

## **BILL ANALYSIS**

C.S.H.B. 3028  
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Natural Resources  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Currently, Texas ports have the authority to contract using various methods including a limited form of design-build through Chapter 44 of the Education Code. The design-build method of construction alleviates many of the pitfalls inherent in preliminary planning for a project by offering an insured construction method. Design-build is a method of contracting in which an owner hires a competent design firm or contractor who in turn hires an architect, structural engineer, mechanical/electrical engineer, civil engineer, and any specialty consultants. All design and construction is handled under one contract. The design team works with the owner from day one to design a building best suited to the owner's needs. The result is a project with a realistic budget, little or no change orders, time savings and effective design from the start. C.S.H.B. 3028 will copy much of Chapter 44 of the Education Code to the Water Code with some changes. The definition of facility is changed to allow ports to use alternative contracting methods to construct docks and wharves, and a provision was added to allow a stipend to losing design-build proposals to cover their cost of providing additional information, especially engineering and architectural designs. This provision will also allow ports to use design features in the losing proposals on the winning proposals.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

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

Sec. 60.451. DEFINITIONS. Provides definitions for a variety of terms used in Subchapter O.

- (1) "Architect" has the meaning assigned by Section 1051.001, Occupations Code.
- (2) "Contractor" in the context of a contract for the construction of a facility means a legal entity that assumes the risk for constructing the facility at the contracted price.
- (3) "Construction manager-agent" means a legal entity that provides consultation to the district regarding construction of a facility.
- (4) "Construction manager-at-risk" means a legal entity that assumes the risk for construction of a facility at the contracted price as a general contractor and provides consultation to the district regarding construction during and after the design of the facility.
- (5) "Design-build contract" means a single contract with a design-build firm for the design and construction of a facility.
- (6) "Design-build firm" means a legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas.
- (7) "Design criteria package" means a set of documents prepared by a district that provides sufficient information to permit a design-build firm to prepare a response to a district's request for qualifications. The design criteria package must specify criteria the district considers necessary to

describe the project and may include, as appropriate:

- (A) the legal description of the site;
- (B) survey information concerning the site;
- (C) interior space requirements;
- (D) special material requirements;
- (E) material quality standards;
- (F) conceptual criteria for the project;
- (G) special equipment requirements;
- (H) cost or budget estimates;
- (I) time schedules;
- (J) quality assurance and quality control requirements;
- (K) site development requirements;
- (L) applicable codes and ordinances;
- (M) provisions for utilities;
- (N) geotechnical baseline reports;
- (O) parking requirements; or
- (P) any other requirements, as applicable.

(8) "District" means a navigation district or port authority created or operating under Section 52, Article III, or Section 59, Article XVI, Texas Constitution.

(9) "Engineer" has the meaning assigned by Section 1001.002, Occupations Code.

(10) "Facility" means real property, including buildings, associated, structures, utilities, docks, wharves, channels, dredge material placement areas, marine terminal, improvements, railroads on or adjacent to the marine terminal, and improved or unimproved land. The term also includes roads or bridges that are incidental to a larger project.

(11) "Fee" in the context of a contract for the construction of a facility means the payment a construction manager-agent or construction manager-at-risk receives for the manager's overhead and profit in performing the manager's services.

(12) "General conditions" in the context of a contract for the construction, of a facility means on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.

Sec. 60.452. **APPLICABILITY OF SUBCHAPTER; OTHER LAW.** (a) Provides that the district may not use this subchapter to contract solely for professional services. (b) If a district elects to use this subchapter, it prevails over other laws.

Sec. 60.453. **AUTHORITY TO ADOPT RULES.** The commission of a port may adopt rules for using this subchapter.

Sec. 60.454. **PURCHASING CONTRACT METHODS.** Allows a port commission to choose the contract method that provides the best value for the port. The district can choose from:

- Design-build contracts
- Construction manager-agent contracts or construction manager-at-risk
- Competitive sealed proposals
- A job order contract
- Request for proposals for non-construction services
- Competitive sealed bids
- A catalog purchase
- A interlocal contract agreement
- A reverse auction procedure

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

Sec. 60.456. **NOTICE REQUIREMENTS.** Prescribes what the district shall do to publish notice of the time and place the bids, proposals or the responses to a request for qualifications under this subchapter will

be received and opened.

