

By: Geren

H.B. No. 2106

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to contracts by governmental entities and related  
3 professional services and to public works performance and payment  
4 bonds.

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

6 ARTICLE 1. PUBLIC WORKS PERFORMANCE AND PAYMENT BONDS

7 SECTION 1.01. Section 2253.021, Government Code, is amended  
8 by adding Subsection (h) to read as follows:

9 (h) A reverse auction procedure may not be used to obtain  
10 services related to a public work contract for which a bond is  
11 required under this section. In this subsection, "reverse auction  
12 procedure" has the meaning assigned by Section 2155.062 or a  
13 procedure similar to that described by Section 2155.062.

14 ARTICLE 2. CONTRACTS BY GOVERNMENTAL ENTITIES

15 SECTION 2.01. Section 11.168, Education Code, is amended to  
16 read as follows:

17 Sec. 11.168. USE OF DISTRICT RESOURCES PROHIBITED FOR  
18 CERTAIN PURPOSES; EXCEPTION. (a) Except as provided by Subsection  
19 (b), the [The] board of trustees of a school district may not enter  
20 into an agreement authorizing the use of school district employees,  
21 property, or resources for the provision of materials or labor for  
22 the design, construction, or renovation of improvements to real  
23 property not owned or leased by the district.

24 (b) This section does not prohibit the board of trustees of

1 a school district from entering into an agreement for the design,  
2 construction, or renovation of improvements to real property not  
3 owned or leased by the district if the improvements benefit real  
4 property owned or leased by the district. Benefits to real property  
5 owned or leased by the district include the design, construction,  
6 or renovation of highways, roads, streets, sidewalks, crosswalks,  
7 utilities, and drainage improvements that serve or benefit the real  
8 property owned or leased by the district.

9 SECTION 2.02. Sections 44.031(a) and (f), Education Code,  
10 are amended to read as follows:

11 (a) Except as provided by this subchapter, all school  
12 district contracts for the purchase of goods and services, except  
13 contracts for the purchase of produce or vehicle fuel, valued at  
14 \$25,000 or more in the aggregate for each 12-month period shall be  
15 made by the method, of the following methods, that provides the best  
16 value for the district:

17 (1) competitive bidding for services other than  
18 construction services;

19 (2) competitive sealed proposals for services other  
20 than construction services;

21 (3) a request for proposals, for services other than  
22 construction services;

23 (4) an interlocal contract;

24 (5) a method provided by Chapter 2267, Government Code  
25 ~~[a design/build contract,~~

26 ~~[(6) a contract to construct, rehabilitate, alter, or~~  
27 ~~repair facilities that involves using a construction manager,~~

1           ~~[(7) a job order contract for the minor construction,~~  
2 ~~repair, rehabilitation, or alteration of a facility];~~

3           (6) [(8)] the reverse auction procedure as defined by  
4 Section 2155.062(d), Government Code; or

5           (7) [(9)] the formation of a political subdivision  
6 corporation under Section 304.001, Local Government Code.

7           (f) This section does not apply to a contract for  
8 professional services rendered, including services of an  
9 architect, attorney, engineer, or fiscal agent. A school district  
10 may, at its option, contract for professional services rendered by  
11 a financial consultant or a technology consultant in the manner  
12 provided by Section 2254.003, Government Code, in lieu of the  
13 methods provided by this section.

14           SECTION 2.03. Subchapter B, Chapter 44, Education Code, is  
15 amended by adding Section 44.0351 to read as follows:

16           Sec. 44.0351. COMPETITIVE BIDDING. (a) Except to the  
17 extent prohibited by other law and to the extent consistent with  
18 this subchapter, a school district may use competitive bidding to  
19 select a vendor as authorized by Section 44.031(a)(1).

20           (b) Except as provided by this subsection, Subchapter B,  
21 Chapter 271, Local Government Code, does not apply to a competitive  
22 bidding process under this subchapter. Sections 271.026,  
23 271.027(a), and 271.0275, Local Government Code, apply to a  
24 competitive bidding process under this subchapter.

25           (c) A school district shall award a competitively bid  
26 contract at the bid amount to the bidder offering the best value for  
27 the district. In determining the best value for the district, the

1 district is not restricted to considering price alone, but may  
2 consider any other factors stated in the selection criteria. The  
3 selection criteria may include the factors listed in Section  
4 44.031(b).

5 SECTION 2.04. Subchapter B, Chapter 44, Education Code, is  
6 amended by adding Section 44.0361 to read as follows:

7 Sec. 44.0361. COMPETITIVE SEALED PROPOSALS. (a) In  
8 selecting a vendor through competitive sealed proposals as  
9 authorized by Section 44.031(a)(2), a school district shall follow  
10 the procedures prescribed by this section.

11 (b) The district shall prepare a request for competitive  
12 sealed proposals that includes information that vendors may require  
13 to respond to the request. The district shall state in the request  
14 for proposals the selection criteria that will be used in selecting  
15 the successful offeror.

16 (c) The district shall receive, publicly open, and read  
17 aloud the names of the offerors and, if any are required to be  
18 stated, all prices stated in each proposal. Not later than the 45th  
19 day after the date on which the proposals are opened, the district  
20 shall evaluate and rank each proposal submitted in relation to the  
21 published selection criteria.

22 (d) The district shall select the offeror that offers the  
23 best value for the district based on the published selection  
24 criteria and on its ranking evaluation. The district shall first  
25 attempt to negotiate with the selected offeror a contract. The  
26 district may discuss with the selected offeror options for a scope  
27 or time modification and any price change associated with the

1 modification. If the district is unable to negotiate a contract  
2 with the selected offeror, the district shall, formally and in  
3 writing, end negotiations with that offeror and proceed to the next  
4 offeror in the order of the selection ranking until a contract is  
5 reached or all proposals are rejected.

6 (e) In determining the best value for the district, the  
7 district is not restricted to considering price alone, but may  
8 consider any other factors stated in the selection criteria.

9 SECTION 2.05. Subchapter B, Chapter 44, Education Code, is  
10 amended by adding Section 44.0411 to read as follows:

11 Sec. 44.0411. CHANGE ORDERS. (a) If a change in plans or  
12 specifications is necessary after the performance of a contract is  
13 begun or if it is necessary to decrease or increase the quantity of  
14 work to be performed or of materials, equipment, or supplies to be  
15 furnished, the district may approve change orders making the  
16 changes.

17 (b) The total contract price may not be increased because of  
18 the changes unless additional money for increased costs is approved  
19 for that purpose from available money or is provided for by the  
20 authorization of the issuance of time warrants.

21 (c) The district may grant general authority to an  
22 administrative official to approve the change orders.

23 (d) A contract with an original contract price of \$1 million  
24 or more may not be increased under this section by more than 25  
25 percent. If a change order for a contract with an original contract  
26 price of less than \$1 million increases the contract amount to \$1  
27 million or more, subsequent change orders may not increase the

1 revised contract amount by more than 25 percent.

2 SECTION 2.06. Subchapter A, Chapter 46, Education Code, is  
3 amended by adding Section 46.0111 to read as follows:

4 Sec. 46.0111. ACTIONS BROUGHT FOR DEFECTIVE DESIGN,  
5 CONSTRUCTION, RENOVATION, OR IMPROVEMENT OF INSTRUCTIONAL  
6 FACILITY. (a) In this section:

7 (1) "Net proceeds" means the difference between the  
8 amount recovered by or on behalf of a school district in an action,  
9 by settlement or otherwise, and the legal fees and litigation costs  
10 incurred by the district in prosecuting the action.

