

By: Callegari

H.B. No. 1886

Substitute the following for H.B. No. 1886:

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C.S.H.B. No. 1886

A BILL TO BE ENTITLED

AN ACT

1
2 relating to the procurement methods of certain political
3 subdivisions and certain other entities for the construction,
4 rehabilitation, alteration, or repair of certain projects.

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

6 SECTION 1. Sections 271.111(7) and (10), Local Government
7 Code, are amended to read as follows:

8 (7) "Facility" means, unless otherwise specifically
9 provided, buildings the design and construction of which are
10 governed by accepted building codes. The term does not include:

11 (A) highways, roads, streets, bridges,
12 utilities, water supply projects, water plants, wastewater plants,
13 water and wastewater distribution or conveyance facilities,
14 wharves, docks, airport runways and taxiways, drainage projects, or
15 related types of projects associated with civil engineering
16 construction; or

17 (B) buildings or structures that are incidental
18 to projects that are primarily civil engineering construction
19 projects.

20 (10) "Governmental entity" means a municipality,
21 county, hospital district, water district or authority created
22 under Section 59, Article XVI, Texas Constitution, including a
23 river authority[7] or conservation and reclamation district, or a
24 defense base development authority established under Chapter 379B

1 ~~[378 as added by Chapter 1221, Acts of the 76th Legislature, Regular~~
2 ~~Session, 1999].~~

3 SECTION 2. Sections 271.112(a), (d), and (f), Local
4 Government Code, are amended to read as follows:

5 (a) Any provision in the charter of a home-rule municipality
6 or regulation, if any, of a governmental entity ~~[county, river~~
7 ~~authority, or defense base development authority]~~ that requires the
8 use of competitive bidding or competitive sealed proposals or that
9 prescribes procurement procedures and that is in conflict with this
10 subchapter controls over this subchapter unless the governing body
11 of the governmental entity elects to have this subchapter supersede
12 the charter or regulation.

13 (d) For a contract entered into by a governmental entity,
14 other than a county, ~~[municipality, river authority, or defense~~
15 ~~base development authority]~~ under any of the methods provided by
16 this subchapter, the governmental entity ~~[municipality, river~~
17 ~~authority, or defense base development authority]~~ shall publish
18 notice of the time and place the bids or proposals, or the responses
19 to a request for qualifications, will be received and opened. The
20 notice must be published, in the case of a governmental entity that
21 is a defense base authority or municipality, in a newspaper of
22 general circulation in the county in which the ~~[defense base~~
23 ~~development]~~ authority's or municipality's central administrative
24 office is located or, in the case of a governmental entity that is a
25 hospital district or a water district or authority, must be
26 published in a newspaper of general circulation in the county in
27 which the greatest amount of the district's or ~~[river]~~ authority's

1 territory is located once each week for at least two weeks before
2 the deadline for receiving bids, proposals, or responses. If there
3 is not a newspaper of general circulation in that county, the notice
4 shall be published in a newspaper of general circulation in the
5 county nearest the county seat of the county in which the defense
6 base development authority's or municipality's central
7 administrative office is located or the county in which the
8 greatest amount of the hospital district's or water district's or
9 ~~river~~ authority's territory is located. In a two-step
10 procurement process, the time and place the second step bids,
11 proposals, or responses will be received are not required to be
12 published separately.

13 (f) A contract entered into or an arrangement made in
14 violation of this subchapter is contrary to public policy and is
15 void. A court may enjoin performance of a contract made in
16 violation of this subchapter. A county attorney, a district
17 attorney, a criminal district attorney, a resident of a county that
18 enters into a contract under this subchapter or of a county in which
19 a municipality, hospital district, or water district or ~~or a~~
20 ~~river~~ authority that enters into a contract under this subchapter
21 is located, or any interested party may bring an action for an
22 injunction. A party who prevails in an action brought under this
23 subsection is entitled to reasonable attorney's fees as approved by
24 the court.

25 SECTION 3. Section 271.116, Local Government Code, is
26 amended by adding Subsection (a-1) to read as follows:

27 (a-1) In this section "facility" means an improvement to

1 real property.