Sec. 60.457. DELEGATION. The commission may delegate authority under this subchapter to staff, except actions required by other provisions for commission decisions.

Sec. 60.458. PURCHASE CONTRACT AWARD CRITERIA. The district may consider:

- the purchase price;
- the reputation of the vendor and the vendor's goods;
- the quality of the vendor's goods;
- the extent to which the goods or services meet the district's needs;
- the vendor's past relationship with the district;
- the impact of the contract to comply with laws and rules relating to Historically Underutilized Businesses, a district's small business development program or other contracting program;
- the long-term cost of a vendor's goods or services;
- any other relevant factor

Sec. 60.459. EVALUATION OF BIDS AND PROPOSALS FOR CONSTRUCTION SERVICES.

- (a) the commission must decide what method of contracting will provide the best value for the district for advertising the bid, proposal or request for qualifications.
- (b) The district shall base its decision on an award criteria.
- (c) The district will document the basis of the selection.

Sec. 60.460. DESIGN-BUILD CONTRACTS FOR FACILITIES. (a) A design-build contract can be used if it the provision of this section are followed.

(b) The district shall designate an engineer or architect, either an employee or hired under the provision of Section 2254.004, Government Code, independent of the design-build firm to act as the district's representative.

(c) The district shall prepare a request for qualifications that includes general information on the project, a design criteria package, and if engineering or architectural services are needed to complete the package, the service shall be provided within applicable law.

(d) The district shall evaluate statements of qualifications and select a design-build firm in two phases:

(1) The district shall prepare a request for qualifications and evaluate each offeror's experience, technical competence, and capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. Each offeror must certify to the district that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications, in the manner provided by Section 2254.004, Government Code. The district shall qualify a maximum of five offerors to submit additional information and, if the district chooses, to interview for final selection.

(2) In phase two, the district shall 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. The district may request additional information regarding demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, construction cost, engineering and architectural design, or other factors as appropriate. The district shall rank each proposal submitted on the basis of the criteria set forth in the request for qualifications. The district shall 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. The district shall first attempt to negotiate a contract with the selected offeror. If the district is unable to negotiate a satisfactory contract with the selected offeror, the district shall, 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.

(e) The winning firm's engineers or architects shall 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) The district shall provide, 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. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

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

(h) 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. 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 must each be in an amount equal to the project budget, as specified in the design criteria package.

(i) The district shall 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. After payment of the stipulated amount, the district may make use of any design contained in the proposal, including the technologies, techniques, methods, processes, and information contained in the design. The use by the district of any design element 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. The methodology for computing the stipulated amount must be stated in the request for additional information under (d)(2) of this section.

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

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

(b) A district may, under the contract between the district and the construction manager-agent, 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.

(c) Before or concurrently with selecting a construction manager-agent, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect as provided by Section 2254.004, Government Code.

(d) A district shall 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) A district contracting with a construction manager-agent shall procure, in accordance with applicable law, and in any manner authorized by this chapter, a contractor for their specific portion of the work.

(f) The district or the construction manager-agent shall 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) A district may award a contract to a construction manager-at-risk for the construction of a facility provided that the construction manager-at-risk and the district follow the procedures prescribed by this section.

(b) Before or concurrently with selecting a construction manager-at-risk, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect in accordance with Section 2254.004, Government Code.

(c) The district shall 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.

(d) The district shall select the construction manager-at-risk in either a one-step or two-step process. The district shall 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. The district shall state the selection criteria in the request for proposals or qualifications, as applicable. The selection criteria may 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. If a one-step process is used, the district may request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions.

(e) If a two-step process is used, the district may not request fees or prices in step one. In step two, the district may 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) At each step, the district shall receive, publicly open, and read aloud the names of the offerors.

