

BILL ANALYSIS

Senate Research Center
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C.S.H.B. 3487
By: Coleman (West)
Intergovernmental Relations
5/17/2009
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

C.S.H.B. 3487 amends current law relating to the purchasing and contracting authority of counties, and provides penalties.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the comptroller of public accounts (as the successor agency to the Texas Building and Procurement Commission) is rescinded in SECTION 1 (Section 262.002, Local Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 262.002, Local Government Code, as follows:

Sec. 262.002. New heading: **AUTHORITY TO COOPERATIVELY PURCHASE GOODS AND SERVICES.** (a) Authorizes a county to purchase an item through a cooperative purchasing program (program). Requires the program to use a competitive bidding procedure if the item is otherwise required by law to be purchased through a competitive bidding procedure. Deletes existing text authorizing the commissioners court of a county to purchase through the comptroller road machinery and equipment, tires, and tubes to be used by the county.

(b) Authorizes a county to purchase an item according to a competitive bidding procedure promulgated by an authorized state agency if the item is otherwise required by law to be purchased through a competitive bidding procedure. Deletes existing text requiring the comptroller of public accounts as the successor agency to the Texas Building and Procurement Commission (commission) to purchase an item under this section on competitive bids and in accordance with any rules of the commission.

(c) Authorizes a county to purchase an item cooperatively through an interlocal agreement. Requires that the agreement provide for a competitive bidding procedure if the item is otherwise required by law to be purchased through a competitive bidding procedure. Deletes existing text requiring a purchase under this section be made on the requisition of the commissioners court. Deletes existing text requiring the court, when the court sends the requisition to the commission, to include with the requisition a general description of the item desired and a certification of the funds available to pay for the item.

(d) Provides that a cooperative purchase under this section does not violate competitive bidding statutes. Deletes existing text authorizing the commission to adopt rules to carry out the purpose of this section.

SECTION 2. Amends Section 262.003, Local Government Code, as follows:

Sec. 262.003. **SMALL, SOLE-SOURCE PURCHASE EXEMPT FROM COMPETITIVE BIDDING.** Creates this section from existing text. Prohibits the county auditor or other appropriate county officer or employee, if a county makes a sole-source purchase as described by Section 262.024(a)(7) (relating to an item that can be obtained from only one source being exempt from requirement), rather than covered by Subsection

(a), from refusing payment for the purchase because a competitive bidding procedure was not followed. Deletes existing Subsection (a) providing that any law that requires a county to follow a competitive bidding procedure in making a purchase requiring the expenditure of \$25,000 or less does not apply to the purchase of an item available for purchase from only one supplier. Deletes existing Subsection (b) designation.

SECTION 3. Amends Section 262,011, Local Government Code, by amending Subsections (f), (g), (k), (m), and (o) and adding Subsection (q), as follows:

(f) Requires that a purchase made by the county purchasing agent be paid for by an electronic transfer, check, or warrant drawn by the county auditor on funds in the county treasury in the manner provided by law. Prohibits the county auditor from drawing and prohibits the county treasurer from honoring an electronic transfer, check, or warrant for a purchase unless the purchase is made by the county purchasing agent or on competitive bid as provided by law.

(g) Authorizes the county purchasing agent to cooperate with the purchasing agent of a municipality in the county to purchase any item in volume as may be necessary. Requires the county treasurer to honor an electronic transfer, check, or warrant drawn by the county auditor to reimburse the municipality's purchasing agent making the purchase for the county.

(k) Requires that the salary be paid by an electronic transfer, check, or warrant, rather than warrants, drawn on funds in the county treasury.

(m) Provides that an offense under this subsection is a misdemeanor punishable by a fine of not less than \$10 or more than \$100, rather than by confinement in the county jail for not less than 30 days or more than one year, or by both the fine and confinement.

(o) Prohibits procedures for use of purchasing cards from avoiding the competitive bidding requirements of this chapter or other requirements of county financial law.

(q) Requires that an electronic transfer under this chapter provide the same level of internal controls and statutory authorizations as required for a check or warrant.

SECTION 4. Amends Sections 262.0115(d) and (e), Local Government Code, as follows:

(d) Requires the purchasing agent, under the supervision of the commissioners court, to carry out the functions prescribed by law for a purchasing agent under Section 262.011 and for any ministerial function of the county auditor in regard to county purchases and contracts and to administer the procedures prescribed by law for notice and public bidding for county purchases and contracts.

