

By: Krusee

H.B. No. 2703

A BILL TO BE ENTITLED

AN ACT

relating to contracts for the design and construction of transportation projects by certain governmental entities.

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

SECTION 1. The heading to Title 6, Transportation Code, is amended to read as follows:

TITLE 6. ROADWAYS AND OTHER TRANSPORTATION PROJECTS

SECTION 2. Subtitle Z, Title 6, Transportation Code, is amended by adding Chapter 473 to read as follows:

CHAPTER 473. ALTERNATIVE PROJECT DELIVERY METHODS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 473.001. DEFINITIONS. In this chapter:

(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) post-construction services, including operations and maintenance.

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

(A) an engineer, an architect, or both; and

1           (B) a firm qualified to engage in transportation  
2 project construction in this state.

3           (3) "Governmental entity" means a political  
4 subdivision of this state, including a municipality or a county, a  
5 political subdivision of a county, a group of adjoining counties, a  
6 district organized or operating under Section 52, Article III, or  
7 Section 59, Article XVI, Texas Constitution, the department, a  
8 regional tollway authority under Chapter 366, a regional mobility  
9 authority under Chapter 370, a transit authority, a nonprofit  
10 corporation, including a transportation corporation that is  
11 created under Chapter 431, or any other public entity or  
12 instrumentality.

13           (4) "Transportation project" has the meaning assigned  
14 by Section 370.003.

15           Sec. 473.002. DISADVANTAGED AND SMALL BUSINESSES. A  
16 governmental entity shall:

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

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

23           Sec. 473.003. PROJECTS FUNDED BY FEDERAL FUNDS. If a  
24 transportation project procured under this chapter is funded wholly  
25 or partly by federal funds and subject to federal procurement laws,  
26 rules, regulations, and procedures, the requirements of this  
27 chapter shall be applied in a manner consistent with the applicable

1 federal procurement laws, rules, regulations, and procedures.

2 Sec. 473.004. RULES. A governmental entity that enters  
3 into contracts under this chapter shall adopt rules, ordinances, or  
4 orders, as appropriate, necessary to implement and administer this  
5 chapter.

6 Sec. 473.005. CONFLICTS WITH OTHER LAWS. To the extent of a  
7 conflict between this chapter and another law applicable to a  
8 governmental entity, this chapter prevails.

9 [Sections 473.006–473.050 reserved for expansion]

10 SUBCHAPTER B. DESIGN-BUILD CONTRACTS

11 Sec. 473.051. POWER TO ENTER INTO DESIGN-BUILD CONTRACTS.  
12 A governmental entity, for a transportation project with an  
13 estimated total cost of more than \$25 million, may:

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

16 (2) enter into one or more design-build contracts  
17 under this subchapter for the services of one or more design-build  
18 firms.

19 Sec. 473.052. REQUEST FOR QUALIFICATIONS. (a) A  
20 governmental entity shall prepare:

21 (1) a request for qualifications that includes general  
22 information about the transportation project, proposed location,  
23 project scope, budget, time schedules, selection criteria, and  
24 other information that may assist design-build firms in submitting  
25 qualifications for the transportation project; and

26 (2) a request for proposals that includes more  
27 detailed information about the transportation project.

1       (b) If the preparation of the request for qualifications or  
2 the request for proposals requires engineering or architectural  
3 services that constitute the practice of engineering under Chapter  
4 1001, Occupations Code, or the practice of architecture under  
5 Chapter 1051 of that code, those services must be provided in  
6 accordance with the applicable law.

7       Sec. 473.053. EVALUATION AND SELECTION OF DESIGN-BUILD  
8 FIRM. (a) A governmental entity shall evaluate and select a  
9 design-build firm in two phases.

10       (b) In the first phase, the governmental entity shall  
11 prepare a request for qualifications and evaluate each responding  
12 design-build firm's experience, technical competence, and  
13 capability to perform, the past performance of the design-build  
14 firm and the members of that firm, and other appropriate factors  
15 submitted by that firm, except that cost-related or price-related  
16 evaluation factors may not be used.