11 (2) "State's share" means an amount equal to the  
12 district's net proceeds from the recovery multiplied by a  
13 percentage determined by dividing the amount of state assistance  
14 under this subchapter used to pay the principal of and interest on  
15 bonds issued in connection with the instructional facility that is  
16 the subject of the action by the total amount of principal and  
17 interest paid on the bonds as of the date of the judgment or  
18 settlement.

19 (b) A school district that brings an action for recovery of  
20 damages for the defective design, construction, renovation, or  
21 improvement of an instructional facility financed by bonds for  
22 which the district receives state assistance under this subchapter  
23 shall provide the commissioner with written notice of the action.

24 (c) The commissioner may join in the action on behalf of the  
25 state to protect the state's share in the action.

26 (d) A school district shall use the net proceeds from an  
27 action brought by the district for the defective design,

1 construction, renovation, or improvement of an instructional  
2 facility financed by bonds for which the district receives state  
3 assistance under this subchapter to repair the defective design,  
4 construction, renovation, or improvement of the instructional  
5 facility on which the action is brought or to replace the facility.  
6 Section 46.008 applies to the repair.

7 (e) The state's share is state property. The school  
8 district shall send to the comptroller any portion of the state's  
9 share not used by the school district to repair the defective  
10 design, construction, renovation, or improvement of the  
11 instructional facility on which the action is brought or to replace  
12 the facility. Section 42.258 applies to the state's share under  
13 this subsection.

14 SECTION 2.07. Section 791.011, Government Code, is amended  
15 by amending Subsection (h) and adding Subsection (i) to read as  
16 follows:

17 (h) An interlocal contract or any other agreement between a  
18 governmental entity and a purchasing cooperative may not be used to  
19 purchase engineering or architectural services.

20 (i) An interlocal contract may not be used to purchase  
21 construction services unless the services are in connection with  
22 the design or construction of a specific facility to be jointly  
23 owned, used, or financed by the parties to the contract or:

24 (1) the services are in connection with a job order  
25 contract;

26 (2) the governing body of the governmental entity for  
27 whom the work will ultimately be performed approves the purchase in

1 open session;

2 (3) public notice is provided in a manner consistent  
3 with a direct contract for job order contracting services; and

4 (4) work orders under the contract comply with Section  
5 2267.353.

6 SECTION 2.08. Section 2166.2525, Government Code, is  
7 amended to read as follows:

8 Sec. 2166.2525. DETERMINATION OF CONTRACTING METHOD. The  
9 ~~[commission shall adopt rules that determine the circumstances for~~  
10 ~~use of each]~~ method of contracting allowed under this subchapter  
11 for design and construction services is any method provided by  
12 Chapter 2267. ~~[In developing the rules, the commission shall~~  
13 ~~solicit advice and comment from design and construction~~  
14 ~~professionals regarding the criteria the commission will use in~~  
15 ~~determining which contracting method is best suited for a project.]~~

16 SECTION 2.09. Subtitle F, Title 10, Government Code, is  
17 amended by adding Chapter 2267 to read as follows:

18 CHAPTER 2267. CONTRACTING AND DELIVERY PROCEDURES FOR

19 CONSTRUCTION PROJECTS

20 SUBCHAPTER A. GENERAL PROVISIONS

21 Sec. 2267.001. DEFINITIONS. In this chapter:

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

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

26 (3) "Facility" means, unless otherwise specifically  
27 provided, an improvement to real property.



1           (4) "General conditions" in the context of a contract  
2 for the construction, rehabilitation, alteration, or repair of a  
3 facility means on-site management, administrative personnel,  
4 insurance, bonds, equipment, utilities, and incidental work,  
5 including minor field labor and materials.

6           (5) "General contractor" means a sole proprietorship,  
7 partnership, corporation, or other legal entity that assumes the  
8 risk for constructing, rehabilitating, altering, or repairing all  
9 or part of a facility at the contracted price.

10           (6) "Public work contract" means a contract for  
11 constructing, altering, or repairing a public building or carrying  
12 out or completing any public work.

13           Sec. 2267.002. APPLICABILITY OF CHAPTER TO GOVERNMENTAL  
14 ENTITIES AND QUASI-GOVERNMENTAL ENTITIES ENGAGED IN PUBLIC WORKS.

15           This chapter applies to a public work contract made by a  
16 governmental entity or quasi-governmental entity authorized by  
17 state law to make a public work contract, including:

18           (1) a state agency as defined by Section 2151.002,  
19 including the Texas Building and Procurement Commission;

20           (2) a local government, including:

21                   (A) a county;

22                   (B) a municipality;

23                   (C) a school district;

24                   (D) any other special district or authority,  
25 including a hospital district, a defense base development authority  
26 established under Chapter 379B, Local Government Code, and a  
27 conservation and reclamation district, including a river authority

1 or any other type of water district; and

2 (E) any other political subdivision of this  
3 state;

4 (3) a public junior college as defined by Section  
5 61.003, Education Code;

6 (4) any entity owned by a municipality; and

7 (5) any other entity that owns or operates a facility  
8 for the benefit of a municipality or county.

9 Sec. 2267.003. CONFLICT OF LAWS; REQUIREMENT TO FOLLOW  
10 PROCEDURES OF THIS CHAPTER. (a) Except as provided by this  
11 section, this chapter prevails over any other law relating to a  
12 public work contract.

13 (b) This chapter does not prevail over a conflicting  
14 provision in a law relating to contracting with a historically  
15 underutilized business.

16 (c) This chapter does not prevail over a conflicting  
17 provision in an ordinance or resolution passed by the governing  
18 body of a municipally owned electric utility in a procedure  
19 described by Section 252.022(c), Local Government Code, that:

20 (1) requires the use of competitive bidding or  
21 competitive sealed proposals; or

22 (2) prescribes a design-build procurement procedure  
23 that conflicts with this chapter.

24 Sec. 2267.004. EXEMPTION: TEXAS DEPARTMENT OF  
25 TRANSPORTATION; HIGHWAY PROJECTS. This chapter does not apply to:

26 (1) a contract entered into by the Texas Department of  
27 Transportation; or

1           (2) a project that receives money from a state or  
2 federal highway fund.

3           Sec. 2267.005. APPLICABILITY: INSTITUTIONS OF HIGHER  
4 EDUCATION. (a) In this section, "institution of higher  
5 education," "public junior college," and "university system" have  
6 the meanings assigned by Section 61.003, Education Code.

7           (b) This chapter applies to a public junior college but does  
8 not apply to:

- 9                   (1) any other institution of higher education; or  
10                   (2) a university system.

11           Sec. 2267.006. EXEMPTION: REGIONAL TOLLWAY AUTHORITIES.  
12 This chapter does not apply to a regional tollway authority under  
13 Chapter 366, Transportation Code.

14           [Sections 2267.007-2267.050 reserved for expansion]

15                   SUBCHAPTER B. GENERAL POWERS AND DUTIES

16           Sec. 2267.051. RULES. A governmental entity may adopt  
17 rules as necessary to implement this chapter.

18           Sec. 2267.052. NOTICE REQUIREMENTS. (a) A governmental  
19 entity shall advertise or publish notice of requests for bids,  
20 proposals, or qualifications in a manner prescribed by law.