(g) The district shall 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. The district shall first attempt to negotiate a contract with the selected offeror. If the district is unable to negotiate a satisfactory contract with the selected offeror, the district shall, 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) If a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, the penal sums of the performance and payment bonds delivered to the district must each be in an amount equal to the project budget, as specified in the request for proposals or qualifications.

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

(b) The district shall select or designate an engineer or architect to prepare construction documents for the project. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect as provided by Section 2254.004, Government Code.

(c) The district shall 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.

(d) The district shall 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. The district shall state in the request for proposals the selection criteria that will be used in selecting the successful offeror.

(e) The district shall 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. Not later than the 45th day after the date of opening the proposals, the district shall evaluate and rank each proposal submitted in relation to the published selection criteria.

(f) The district shall select the offeror that offers the best value for the district based on the published selection criteria and on its ranking evaluation. The district shall first attempt to negotiate a contract with the selected offeror. If the district is unable to negotiate a contract with the selected offeror, the district shall, 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) In determining best value for the district, the district 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) A district may 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) The district may establish contractual unit prices for a job order contract by:

(1) specifying one or more published construction unit price books and the applicable divisions or line items; or

(2) providing a list of work items and requiring the offerors to bid or propose one or more coefficients or multipliers to be applied to the price book or work items as the price proposal.

(c) The district shall advertise for, receive, and publicly open sealed proposals for job order contracts.

(d) The district may require offerors to submit, in addition to information on rates, other information, including experience, past performance, and proposed personnel and methodology.

(e) The district may award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals.

(f) An order for a job or project under the job order contract must be signed by the district's representative and the contractor. The order may be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or may be a unit price order based on the quantities and line items delivered.

(g) The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

(h) 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. If the district fails to advertise that term, the base term may not exceed two years and is not renewable without further advertisement and solicitation of proposals.

(I) If a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering those services shall be provided in accordance with applicable law.

Sec. 60.465. EXPIRATION. This subchapter expires September 1, 2013.

SECTION 2. Section 60.4125, Water Code, is repealed.

SECTION 3. 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. Effective Date.

#### **EFFECTIVE DATE**

On passage, or if the Act does not receive the necessary vote, the Act takes effect on September 1, 2003.

#### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.H.B. 3028 differs from the original by making several minor changes to clean up or clarifying provisions; however, C.S.H.B. 3028 makes several substantive changes.

C.S.H.B. 3028 changes the definition of facility to add channels, dredge disposal areas, utilities, railroads on or adjacent to the terminal and marine terminal improvements. This is done to ensure roads and bridges are only constructed as part of a larger project, like a marine terminal (60.541(10)).

C.S.H.B. 3028 differs so that ports have the right to reject any and all bids (60.455).

C.S.H.B. 3028 clarifies the bill regarding historically underutilized businesses to include small business development programs or other contracting programs of the port, if any. (60.458(6)).

C.S.H.B. 3028 adds a provision to ensure the Texas Engineering Practices Act would apply to an engineer hired directly by the port as a project manager (60.460 (c)).

C.S.H.B. 3028 adds a provision to the first phase of the design-build selection process that requires the design-build firm to certify to the port that each engineer or architect on the design-build team was selected on competence and qualifications - not price (60.460(d)(1)).

C.S.H.B. 3028 sets up a stipend system for unsuccessful design-build proposals. In phase 2 of the design-build selection process, after the field has been reduced to no more than 5 proposers. The port can request additional information from each proposer including construction costs, and engineering and architectural design. An unsuccessful proposer could spend significant funds in preparing the proposal. To reduce the cost to the proposer, a stipend of up to one-half of one percent of the value of awarded contract is allowed in this bill to each losing proposer. The maximum amount is 2 percent of the contract value for 4 unsuccessful proposers. In return for paying the stipend, the port is allowed to use any design feature or cost savings presented in the losing proposals (60.460(i)).

C.S.H.B. 3028 provides that the district may use a design-build firm to assist the district in obtaining necessary permits, but the district is ultimately responsible for obtaining necessary permits for the facility (60.460(j)).

C.S.H.B. 3028 sets an expiration date of September 1, 2013 for this subchapter.