17       (c) Each design-build firm that responds to the request for  
18 qualifications:

19           (1) must certify to the governmental entity that each  
20 engineer or architect who is a member of the design-build firm is  
21 authorized to practice engineering or architecture under the  
22 applicable law of this state; and

23           (2) shall have responsibility for compliance with the  
24 requirements of that law.

25       (d) A governmental entity may interview the design-build  
26 firms that respond to the request for qualifications, and if the  
27 governmental entity interviews firms, the governmental entity must

1 qualify at least two firms for the second phase of the evaluation  
2 and selection process.

3 (e) In the second phase, the governmental entity shall  
4 prepare a request for proposals seeking additional information  
5 regarding demonstrated technical competence and qualifications,  
6 considerations of the safety and long-term durability of the  
7 transportation project, the feasibility of developing the project  
8 as proposed, the ability of the offeror to meet schedules, costing  
9 methodology, and any other factor the governmental entity considers  
10 relevant or necessary.

11 (f) A governmental entity may require the design-build  
12 firms to submit detailed engineering or architectural designs as  
13 part of their proposals and may interview one or more of the  
14 design-build firms responding to the request for proposals.

15 (g) The governmental entity shall rank each responding  
16 design-build firm on the basis of the criteria in the request for  
17 proposals and select the design-build firm submitting the proposal  
18 that offers the best value considering price, time for project  
19 completion, technical evaluation factors, and any other factor  
20 described in the request for proposals.

21 Sec. 473.054. NEGOTIATIONS WITH SELECTED DESIGN-BUILD  
22 FIRM. (a) A governmental entity shall first attempt to negotiate a  
23 contract with the selected design-build firm.

24 (b) If the governmental entity cannot negotiate a  
25 satisfactory contract with the selected design-build firm, it  
26 shall:

27 (1) formally and in writing end negotiations with that

1 firm; and

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

4 (A) a contract is entered into;

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

6 (C) the entity determines that it is no longer in  
7 the best interest of the entity to enter into a design-build  
8 contract for the proposed transportation project.

9 Sec. 473.055. COMPLETION OF DESIGN BY SELECTED DESIGN-BUILD  
10 FIRM. (a) The engineers or architects of the design-build firm  
11 with which a governmental entity contracts shall submit all  
12 specified design elements for review and determination of scope  
13 compliance to the entity before or concurrently with construction  
14 of the transportation project.

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

18 (c) An architect shall have responsibility for compliance  
19 with all applicable requirements of Chapter 1051, Occupations Code.

20 Sec. 473.056. INSPECTION AND TESTING SERVICES. (a) For  
21 quality assurance purposes, a governmental entity shall provide or  
22 contract for, independently of the design-build firm, any  
23 inspection services or verification testing services necessary for  
24 acceptance of the transportation project.

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

27 Sec. 473.057. PERFORMANCE AND PAYMENT BONDS. (a) If a

1 fixed contract amount or guaranteed maximum price has not been  
2 determined when a design-build contract is awarded, the penal sums  
3 of the performance and payment bonds or equivalent security or  
4 collateral delivered by the design-build firm must be in an amount  
5 equal to the transportation project budget, as specified in the  
6 request for proposals.

7 (b) The design-build firm shall deliver the bonds not later  
8 than the 10th day after the date the design-build firm executes a  
9 contract unless the design-build firm furnishes a bid bond or other  
10 financial security acceptable to the governmental entity to ensure  
11 that the design-build firm will furnish the required performance  
12 and payment bonds when a guaranteed maximum price is established.

13 Sec. 473.058. PAYMENT TO UNSUCCESSFUL DESIGN-BUILD FIRMS.

14 (a) A governmental entity shall pay an unsuccessful design-build  
15 firm that submits a response to a request for proposals the  
16 stipulated amount computed using the stated methodology for costs  
17 incurred in preparing that proposal.