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

26           Sec. 2267.053. DELEGATION OF AUTHORITY. (a) The governing  
27 body of a governmental entity may delegate its authority under this

1 chapter regarding an action authorized or required by this chapter  
2 to a designated representative, committee, or other person.

3 (b) The governmental entity shall provide notice of the  
4 delegation, the limits of the delegation, and the name or title of  
5 each person designated under Subsection (a) by rule or in the  
6 request for bids, proposals, or qualifications or in an addendum to  
7 the request.

8 Sec. 2267.054. RIGHT TO WORK. (a) This section applies to  
9 a governmental entity when the governmental entity is engaged in:

- 10 (1) procuring goods or services under this chapter;  
11 (2) awarding a contract under this chapter; or  
12 (3) overseeing procurement or construction for a  
13 public work or public improvement under this chapter.

14 (b) In engaging in an activity to which this section  
15 applies, a governmental entity:

- 16 (1) may not consider whether a person is a member of or  
17 has another relationship with any organization; and  
18 (2) shall ensure that its bid specifications and any  
19 subsequent contract or other agreement do not deny or diminish the  
20 right of a person to work because of the person's membership or  
21 other relationship status with respect to an organization.

22 Sec. 2267.055. CRITERIA TO CONSIDER. (a) In determining  
23 the award of a contract under this chapter, the governmental entity  
24 may consider:

- 25 (1) the price;  
26 (2) the offeror's experience and reputation;  
27 (3) the quality of the offeror's goods or services;

1           (4) the impact on the ability of the governmental  
2 entity to comply with rules relating to historically underutilized  
3 businesses;

4           (5) the offeror's safety record;

5           (6) the offeror's proposed personnel;

6           (7) whether the offeror's financial capability is  
7 appropriate to the size and scope of the project; and

8           (8) any other relevant factor specifically listed in  
9 the request for bids, proposals, or qualifications.

10          (b) In determining the award of a contract under this  
11 chapter, the governmental entity shall:

12           (1) consider and apply any existing laws, including  
13 any criteria, related to historically underutilized businesses;  
14 and

15           (2) consider and apply any existing laws, rules, or  
16 applicable municipal charters, including laws applicable to local  
17 governments, related to the use of women, minority, small, or  
18 disadvantaged businesses.

19          Sec. 2267.056. USING METHOD OTHER THAN COMPETITIVE BIDDING  
20 FOR CONSTRUCTION SERVICES; EVALUATION OF PROPOSALS; CRITERIA. (a)  
21 The governing body of a governmental entity that considers a  
22 construction contract using a method authorized by this chapter  
23 other than competitive bidding must, before advertising, determine  
24 which method provides the best value for the governmental entity.

25          (b) The governmental entity shall base its selection among  
26 offerors on applicable criteria listed for the particular method  
27 used. The governmental entity shall publish in the request for

1 proposals or qualifications the criteria that will be used to  
2 evaluate the offerors, and the applicable weighted value for each  
3 criterion.

4 (c) The governmental entity shall document the basis of its  
5 selection and shall make the evaluations public not later than the  
6 seventh day after the date the contract is awarded.

7 Sec. 2267.057. ARCHITECT OR ENGINEER SERVICES. (a) An  
8 architect or engineer required to be selected or designated under  
9 this chapter has full responsibility for complying with Chapter  
10 1051 or 1001, Occupations Code, as applicable.

11 (b) If the selected or designated architect or engineer is  
12 not a full-time employee of the governmental entity, the  
13 governmental entity shall select the architect or engineer on the  
14 basis of demonstrated competence and qualifications as provided by  
15 Section 2254.004.

16 Sec. 2267.058. USE OF OTHER PROFESSIONAL SERVICES. (a)  
17 Independently of the contractor, construction manager-at-risk, or  
18 design-build firm, the governmental entity shall provide or  
19 contract for the construction materials engineering, testing, and  
20 inspection services and the verification testing services  
21 necessary for acceptance of the facility by the governmental  
22 entity.

23 (b) The governmental entity shall select the services for  
24 which it contracts under this section in accordance with Section  
25 2254.004.

26 Sec. 2267.059. SEALED BIDS, PROPOSALS, OR QUALIFICATIONS  
27 REQUIRED. A person who submits a bid, proposal, or qualification to

1 a governmental entity shall seal it before delivery.

2 [Sections 2267.060-2267.100 reserved for expansion]

3 SUBCHAPTER C. COMPETITIVE BIDDING METHOD

4 Sec. 2267.101. CONTRACTS FOR FACILITIES: COMPETITIVE  
5 BIDDING. (a) In this chapter, "competitive bidding" is a  
6 procurement method by which a governmental entity contracts with a  
7 contractor for the construction, alteration, rehabilitation, or  
8 repair of a facility by awarding the contract to the lowest  
9 responsible bidder.

10 (b) Except as otherwise provided by this chapter or other  
11 law, a governmental entity may contract for the construction,  
12 alteration, rehabilitation, or repair of a facility only after the  
13 entity advertises for bids for the contract in a manner prescribed  
14 by law, receives competitive bids, and awards the contract to the  
15 lowest responsible bidder.

16 Sec. 2267.102. USE OF ARCHITECT OR ENGINEER. The  
17 governmental entity shall select or designate an architect or  
18 engineer in accordance with Chapter 1051 or 1001, Occupations Code,  
19 as applicable, to prepare the construction documents required for a  
20 project to be awarded by competitive bidding.

21 Sec. 2267.103. PREPARATION OF REQUEST. The governmental  
22 entity shall prepare a request for competitive bids that includes  
23 construction documents, estimated budget, project scope, estimated  
24 project completion date, and other information that a contractor  
25 may require to submit a bid.

26 Sec. 2267.104. EVALUATION OF OFFERORS. The governmental  
27 entity shall receive, publicly open, and read aloud the names of the

1 offerors and their bids.

2 Sec. 2267.105. SELECTION OF OFFEROR. Not later than the  
3 seventh day after the date the contract is awarded, the  
4 governmental entity shall document the basis of its selection and  
5 shall make the evaluations public.

6 Sec. 2267.106. APPLICABILITY OF OTHER COMPETITIVE BIDDING  
7 LAW TO CERTAIN LOCAL GOVERNMENTAL ENTITIES. Except as otherwise  
8 specifically provided by this section, Subchapter B, Chapter 271,  
9 Local Government Code, does not apply to a competitive bidding  
10 process conducted under this chapter. Sections 271.026,  
11 271.027(a), and 271.0275, Local Government Code, apply to a  
12 competitive bidding process conducted under this chapter by a  
13 governmental entity as defined by Section 271.021, Local Government  
14 Code.

15 [Sections 2267.107-2267.150 reserved for expansion]

16 SUBCHAPTER D. COMPETITIVE SEALED PROPOSAL METHOD

17 Sec. 2267.151. CONTRACTS FOR FACILITIES: COMPETITIVE  
18 SEALED PROPOSALS. (a) In this chapter, "competitive sealed  
19 proposals" is a procurement method by which a governmental entity  
20 requests proposals, ranks the offerors, negotiates as prescribed,  
21 and then contracts with a general contractor for the construction,  
22 rehabilitation, alteration, or repair of a facility.

23 (b) In selecting a contractor through competitive sealed  
24 proposals, a governmental entity shall follow the procedures  
25 provided by this subchapter.

