

By: Hinojosa

S.B. No. 1396

A BILL TO BE ENTITLED

AN ACT

relating to certain purchasing contracts of certain navigation districts and port authorities.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 60, Water Code, is amended by adding Subchapter O to read as follows:

SUBCHAPTER O. LARGE PURCHASE CONTRACTS

Sec. 60.451. DEFINITIONS. In this subchapter:

(1) "Architect" has the meaning assigned by Section 1051.001, Occupations Code.

(2) "Contractor" in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price.

(3) "Construction manager-agent" means a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the district regarding construction, rehabilitation, alteration, or repair of a facility.

(4) "Construction manager-at-risk" means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a

1 general contractor and provides consultation to the district
2 regarding construction during and after the design of the facility.

3 (5) "Design-build contract" means a single contract
4 with a design-build firm for the design and construction of a
5 facility.

6 (6) "Design-build firm" means a partnership,
7 corporation, or other legal entity or team that includes an
8 engineer or architect and builder qualified to engage in building
9 construction in Texas.

10 (7) "Design criteria package" means a set of documents
11 prepared by a district that provides sufficient information to
12 permit a design-build firm to prepare a response to a district's
13 request for qualifications and any additional information
14 requested, including criteria for selection. The design criteria
15 package must specify criteria the district considers necessary to
16 describe the project and may include, as appropriate:

- 17 (A) the legal description of the site;
- 18 (B) survey information concerning the site;
- 19 (C) interior space requirements;
- 20 (D) special material requirements;
- 21 (E) material quality standards;
- 22 (F) conceptual criteria for the project;
- 23 (G) special equipment requirements;
- 24 (H) cost or budget estimates;
- 25 (I) time schedules;
- 26 (J) quality assurance and quality control
27 requirements;

- 1 (K) site development requirements;
- 2 (L) applicable codes and ordinances;
- 3 (M) provisions for utilities;
- 4 (N) parking requirements; or
- 5 (O) any other requirements, as applicable.

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

9 (9) "Engineer" has the meaning assigned by Section
10 1001.002, Occupations Code.

11 (10) "Facility" means real property, including
12 buildings and associated structures, docks, wharves, and improved
13 or unimproved land.

14 (11) "Fee" in the context of a contract for the
15 construction, rehabilitation, alteration, or repair of a facility
16 means the payment a construction manager-agent or construction
17 manager-at-risk receives for the manager's overhead and profit in
18 performing the manager's services.

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

24 Sec. 60.452. APPLICABILITY OF SUBCHAPTER; OTHER LAW. (a)
25 This subchapter does not apply to a contract for professional
26 services rendered, including services of an architect, attorney, or
27 fiscal agent.

1 (b) This subchapter prevails over any other law relating to
2 a purchase contract for goods and services by a district that is in
3 conflict with or inconsistent with this subchapter except a law
4 relating to contracting with a historically underutilized
5 business.

6 Sec. 60.453. AUTHORITY TO ADOPT RULES. The commission of a
7 district may adopt rules and procedures for the acquisition of
8 goods or services.

9 Sec. 60.454. PURCHASING CONTRACT METHODS. Notwithstanding
10 any other provision of this chapter or other law, a district
11 contract valued at \$25,000 or more in the aggregate for each
12 12-month period may be made by the method below that, in the opinion
13 of the district's commission, provides the best value for the
14 district:

15 (1) a design-build contract;

16 (2) a contract to construct, rehabilitate, alter, or
17 repair facilities that involves using a construction manager-agent
18 or construction manager-at-risk;

19 (3) competitive sealed proposals;

20 (4) a job order contract for the minor construction,
21 repair, rehabilitation, or alteration of a facility;

22 (5) a request for proposals, if the contract is for
23 services other than construction services;

24 (6) a catalog purchase as provided by Subchapter B,
25 Chapter 2157, Government Code;

26 (7) an interlocal contract as provided by Chapter 791,
27 Government Code; or

1 (8) the reverse auction procedure as defined by
2 Section 2155.062(d), Government Code.