2 SECTION 4. Section 271.118, Local Government Code, is
3 amended by adding Subsection (a-1) to read as follows:

4 (a-1) In this section "facility" means an improvement to
5 real property.

6 SECTION 5. Section 271.120(i), Local Government Code, is
7 amended to read as follows:

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

20 SECTION 6. Chapter 271, Local Government Code, is amended
21 by adding Subchapter J to read as follows:

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

23 PROJECTS

24 Sec. 271.181. DEFINITIONS. In this subchapter:

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

27 (2) "Civil works project" means:

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

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

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

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

16 (4) "Design criteria package" means a set of documents
17 that:

18 (A) provides sufficient information to convey
19 the intent, goals, criteria, and objectives of the civil works
20 project; and

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

22 (i) assess the scope of work and the risk
23 involved; and

24 (ii) submit a proposal on the project.

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

27 (6) "Local governmental entity" means a municipality,

1 a county, a water district or authority created under Section 59,
2 Article XVI, Texas Constitution, including a river authority, any
3 other special district or authority authorized by law, or a defense
4 base development authority established under Chapter 379B. The
5 term does not include a municipally owned water or wastewater
6 system with a governing board appointed by the governing body of a
7 municipality with a population of 1.2 million or more.

8 Sec. 271.182. APPLICABILITY. (a) Before September 1,
9 2009, this subchapter applies to a local governmental entity with a
10 population of 500,000 or more within its geographic boundaries or
11 service area.

12 (b) On or after September 1, 2009, and before September 1,
13 2011, this subchapter applies to a local governmental entity with a
14 population of more than 100,000 within its geographic boundaries or
15 service area.

16 (c) On or after September 1, 2011, and before September 1,
17 2013, this subchapter applies to a local governmental entity with a
18 population of more than 25,000 within its geographic boundaries or
19 service area.

20 (d) On or after September 1, 2013, this subchapter applies
21 to any local governmental entity within its geographic boundaries
22 or service area.

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

27 (b) Except as provided by this section, to the extent of any

1 conflict, this subchapter prevails over any other law relating to
2 the purchasing of goods and services except a law relating to
3 contracting with historically underutilized businesses.

4 Sec. 271.184. NOTICE REQUIREMENTS. (a) A local
5 governmental entity shall advertise or publish notice of requests
6 for bids, proposals, or qualifications in any manner prescribed by
7 law.

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

13 Sec. 271.185. CONTRACTS FOR CIVIL WORKS PROJECTS:
14 DESIGN-BUILD. (a) A local governmental entity may use the
15 design-build method for the construction, rehabilitation,
16 alteration, or repair of a civil works project. In using this method
17 and in entering into a contract for the services of a design-build
18 firm, the contracting local governmental entity and the
19 design-build firm shall follow the procedures provided by this
20 subchapter.

21 (b) A contract for a project under this subchapter may cover
22 only a single integrated project. A local governmental entity may
23 not enter into a contract for aggregated projects at multiple
24 locations.

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

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

3 (2) the time constraints for the delivery of the
4 project;

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

7 (4) the capability of the entity to manage and oversee
8 the project, including the availability of experienced personnel or
9 outside consultants who are familiar with the design-build method
10 of project delivery.

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

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

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

20 (1) a local governmental entity with a population of
21 500,000 or more may, under this subchapter, enter into contracts
22 for not more than four projects in any fiscal year;

23 (2) a local governmental entity with a population of
24 100,000 or more but less than 500,000 may, under this subchapter,
25 enter into contracts for not more than three projects in any fiscal
26 year; and

27 (3) a local governmental entity with a population of

1 less than 100,000 may, under this subchapter, enter into contracts
2 for not more than two projects in any fiscal year.

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

9 (b) If the engineer is not a full-time employee of the local
10 governmental entity, the local governmental entity shall select the
11 engineer on the basis of demonstrated competence and qualifications
12 as provided by Section 2254.004, Government Code.