26 Sec. 2267.152. USE OF ARCHITECT OR ENGINEER. The  
27 governmental entity shall select or designate an architect or



1 engineer to prepare construction documents for the project.

2 Sec. 2267.153. PREPARATION OF REQUEST. The governmental  
3 entity shall prepare a request for competitive sealed proposals  
4 that includes construction documents, selection criteria and the  
5 weighted value for each criterion, estimated budget, project scope,  
6 estimated project completion date, and other information that a  
7 contractor may require to respond to the request.

8 Sec. 2267.154. EVALUATION OF OFFERORS. (a) The  
9 governmental entity shall receive, publicly open, and read aloud  
10 the names of the offerors and any monetary proposals made by the  
11 offerors.

12 (b) Not later than the 45th day after the date of opening the  
13 proposals, the governmental entity shall evaluate and rank each  
14 proposal submitted in relation to the published selection criteria.

15 Sec. 2267.155. SELECTION OF OFFEROR. (a) The governmental  
16 entity shall select the offeror that submits the proposal that  
17 offers the best value for the governmental entity based on:

18 (1) the selection criteria in the request for proposal  
19 and the weighted value for those criteria in the request for  
20 proposal; and

21 (2) its ranking evaluation.

22 (b) The governmental entity shall first attempt to  
23 negotiate a contract with the selected offeror. The governmental  
24 entity and its architect or engineer may discuss with the selected  
25 offeror options for a scope or time modification and any price  
26 change associated with the modification.

27 (c) If the governmental entity is unable to negotiate a

1 contract with the selected offeror, the governmental entity shall,  
2 formally and in writing, end negotiations with that offeror and  
3 proceed to the next offeror in the order of the selection ranking  
4 until a contract is reached or all proposals are rejected.

5 [Sections 2267.156-2267.200 reserved for expansion]

6 SUBCHAPTER E. CONSTRUCTION MANAGER-AGENT METHOD

7 Sec. 2267.201. CONTRACTS FOR FACILITIES: CONSTRUCTION  
8 MANAGER-AGENT. (a) In this chapter, the "construction  
9 manager-agent method" is a delivery method by which a governmental  
10 entity contracts with a construction manager-agent to provide  
11 administrative services and to manage multiple contracts with  
12 various construction prime contractors.

13 (b) A construction manager-agent is a sole proprietorship,  
14 partnership, corporation, or other legal entity that serves as the  
15 agent for the governmental entity by providing construction  
16 administration and management services described by Subsection (a)  
17 for the construction, rehabilitation, alteration, or repair of a  
18 facility.

19 (c) A governmental entity may retain a construction  
20 manager-agent for assistance in the construction, rehabilitation,  
21 alteration, or repair of a facility only as provided by this  
22 subchapter.

23 Sec. 2267.202. CONTRACT PROVISIONS OF CONSTRUCTION  
24 MANAGER-AGENT. The contract between the governmental entity and  
25 the construction manager-agent may require the construction  
26 manager-agent to provide:

27 (1) administrative personnel;

1           (2) equipment necessary to perform duties under this  
2 subchapter;

3           (3) on-site management; and

4           (4) other services specified in the contract.

5           Sec. 2267.203. LIMITS ON CONSTRUCTION MANAGER-AGENT. A  
6 construction manager-agent may not:

7           (1) self-perform any aspect of the construction,  
8 rehabilitation, alteration, or repair of the facility;

9           (2) be a party to a construction subcontract for the  
10 construction, rehabilitation, alteration, or repair of the  
11 facility; or

12           (3) provide or be required to provide performance and  
13 payment bonds for the construction, rehabilitation, alteration, or  
14 repair of the facility.

15           Sec. 2267.204. FIDUCIARY CAPACITY OF CONSTRUCTION  
16 MANAGER-AGENT. A construction manager-agent represents the  
17 governmental entity in a fiduciary capacity.

18           Sec. 2267.205. USE OF ARCHITECT OR ENGINEER. (a) On or  
19 before the selection of a construction manager-agent, the  
20 governmental entity shall select or designate an architect or  
21 engineer in accordance with Chapter 1051 or 1001, Occupations Code,  
22 as applicable, to prepare the construction documents for the  
23 project.

24           (b) The governmental entity's architect or engineer may not  
25 serve, alone or in combination with another person, as the  
26 construction manager-agent unless the architect or engineer is  
27 hired to serve as the construction manager-agent under a separate

1 or concurrent selection process conducted in accordance with this  
2 subchapter. This subsection does not prohibit the governmental  
3 entity's architect or engineer from providing customary  
4 construction phase services under the architect's or engineer's  
5 original professional service agreement in accordance with  
6 applicable licensing laws.

7 (c) To the extent that the construction manager-agent's  
8 services are defined as part of the practice of architecture or  
9 engineering under Chapter 1051 or 1001, Occupations Code, those  
10 services must be conducted by a person licensed under the  
11 applicable chapter.

12 Sec. 2267.206. SELECTION OF CONTRACTORS. A governmental  
13 entity using the construction manager-agent method shall procure,  
14 in accordance with applicable law and in any manner authorized by  
15 this chapter, a general contractor or trade contractors who will  
16 serve as the prime contractor for their specific portion of the work  
17 and provide performance and payment bonds to the governmental  
18 entity.

19 Sec. 2267.207. SELECTION OF CONSTRUCTION MANAGER-AGENT. A  
20 governmental entity shall select a construction manager-agent on  
21 the basis of demonstrated competence and qualifications in the same  
22 manner that an architect or engineer is selected under Section  
23 2254.004.

24 Sec. 2267.208. INSURANCE. A construction manager-agent  
25 selected under this subchapter shall maintain professional  
26 liability or errors and omissions insurance in the amount of at  
27 least \$1 million for each occurrence.

1 [Sections 2267.209-2267.250 reserved for expansion]

2 SUBCHAPTER F. CONSTRUCTION MANAGER-AT-RISK METHOD

3 Sec. 2267.251. CONTRACTS FOR FACILITIES: CONSTRUCTION  
4 MANAGER-AT-RISK. (a) In this chapter, the "construction  
5 manager-at-risk method" is a delivery method by which a  
6 governmental entity contracts with an architect or engineer for  
7 design and construction phase services and contracts separately  
8 with a construction manager-at-risk to serve as the general  
9 contractor and to provide consultation during the design and  
10 construction, rehabilitation, alteration, or repair of a facility.

11 (b) A construction manager-at-risk is a sole  
12 proprietorship, partnership, corporation, or other legal entity  
13 that assumes the risk for construction, rehabilitation,  
14 alteration, or repair of a facility at the contracted price as a  
15 general contractor and provides consultation to the governmental  
16 entity regarding construction during and after the design of the  
17 facility. The contracted price may be a guaranteed maximum price.

18 (c) A governmental entity may use the construction  
19 manager-at-risk method in selecting a general contractor for the  
20 construction, rehabilitation, alteration, or repair of a facility  
21 only as provided by this subchapter.

22 Sec. 2267.252. USE OF ARCHITECT OR ENGINEER. (a) On or  
23 before the selection of a construction manager-at-risk, the  
24 governmental entity shall select or designate an architect or  
25 engineer to prepare the construction documents for the project.