3 Sec. 60.455. NOTICE REQUIREMENTS. For a contract entered
4 into by a district under any of the methods provided by this
5 subchapter, the district shall publish notice of the time and place
6 the bids or proposals, or the responses to a request for
7 qualifications, will be received and opened. The notice must be
8 published in a newspaper of general circulation in each county in
9 which the district is located once each week for two consecutive
10 weeks before the deadline for receiving bids, proposals, or
11 responses. If there is not a newspaper of general circulation in
12 any county in which the district is located, the notice shall be
13 published in a newspaper of general circulation in the county
14 nearest the county seat of the county in which the district is
15 located or the county in which the greatest amount of the district's
16 territory is located. In a two-step procurement process, the time
17 and place the second-step bids, proposals, or responses will be
18 received are not required to be published separately.

19 Sec. 60.456. DELEGATION. (a) The commission of a district
20 may, as appropriate, delegate its authority under this subchapter
21 regarding an action authorized or required by this subchapter to be
22 taken by a district to a designated person, representative, or
23 committee. In procuring construction services, the district shall
24 provide notice of the delegation and the limits of the delegation in
25 the request for bids, proposals, or qualifications, or in an
26 addendum to the request. If the district fails to provide that
27 notice, a ranking, selection, or evaluation of bids, proposals, or

1 qualifications for construction services other than by the
2 commission in an open meeting is advisory only.

3 (b) A commission may not delegate the authority to act
4 regarding an action authorized or required by this subchapter to be
5 taken by the commission of a district.

6 Sec. 60.457. PURCHASE CONTRACT AWARD CRITERIA. Except as
7 provided by this subchapter, in determining to whom to award a
8 contract, the district may consider:

9 (1) the purchase price;

10 (2) the reputation of the vendor and of the vendor's
11 goods or services;

12 (3) the quality of the vendor's goods or services;

13 (4) the extent to which the goods or services meet the
14 district's needs;

15 (5) the vendor's past relationship with the district;

16 (6) the impact on the ability of the district to comply
17 with laws and rules relating to historically underutilized
18 businesses;

19 (7) the total long-term cost to the district to
20 acquire the vendor's goods or services; and

21 (8) any other relevant factor specifically listed in
22 the request for bids or proposals.

23 Sec. 60.458. EVALUATION OF BIDS AND PROPOSALS FOR
24 CONSTRUCTION SERVICES. (a) The commission of a district that is
25 considering a construction contract using a method specified by
26 Section 60.454 must, before advertising, determine which method
27 provides the best value for the district.

1 (b) The district shall base its selection among offerors on
2 criteria authorized to be used under Section 60.457. The district
3 shall publish in the request for bids, proposals, or qualifications
4 the specific criteria that will be used to evaluate the offerors and
5 the relative weights given to the criteria.

6 (c) The district shall document the basis of its selection
7 and shall make the evaluations public not later than the seventh day
8 after the date of the award of the contract.

9 Sec. 60.459. DESIGN-BUILD CONTRACTS FOR FACILITIES. (a) A
10 district may award a design-build contract for the construction,
11 rehabilitation, alteration, or repair of a facility provided that
12 the contracting district and the design-build firm follow the
13 procedures provided by this section.

14 (b) The district shall designate an engineer or architect
15 independent of the design-build firm to act as its representative
16 for the duration of the work on the facility. If the district's
17 engineer or architect is not a full-time employee of the district,
18 the district shall select the engineer or architect as provided by
19 Section 2254.004, Government Code.

20 (c) The district shall prepare a request for qualifications
21 that includes general information on the project site, project
22 scope, budget, special systems, selection criteria, and other
23 information that may assist potential design-build firms in
24 submitting proposals for the project. The district shall also
25 prepare a design criteria package that includes more detailed
26 information on the project. If the preparation of the design
27 criteria package requires engineering or architectural services

1 that constitute the practice of engineering within the meaning of
2 Chapter 1001, Occupations Code, or the practice of architecture
3 within the meaning of Chapter 1051, Occupations Code, those
4 services shall be provided in accordance with the applicable law.