13 Sec. 271.188. USE OF OTHER PROFESSIONAL SERVICES. (a) The
14 local governmental entity shall provide or contract for,
15 independently of the design-build firm, the following services as
16 necessary for the acceptance of the civil works project by the
17 entity:

18 (1) inspection services;

19 (2) construction materials engineering and testing;

20 and

21 (3) verification testing services.

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

25 Sec. 271.189. REQUEST FOR QUALIFICATIONS. (a) The local
26 governmental entity shall prepare a request for qualifications that
27 includes:

- 1 (1) information on the civil works project site;
2 (2) project scope;
3 (3) project budget;
4 (4) project schedule;
5 (5) criteria for selection under Section 271.191 and
6 the weighting of the criteria; and
7 (6) other information that may assist potential
8 design-build firms in submitting proposals for the project.

9 (b) The local governmental entity shall also prepare a
10 design criteria package as described by Section 271.190.

11 Sec. 271.190. CONTENTS OF DESIGN CRITERIA PACKAGE. A
12 design criteria package must include, as appropriate:

- 13 (1) budget or cost estimates;
14 (2) information on the site;
15 (3) performance criteria;
16 (4) special material requirements;
17 (5) initial design calculations;
18 (6) known utilities;
19 (7) capacity requirements;
20 (8) quality assurance and quality control
21 requirements; and
22 (9) the type, size, and location of structures.

23 Sec. 271.191. EVALUATION OF DESIGN-BUILD FIRMS. (a) The
24 local governmental entity shall receive proposals and shall
25 evaluate each offeror's experience, technical competence,
26 capability to perform, the past performance of the offeror's team
27 and members of the team, and other appropriate factors submitted by

1 the team or firm in response to the request for qualifications,
2 except that cost-related or price-related evaluation factors are
3 not permitted at this stage.

4 (b) Each offeror must:

5 (1) select or designate each engineer that is a member
6 of its team based on demonstrated competence and qualifications, in
7 the manner provided by Section 2254.004, Government Code; and

8 (2) certify to the local governmental entity that each
9 selection or designation was based on demonstrated competence and
10 qualifications, in the manner provided by Section 2254.004,
11 Government Code.

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

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

18 (1) qualifications-based selection as provided by
19 Section 271.193; or

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

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

25 (1) may request that the firms identified under
26 Section 271.191(c) provide additional information regarding
27 demonstrated competence and qualifications, project approaches,

1 the ability of the firm to meet schedules, or other factors as
2 appropriate, except that price or cost-related criteria may not be
3 utilized;

4 (2) may not require firms to submit and may not accept
5 or consider conceptual or detailed engineering designs as part of
6 the proposal; and

7 (3) shall:

8 (A) rank each proposal submitted on the basis of
9 the criteria set forth in the request for qualifications and the
10 results of any interview; and

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

14 Sec. 271.194. PROCEDURES FOR COMBINATION OF TECHNICAL AND
15 COST PROPOSALS. (a) A local governmental entity that selects a
16 design-build firm using a combination of technical and cost
17 proposals shall request proposals from firms identified under
18 Section 271.191(c). A firm must submit a proposal not later than
19 the 180th day after the date the local governmental entity makes a
20 public request for the proposals from the selected firms. The
21 request for proposals must include:

22 (1) a design criteria package;

23 (2) a geotechnical baseline report;

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

27 (4) the relative weighting of the technical and price

1 proposals and the formula by which the proposals will be evaluated
2 and ranked.

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

5 (c) Each proposal must include a sealed technical proposal
6 and a separate sealed cost proposal.

7 (d) The technical proposal must address:

8 (1) project approach;

9 (2) anticipated problems;

10 (3) proposed solutions to anticipated problems;

11 (4) ability to meet schedules;

12 (5) conceptual engineering design; and

13 (6) other information requested by the local
14 governmental entity.

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

1 Sec. 271.195. NEGOTIATION. After selecting the highest
2 ranked design-build firm under Section 271.193 or 271.194, the
3 local governmental entity shall first attempt to negotiate a
4 contract with the selected firm. If the local governmental entity
5 is unable to negotiate a satisfactory contract with the selected
6 firm, the entity shall, formally and in writing, end all
7 negotiations with that firm and proceed to negotiate with the next
8 firm in the order of the selection ranking until a contract is
9 reached or negotiations with all ranked firms end.