26 (b) The governmental entity's architect or engineer for a  
27 project may not serve, alone or in combination with another person,

1 as the construction manager-at-risk unless the architect or  
2 engineer is hired to serve as the construction manager-at-risk  
3 under a separate or concurrent selection process conducted in  
4 accordance with this subchapter. This subsection does not prohibit  
5 the governmental entity's architect or engineer from providing  
6 customary construction phase services under the architect's or  
7 engineer's original professional service agreement in accordance  
8 with applicable licensing laws.

9 Sec. 2267.253. SELECTION PROCESS. (a) The governmental  
10 entity shall select the construction manager-at-risk in a one-step  
11 or two-step process.

12 (b) The governmental entity shall prepare a single request  
13 for proposals, in the case of a one-step process, and an initial  
14 request for qualifications, in the case of a two-step process, that  
15 includes:

16 (1) a statement as to whether the selection process is  
17 a one-step or two-step process;

18 (2) general information on the project site, project  
19 scope, schedule, selection criteria and the weighted value for each  
20 criterion, and estimated budget and the time and place for receipt  
21 of the proposals or qualifications; and

22 (3) other information that may assist the governmental  
23 entity in its selection of a construction manager-at-risk.

24 (c) The governmental entity shall state the selection  
25 criteria in the request for proposals or qualifications.

26 (d) If a one-step process is used, the governmental entity  
27 may request, as part of the offeror's proposal, proposed fees and

1 prices for fulfilling the general conditions.

2 (e) If a two-step process is used, the governmental entity  
3 may not request fees or prices in step one. In step two, the  
4 governmental entity may request that five or fewer offerors,  
5 selected solely on the basis of qualifications, provide additional  
6 information, including the construction manager-at-risk's proposed  
7 fee and prices for fulfilling the general conditions.

8 (f) At each step, the governmental entity shall receive,  
9 publicly open, and read aloud the names of the offerors. At the  
10 appropriate step, the governmental entity shall also read aloud the  
11 fees and prices, if any, stated in each proposal as the proposal is  
12 opened.

13 (g) Not later than the 45th day after the date of opening the  
14 final proposals, the governmental entity shall evaluate and rank  
15 each proposal submitted in relation to the criteria set forth in the  
16 request for proposals.

17 Sec. 2267.254. SELECTION OF OFFEROR. (a) The governmental  
18 entity shall select the offeror that submits the proposal that  
19 offers the best value for the governmental entity based on the  
20 published selection criteria and on its ranking evaluation.

21 (b) The governmental entity shall first attempt to  
22 negotiate a contract with the selected offeror.

23 (c) If the governmental entity is unable to negotiate a  
24 satisfactory contract with the selected offeror, the governmental  
25 entity shall, formally and in writing, end negotiations with that  
26 offeror and proceed to negotiate with the next offeror in the order  
27 of the selection ranking until a contract is reached or

1 negotiations with all ranked offerors end.

2 (d) Not later than the seventh day after the date the  
3 contract is awarded, the governmental entity shall make the  
4 rankings determined under Section 2267.253(g) public.

5 Sec. 2267.255. PERFORMANCE OF WORK. (a) A construction  
6 manager-at-risk shall publicly advertise for bids or proposals and  
7 receive bids or proposals from trade contractors or subcontractors  
8 for the performance of all major elements of the work other than the  
9 minor work that may be included in the general conditions.

10 (b) A construction manager-at-risk may seek to perform  
11 portions of the work itself if:

12 (1) the construction manager-at-risk submits its bid  
13 or proposal for those portions of the work in the same manner as all  
14 other trade contractors or subcontractors; and

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

18 Sec. 2267.256. REVIEW OF BIDS OR PROPOSALS. (a) The  
19 construction manager-at-risk shall review all trade contractor or  
20 subcontractor bids or proposals in a manner that does not disclose  
21 the contents of the bid or proposal during the selection process to  
22 a person not employed by the construction manager-at-risk,  
23 architect, engineer, or governmental entity. All bids or proposals  
24 shall be made available to the governmental entity on request and to  
25 the public after the later of the award of the contract or the  
26 seventh day after the date of final selection of bids or proposals.

27 (b) If the construction manager-at-risk reviews, evaluates,



1 and recommends to the governmental entity a bid or proposal from a  
2 trade contractor or subcontractor but the governmental entity  
3 requires another bid or proposal to be accepted, the governmental  
4 entity shall compensate the construction manager-at-risk by a  
5 change in price, time, or guaranteed maximum cost for any  
6 additional cost and risk that the construction manager-at-risk  
7 incurs because of the governmental entity's requirement that  
8 another bid or proposal be accepted.

9 Sec. 2267.257. DEFAULT; PERFORMANCE OF WORK. If a selected  
10 trade contractor or subcontractor defaults in the performance of  
11 its work or fails to execute a subcontract after being selected in  
12 accordance with this subchapter, the construction manager-at-risk  
13 may itself fulfill, without advertising, the contract requirements  
14 or select a replacement trade contractor or subcontractor to  
15 fulfill the contract requirements.

16 Sec. 2267.258. PERFORMANCE OR PAYMENT BOND. (a) If a fixed  
17 contract amount or guaranteed maximum price has not been determined  
18 at the time the contract is awarded, the penal sums of the  
19 performance and payment bonds delivered to the governmental entity  
20 must each be in an amount equal to the construction budget, as  
21 specified in the request for proposals or qualifications.

22 (b) The construction manager-at-risk shall deliver the  
23 bonds not later than the 10th day after the date the construction  
24 manager-at-risk executes the contract unless the construction  
25 manager-at-risk furnishes a bid bond or other financial security  
26 acceptable to the governmental entity to ensure that the  
27 construction manager will furnish the required performance and

1 payment bonds when a guaranteed maximum price is established.

2 [Sections 2267.259-2267.300 reserved for expansion]

3 SUBCHAPTER G. BUILDING USING DESIGN-BUILD METHOD

4 Sec. 2267.301. CONTRACTS FOR FACILITIES: DESIGN-BUILD. In  
5 this chapter, "design-build" is a project delivery method by which  
6 a governmental entity contracts with a single entity to provide  
7 both design and construction services for the construction,  
8 rehabilitation, alteration, or repair of a facility.

9 Sec. 2267.302. APPLICABILITY OF SUBCHAPTER TO BUILDINGS;  
10 EXCEPTIONS. This subchapter applies only to a facility that is a  
11 building or an associated structure, including an electric utility  
12 structure. This subchapter does not apply to:

13 (1) a highway, road, street, bridge, underground  
14 utility, water supply project, water plant, wastewater plant, water  
15 and wastewater distribution or conveyance facility, wharf, dock,  
16 airport runway or taxiway, drainage project, or related type of  
17 project associated with civil engineering construction; or

18 (2) a building or structure that is incidental to a  
19 project that is primarily a civil engineering construction project.

20 Sec. 2267.303. CONTRACTS FOR BUILDINGS: DESIGN-BUILD. A  
21 governmental entity may use the design-build method for the  
22 construction, rehabilitation, alteration, or repair of a building  
23 or associated structure only as provided by this subchapter. In  
24 using that method, the governmental entity shall enter into a  
25 single contract with a design-build firm for the design and  
26 construction of the building or associated structure.

27 Sec. 2267.304. DESIGN-BUILD FIRMS. A design-build firm

1 under this subchapter must be a sole proprietorship, partnership,  
2 corporation, or other legal entity or team that includes an  
3 architect or engineer and a construction contractor.

