

By: Callegari

H.B. No. 1886

A BILL TO BE ENTITLED

AN ACT

relating to the procurement methods of certain political subdivisions and certain other entities for the construction, rehabilitation, alteration, or repair of certain projects.

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

SECTION 1. Chapter 271, Local Government Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. DESIGN-BUILD PROCEDURES FOR CERTAIN CIVIL WORKS PROJECTS

Sec. 271.181. DEFINITIONS. In this subchapter:

(1) "Architect" means an individual registered as an architect under Chapter 1051, Occupations Code.

(2) "Civil works project" means:

(A) roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, airport runways and taxiways, storm drainage and flood control projects, or transit projects;

(B) types of projects or facilities related to those described by Paragraph (A) and associated with civil engineering construction; and

(C) buildings or structures that are incidental to projects or facilities that are described by Paragraphs (A) and (B) and that are primarily civil engineering construction projects.

1 (3) "Design-build firm" means a partnership,
2 corporation, or other legal entity or team that includes an
3 engineer and a construction contractor qualified to engage in civil
4 works construction in Texas.

5 (4) "Design criteria package" means a set of documents
6 that:

7 (A) provides sufficient information to convey
8 the intent, goals, criteria, and objectives of the civil works
9 project; and

10 (B) permits a design-build firm to:

11 (i) assess the scope of work and the risk
12 involved; and

13 (ii) submit a proposal on the project.

14 (5) "Engineer" means an individual licensed as an
15 engineer under Chapter 1001, Occupations Code.

16 (6) "Local governmental entity" means a municipality,
17 a county, a river authority, a defense base development authority
18 established under Chapter 379B, a municipally owned water utility
19 with a separate governing board appointed by the governing body of a
20 municipality, or any other special district or authority authorized
21 by law to enter into a public works contract for a civil works
22 project. The term does not include a water district or authority
23 created under Section 52, Article III, or Section 59, Article XVI,
24 Texas Constitution, with a population of less than 50,000.

25 Sec. 271.182. APPLICABILITY. (a) Before September 1,
26 2009, this subchapter applies to a local governmental entity with a
27 population of 500,000 or more within its geographic boundaries or

1 service area.

2 (b) On or after September 1, 2009, and before September 1,
3 2011, this subchapter applies to a local governmental entity with a
4 population of more than 100,000 within its geographic boundaries or
5 service area.

6 (c) On or after September 1, 2011, and before September 1,
7 2013, this subchapter applies to a local governmental entity with a
8 population of more than 50,000 within its geographic boundaries or
9 service area.

10 Sec. 271.183. APPLICABILITY OF OTHER LAW. (a) The
11 purchasing requirements of Section 361.426, Health and Safety Code,
12 apply to purchases by a local governmental entity made under this
13 subchapter.

14 (b) Except as provided by this section, to the extent of any
15 conflict, this subchapter prevails over any other law relating to
16 the purchasing of goods and services except a law relating to
17 contracting with historically underutilized businesses.

18 Sec. 271.184. NOTICE REQUIREMENTS. (a) A local
19 governmental entity shall advertise or publish notice of requests
20 for bids, proposals, or qualifications in any manner prescribed by
21 law.

22 (b) For a contract entered into by a local governmental
23 entity under any of the methods provided by this subchapter, the
24 entity shall publish notice of the time and place the bid or
25 proposals or the request for qualifications will be received and
26 opened in any manner prescribed by law.

27 Sec. 271.185. CONTRACTS FOR CIVIL WORKS PROJECTS:

1 DESIGN-BUILD. (a) A local governmental entity may use the
2 design-build method for the construction, rehabilitation,
3 alteration, or repair of a civil works project. In using this method
4 and in entering into a contract for the services of a design-build
5 firm, the contracting local governmental entity and the
6 design-build firm shall follow the procedures provided by this
7 subchapter.

