

1-1 By: Hinojosa S.B. No. 1396
1-2 (In the Senate - Filed March 13, 2003; March 20, 2003, read
1-3 first time and referred to Committee on Natural Resources;
1-4 May 5, 2003, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 9, Nays 1; May 5, 2003, sent
1-6 to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1396 By: Hinojosa

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to certain purchasing contracts of certain navigation
1-11 districts and port authorities.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Chapter 60, Water Code, is amended by adding
1-14 Subchapter O to read as follows:

1-15 SUBCHAPTER O. PURCHASE CONTRACTS

1-16 Sec. 60.451. DEFINITIONS. In this subchapter:

1-17 (1) "Architect" has the meaning assigned by Section
1-18 1051.001, Occupations Code.

1-19 (2) "Contractor" in the context of a contract for the
1-20 construction, rehabilitation, alteration, or repair of a facility
1-21 means a sole proprietorship, partnership, corporation, or other
1-22 legal entity that assumes the risk for constructing,
1-23 rehabilitating, altering, or repairing all or part of the facility
1-24 at the contracted price.

1-25 (3) "Construction manager-agent" means a sole
1-26 proprietorship, partnership, corporation, or other legal entity
1-27 that provides consultation to the district regarding construction,
1-28 rehabilitation, alteration, or repair of a facility.

1-29 (4) "Construction manager-at-risk" means a sole
1-30 proprietorship, partnership, corporation, or other legal entity
1-31 that assumes the risk for construction, rehabilitation,
1-32 alteration, or repair of a facility at the contracted price as a
1-33 general contractor and provides consultation to the district
1-34 regarding construction during and after the design of the facility.

1-35 (5) "Design-build contract" means a single contract
1-36 with a design-build firm for the design and construction of a
1-37 facility.

1-38 (6) "Design-build firm" means a partnership,
1-39 corporation, or other legal entity or team that includes an
1-40 engineer or architect and builder qualified to engage in building
1-41 construction in Texas.

1-42 (7) "Design criteria package" means a set of documents
1-43 prepared by a district that provides sufficient information to
1-44 permit a design-build firm to prepare a response to a district's
1-45 request for qualifications and any additional information
1-46 requested, including criteria for selection. The design criteria
1-47 package must specify criteria the district considers necessary to
1-48 describe the project and may include, as appropriate:

1-49 (A) the legal description of the site;
1-50 (B) survey information concerning the site;
1-51 (C) interior space requirements;
1-52 (D) special material requirements;
1-53 (E) material quality standards;
1-54 (F) conceptual criteria for the project;
1-55 (G) special equipment requirements;
1-56 (H) cost or budget estimates;
1-57 (I) time schedules;
1-58 (J) quality assurance and quality control
1-59 requirements;

1-60 (K) site development requirements;
1-61 (L) applicable codes and ordinances;
1-62 (M) provisions for utilities;
1-63 (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, roads and bridges 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, rehabilitation, alteration, or repair 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, rehabilitation, alteration, or repair 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) This subchapter does not apply to a contract solely for professional services rendered, including services of an architect, attorney, or fiscal agent.

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

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

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

(1) a design-build contract to construct, rehabilitate, alter, or repair facilities;

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

(3) competitive sealed proposals;

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

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

(6) competitive sealed bids;

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

(8) an interlocal contract as provided by Chapter 791, Government Code; or

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

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. For a contract entered into by a district under any of the methods provided by this subchapter, the district shall publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened. The notice must 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. If there is not a newspaper of general circulation in any county in which the district is located, the notice shall 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. 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) The commission of a district may, as it considers appropriate, 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. In procuring construction services, the district shall 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. 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) A commission may not delegate 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. Except as provided by this subchapter, in determining to whom to award a contract, the district may consider:

- (1) the purchase price;
- (2) the reputation of the vendor and of the vendor's goods or services;
- (3) the quality of the vendor's goods or services;
- (4) the extent to which the goods or services meet the district's needs;
- (5) the vendor's past relationship with the district;
- (6) the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses, the district's small business development program, or another contracting program approved by the district, if any;
- (7) the total long-term cost to the district to acquire the vendor's goods or services; and
- (8) any other relevant factor specifically listed in the request for bids or proposals.

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

(b) The district shall base its selection among offerors on criteria authorized to be used under Section 60.458. The district shall 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) The district shall document the basis of its selection and shall make the evaluations public not later than the seventh day after the date of the award of the contract.