4 Sec. 2267.305. USE OF ARCHITECT OR ENGINEER AS INDEPENDENT  
5 REPRESENTATIVE. The governmental entity shall select or designate  
6 an architect or engineer independent of the design-build firm to  
7 act as the governmental entity's representative for the duration of  
8 the project.

9 Sec. 2267.306. PREPARATION OF REQUEST. (a) The  
10 governmental entity shall prepare a request for qualifications that  
11 includes general information on the project site, project scope,  
12 budget, special systems, selection criteria and the weighted value  
13 for each criterion, and other information that may assist potential  
14 design-build firms in submitting proposals for the project.

15 (b) The governmental entity shall also prepare the design  
16 criteria package that includes more detailed information on the  
17 project. If the preparation of the design criteria package  
18 requires architectural or engineering services that constitute the  
19 practice of architecture within the meaning of Chapter 1051,  
20 Occupations Code, or the practice of engineering within the meaning  
21 of Chapter 1001, Occupations Code, those services shall be provided  
22 in accordance with the applicable law.

23 (c) The design criteria package must include a set of  
24 documents that provides sufficient information, including criteria  
25 for selection, to permit a design-build firm to prepare a response  
26 to the governmental entity's request for qualifications and to  
27 provide any additional information requested. The design criteria

1 package must specify criteria the governmental entity considers  
2 necessary to describe the project and may include, as appropriate,  
3 the legal description of the site, survey information concerning  
4 the site, interior space requirements, special material  
5 requirements, material quality standards, conceptual criteria for  
6 the project, special equipment requirements, cost or budget  
7 estimates, time schedules, quality assurance and quality control  
8 requirements, site development requirements, applicable codes and  
9 ordinances, provisions for utilities, parking requirements, and  
10 any other requirement.

11 (d) The governmental entity may not require offerors to  
12 submit detailed architectural or engineering designs as part of a  
13 proposal or a response to a request for qualifications.

14 Sec. 2267.307. EVALUATION OF DESIGN-BUILD FIRMS. (a) For  
15 each design-build firm that responded to the request for  
16 qualifications, the governmental entity shall evaluate the firm's  
17 experience, technical competence, and capability to perform, the  
18 past performance of the firm and members of the firm, and other  
19 appropriate factors submitted by the firm in response to the  
20 request for qualifications, except that cost-related or  
21 price-related evaluation factors are not permitted.

22 (b) Each firm must certify to the governmental entity that  
23 each architect or engineer that is a member of the firm was selected  
24 based on demonstrated competence and qualifications, in the manner  
25 provided by Section 2254.004.

26 (c) The governmental entity shall qualify a maximum of five  
27 responders to submit proposals that contain additional information

1 and, if the governmental entity chooses, to interview for final  
2 selection.

3 (d) The governmental entity shall evaluate the additional  
4 information submitted by the offerors on the basis of the selection  
5 criteria stated in the request for qualifications and the results  
6 of any interview.

7 (e) The governmental entity may request additional  
8 information regarding demonstrated competence and qualifications,  
9 considerations of the safety and long-term durability of the  
10 project, the feasibility of implementing the project as proposed,  
11 the ability of the offeror to meet schedules, or costing  
12 methodology. As used in this subsection, "costing methodology"  
13 means an offeror's policies on subcontractor markup, definition of  
14 general conditions, range of cost for general conditions, policies  
15 on retainage, policies on contingencies, discount for prompt  
16 payment, and expected staffing for administrative duties. The term  
17 does not include a guaranteed maximum price or bid for overall  
18 design or construction.

19 (f) The governmental entity shall rank each proposal  
20 submitted on the basis of the criteria set forth in the request for  
21 qualifications.

22 Sec. 2267.308. SELECTION OF DESIGN-BUILD FIRM. (a) The  
23 governmental entity shall select the design-build firm that submits  
24 the proposal offering the best value for the governmental entity on  
25 the basis of the published selection criteria and on its ranking  
26 evaluations.

27 (b) The governmental entity shall first attempt to

1 negotiate a contract with the selected firm.

2 (c) If the governmental entity is unable to negotiate a  
3 satisfactory contract with the selected firm, the governmental  
4 entity shall, formally and in writing, end all negotiations with  
5 that firm and proceed to negotiate with the next firm in the order  
6 of the selection ranking until a contract is reached or  
7 negotiations with all ranked firms end.

8 (d) Not later than the seventh day after the date the  
9 contract is awarded, the governmental entity shall make the  
10 rankings determined under Section 2267.307(f) public.

11 Sec. 2267.309. SUBMISSION OF DESIGN AFTER SELECTION. After  
12 selection of the design-build firm, that firm's architects or  
13 engineers shall submit all design elements for review and  
14 determination of scope compliance to the governmental entity or the  
15 governmental entity's architect or engineer before or concurrently  
16 with construction.

17 Sec. 2267.310. FINAL CONSTRUCTION DOCUMENTS. The  
18 design-build firm shall supply a set of construction documents for  
19 the completed project to the governmental entity at the conclusion  
20 of construction. The documents must note any changes made during  
21 construction.

22 Sec. 2267.311. PERFORMANCE OR PAYMENT BOND. (a) A payment  
23 or performance bond is not required and may not provide coverage for  
24 the design portion of the design-build contract with the  
25 design-build firm under this subchapter.

26 (b) If a fixed contract amount or guaranteed maximum price  
27 has not been determined at the time the design-build contract is

1 awarded, the penal sums of the performance and payment bonds  
2 delivered to the governmental entity must each be in an amount equal  
3 to the construction budget, as specified in the design criteria  
4 package.

5 (c) The design-build firm shall deliver the bonds not later  
6 than the 10th day after the date the design-build firm executes the  
7 contract unless the design-build firm furnishes a bid bond or other  
8 financial security acceptable to the governmental entity to ensure  
9 that the design-build firm will furnish the required performance  
10 and payment bonds before construction begins.

11 [Sections 2267.312-2267.350 reserved for expansion]

12 SUBCHAPTER H. DESIGN-BUILD PROCEDURES FOR CERTAIN CIVIL WORKS  
13 PROJECTS

14 Sec. 2267.351. DEFINITIONS. In this subchapter:

15 (1) "Civil works project" means:

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

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

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

27 (2) "Design-build firm" means a partnership,

1 corporation, or other legal entity or team that includes an  
2 engineer and a construction contractor qualified to engage in civil  
3 works construction in Texas.

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

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

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

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

12 (ii) submit a proposal on the project.

13 Sec. 2267.352. APPLICABILITY. This subchapter applies to a  
14 governmental entity with a population of more than 100,000 within  
15 its geographic boundaries or service area.

16 Sec. 2267.353. CONTRACTS FOR CIVIL WORKS PROJECTS:  
17 DESIGN-BUILD. (a) A governmental entity may use the design-build  
18 method for the construction, rehabilitation, alteration, or repair  
19 of a civil works project. In using this method and in entering into  
20 a contract for the services of a design-build firm, the contracting  
21 governmental entity and the design-build firm shall follow the  
22 procedures provided by this subchapter.

23 (b) A contract for a project under this subchapter may cover  
24 only a single integrated project. A governmental entity may not  
25 enter into a contract for aggregated projects at multiple  
26 locations. For purposes of this subsection:

27 (1) if a metropolitan transit authority created under



1 Chapter 451, Transportation Code, enters into a contract for a  
2 project involving a bus rapid transit system created under Chapter  
3 451, Transportation Code, the bus rapid transit system is a single  
4 integrated project; and

5 (2) a water treatment plant, including a desalination  
6 plant, that includes treatment facilities, well fields, and  
7 pipelines is a single integrated project.