8 (b) A contract for a project under this subchapter may cover
9 only a single integrated project. A local governmental entity may
10 not enter into a contract for aggregated projects at multiple
11 locations. If a metropolitan transit authority created under
12 Chapter 451, Transportation Code, enters into a contract for a
13 project involving a bus rapid transit system created under Chapter
14 451, Transportation Code, the bus rapid transit system is a single
15 integrated project for purposes of this subsection.

16 (c) A local governmental entity shall use the following
17 criteria as a minimum basis for determining the circumstances under
18 which the design-build method is appropriate for a project:

19 (1) the extent to which the entity can adequately
20 define the project requirements;

21 (2) the time constraints for the delivery of the
22 project;

23 (3) the ability to ensure that a competitive
24 procurement can be held; and

25 (4) the capability of the entity to manage and oversee
26 the project, including the availability of experienced personnel or
27 outside consultants who are familiar with the design-build method

1 of project delivery.

2 (d) A local governmental entity shall make a formal finding
3 on the criteria described by Subsection (c) before preparing a
4 request for qualifications under Section 271.189.

5 Sec. 271.186. LIMITATION ON NUMBER OF PROJECTS. (a) During
6 the first four years that this subchapter applies to a local
7 governmental entity under Section 271.182, the entity may, under
8 this subchapter, enter into contracts for not more than two
9 projects in any fiscal year.

10 (b) After the period described by Subsection (a):

11 (1) a local governmental entity with a population of
12 500,000 or more may, under this subchapter, enter into contracts
13 for not more than four projects in any fiscal year;

14 (2) a local governmental entity with a population of
15 100,000 or more but less than 500,000 may, under this subchapter,
16 enter into contracts for not more than three projects in any fiscal
17 year; and

18 (3) a local governmental entity with a population of
19 less than 100,000 may, under this subchapter, enter into contracts
20 for not more than two projects in any fiscal year.

21 Sec. 271.187. USE OF ENGINEER. (a) The local governmental
22 entity shall select or designate an engineer who is independent of
23 the design-build firm to act as its representative for the
24 procurement process and for the duration of the work on the civil
25 works project. The selected or designated engineer has full
26 responsibility for complying with Chapter 1001, Occupations Code.

27 (b) If the engineer is not a full-time employee of the local

1 governmental entity, the local governmental entity shall select the
2 engineer on the basis of demonstrated competence and qualifications
3 as provided by Section 2254.004, Government Code.

4 Sec. 271.188. USE OF OTHER PROFESSIONAL SERVICES. (a) The
5 local governmental entity shall provide or contract for,
6 independently of the design-build firm, the following services as
7 necessary for the acceptance of the civil works project by the
8 entity:

9 (1) inspection services;

10 (2) construction materials engineering and testing;

11 and

12 (3) verification testing services.

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

16 Sec. 271.189. REQUEST FOR QUALIFICATIONS. (a) The local
17 governmental entity shall prepare a request for qualifications that
18 includes:

19 (1) information on the civil works project site;

20 (2) project scope;

21 (3) project budget;

22 (4) project schedule;

23 (5) criteria for selection under Section 271.191 and
24 the weighting of the criteria; and

25 (6) other information that may assist potential
26 design-build firms in submitting proposals for the project.

27 (b) The local governmental entity shall also prepare a

1 design criteria package as described by Section 271.190.

2 Sec. 271.190. CONTENTS OF DESIGN CRITERIA PACKAGE. A

3 design criteria package may include, as appropriate:

4 (1) budget or cost estimates;

5 (2) information on the site;

6 (3) performance criteria;

7 (4) special material requirements;

8 (5) initial design calculations;

9 (6) known utilities;

10 (7) capacity requirements;

11 (8) quality assurance and quality control

12 requirements; and

13 (9) the type, size, and location of structures.

14 Sec. 271.191. EVALUATION OF DESIGN-BUILD FIRMS. (a) The

15 local governmental entity shall receive proposals and shall

16 evaluate each offeror's experience, technical competence,

17 capability to perform, the past performance of the offeror's team

18 and members of the team, and other appropriate factors submitted by

19 the team or firm in response to the request for qualifications,

20 except that cost-related or price-related evaluation factors are

21 not permitted at this stage.