(e) Authorizes a county that has established the position of county purchasing agent under this section to abolish the position at any time. Requires the county auditor, on the abolition of the position, to assume the rights and responsibilities of bid or proposal notice and opening under this chapter and Chapter 271 (Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments), rather than assume the functions previously performed by the purchasing agent.

SECTION 5. Amends Section 262.012, Local Government Code, as follows:

Sec. 262.012. New heading: PURCHASING AGENTS IN COUNTIES WITH POPULATION OF 100,000 OR LESS. (a) Provides that in a county with a population of 100,000 or less a county auditor is authorized to, on request of the commissioners court, assume purchasing responsibilities for the county, in addition to performing the regular duties of the auditor as required by law, rather than authorizing the commissioners court of a county that employs a county auditor jointly with one or more counties under Section 84.008 (Joint Employment of County Auditor in Counties With Population of Less Than 25,000) to require the auditor to act as the purchasing agent for the county, in addition to performing the regular duties of the auditor as required by law;

or authorizing the commissioners court to employ a person to serve as county purchasing agent at the pleasure of the commissioners court.

(b) Provides that a purchasing agent employed under Subsection (a)(2) (relating to authorizing the commissioners court to employ a person to serve as county purchasing agent at the pleasure of the commissioners court) acts under the commissioners court's supervision; carries out the functions prescribed by law for county purchases and contracts; and administers public notice and bidding procedures for a county purchase or contract. Deletes existing text requiring the county auditor, in a county with a population of 41,680 to 42,100, to act as the purchasing agent for the county in addition to performing the regular duties of the auditor as required by law.

(c) Makes no changes to this subsection.

SECTION 6. Amends Subchapter B, Chapter 262, Local Government Code, by adding Section 262.013, as follows:

Sec. 262.013. QUALIFICATION. Prohibits a person authorized to make a purchase on behalf of a county or a county department or office from making any purchase until providing to the county or county department or office a signed acknowledgment that the person understands the requirements of this chapter and Chapters 263 (Sale or Lease of Property by Counties), 270 (Miscellaneous Provisions Affecting the Acquisition, Sale, or Lease of Property by Counties), and 271. Requires that the acknowledgment be maintained in the person's personnel file or with the official bond of an elected or appointed official.

SECTION 7. Amends Section 262.022, Local Government Code, by adding Subdivisions (3-a), (5-a), and (5-b) and amending Subdivisions (5) and (6), to define "day," "lowest and best," and "normal purchasing practice" and to redefine "item" and "purchase."

SECTION 8. Amends Section 262.0225, Local Government Code, by adding Subsection (d), to authorize a county that complies with the competitive bidding requirements of this chapter and receives no responsive bids for an item to procure the item under Section 262.0245 (Competitive Bidding Procedures Adopted by County Purchasing Agents).

SECTION 9. Amends Section 262.023, Local Government Code, by amending Subsection (c) and adding Subsections (d) and (e), as follows:

(c) Provides that under this section, a person is presumed to have intent to avoid the competitive bidding requirement if the person makes separate, sequential, or component purchases of items for that person's office or department within a single fiscal year, the office or department budget for similar items exceeds the competitive bidding threshold, and the purchase is not office supplies. Deletes existing text providing that in applying the requirements established by Subsection (a) (relating to requirements before a county may purchase one or more items under a contract, all separate, sequential, or component purchases of items ordered or purchased, with the intent of avoiding the requirements of this subchapter, from the same supplier by the same county officer, department, or institution are treated as if they are part of a single purchase and of a single contract. Deletes existing text providing that in applying this provision to the purchase of office supplies, separate purchases of supplies by an individual department are not considered to be part of a single purchase and single contract by the county if a specific intent to avoid the requirements of this subchapter is not present.

(d) Authorizes a person to rebut the presumption under Subsection (c) if the person timely obtained an exemption for the purchases from the commissioners court under Section 262.024 (Discretionary Exemptions), initiated competitive bidding procedures within a reasonable time after reaching the competitive bidding threshold, or complied with a routine competitive procurement practice adopted by the county purchasing agent or commissioners court under Section 262.0245.

(e) Defines "expenditure" in applying the requirements established in Subsection (a).