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

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

13 (2) the time constraints for the delivery of the  
14 project;

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

17 (4) the capability of the entity to manage and oversee  
18 the project, including the availability of experienced personnel or  
19 outside consultants who are familiar with the design-build method  
20 of project delivery.

21 (d) A governmental entity shall make a formal finding on the  
22 criteria described by Subsection (c) before preparing a request for  
23 qualifications under Section 2267.357.

24 Sec. 2267.354. LIMITATION ON NUMBER OF PROJECTS. (a)  
25 Before September 1, 2011:

26 (1) a governmental entity with a population of 500,000  
27 or more may, under this subchapter, enter into contracts for not

1 more than three projects in any fiscal year; and

2 (2) a municipally owned water utility with a separate  
3 governing board appointed by the governing body of a municipality  
4 with a population of 500,000 or more may:

5 (A) independently enter into a contract for not  
6 more than one civil works project in any fiscal year; and

7 (B) enter into contracts for additional civil  
8 works projects in any fiscal year, but not more than the number of  
9 civil works projects prescribed by the limit in Subdivision (1) for  
10 the municipality, provided that:

11 (i) the additional contracts for the civil  
12 works projects entered into by the utility under this paragraph are  
13 allocated to the number of contracts the municipality that appoints  
14 the utility's governing board may enter under Subdivision (1); and

15 (ii) the governing body of the municipality  
16 must approve the contracts.

17 (b) Before September 1, 2013, a governmental entity with a  
18 population of 100,000 or more but less than 500,000 may, under this  
19 subchapter, enter into contracts for not more than two projects in  
20 any fiscal year.

21 (c) After the period described by Subsection (a) or (b):

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

25 (2) a municipally owned water utility with a separate  
26 governing board appointed by the governing body of a municipality  
27 with a population of 500,000 or more may:

1           (A) independently enter into contracts for not  
2 more than two civil works projects in any fiscal year; and

3           (B) enter into contracts for additional civil  
4 works projects in any fiscal year, but not more than the number of  
5 civil works projects prescribed by the limit in Subdivision (1) for  
6 the municipality, provided that:

7                   (i) the additional contracts for the civil  
8 works projects entered into by the utility under this paragraph are  
9 allocated to the number of contracts the municipality that appoints  
10 the utility's governing board may enter under Subdivision (1); and

11                   (ii) the governing body of the municipality  
12 must approve the contracts; and

13           (3) a governmental entity with a population of 100,000  
14 or more but less than 500,000 may, under this subchapter, enter into  
15 contracts for not more than four projects in any fiscal year.

16           (d) For purposes of determining the number of eligible  
17 projects under this section, a municipally owned water utility with  
18 a separate governing board appointed by the governing body of the  
19 municipality is considered part of the municipality.

20           Sec. 2267.355. USE OF ENGINEER. (a) The governmental  
21 entity shall select or designate an engineer who is independent of  
22 the design-build firm to act as its representative for the  
23 procurement process and for the duration of the work on the civil  
24 works project. The selected or designated engineer has full  
25 responsibility for complying with Chapter 1001, Occupations Code.

26           (b) If the engineer is not a full-time employee of the  
27 governmental entity, the governmental entity shall select the

1 engineer on the basis of demonstrated competence and qualifications  
2 as provided by Section 2254.004.

3 Sec. 2267.356. USE OF OTHER PROFESSIONAL SERVICES. (a) The  
4 governmental entity shall provide or contract for, independently of  
5 the design-build firm, the following services as necessary for the  
6 acceptance of the civil works project by the entity:

- 7 (1) inspection services;  
8 (2) construction materials engineering and testing;  
9 and  
10 (3) verification testing services.

11 (b) The governmental entity shall select the services for  
12 which it contracts under this section in accordance with Section  
13 2254.004.

14 Sec. 2267.357. REQUEST FOR QUALIFICATIONS. (a) The  
15 governmental entity shall prepare a request for qualifications that  
16 includes:

- 17 (1) information on the civil works project site;  
18 (2) projectscope;  
19 (3) project budget;  
20 (4) project schedule;  
21 (5) criteria for selection under Section 2267.359 and  
22 the weighting of the criteria; and  
23 (6) other information that may assist potential  
24 design-build firms in submitting proposals for the project.

25 (b) The governmental entity shall also prepare a design  
26 criteria package as described by Section 2267.358.

27 Sec. 2267.358. CONTENTS OF DESIGN CRITERIA PACKAGE. A

1 design criteria package may include, as appropriate:

2 (1) budget or cost estimates;

3 (2) information on the site;

4 (3) performance criteria;

5 (4) special material requirements;

6 (5) initial design calculations;

7 (6) known utilities;

8 (7) capacity requirements;

9 (8) quality assurance and quality control  
10 requirements;

11 (9) the type, size, and location of structures; and

12 (10) notice of any ordinances, rules, or goals adopted  
13 by the governmental entity relating to awarding contracts to  
14 historically underutilized businesses.

15 Sec. 2267.359. EVALUATION OF DESIGN-BUILD FIRMS. (a) The  
16 governmental entity shall receive proposals and shall evaluate each  
17 offeror's experience, technical competence, capability to perform,  
18 the past performance of the offeror's team and members of the team,  
19 and other appropriate factors submitted by the team or firm in  
20 response to the request for qualifications, except that  
21 cost-related or price-related evaluation factors are not permitted  
22 at this stage.

23 (b) Each offeror must:

24 (1) select or designate each engineer that is a member  
25 of its team based on demonstrated competence and qualifications, in  
26 the manner provided by Section 2254.004; and

27 (2) certify to the governmental entity that each

1 selection or designation was based on demonstrated competence and  
2 qualifications, in the manner provided by Section 2254.004.

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

6 Sec. 2267.360. SELECTION OF DESIGN-BUILD FIRM. The  
7 governmental entity shall select a design-build firm using a  
8 combination of technical and cost proposals as provided by Section  
9 2267.361.

10 Sec. 2267.361. PROCEDURES FOR COMBINATION OF TECHNICAL AND  
11 COST PROPOSALS. (a) A governmental entity shall request proposals  
12 from design-build firms identified under Section 2267.359(c). A  
13 firm must submit a proposal not later than the 180th day after the  
14 date the governmental entity makes a public request for the  
15 proposals from the selected firms. The request for proposals must  
16 include:

17 (1) a design criteria package;

18 (2) if the project site is identified, a geotechnical  
19 baseline report or other information that provides the design-build  
20 firm minimum geotechnical design parameters to submit a proposal;

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

24 (4) the relative weighting of the technical and price  
25 proposals and the formula by which the proposals will be evaluated  
26 and ranked.

27 (b) The technical proposal is a component of the proposal

1 under this section.

2 (c) Each proposal must include a sealed technical proposal  
3 and a separate sealed cost proposal.

4 (d) The technical proposal must address:

5 (1) project approach;

6 (2) anticipated problems;

7 (3) proposed solutions to anticipated problems;

8 (4) ability to meet schedules;

9 (5) conceptual engineering design; and

10 (6) other information requested by the governmental  
11 entity.