22 (b) Each offeror must:

23 (1) select or designate each engineer that is a member

24 of its team based on demonstrated competence and qualifications, in

25 the manner provided by Section 2254.004, Government Code; and

26 (2) certify to the local governmental entity that each

27 selection or designation was based on demonstrated competence and

1 qualifications, in the manner provided by Section 2254.004,
2 Government Code.

3 (c) The local governmental entity shall qualify a maximum of
4 three offerors to submit additional information and, if the entity
5 chooses, to interview for final selection.

6 Sec. 271.192. SELECTION OF DESIGN-BUILD FIRM. The local
7 governmental entity shall select a design-build firm using one of
8 the following selection options:

9 (1) qualifications-based selection as provided by
10 Section 271.193; or

11 (2) a combination of technical and cost proposals as
12 provided by Section 271.194.

13 Sec. 271.193. PROCEDURES FOR QUALIFICATIONS-BASED
14 SELECTION. A local governmental entity that selects a design-build
15 firm using the qualifications-based selection option:

16 (1) may request that the firms identified under
17 Section 271.191(c) provide additional information regarding
18 demonstrated competence and qualifications, project approaches,
19 the ability of the firm to meet schedules, or other factors as
20 appropriate, except that price or cost-related criteria may not be
21 utilized;

22 (2) may not require firms to submit and may not accept
23 or consider conceptual or detailed engineering designs as part of
24 the proposal; and

25 (3) shall:

26 (A) rank each proposal submitted on the basis of
27 the criteria set forth in the request for qualifications and the

1 results of any interview; and

2 (B) select the design-build firm that is most
3 highly qualified on the basis of the published selection criteria
4 and on its ranking evaluations.

5 Sec. 271.194. PROCEDURES FOR COMBINATION OF TECHNICAL AND
6 COST PROPOSALS. (a) A local governmental entity that selects a
7 design-build firm using a combination of technical and cost
8 proposals shall request proposals from firms identified under
9 Section 271.191(c). A firm must submit a proposal not later than
10 the 180th day after the date the local governmental entity makes a
11 public request for the proposals from the selected firms. The
12 request for proposals must include:

13 (1) a design criteria package;

14 (2) a report containing geotechnical information
15 relating to the project site;

16 (3) detailed instructions for preparing the technical
17 proposal and the items to be included, including a description of
18 the form and level of completeness of drawings expected; and

19 (4) the relative weighting of the technical and price
20 proposals and the formula by which the proposals will be evaluated
21 and ranked.

22 (b) The technical proposal component under this section
23 must be weighted a minimum of 50 percent.

24 (c) Each proposal must include a sealed technical proposal
25 and a separate sealed cost proposal.

26 (d) The technical proposal must address:

27 (1) project approach;

- 1 (2) anticipated problems;
- 2 (3) proposed solutions to anticipated problems;
- 3 (4) ability to meet schedules;
- 4 (5) conceptual engineering design; and
- 5 (6) other information requested by the local
6 governmental entity.

7 (e) The local governmental entity shall first open,
8 evaluate, and score each responsive technical proposal submitted on
9 the basis of the criteria described in the request for proposals and
10 assign points on the basis of the weighting specified in the request
11 for proposals. The local governmental entity may reject as
12 nonresponsive any firm that makes a significant change to the
13 composition of its firm as initially submitted. The local
14 governmental entity shall subsequently open, evaluate, and score
15 the cost proposals from firms that submitted a responsive technical
16 proposal and assign points on the basis of the weighting specified
17 in the request for proposals. The local governmental entity shall
18 select the design-build firm in accordance with the formula
19 provided in the request for proposals.