SECTION 10. Amends Section 262.024, Local Government Code, by amending Subsection (a), (b), and (d) and adding Subsection (b-1), as follows:

(a) Provides that a contract for the purchase of any of the following items is exempt from the requirement established by Section 262.023 (Competitive Requirements for Certain Purchases) if the commissioners court by order grants the exemption: personal property sold at an action by a state license auctioneer or in a commercial online auction available to the general public, or transportation and lodging purchased in compliance with travel policies adopted by the commissioners court.

(b) Provides that the renewal or extension of an agreement to purchase equipment, supplies, or maintenance service, rather than the renewal or extension of a lease or of an equipment maintenance agreement, is exempt from the requirement established by Section 262.023 if the commissioners court by order grants the exemption and if the renewal or extension does not exceed one year and the renewal or extension is the first or second renewal of the agreement, rather than the lease or agreement has gone through the competitive bidding procedure within the preceding year, and the renewal or extension is the first renewal or extension of the lease or agreement.

(b-1) Provides that the renewal or extension of an agreement to purchase equipment, supplies, or maintenance service initially obtained through a competitive bidding process is exempt from the requirement established by Section 262.023.

(d) Requires the purchasing officer taking telephone or written bids under this subsection to maintain, on a form approved by the commissioners court, a record of all bids solicited and the vendors contacted. Authorizes this record to be audited by the county auditor, rather than requires that the record be kept in the purchasing office for a period of at least one year or until audited by the county auditor.

SECTION 11. Amends Section 262.0245, Local Government Code, as follows:

Sec. 262.0245. New heading: **COMPETITIVE BIDDING PROCEDURES ADOPTED BY COUNTY PURCHASING AGENTS OR COMMISSIONERS COURT.** Requires a county purchasing agent or, in a county without a purchasing agent, the commissioners court to adopt procedures that provide for competitive procurement, rather than bidding, to the extent practicable under the circumstances, for the county purchase of an item, rather than under a contract, that is not subject to competitive bidding under Section 262.023 or for which the county receives no responsive bid.

SECTION 12. Amends Section 262.025, Local Government Code, by amending Subsection (a) and adding Subsections (a-1), (b-1), and (b-2), as follows:

(a) Requires that a notice of a proposed purchase be published at least once, rather than at least once a week, in a newspaper of general circulation in the county, with the first day of publication occurring at least 14 days before the date, rather than occurring before the 14th day before the date, of the bid opening. Requires that the notice be posted in a place described by Section 51.002 (Sale of Real Property Under Contract Lien), Property Code, rather than in a prominent place in the courthouse, for 14 days before the date of the bid opening if there is no newspaper of general circulation in the county. Requires that notice published in a newspaper under this section include:

- (1) a general statement of the proposed purchase;
- (2) the name and telephone number of the purchasing agent; and
- (3) the county website address, if any.

(a-1) Requires that nothing in Subsection (a) be construed to require more than one notice in one newspaper or to limit the county from providing additional notice for longer periods or in more locations.

(b-1) Authorizes the county, if a county maintains an Internet website, instead of meeting the publication requirements under Subsection (a), to publish notice in a newspaper described by Subsection (a) once not later than the 14th day before the bid receipt deadline, and post notice continuously on its website for at least 14 days immediately preceding the bid receipt deadline.

(b-2) Requires that the newspaper notice under Subsection (b-1) include the time and place at which the bids will be publicly opened and the website address for the procurement information.

SECTION 13. Amends Section 262.0255, Local Government Code, by adding Subsection (c), to authorize a commissioners court purchasing earth-moving, material-handling, road maintenance, or construction equipment under Section 271.083 (Local Government Participation) of this code or Section 791.025 (Contracts for Purchases), Government Code, to negotiate with a vendor awarded a cooperative contract under those sections an agreement for the vendor to purchase or accept as trade used equipment owned by the county.

SECTION 14. Reenacts Section 262.0256, Local Government Code, as amended by Chapters 660 (H.B. 2242) and 725 (H.B. 3089), Acts of the 78th Legislature, Regular Session, 2003, and amends it as follows:

Sec. 262.0256. PRE-BID CONFERENCE FOR CERTAIN COUNTIES OR A DISTRICT GOVERNED BY THOSE COUNTIES. (a) Deletes existing Subsection (a) providing that this section applies only to a county with a population of 2.8 million or more. Redesignates existing Subsection (b) as Subsection (a).