18 (b) After payment of the stipulated amount, the  
19 governmental entity owns the rights to, and at its own risk may  
20 reproduce, transfer, publish, or make use of, any design contained  
21 in the proposal, including the technologies, techniques, methods,  
22 processes, and information contained in the design.

23 (c) The methodology for computing the stipulated amount  
24 must be stated in the request for proposals.

25 [Sections 473.059-473.100 reserved for expansion]

26 SUBCHAPTER C. CONSTRUCTION MANAGER-AT-RISK CONTRACTS

27 Sec. 473.101. DEFINITION. In this subchapter,

1 "construction manager-at-risk" means a sole proprietorship,  
2 partnership, corporation, or other legal entity that:

3 (1) assumes the risk for construction,  
4 rehabilitation, alteration, or repair of a transportation project  
5 at the contracted price as a general contractor; and

6 (2) provides consultation services to the  
7 governmental entity regarding construction during and after the  
8 design of the transportation project.

9 Sec. 473.102. AUTHORITY TO ENTER INTO CONSTRUCTION  
10 MANAGER-AT-RISK CONTRACTS. A governmental entity may use the  
11 construction manager-at-risk method for the construction,  
12 maintenance, alteration, or repair of a transportation project. In  
13 using that method and in entering into a contract for the services  
14 of a construction manager-at-risk, a governmental entity shall  
15 follow the procedures prescribed by this subchapter.

16 Sec. 473.103. SELECTION OR DESIGNATION OF ENGINEER OR  
17 ARCHITECT. (a) Before or concurrently with selecting a construction  
18 manager-at-risk, the governmental entity shall select or designate  
19 an engineer or architect who shall prepare the construction  
20 documents for the project and who has full responsibility for  
21 complying with Chapter 1001 or 1051, Occupations Code, as  
22 applicable.

23 (b) If the engineer or architect is not a full-time employee  
24 of the governmental entity, the governmental entity shall select  
25 the engineer or architect on the basis of demonstrated competence  
26 and qualifications as provided by Section 2254.004, Government  
27 Code.



1       (c) The governmental entity's engineer, architect, or  
2 construction manager-agent for a project may not serve, alone or in  
3 combination with another, as the construction manager-at-risk  
4 unless the engineer or architect is hired to serve as the  
5 construction manager-at-risk under a separate or concurrent  
6 procurement.

7       Sec. 473.104. INSPECTION AND TESTING SERVICES. (a) The  
8 governmental entity shall provide or contract for, independently of  
9 the construction manager-at-risk, the inspection services, the  
10 testing of construction materials engineering, and the  
11 verification testing services necessary for acceptance of the  
12 transportation project by the governmental entity.

13       (b) The governmental entity shall select those services for  
14 which it contracts in accordance with Section 2254.004, Government  
15 Code.

16       Sec. 473.105. EVALUATION AND SELECTION OF CONSTRUCTION  
17 MANAGER-AT-RISK. (a) The governmental entity shall select the  
18 construction manager-at-risk in a one-step or a two-step process.  
19 The governmental entity shall prepare a request for proposals, in  
20 the case of a one-step process, or a request for qualifications, in  
21 the case of a two-step process, that includes general information  
22 on the project site, project scope, schedule, selection criteria,  
23 estimated budget, and time and place for receipt of proposals or  
24 qualifications, as applicable, and other information that may  
25 assist the governmental entity in its selection of a construction  
26 manager-at-risk.

27       (b) The governmental entity shall state the selection

1 criteria in the request for proposals or qualifications, as  
2 applicable. The selection criteria may include the offeror's  
3 experience, past performance, safety record, proposed personnel  
4 and methodology, and other appropriate factors that demonstrate the  
5 capability of the construction manager-at-risk.

6 (c) If a one-step process is used, the governmental entity  
7 may request, as part of the offeror's proposal, proposed fees and  
8 prices for meeting the general conditions. If a two-step process is  
9 used, the governmental entity may not request fees or prices in the  
10 first step. In the second step, the governmental entity may request  
11 that five or fewer offerors, selected solely on the basis of  
12 qualifications, provide additional information, including the  
13 construction manager-at-risk's proposed fee and its price for  
14 fulfilling the general conditions.

