60.453. AUTHORITY TO ADOPT RULES. Authorizes the commission of a district (commission) to adopt rules and procedures for the acquisition of goods or services.

Sec. 60.454. PURCHASING CONTRACT METHODS. Authorizes a district contract valued at \$25,000 or more in the aggregate for each 12-month period to be made by one of several methods that, in the opinion of the district's commission, provides the best value for the district, notwithstanding any other provision of this chapter or other law.

Sec. 60.455. RIGHT TO REJECT ALL BIDS. Authorizes a district that requests bids or proposals under any of the methods provided by this subchapter to reject any and all bids or proposals submitted.

Sec. 60.456. NOTICE REQUIREMENTS. Requires the district, for a contract entered by a district under any of the methods provided by this subchapter, 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. Requires the notice to be published in a newspaper of general circulation in each county in which the district is located once each week for two consecutive weeks before the deadline for receiving bids, proposals, or responses. Requires the notice, if there is not a newspaper of general circulation in any county in which the district is located, to be published in a newspaper of general circulation in the county nearest the county seat of the county in which the district is located or the county in which the greatest amount of the district's territory 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.

Sec. 60.457. DELEGATION. (a) Authorizes the commission, as it considers appropriate, to delegate its authority under this subchapter regarding an action authorized or required by this subchapter to be taken by a district to a designated person, representative, or committee. Requires the district, in procuring construction services, 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 for construction services other than by the commission in an open meeting is advisory only.

(b) Prohibits a commission from delegating the authority to act regarding an action authorized or required by this subchapter to be taken by the commission of a district.

Sec. 60.458. PURCHASE CONTRACT AWARD CRITERIA. Authorizes a district to consider certain factors, in determining to whom to award a contract, except as provided by this subchapter.

Sec. 60.459. EVALUATION OF BIDS AND PROPOSALS FOR CONSTRUCTION SERVICES. (a) Requires the commission of a district that is considering a construction contract using a method specified by Section 60.454, to determine which method provides the best value for the district, before advertising.

(b) Requires the district to base its selection among offerors on criteria authorized to be used under Section 60.458. 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 given to the criteria.

(c) Requires the district to document the basis of its selection and to make the evaluations public by the seventh day after the date of the award of the contract.

Sec. 60.460. DESIGN-BUILD CONTRACTS FOR FACILITIES. (a) Authorizes a district to award a design-build contract for the construction, rehabilitation, alteration, or repair of a facility provided that the contracting district and the design-build firm follow the procedures provided by this section.

(b) Requires a district to designate an engineer or architect independent of the design-build firm to act as its representative for the duration of the work on the facility. Requires the district, if its' engineer or architect is not a full-time employee of the district, to select the engineer or architect as provided by Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyors), Government Code.

(c) Requires the district to prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist potential design-build firms in submitting proposals for the project. Requires the district to also prepare a design criteria package that includes more detailed information on the project.

Provides that, if the preparation of the design criteria packages requires engineering or architectural services that constitute the practice of engineering within the meaning of Chapter 1001 (Engineers), Occupations Code, or the practice of architecture within the meaning of Chapter 1051 (Architects), Occupations Code, those services shall be provided in accordance with the applicable law. Requires an engineer to have the responsibility for compliance with the engineering designs requirements and all other applicable requirements of Chapter 1001, Occupation Code. Requires an architect to have the responsibility for compliance with the requirements of Chapter 1051, Occupations Code.

(d) Requires the district to evaluate statements of qualifications and select a design-build in two certain phases.

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

(f) Requires the district to provide or contract for, independently of the design-build firm, the inspection services, the testing of construction materials, and the verification testing services necessary for acceptance of the facility by the district. Requires the district to select those services for which it contracts in accordance with Section 2254.004, Government Code.

(g) Requires the design-build firm to supply a signed and sealed set of as-built construction documents for the project to the district at the conclusion of construction.

(h) Provides that a payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract under this subchapter that includes design services only. Requires, if a fixed contract amount or guaranteed maximum price has not been determined at the time a design-build contract is awarded, the penal sums of the performance and payment bonds delivered to the district to each be in an amount equal to the project budget, as specified in the design criteria package. Requires the design firm to deliver the bond by 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.

(i) Requires the district to pay an unsuccessful design-build firm that submits a response to the district's request for additional information on engineering or architectural design under Subsection (d)(2) the stipulated amount of up to one-half of one percent of the final contract price for any reasonable costs incurred in preparing that proposal. Authorizes the district, after payment of the stipulated amount, to make use of any design contained in the proposal, including technologies, techniques, methods, processes, and information contained in the design. Provides that the use by the district of any design elements contained in an unsuccessful proposal is at the sole risk and discretion of the district and does not confer liability on the recipient of the stipulated amount under this section. Requires the methodology for computing the stipulated amount to be stated in the request for additional information under Subsection (d)(2).

(j) Authorizes the district to use a design-build firm to assist the district in obtaining a permit necessary for a facility, but provides that the district is responsible for obtaining the permit.

(k) Prohibits a successful design-build from being eligible for another design-build contract with the district for a period of 12 months after the date the successful design-build firm's contract has been completed.