(b) Redesignates existing Subsection (c) as Subsection (b). Makes a conforming change.

SECTION 15. Amends Section 262.026(b), Local Government Code, to require that open bids be kept on file and available for inspection by anyone desiring to see them until the first anniversary of the date of opening.

SECTION 16. Amends Section 262.027, Local Government Code, by amending Subsection (c) and adding Subsection (g), as follows:

(c) Prohibits a contract from being awarded to a bidder who is not the lowest dollar bidder meeting specifications unless, before the award, each lower bidder is given:

(1) notice of the proposed award;

(2) the purchasing agent's evaluation and recommendation to the commissioners court or the commissioners court's evaluation of the bid as lowest and best; and

(3) an opportunity to appear before the commissioners court and present previously unconsidered evidence concerning the value of the lower bid, which may include evidence of the bidder's responsibility.

(g) Authorizes the commissioners court to award the contract to the next bidder in order of ranking as lowest and best bid if after the award the successful bidder fails to qualify for required bonds, or is otherwise unable to meet the requirements of the award.

SECTION 17. Amends Section 262.0271(b), Local Government Code, to authorize the commissioners court of the county, in purchasing items under this chapter through a competitive bidding process, if a county receives one or more bids from a bidder who provides reasonable, rather than comparable, health insurance coverage to its employees and requires a subcontractor the bidder intends to use to provide reasonable health insurance coverage to the subcontractor's

employees and whose bid is within five percent of the lowest and best bid price, rather than the lowest bid price, received by the county from a bidder who does not provide or require reasonable health insurance coverage, to give preference to the bidder who provides and requires reasonable health insurance coverage.

SECTION 18. Amends Section 262.0276, Local Government Code, by amending Subsection (a) and adding Subsection (d), as follows:

(a) Authorizes the commissioners court, by an order adopted and entered in the minutes of the commissioners court and after notice is published in a newspaper of general circulation in the county, to adopt rules permitting the county to refuse to enter into a contract or other transaction with a person who owes a debt, rather than a person indebted, to the county.

(d) Defines "debt" in this section.

SECTION 19. Amends Section 262.0295(d), Local Government Code, to require that the award of the contract be made to the responsible offeror whose bid is determined to be the lowest and best, rather than the lowest, evaluated offer resulting from negotiation.

SECTION 20. Amends Section 262.030(b), Local Government Code, to make a conforming change.

SECTION 21. Amends Section 262.032, Local Government Code, by adding Subsection (e), to authorize the commissioners court to establish financial criteria for accepting surety companies that provide bid, payment, or performance bonds.

SECTION 22. Amends Section 262.034, Local Government Code, as follows:

Sec. 262.034. CRIMINAL PENALTIES. (a) Provides that a county officer or employee commits an offense if the officer or employee intentionally or knowingly violates Section 262.023.

(b) Provides that, except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) Creates this subsection from existing text. Provides that an offense under this section, rather than subsection, is:

(1) a Class B misdemeanor if the officer or employee has a personal relationship with the selected vendor that has not been previously disclosed to and approved by the appropriate governing body; or

(2) a Class A misdemeanor if the officer or employee receives or has received from the vendor a benefit as defined by Section 1.07, Penal Code, not provided to all employees.

(d) Defines "personal relationship."

(e) Provides that this section does not apply to a purchase that complies with a procedure adopted under Section 262.0245. Deletes existing Subsections (b) and (c) relating to applicable offenses under this section.

SECTION 23. Amends Section 262.036(a), Local Government Code, to authorize a county, rather than a county with a population of 800,000 or more, notwithstanding any other provision in this chapter, to select an appropriately licensed insurance agent as the sole broker of record to obtain proposals and coverages for insurance that provides necessary coverage and adequate limits of coverage in all areas of risk, including public official liability, property, casualty, workers' compensation, and specific and aggregate stop-loss coverage for self-funded health care.

SECTION 24. Amends Section 271.025(e), Local Government Code, to authorize a county, rather than a county with a population of 3.3 million or more, and any district or authority created under Article XVI (General Provisions), Section 59 (Conservation and Development of Natural Resources and Parks and Recreational Facilities; Conservation and Reclamation Districts), of the Texas Constitution of which the governing body is the commissioners court to require that a minimum of 25 percent of the work be performed by the bidder and, notwithstanding any other law to the contrary, to establish financial criteria for the surety companies that provide payment and performance bonds.