15 (d) In each step, the governmental entity shall receive,  
16 publicly open, and read aloud the names of the offerors. At the  
17 appropriate step, the governmental entity shall also read aloud the  
18 fees and prices, if any, stated in each proposal as the proposal is  
19 opened. Not later than the 45th day after the date of opening the  
20 proposals, the governmental entity shall evaluate and rank each  
21 proposal using the criteria stated in the request for proposals.

22 (e) The governmental entity shall select the offeror that  
23 submits the proposal that offers the best value for the  
24 governmental entity based on the selection criteria and ranking  
25 evaluation. The governmental entity shall first attempt to  
26 negotiate a contract with the selected offeror. If the  
27 governmental entity is unable to negotiate a satisfactory contract

1 with the selected offeror, the governmental entity shall, formally  
2 and in writing, end negotiations with that offeror and begin to  
3 negotiate with the next offeror in the order of the selection  
4 ranking until a contract is reached or negotiations with all ranked  
5 offerors end.

6 Sec. 473.106. BIDS OR PROPOSALS FROM CONTRACTORS OR  
7 SUBCONTRACTORS. (a) A construction manager-at-risk shall  
8 publicly advertise and receive bids or proposals from trade  
9 contractors or subcontractors for the performance of all major  
10 elements of the transportation project other than the minor work  
11 that may be included in the general conditions.

12 (b) A construction manager-at-risk may seek to perform one  
13 or more portions of the transportation project if:

14 (1) the construction manager-at-risk submits its bid  
15 or proposal for each portion of the project in the same manner as  
16 any other trade contractor or subcontractor; and

17 (2) the governmental entity determines that the  
18 construction manager-at-risk's bid or proposal provides the best  
19 value for the governmental entity.

20 (c) The construction manager-at-risk and the governmental  
21 entity or its representative shall review each trade contractor or  
22 subcontractor bid or proposal in a manner that does not disclose the  
23 contents of the bid or proposal during the selection process to a  
24 person who is not employed by the construction manager-at-risk, the  
25 project engineer, the project architect, or the governmental  
26 entity. All bids or proposals shall be made public not later than  
27 the date the contract is awarded or the seventh day after the date

1 that final selection of the bid or proposal is made.

2 (d) If the construction manager-at-risk reviews, evaluates,  
3 and recommends to the governmental entity a bid or proposal from a  
4 trade contractor or subcontractor but the governmental entity  
5 requires another bid or proposal to be accepted, the governmental  
6 entity shall compensate the construction manager-at-risk by a  
7 change in price, time, or guaranteed maximum cost for any  
8 additional cost or risk the construction manager-at-risk may incur  
9 because the governmental entity required the other bid or proposal  
10 be accepted.

11 (e) If a selected trade contractor or subcontractor fails to  
12 execute a subcontract after being selected or defaults in the  
13 performance of its work, the construction manager-at-risk may,  
14 without advertising:

15 (1) meet the contract requirements; or

16 (2) select another trade contractor or subcontractor  
17 to meet with the contract requirements.

18 Sec. 473.107. PERFORMANCE AND PAYMENT BONDS. (a) If a  
19 fixed contract amount or guaranteed maximum price has not been  
20 determined when the contract is awarded, the penal sums of the  
21 performance and payment bonds delivered to the governmental entity  
22 must each be in an amount equal to the project budget, as specified  
23 in the request for qualifications.

24 (b) The construction manager shall deliver the bonds not  
25 later than the 10th day after the date the construction manager  
26 executes the contract unless the construction manager furnishes a  
27 bid bond or other financial security acceptable to the governmental

1 entity to ensure that the construction manager will deliver the  
2 required performance and payment bonds when a guaranteed maximum  
3 price is established.

4 SECTION 3. This Act takes effect September 1, 2005.