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S.B. No. 1499

A BILL TO BE ENTITLED

AN ACT

relating to contracts for the design and construction of transportation projects by the Texas Department of Transportation.

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

SECTION 1. Chapter 223, Transportation Code, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. DESIGN-BUILD CONTRACTS FOR TRANSPORTATION PROJECTS

Sec. 223.161. DEFINITIONS. In this subchapter:

(1) "Design-build contract" means a single contract for any combination of the following:

(A) preconstruction services, including planning, environmental review, right-of-way services, design services, and engineering services;

(B) construction services, including design during construction; and

(C) postconstruction services, including operations and maintenance.

(2) "Design-build firm" means a legal entity or team that includes:

(A) an engineering firm registered under Chapter 1001, Occupations Code; and

(B) a builder qualified to engage in highway construction in this state.

(3) "Transportation project" means an improvement,

1 addition, or extension to the state highway system, or a turnpike
2 project, that is undertaken by the department.

3 (4) "Design criteria package" means a set of documents
4 that provides sufficient information to permit a design-build firm
5 to prepare a response to the department's request for
6 qualifications and request for proposals and includes the criteria
7 for selection. A design criteria package shall include a
8 description of the project site, survey information, cost or budget
9 requirements, time schedules, conceptual design, a geotechnical
10 baseline report, quality assurance and quality control
11 requirements, special material requirements, applicable
12 ordinances, provisions for utilities, and any other applicable
13 information, as appropriate.

14 Sec. 223.162. POWER TO ENTER INTO DESIGN-BUILD CONTRACTS.

15 (a) Notwithstanding any other law of this state, for a
16 transportation project that has an estimated total cost of more
17 than \$50 million, the department may:

18 (1) use the design-build method under this subchapter
19 for the design and construction of a transportation project; and

20 (2) enter into one or more design-build contracts
21 under this subchapter for the services of one or more design-build
22 firms.

23 (b) In entering into a design-build contract, the
24 department shall use the procedures provided in this subchapter.

25 Sec. 223.163. DEPARTMENT'S REPRESENTATIVE. The department
26 shall designate or retain an engineer independent of the
27 design-build firm to act as its representative, prepare the design

1 criteria package, and advise the department on project delivery
2 systems, project definition, technical specifications, risk
3 allocation and related matters.

4 Sec. 223.164. REQUEST FOR QUALIFICATIONS. (a) The
5 department shall prepare:

6 (1) a request for qualifications that includes general
7 information about the transportation project, proposed location,
8 project scope, budget, time schedules, selection criteria, and
9 other information that may assist design-build firms in submitting
10 qualifications for the transportation project; and

11 (2) a request for proposals that includes a design
12 criteria package and more detailed information about the
13 transportation project.

14 (b) If the preparation of the request for qualifications or
15 the request for proposals requires engineering or architectural
16 services that constitute the practice of engineering under Chapter
17 1001, Occupations Code, or the practice of architecture under
18 Chapter 1051, Occupations Code, those services must be provided in
19 accordance with the applicable law.

20 Sec. 223.165. EVALUATION AND SELECTION OF DESIGN-BUILD
21 FIRM. (a) The department shall evaluate and select a design-build
22 firm in two phases.

23 (b) In phase one, the department shall prepare a request for
24 qualifications and evaluate each responding design-build firm's
25 experience, technical competence, and capability to perform, the
26 past performance of the design-build firm and the members of that
27 firm, and other appropriate factors submitted by that firm, except

1 that cost-related or price-related evaluation factors may not be
2 used.

3 (c) The department may interview the design-build firms
4 that respond to the request for qualifications. The department
5 shall qualify at least two and a maximum of five firms to
6 participate in phase two of the evaluation and selection process.

7 (d) In phase two, the department shall prepare a request for
8 proposals, including the design criteria package, seeking
9 additional information regarding demonstrated technical competence
10 and qualifications, considerations of the safety and long-term
11 durability of the transportation project, the feasibility of
12 developing the project as proposed, the ability of the offeror to
13 meet schedules, alternate technical concepts to the conceptual
14 design included in the design criteria package, costing
15 methodology, construction cost, and any other factor the department
16 considers relevant or necessary that is listed in the design
17 criteria package.

18 (e) The department may require the design-build firms to
19 submit detailed engineering or architectural designs as part of
20 their proposals and may interview the design-build firms responding
21 to the request for proposals.

22 (f) The department shall rank each responding design-build
23 firm on the basis of the criteria in the request for proposals and
24 select the design-build firm submitting the proposal that offers
25 the best value considering price, time for project completion,
26 technical evaluation factors, and any other factor described in the
27 request for proposals.

1 Sec. 223.166. NEGOTIATIONS WITH SELECTED DESIGN-BUILD
2 FIRM. (a) The department shall first attempt to negotiate a
3 contract with the selected design-build firm.

4 (b) If the department cannot negotiate a satisfactory
5 contract with the selected design-build firm, it shall:

6 (1) formally and in writing end negotiations with that
7 firm; and

8 (2) attempt to negotiate with the next design-build
9 firm in the order of the selection ranking until:

10 (A) a contract is entered into;

11 (B) negotiations with all ranked firms end; or

12 (C) the department determines that it is no
13 longer in the best interest of this state to enter into a
14 design-build contract for the proposed transportation project.