20 Sec. 271.195. NEGOTIATION. After selecting the highest
21 ranked design-build firm under Section 271.193 or 271.194, the
22 local governmental entity shall first attempt to negotiate a
23 contract with the selected firm. If the local governmental entity
24 is unable to negotiate a satisfactory contract with the selected
25 firm, the entity shall, formally and in writing, end all
26 negotiations with that firm and proceed to negotiate with the next
27 firm in the order of the selection ranking until a contract is

1 reached or negotiations with all ranked firms end.

2 Sec. 271.196. ASSUMPTION OF RISKS. The local governmental
3 entity shall assume:

4 (1) all risks and costs associated with:

5 (A) scope changes and modifications;

6 (B) unknown or differing site conditions;

7 (C) regulatory permitting, if the local
8 governmental entity is responsible for those risks and costs by law
9 or contract; and

10 (D) natural disasters and other force majeure
11 events; and

12 (2) all costs associated with property acquisition.

13 Sec. 271.197. STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS.

14 (a) Not later than the 30th day after the date a contract is
15 executed under this subchapter, the local governmental entity shall
16 offer unsuccessful design-build firms that submit a response to the
17 entity's request for additional information under Section 271.194 a
18 stipend for preliminary engineering costs associated with the
19 development of the proposal that is equal to a minimum of one-half
20 of one percent of the preliminary estimate or budgeted cost for the
21 construction of the project. A greater amount may be negotiated
22 with a firm as compensation for the use of intellectual property.
23 If the offer is accepted and paid, the local governmental entity may
24 make use of any work product contained in the proposal, including
25 the techniques, methods, processes, and information contained in
26 the proposal. The use by the local governmental entity of any
27 design element contained in an unsuccessful proposal is at the sole

1 risk and discretion of the entity and does not confer liability on
2 the recipient of the stipend under this subsection.

3 (b) If a design-build firm rejects the offer of the stipend,
4 the firm retains all rights to the work product and the local
5 governmental entity may not make use of any unique design element,
6 technique, method, or process contained in the unsuccessful
7 proposal that was not also contained in the successful proposal at
8 the time of the original submittal. If the local governmental
9 entity wants to acquire the rights to the work product of an
10 unsuccessful firm and the local governmental entity and that firm
11 are unable to reach an agreement on the value of the work product,
12 the matter may be submitted to binding arbitration.

13 (c) If a local governmental entity requests and receives
14 proposals and subsequently cancels the request or suspends the
15 selection process for more than 270 days after the date the local
16 governmental entity requests the design-build firms to provide
17 additional information, each offeror who submitted a proposal as
18 requested shall receive the minimum stipend required by this
19 section.

20 (d) To the extent of a conflict between this section and a
21 federal law or rule governing the expenditure of federal transit
22 funds by a transit authority created under Chapter 451,
23 Transportation Code, the federal law or rule prevails.

24 Sec. 271.198. COMPLETION OF DESIGN. (a) Following
25 selection of a design-build firm under this subchapter, the firm's
26 engineers shall submit all design elements for review and
27 determination of scope compliance to the local governmental entity

1 before or concurrently with construction.

2 (b) An appropriately licensed design professional shall
3 sign and seal construction documents before the documents are
4 released for construction.

5 Sec. 271.199. FINAL CONSTRUCTION DOCUMENTS. At the
6 conclusion of construction, the design-build firm shall supply to
7 the local governmental entity a record set of construction
8 documents for the project prepared as provided by Chapter 1001,
9 Occupations Code.

10 Sec. 271.200. PERFORMANCE OR PAYMENT BOND. (a) A payment
11 or performance bond is not required for, and may not provide
12 coverage for, the portion of a design-build contract under this
13 section that includes design services only.

14 (b) If a fixed contract amount or guaranteed maximum price
15 has not been determined at the time a design-build contract is
16 awarded, the penal sums of the performance and payment bonds
17 delivered to the local governmental entity must each be in an amount
18 equal to the construction budget, as specified in the design
19 criteria package.

20 (c) The design-build firm shall deliver the bonds not later
21 than the 10th day after the date the design-build firm executes the
22 contract unless the design-build firm furnishes a bid bond or other
23 financial security acceptable to the local governmental entity to
24 ensure that the design-build firm will furnish the required
25 performance and payment bonds before the commencement of
26 construction.