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

7 (1) In phase one, the district shall prepare a request
8 for qualifications and evaluate each offeror's experience,
9 technical competence, and capability to perform, the past
10 performance of the offeror's team and members of the team, and other
11 appropriate factors submitted by the team or firm in response to the
12 request for qualifications, except that cost-related or
13 price-related evaluation factors are not permitted. The district
14 shall qualify a maximum of five offerors to submit additional
15 information and, if the district chooses, to interview for final
16 selection.

17 (2) In phase two, the district shall evaluate the
18 information submitted by the offerors on the basis of the selection
19 criteria stated in the request for qualifications and the results
20 of any interview. The district may request additional information
21 regarding demonstrated competence and qualifications,
22 considerations of the safety and long-term durability of the
23 project, the feasibility of implementing the project as proposed,
24 the ability of the offeror to meet schedules, costing methodology,
25 construction cost, engineering and architectural design, or other
26 factors as appropriate. The district shall rank each proposal
27 submitted on the basis of the criteria set forth in the request for

1 qualifications. The district shall select the design-build firm
2 that submits the proposal offering the best value for the district
3 on the basis of the published selection criteria and on its ranking
4 evaluations. The district shall first attempt to negotiate a
5 contract with the selected offeror. If the district is unable to
6 negotiate a satisfactory contract with the selected offeror, the
7 district shall, formally and in writing, end negotiations with that
8 offeror and proceed to negotiate with the next offeror in the order
9 of the selection ranking until a contract is reached or
10 negotiations with all ranked offerors end.

11 (e) Following selection of a design-build firm under
12 Subsection (d), that firm's engineers or architects shall complete
13 the design, submitting all design elements for review and
14 determination of scope compliance to the district or the district's
15 engineer or architect before or concurrently with construction.

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

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

25 (h) A payment or performance bond is not required for, and
26 may not provide coverage for, the portion of a design-build
27 contract under this subchapter that includes design services only.

1 If a fixed contract amount or guaranteed maximum price has not been
2 determined at the time a design-build contract is awarded, the
3 penal sums of the performance and payment bonds delivered to the
4 district must each be in an amount equal to the project budget, as
5 specified in the design criteria package. The design-build firm
6 shall deliver the bonds not later than the 10th day after the date
7 the design-build firm executes the contract unless the design-build
8 firm furnishes a bid bond or other financial security acceptable to
9 the district to ensure that the design-build firm will furnish the
10 required performance and payment bonds when a guaranteed maximum
11 price is established.

12 Sec. 60.460. CONTRACTS FOR FACILITIES: CONSTRUCTION
13 MANAGER-AGENT. (a) A district may award a contract to a
14 construction manager-agent for the construction, rehabilitation,
15 alteration, or repair of a facility provided that the construction
16 manager-agent and the district follow the procedures prescribed by
17 this section.

18 (b) A district may, under the contract between the district
19 and the construction manager-agent, require the construction
20 manager-agent to provide administrative personnel, equipment
21 necessary to perform duties under this section, and on-site
22 management and other services specified in the contract. A
23 construction manager-agent represents the district in a fiduciary
24 capacity.

25 (c) Before or concurrently with selecting a construction
26 manager-agent, the district shall select or designate an engineer
27 or architect who shall prepare the construction documents for the

1 project and who has full responsibility for complying with Chapter
2 1001 or 1051, Occupations Code, as applicable. If the engineer or
3 architect is not a full-time employee of the district, the district
4 shall select the engineer or architect as provided by Section
5 2254.004, Government Code. The district's engineer or architect
6 may not serve, alone or in combination with another person, as the
7 construction manager-agent unless the engineer or architect is
8 hired to serve as the construction manager-agent under a separate
9 or concurrent procurement conducted in accordance with this
10 subchapter. This subsection does not prohibit the district's
11 engineer or architect from providing customary construction phase
12 services under the engineer's or architect's original professional
13 service agreement in accordance with applicable laws.