15 Sec. 223.167. ENVIRONMENTAL CLEARANCE. The department may
16 terminate the contract if the project does not receive
17 environmental clearance, such as a record of decision or a finding
18 of no significant impact.

19 Sec. 223.168. ALLOCATION OF RISK. The department shall
20 assume all risks associated with:

21 (1) scope changes and modifications;

22 (2) regulatory compliance and permitting; and

23 (3) differing site conditions.

24 Sec. 223.169. COMPLETION OF DESIGN BY SELECTED DESIGN-BUILD
25 FIRM. (a) The engineers of the design-build firm with which the
26 department contracts shall submit all specified design elements for
27 review and determination of scope compliance to the department

1 before or concurrently with construction of the transportation
2 project.

3 (b) An engineer shall have responsibility for compliance
4 with the engineering design requirements and all other applicable
5 requirements of Chapter 1001, Occupations Code.

6 Sec. 223.170. INSPECTION AND TESTING SERVICES. (a) For
7 quality assurance purposes, the department shall provide or
8 contract for, independently of the design-build firm, any
9 inspection services or verification testing services necessary for
10 acceptance of the transportation project.

11 (b) Section 2254.004, Government Code, applies to the
12 procurement of services contracted for under Subsection (a).

13 Sec. 223.171. PERFORMANCE AND PAYMENT BONDS. (a) If a
14 fixed contract amount or guaranteed maximum price has not been
15 determined when a design-build contract is awarded, the penal sums
16 of the performance and payment bonds or equivalent security or
17 collateral delivered by the design-build firm must be in an amount
18 equal to the transportation project budget, as specified in the
19 request for proposals.

20 (b) The design-build firm shall deliver the bonds not later
21 than the 10th day after the date the design-build firm executes a
22 contract unless the design-build firm furnishes a bid bond or other
23 financial security acceptable to the department to ensure that the
24 design-build firm will furnish the required performance and payment
25 bonds when a guaranteed maximum price is established.

26 Sec. 223.172. PAYMENT TO UNSUCCESSFUL DESIGN-BUILD FIRMS.
27 (a) The department shall pay an unsuccessful design-build firm

1 that submits a complete response to a request for proposals the
2 stipulated amount computed using the stated methodology for costs
3 incurred in preparing that proposal.

4 (b) After payment of the stipulated amount, the department
5 may make use of any design contained in the proposal, including the
6 technologies, techniques, methods, processes, and information
7 contained in the design. The use by the department of any design
8 element contained in an unsuccessful proposal is at the sole risk
9 and discretion of the department and does not confer liability on
10 the recipient of the stipulated amount under this section.

11 (c) The methodology for computing the stipulated amount of
12 the stipend must be stated in the request for proposals.

13 Sec. 223.173. SMALL BUSINESSES AND DISADVANTAGED OR
14 HISTORICALLY UNDERUTILIZED BUSINESSES. (a) If a service
15 performed as part of a contract under this subchapter is funded by a
16 federal revenue source, the department shall:

17 (1) ensure that disadvantaged and small businesses
18 have an opportunity to participate in the performance of the
19 contract; and

20 (2) use the same procedures that exist for removing
21 barriers to participation by disadvantaged and small businesses in
22 other department construction and design contracts.

23 (b) If a service performed as part of a contract under this
24 subchapter is funded by a state revenue source, the department
25 shall comply with the historically underutilized business
26 requirements under Chapter 2161, Government Code.

27 Sec. 223.174. PROJECTS FUNDED BY FEDERAL FUNDS. If a

1 transportation project procured under this subchapter is funded
2 wholly or partly by federal funds and subject to federal
3 procurement laws, rules, regulations, and procedures, the
4 requirements of this subchapter shall be applied in a manner
5 consistent with the applicable federal procurement laws, rules,
6 regulations, and procedures.

7 Sec. 223.175. RULES. The department shall adopt rules to
8 implement and administer this subchapter.

9 Sec. 223.176. REPORT. Not later than December 1, 2008, the
10 department shall submit a report to the legislature relating to the
11 use of design-build contracts under this subchapter as part of the
12 review of the department in 2009 by the Sunset Advisory Commission
13 under Chapter 325, Government Code (Texas Sunset Act).

14 Sec. 223.177. LIMITATIONS. Money spent by the department
15 for a project under this chapter is not included in computing the
16 amount required to be spent for engineering and design contracts
17 under Section 223.041 in any fiscal year.

18 Sec. 223.178. FURTHER LIMITATION. (a) Before December 1,
19 2009, the department may not use design-build contracts under this
20 subchapter for more than 24 projects.

21 (b) The amount of money disbursed by the department from all
22 sources during a federal fiscal year to pay the costs of contracts
23 under this section may not exceed 15 percent of the obligation
24 authority under the federal aid highway program that is distributed
25 to the state for the fiscal year.

26 SECTION 2. This Act takes effect September 1, 2003.