SECTION 25. Amends Section 271.029, Local Government Code, as follows:

Sec. 271.029. CRIMINAL PENALTIES. (a) Provides that an officer or employee, rather than an officer or employee of a governmental entity, commits an offense if the officer or employee intentionally or knowingly:

(1) violates Section 271.024; or

(2) makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of the statute that requires a contract described by Section 271.024, rather than a contract described by Section 271.024 to be awarded on the basis of competitive bids.

(b) Provides that, except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) Creates this subsection from existing text. Provides that an offense under this subsection is:

(1) a Class B misdemeanor if the officer or employee has a personal relationship with the selected vendor that has not been previously disclosed to and approved by the appropriate governing body; or

(2) a Class A misdemeanor if the officer or employee receives or has received from the vendor a benefit as defined in Section 1.07, Penal Code, not provided to all employees.

(d) Defines "personal relationship."

(e) Provides that this section does not apply to a purchase that complies with a procedure adopted under Section 271.024. Deletes existing Subsections (b) and (c) relating to applicable offenses under this section.

SECTION 26. Amends Section 271.042, Local Government Code, by amending Subsection (b) and adding Subsection (c), as follows:

(b) Authorizes an issuer, if there is a conflict between a provision of this subchapter and a provision of Chapter 252 or 262, to use either provision, and it is not necessary for the governing body to designate the law under which action is being taken.

(c) Provides that, notwithstanding Subsection (b), for purposes of enforcement or penalty, a county official or employee is presumed to act under Chapter 262.

SECTION 27. Amends Section 271.055(e), Local Government Code, to authorize a county, rather than a county with a population of 3.3 million or more, and any district or authority created under Article XVI, Section 59, of the Texas Constitution of which the governing body is the commissioners court to require that a minimum of 25 percent of the work be performed by the bidder and, notwithstanding any other law to the contrary, to establish financial criteria for the surety companies that provide payment and performance bonds.

SECTION 28. Amends Section 271.064, Local Government Code, as follows:

Sec. 271.064. CRIMINAL PENALTIES. (a) Provides that an officer or employee of an issuer commits an offense if the officer or employee intentionally or knowingly violates Section 271.054.

(b) Provides that except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) Creates this subsection from existing text. Provides that an offense under this section, rather than subsection, is:

(1) a Class B misdemeanor if the officer or employee has a personal relationship with the selected vendor that has not been previously disclosed to and approved by the appropriate governing body; or

(2) a Class A misdemeanor if the officer or employee receives or has received from the vendor a benefit as defined in Section 1.07, Penal Code, not provided to all employees.

(d) Defines "personal relationship."

(e) Provides that this section does not apply to a purchase that complies with a procedure adopted under Section 271.054. Deletes existing Subsections (b) and (c) relating to applicable offenses under this section.

SECTION 29. Amends Section 252.312, Transportation Code, by amending Subsection (b) and adding Subsection (d), as follows:

(b) Authorizes that a purchase in an amount of \$25,000 or less, if the county road engineer so recommends and the commissioners court considers it to be in the best interest of the county, be made through negotiation by the commissioners court or the court's authorized representative under Subchapter B (Purchasing Agents), Chapter 262 (Purchasing and Contracting Authority of Counties), Local Government Code, on requisition to be approved by the commissioners court, rather than the commissioners court or the county auditor, without advertising for competitive bids.

(d) Provides that the cost under this section is the final amount of the payment for the purchase.

SECTION 30. Repealers: Sections 262.0295(a)(3) (relating to the provision that the section only applies to a county with a population of 125,000 or more), 262.035 (Removal; Ineligibility), 271.030 (Removal; Ineligibility), and 271.065 (Removal; Ineligibility), Local Government Code.

SECTION 31. Makes application of this Act prospective.

SECTION 32. (a) Provides that, notwithstanding Section 31 of this Act, the changes in law made by this Act to Sections 262.034, 271.029, and 271.064, Local Government Code, apply only to an offense committed on or after the effective date of this Act. Provides that for purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

(b) Provides that an offense committed before the effective date of this Act is covered by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

SECTION 33. Effective date: September 1, 2009.