27 SECTION 2. Section 271.904(a), Local Government Code, is

1 amended to read as follows:

2 (a) A covenant or promise in, in connection with, or
3 collateral to a contract for engineering or architectural services
4 to which a governmental agency is a party is void and unenforceable
5 if the covenant or promise provides that a licensed engineer or
6 registered architect whose work product is the subject of the
7 contract must indemnify, ~~[or]~~ hold harmless, or defend the
8 governmental agency against liability for damage, other than
9 liability for damage that is caused by or results from an act of
10 [the] negligence, intentional tort, intellectual property
11 infringement, or failure to pay a subcontractor or supplier
12 committed by [or] the indemnitor or the indemnitor's agent,
13 consultant under contract, or another entity over which the
14 indemnitor exercises control ~~[governmental agency or its agent or~~
15 ~~employee]~~.

16 SECTION 3. Section 46.008, Education Code, is amended to
17 read as follows:

18 Sec. 46.008. STANDARDS. (a) The commissioner shall
19 establish standards for adequacy of school facilities. The
20 standards must include requirements related to space, educational
21 adequacy, and construction quality. All new facilities constructed
22 after September 1, 1998, must meet the standards to be eligible to
23 be financed with state or local tax funds.

24 (b) Any portable, modular building capable of being
25 relocated that is purchased or leased after September 1, 2007, for
26 use as a school facility, regardless of whether the building is an
27 industrialized building as defined by Section 1202.003,

1 Occupations Code, must be inspected as provided by Subchapter E,
2 Chapter 1202, Occupations Code, to ensure compliance with the
3 mandatory building codes or approved designs, plans, and
4 specifications.

5 SECTION 4. Section 51.784(i), Education Code, is amended to
6 read as follows:

7 (i) If a job order contract or an order issued under the
8 contract requires engineering or architectural services that
9 constitute the practice of engineering within the meaning of
10 Chapter 1001, Occupations Code, or the practice of architecture
11 within the meaning of Chapter 1051, Occupations Code, the board
12 shall select or designate an architect or engineer to prepare the
13 construction documents for the facility [~~those services shall be~~
14 ~~provided in accordance with applicable law~~]. If the architect or
15 engineer is not a full-time employee of the institution, the board
16 shall select the architect or engineer on the basis of demonstrated
17 competence and qualifications as provided by Section 2254.004,
18 Government Code.

19 SECTION 5. Section 60.464(i), Water Code, is amended to
20 read as follows:

21 (i) If a job order contract or an order issued under the
22 contract requires engineering or architectural services that
23 constitute the practice of engineering within the meaning of
24 Chapter 1001, Occupations Code, or the practice of architecture
25 within the meaning of Chapter 1051, Occupations Code, the district
26 shall select or designate an architect or engineer to prepare the
27 construction documents for the facility [~~those services shall be~~

1 ~~provided in accordance with applicable law].~~ If the architect or
2 engineer is not a full-time employee of the district, the district
3 shall select the architect or engineer on the basis of demonstrated
4 competence and qualifications as provided by Section 2254.004,
5 Government Code.

6 SECTION 6. The changes in law made by this Act apply only to
7 a contract for which a request for proposals or a request for
8 qualifications is first published or distributed on or after the
9 effective date of this Act. A contract for which a request for
10 proposals or a request for qualifications is first published or
11 distributed before the effective date of this Act is governed by the
12 law in effect at the time the request is published or distributed,
13 and the former law is continued in effect for that purpose.

14 SECTION 7. (a) Except as provided by Subsection (b), this
15 Act takes effect September 1, 2007.

16 (b) This Act takes effect only if H.B. No. 447, Acts of the
17 80th Legislature, Regular Session, 2007, takes effect. If H.B. No.
18 447, Acts of the 80th Legislature, Regular Session, 2007, does not
19 take effect, this Act has no effect.