Sec. 60.461. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT.** (a) Authorizes a district to award a contract to a construction manager-agent for the construction, rehabilitation, alteration, or repair of a facility provided that the construction manager-agent and the district follow the procedures prescribed by this section.

(b) Authorizes a district, under the 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 a construction manager-agent represents the district in a fiduciary capacity.

(c) Requires the district, before or concurrently with selecting a construction manager-agent, to select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. Requires the district, if the engineer or architect is not a full-time employee of the district, to select the engineer or architect as provided by Section 2254.004, Government Code. 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 conducted in accordance with this subchapter. Establishes 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 laws.

(d) Requires a district to select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers or architects under Section 2254.004, Government Code.

(e) Requires a district contracting with a construction manager-agent to procure, in accordance with applicable law, and in any manner authorized by this chapter, a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work.

(f) Requires the district or the construction manager-agent to procure in accordance with Section 2254.004, Government Code, and in any manner authorized by this chapter, all of the testing of construction materials, the inspection services, and the verification testing services necessary for acceptance of the facility by the district.

Sec. 60.462. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK.** (a) Authorizes a district to award a contract to a construction manager-at-risk for the construction, rehabilitation, alteration, or repair of a facility provided that the construction manager-at-risk and the district follow the procedures prescribed by this section.

(b) Requires the district, before or concurrently with selecting a construction manager-at-risk, to select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. Requires the district, if the engineer or architect is not a full-time employee of the

district, to select the engineer or architect in accordance with Section 2254.004, Government Code. 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.

(c) Requires the district to provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials, and the verification testing services necessary for acceptance of the facility by the district. Requires the district to select those services for which it contracts in accordance with Section 2254.004, Government Code.

(d) 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, and estimated budget, 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, if a one-step process is used, to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions.

(e) Prohibits the district, if a two-step process is used, from requesting fees or prices in step one. 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.

(f) Requires the district to receive, publicly open, and read aloud the names of the offerors, at each step. Requires the district, at the appropriate step, to also read aloud the fees and prices, if any, stated in each proposal as the proposal is opened. Requires the district, by the 45th day after the date of opening the proposals, to evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals.

(g) Requires the district to select the offeror who 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 to negotiate a contract with the selected offeror. Requires the district, if it is unable to negotiate a satisfactory contract with the selected offeror 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.

(h) Requires the penal sums of the performance and payment bonds delivered to the district to each be in an amount equal to the project budget, if a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, as specified in the request for proposals or qualifications. Requires the construction manager-at-risk to deliver the bonds by the 10th day after the date the construction manager-at-risk executes the contract unless the construction manager-at-risk furnishes a bid bond or other financial security acceptable to the district to ensure that the construction manager-at-risk will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Sec. 60.463. SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS. (a) Requires a district, in selecting a contractor for construction, rehabilitation, alteration, or repair services for a facility through competitive sealed proposals, to follow the procedures prescribed by this section.

(b) Requires the district to select or designate an engineer or architect to prepare construction documents for the project. Establishes that the selected or designated engineer or architect has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. Requires the district, if the engineer or architect is not a full-time employee of the district, to select the engineer or architect as provided by Section 2254.004, Government Code.

(c) Requires the district to provide or contract for, independently of the contractor, the inspection services, the testing of construction materials, and the verification testing services necessary for acceptance of the facility by the district. 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.

(d) Requires the district to prepare a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. Requires the district to state in the request for proposals the selection criteria that will be used in selecting the successful offeror.

(e) 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, by 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 district to select the offeror 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 to negotiate a contract with the selected offeror. 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 modification. Requires the district, if it is unable to negotiate a contract with the selected offeror to, formally and in writing, 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 the district, in determining the best value, is not restricted to considering price alone, but may consider any other factor stated in the selection criteria.

Sec. 60.464. JOB ORDER CONTRACTS FOR FACILITIES CONSTRUCTION OR REPAIR. (a) Authorizes a district to award job order contracts for the 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 predescribed and prepriced tasks.

(b) Authorizes the district to establish contractual unit prices for a job order contract, in various manners.

(c) Requires the district to advertise for, receive, and publicly open sealed proposals for job order contracts.

(d) Authorizes the district to require offerors to submit, in addition to information

on rates, other information, including experience, past performance, and proposed personnel and methodology.

(e) Authorizes the district 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 district'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 to be a unit price order based on the quantities and line items 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) Establishes that the base term of a job order contract is for the period and with any renewal options that the district sets forth in the request for proposals. Prohibits the base term from exceeding two years and provides that it is not renewable without further advertisement and solicitation of proposals, if the district fails to advertise that term.

(i) Provides that 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 Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Occupations Code, those services shall be provided in accordance with applicable law.

Sec. 60.465. EXPIRATION. Provides that this subchapter expires September 1, 2013.

SECTION 2. Repealer: Section 60.4125(b), Water Code,

SECTION 3. Provides that the changes in law made by this Act apply only to a contract for which requests for bids, requests for proposals, or requests for qualifications are published or distributed after the effective date of this Act.

SECTION 4. Provides that this Act takes effect June 1, 2003, or September 1, 2003.