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

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

23 (f) The district or the construction manager-agent shall
24 procure in accordance with Section 2254.004, Government Code, and
25 in any manner authorized by this chapter, all of the testing of
26 construction materials, the inspection services, and the
27 verification testing services necessary for acceptance of the

1 facility by the district.

2 Sec. 60.461. CONTRACTS FOR FACILITIES: CONSTRUCTION
3 MANAGER-AT-RISK. (a) A district may award a contract to a
4 construction manager-at-risk for the construction, rehabilitation,
5 alteration, or repair of a facility provided that the construction
6 manager-at-risk and the district follow the procedures prescribed
7 by this section.

8 (b) Before or concurrently with selecting a construction
9 manager-at-risk, the district shall select or designate an engineer
10 or architect who shall prepare the construction documents for the
11 project and who has full responsibility for complying with Chapter
12 1001 or 1051, Occupations Code, as applicable. If the engineer or
13 architect is not a full-time employee of the district, the district
14 shall select the engineer or architect in accordance with Section
15 2254.004, Government Code. The district's engineer, architect, or
16 construction manager-agent for a project may not serve, alone or in
17 combination with another, as the construction manager-at-risk.

18 (c) The district shall provide or contract for,
19 independently of the construction manager-at-risk, the inspection
20 services, the testing of construction materials, and the
21 verification testing services necessary for acceptance of the
22 facility by the district. The district shall select those services
23 for which it contracts in accordance with Section 2254.004,
24 Government Code.

25 (d) The district shall select the construction
26 manager-at-risk in either a one-step or two-step process. The
27 district shall prepare a request for proposals, in the case of a

1 one-step process, or a request for qualifications, in the case of a
2 two-step process, that includes general information on the project
3 site, project scope, schedule, selection criteria, estimated
4 budget, and the time and place for receipt of proposals or
5 qualifications, as applicable, a statement as to whether the
6 selection process is a one-step or two-step process, and other
7 information that may assist the district in its selection of a
8 construction manager-at-risk. The district shall state the
9 selection criteria in the request for proposals or qualifications,
10 as applicable. The selection criteria may include the offeror's
11 experience, past performance, safety record, proposed personnel
12 and methodology, and other appropriate factors that demonstrate the
13 capability of the construction manager-at-risk. If a one-step
14 process is used, the district may request, as part of the offeror's
15 proposal, proposed fees and prices for fulfilling the general
16 conditions.

17 (e) If a two-step process is used, the district may not
18 request fees or prices in step one. In step two, the district may
19 request that five or fewer offerors, selected solely on the basis of
20 qualifications, provide additional information, including the
21 construction manager-at-risk's proposed fee and its price for
22 fulfilling the general conditions.

23 (f) At each step, the district shall receive, publicly open,
24 and read aloud the names of the offerors. At the appropriate step,
25 the district shall also read aloud the fees and prices, if any,
26 stated in each proposal as the proposal is opened. Not later than
27 the 45th day after the date of opening the proposals, the district

1 shall evaluate and rank each proposal submitted in relation to the
2 criteria set forth in the request for proposals.

3 (g) The district shall select the offeror that submits the
4 proposal that offers the best value for the district based on the
5 published selection criteria and on its ranking evaluation. The
6 district shall first attempt to negotiate a contract with the
7 selected offeror. If the district is unable to negotiate a
8 satisfactory contract with the selected offeror, the district
9 shall, formally and in writing, end negotiations with that offeror
10 and proceed to negotiate with the next offeror in the order of the
11 selection ranking until a contract is reached or negotiations with
12 all ranked offerors end.