Sec. 60.460. DESIGN-BUILD CONTRACTS FOR FACILITIES. (a) A district may 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) The district shall 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. If the district's 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 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. The district shall also

4-1 prepare a design criteria package that includes more detailed
4-2 information on the project. If the preparation of the design
4-3 criteria package requires engineering or architectural services
4-4 that constitute the practice of engineering within the meaning of
4-5 Chapter 1001, Occupations Code, or the practice of architecture
4-6 within the meaning of Chapter 1051, Occupations Code, those
4-7 services shall be provided in accordance with the applicable law.
4-8 An engineer shall have responsibility for compliance with the
4-9 engineering design requirements and all other applicable
4-10 requirements of Chapter 1001, Occupations Code. An architect shall
4-11 have responsibility for compliance with the requirements of Chapter
4-12 1051, Occupations Code.

4-13 (d) The district shall evaluate statements of
4-14 qualifications and select a design-build firm in two phases:

4-15 (1) In phase one, the district shall prepare a request
4-16 for qualifications and evaluate each offeror's experience,
4-17 technical competence, and capability to perform, the past
4-18 performance of the offeror's team and members of the team, and other
4-19 appropriate factors submitted by the team or firm in response to the
4-20 request for qualifications, except that cost-related or
4-21 price-related evaluation factors are not permitted. Each offeror
4-22 must certify to the district that each engineer or architect who is
4-23 a member of its team was selected based on demonstrated competence
4-24 and qualifications, in the manner provided by Section 2254.004,
4-25 Government Code. The district shall qualify a maximum of five
4-26 offerors to submit additional information and, if the district
4-27 chooses, to interview for final selection.

4-28 (2) In phase two, the district shall evaluate the
4-29 information submitted by the offerors on the basis of the selection
4-30 criteria stated in the request for qualifications and the results
4-31 of any interview. The district may request additional information
4-32 regarding demonstrated competence and qualifications,
4-33 considerations of the safety and long-term durability of the
4-34 project, the feasibility of implementing the project as proposed,
4-35 the ability of the offeror to meet schedules, costing methodology,
4-36 construction cost, engineering and architectural design, or other
4-37 factors as appropriate. The district shall rank each proposal
4-38 submitted on the basis of the criteria set forth in the request for
4-39 qualifications. The district shall select the design-build firm
4-40 that submits the proposal offering the best value for the district
4-41 on the basis of the published selection criteria and on its ranking
4-42 evaluations. The district shall first attempt to negotiate a
4-43 contract with the selected offeror. If the district is unable to
4-44 negotiate a satisfactory contract with the selected offeror, the
4-45 district shall, formally and in writing, end negotiations with that
4-46 offeror and proceed to negotiate with the next offeror in the order
4-47 of the selection ranking until a contract is reached or
4-48 negotiations with all ranked offerors end.

4-49 (e) Following selection of a design-build firm under
4-50 Subsection (d), that firm's engineers or architects shall complete
4-51 the design, submitting all design elements for review and
4-52 determination of scope compliance to the district or the district's
4-53 engineer or architect before or concurrently with construction.

4-54 (f) The district shall provide or contract for,
4-55 independently of the design-build firm, the inspection services,
4-56 the testing of construction materials, and the verification testing
4-57 services necessary for acceptance of the facility by the district.
4-58 The district shall select those services for which it contracts in
4-59 accordance with Section 2254.004, Government Code.

4-60 (g) The design-build firm shall supply a signed and sealed
4-61 set of as-built construction documents for the project to the
4-62 district at the conclusion of construction.

4-63 (h) A payment or performance bond is not required for, and
4-64 may not provide coverage for, the portion of a design-build
4-65 contract under this subchapter that includes design services only.
4-66 If a fixed contract amount or guaranteed maximum price has not been
4-67 determined at the time a design-build contract is awarded, the
4-68 penal sums of the performance and payment bonds delivered to the
4-69 district must each be in an amount equal to the project budget, as

specified in the design criteria package. The design-build firm shall deliver the bonds not later than 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) 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 Subsection (d)(2).

(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.

(k) A successful design-build firm shall not be 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) A district may 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) 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. A construction manager-agent represents the district in a fiduciary capacity.

(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 and who has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. 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. The district's engineer or architect may not serve, 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. 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) 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 general contractor, trade contractors, or subcontractors who will serve as the prime 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, 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) 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 and who has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. 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. The district's engineer, architect, or construction manager-agent for a project may not serve, alone or in combination with another, as the construction manager-at-risk.

(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. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

(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 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. 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. At the appropriate step, the district shall also read aloud the fees and prices, if any, stated in each proposal as the proposal is opened. 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 criteria set forth in the request for proposals.

(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. The construction manager-at-risk shall deliver the bonds not later than 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) 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. The selected or designated engineer or architect has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. 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. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code, and shall identify them in the request for proposals.

(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. The district and its engineer or architect may discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. 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 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. This subchapter expires September 1, 2013.

SECTION 2. Subsection (b), 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. This Act takes effect June 1, 2003, if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for effect on that date, this Act takes effect September 1, 2003.

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