10 Sec. 271.196. ASSUMPTION OF RISKS. The local governmental
11 entity shall assume:

12 (1) all risks and costs associated with:
13 (A) scope changes and modifications;
14 (B) unknown or differing site conditions;
15 (C) regulatory permitting; and
16 (D) natural disasters and other force majeure
17 events; and

18 (2) all costs associated with property acquisition.

19 Sec. 271.197. STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS.

20 (a) Not later than the 30th day after the date a contract is
21 executed under this subchapter, the local governmental entity shall
22 offer unsuccessful design-build firms that submit a response to the
23 entity's request for additional information under Section 271.194 a
24 stipend for preliminary engineering costs associated with the
25 development of the proposal that is equal to a minimum of one-half
26 of one percent of the preliminary estimate or budgeted cost for the
27 construction of the project. A greater amount may be negotiated

1 with a firm as compensation for the use of intellectual property.
2 If the offer is accepted and paid, the local governmental entity may
3 make use of any work product contained in the proposal, including
4 the techniques, methods, processes, and information contained in
5 the proposal. The use by the local governmental entity of any
6 design element contained in an unsuccessful proposal is at the sole
7 risk and discretion of the entity and does not confer liability on
8 the recipient of the stipend under this subsection.

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

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

26 Sec. 271.198. COMPLETION OF DESIGN. (a) Following
27 selection of a design-build firm under this subchapter, the firm's

1 engineers shall submit all design elements for review and
2 determination of scope compliance to the local governmental entity
3 before or concurrently with construction.

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

7 Sec. 271.199. FINAL CONSTRUCTION DOCUMENTS. At the
8 conclusion of construction, the design-build firm shall supply to
9 the local governmental entity a record set of construction
10 documents for the project prepared as provided by Section 1001.407,
11 Occupations Code.

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

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

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

1 construction.

2 SECTION 7. Section 44.041(i), Education Code, is amended to
3 read as follows:

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

16 SECTION 8. Section 51.784(i), Education Code, is amended to
17 read as follows:

18 (i) If a job order contract or an order issued under the
19 contract requires engineering or architectural services that
20 constitute the practice of engineering within the meaning of
21 Chapter 1001, Occupations Code, or the practice of architecture
22 within the meaning of Chapter 1051, Occupations Code, the board
23 shall select or designate an architect or engineer to prepare the
24 construction documents for the facility [~~those services shall be~~
25 ~~provided in accordance with applicable law~~]. If the architect or
26 engineer is not a full-time employee of the institution, the board
27 shall select the architect or engineer on the basis of demonstrated

1 competence and qualifications as provided by Section 2254.004,
2 Government Code.

3 SECTION 9. Section 791.011, Government Code, is amended by
4 adding Subsection (h) to read as follows:

5 (h) An interlocal agreement may not be used to purchase
6 engineering or architectural services unless the services are:

7 (1) directly related to the design or construction of
8 a specific facility to be jointly owned, used, or financed by the
9 parties to the agreement; and

10 (2) procured as provided by Section 2254.004.

11 SECTION 10. Section 60.464(i), Water Code, is amended to
12 read as follows:

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

25 SECTION 11. The changes in law made by this Act apply only
26 to a contract for which a request for proposals or a request for
27 qualifications is first published or distributed on or after the

1 effective date of this Act. A contract for which a request for
2 proposals or a request for qualifications is first published or
3 distributed before the effective date of this Act is governed by the
4 law in effect at the time the request is published or distributed,
5 and the former law is continued in effect for that purpose.

6 SECTION 12. (a) Except as provided by Subsection (b), this
7 Act takes effect September 1, 2007.

8 (b) This Act takes effect only if H.B. No. 447, Acts of the
9 80th Legislature, Regular Session, 2007, takes effect. If H.B. No.
10 447, Acts of the 80th Legislature, Regular Session, 2007, does not
11 take effect, this Act has no effect.