13 (h) If a fixed contract amount or guaranteed maximum price
14 has not been determined at the time the contract is awarded, the
15 penal sums of the performance and payment bonds delivered to the
16 district must each be in an amount equal to the project budget, as
17 specified in the request for proposals or qualifications. The
18 construction manager-at-risk shall deliver the bonds not later than
19 the 10th day after the date the construction manager-at-risk
20 executes the contract unless the construction manager-at-risk
21 furnishes a bid bond or other financial security acceptable to the
22 district to ensure that the construction manager-at-risk will
23 furnish the required performance and payment bonds when a
24 guaranteed maximum price is established.

25 Sec. 60.462. SELECTING CONTRACTOR FOR CONSTRUCTION
26 SERVICES THROUGH COMPETITIVE SEALED PROPOSALS. (a) In selecting a
27 contractor for construction, rehabilitation, alteration, or repair

1 services for a facility through competitive sealed proposals, a
2 district shall follow the procedures prescribed by this section.

3 (b) The district shall select or designate an engineer or
4 architect to prepare construction documents for the project. The
5 selected or designated engineer or architect has full
6 responsibility for complying with Chapter 1001 or 1051, Occupations
7 Code, as applicable. If the engineer or architect is not a
8 full-time employee of the district, the district shall select the
9 engineer or architect as provided by Section 2254.004, Government
10 Code.

11 (c) The district shall provide or contract for,
12 independently of the contractor, the inspection services, the
13 testing of construction materials, and the verification testing
14 services necessary for acceptance of the facility by the district.
15 The district shall select those services for which it contracts in
16 accordance with Section 2254.004, Government Code, and shall
17 identify them in the request for proposals.

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

24 (e) The district shall receive, publicly open, and read
25 aloud the names of the offerors and, if any are required to be
26 stated, all prices stated in each proposal. Not later than the 45th
27 day after the date of opening the proposals, the district shall

1 evaluate and rank each proposal submitted in relation to the
2 published selection criteria.

3 (f) The district shall select the offeror that offers the
4 best value for the district based on the published selection
5 criteria and on its ranking evaluation. The district shall first
6 attempt to negotiate a contract with the selected offeror. The
7 district and its engineer or architect may discuss with the
8 selected offeror options for a scope or time modification and any
9 price change associated with the modification. If the district is
10 unable to negotiate a contract with the selected offeror, the
11 district shall, formally and in writing, end negotiations with that
12 offeror and proceed to the next offeror in the order of the
13 selection ranking until a contract is reached or all proposals are
14 rejected.

15 (g) In determining best value for the district, the district
16 is not restricted to considering price alone, but may consider any
17 other factor stated in the selection criteria.

18 Sec. 60.463. JOB ORDER CONTRACTS FOR FACILITIES
19 CONSTRUCTION OR REPAIR. (a) A district may award job order
20 contracts for the minor construction, repair, rehabilitation, or
21 alteration of a facility if the work is of a recurring nature but
22 the delivery times are indefinite and indefinite quantities and
23 orders are awarded substantially on the basis of prescribed and
24 prepriced tasks.

25 (b) The district may establish contractual unit prices for a
26 job order contract by:

27 (1) specifying one or more published construction unit

1 price books and the applicable divisions or line items; or

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

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

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

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

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

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

22 (h) The base term of a job order contract is for the period
23 and with any renewal options that the district sets forth in the
24 request for proposals. If the district fails to advertise that
25 term, the base term may not exceed two years and is not renewable
26 without further advertisement and solicitation of proposals.

27 (i) If a job order contract or an order issued under the

1 contract requires engineering or architectural services that
2 constitute the practice of engineering within the meaning of
3 Chapter 1001, Occupations Code, or the practice of architecture
4 within the meaning of Chapter 1051, Occupations Code, those
5 services shall be provided in accordance with applicable law.

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

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

11 SECTION 4. This Act takes effect immediately if it receives
12 a vote of two-thirds of all the members elected to each house, as
13 provided by Section 39, Article III, Texas Constitution. If this
14 Act does not receive the vote necessary for immediate effect, this
15 Act takes effect September 1, 2003.