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

24 Sec. 2267.362. NEGOTIATION. After selecting the highest  
25 ranked design-build firm under Section 2267.361, the governmental  
26 entity shall first attempt to negotiate a contract with the  
27 selected firm. If the governmental entity is unable to negotiate a

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

6 Sec. 2267.363. ASSUMPTION OF RISKS. The governmental  
7 entity shall assume:

8 (1) all risks and costs associated with:

9 (A) scope changes and modifications, as  
10 requested by the governmental entity;

11 (B) unknown or differing site conditions unless  
12 otherwise provided by the governmental entity in the request for  
13 proposals and final contract;

14 (C) regulatory permitting, if the governmental  
15 entity is responsible for those risks and costs by law or contract;  
16 and

17 (D) natural disasters and other force majeure  
18 events unless otherwise provided by the governmental entity in the  
19 request for proposals and final contract; and

20 (2) all costs associated with property acquisition,  
21 excluding costs associated with acquiring a temporary easement or  
22 work area associated with staging or construction for the project.

23 Sec. 2267.364. STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS.

24 (a) Unless a stipend is paid under Subsection (c), the design-build  
25 firm retains all rights to the work product submitted in a proposal.

26 The governmental entity may not release or disclose to any person,  
27 including the successful offeror, the work product contained in an



1 unsuccessful proposal. The governmental entity shall return all  
2 copies of the proposal and other information submitted to an  
3 unsuccessful offeror. The governmental entity or its agents may  
4 not make use of any unique or nonordinary design element,  
5 technique, method, or process contained in the unsuccessful  
6 proposal that was not also contained in the successful proposal at  
7 the time of the original submittal, unless the entity acquires a  
8 license from the unsuccessful offeror.

9       (b) A violation of this section voids the contract for the  
10 project entered into by the governmental entity. The governmental  
11 entity is liable to any unsuccessful offeror, or any member of the  
12 design-build team or its assignee, for one-half of the cost savings  
13 associated with the unauthorized use of the work product of the  
14 unsuccessful offeror. Any interested party may bring an action for  
15 an injunction, declaratory relief, or damages for a violation of  
16 this section. A party who prevails in an action under this  
17 subsection is entitled to reasonable attorney's fees as approved by  
18 the court.

19       (c) The governmental entity may offer an unsuccessful  
20 design-build firm that submits a response to the entity's request  
21 for additional information under Section 2267.361 a stipend for  
22 preliminary engineering costs associated with the development of  
23 the proposal. The stipend must be one-half of one percent of the  
24 contract amount and must be specified in the initial request for  
25 proposals. If the offer is accepted and paid, the governmental  
26 entity may make use of any work product contained in the proposal,  
27 including the techniques, methods, processes, and information

1 contained in the proposal. The use by the governmental entity of  
2 any design element contained in an unsuccessful proposal is at the  
3 sole risk and discretion of the entity and does not confer liability  
4 on the recipient of the stipend under this subsection.

5 (d) Notwithstanding other law, including Chapter 552, work  
6 product contained in an unsuccessful proposal submitted and  
7 rejected under this subchapter is confidential and may not be  
8 released unless a stipend offer has been accepted and paid as  
9 provided by Subsection (c).

10 Sec. 2267.365. COMPLETION OF DESIGN. (a) Following  
11 selection of a design-build firm under this subchapter, the firm's  
12 engineers shall submit all design elements for review and  
13 determination of scope compliance to the governmental entity before  
14 or concurrently with construction.

15 (b) An appropriately licensed design professional shall  
16 sign and seal construction documents before the documents are  
17 released for construction.

18 Sec. 2267.366. FINAL CONSTRUCTION DOCUMENTS. At the  
19 conclusion of construction, the design-build firm shall supply to  
20 the governmental entity a record set of construction documents for  
21 the project prepared as provided by Chapter 1001, Occupations Code.

22 Sec. 2267.367. PERFORMANCE OR PAYMENT BOND. (a) A  
23 performance or payment bond is not required for the portion of a  
24 design-build contract under this section that includes design  
25 services only.

26 (b) If a fixed contract amount or guaranteed maximum price  
27 has not been determined at the time a design-build contract is

1 awarded, the penal sums of the performance and payment bonds  
2 delivered to the governmental entity must each be in an amount equal  
3 to the construction budget, if commercially available and  
4 practical, as specified in the design criteria package.

5 (c) If the governmental entity awards a design-build  
6 contract under Section 2267.361, the design-build firm shall  
7 deliver the bonds not later than the 10th day after the date the  
8 design-build firm executes the contract unless the design-build  
9 firm furnishes a bid bond or other financial security acceptable to  
10 the governmental entity to ensure that the design-build firm will  
11 furnish the required performance and payment bonds before the  
12 commencement of construction.

13 [Sections 2267.368-2267.400 reserved for expansion]

14 SUBCHAPTER I. JOB ORDER CONTRACTS METHOD

15 Sec. 2267.401. JOB ORDER CONTRACTING. In this chapter,  
16 "job order contracting" is a procurement method used for  
17 maintenance, repair, alteration, renovation, remediation, or minor  
18 construction of a facility when the work is of a recurring nature  
19 but the delivery times, type, and quantities of work required are  
20 indefinite.

21 Sec. 2267.402. APPLICABILITY OF SUBCHAPTER TO BUILDINGS;  
22 EXCEPTIONS. This subchapter applies only to a facility that is a  
23 building, the design and construction of which is governed by  
24 accepted building codes, or a structure or land, whether improved  
25 or unimproved, that is associated with a building. This subchapter  
26 does not apply to:

27 (1) a highway, road, street, bridge, utility, water

1 supply project, water plant, wastewater plant, water and wastewater  
2 distribution or conveyance facility, wharf, dock, airport runway or  
3 taxiway, drainage project, or related type of project associated  
4 with civil engineering construction; or

5 (2) a building or structure that is incidental to a  
6 project that is primarily a civil engineering construction project.

7 Sec. 2267.403. REQUIREMENTS FOR JOB ORDER CONTRACTS FOR  
8 FACILITIES. (a) A governmental entity may award job order  
9 contracts for the maintenance, repair, alteration, renovation,  
10 remediation, or minor construction of a facility if:

11 (1) the work is of a recurring nature but the delivery  
12 times are indefinite; and

13 (2) indefinite quantities and orders are awarded  
14 substantially on the basis of prescribed and prepriced tasks.

15 (b) The governmental entity shall establish the maximum  
16 aggregate contract price when it advertises the proposal.

17 (c) The governing body of a governmental entity shall  
18 approve each job order that exceeds:

19 (1) \$500,000 under the contract; or

20 (2) a lesser amount as established by the governing  
21 body.

22 Sec. 2267.404. CONTRACTUAL UNIT PRICES. The governmental  
23 entity may establish contractual unit prices for a job order  
24 contract by:

25 (1) specifying one or more published construction unit  
26 price books and the applicable divisions or line items; or

27 (2) providing a list of work items and requiring the

1 offerors to propose one or more coefficients or multipliers to be  
2 applied to the price book or prepriced work items as the price  
3 proposal.

4 Sec. 2267.405. COMPETITIVE SEALED PROPOSAL METHOD. (a) A  
5 governmental entity may use the competitive sealed proposal method  
6 under Subchapter D for job order contracts.

7 (b) The governmental entity shall advertise for, receive,  
8 and publicly open sealed proposals for job order contracts.

9 (c) The governmental entity may require offerors to submit  
10 information in addition to rates, including experience, past  
11 performance, and proposed personnel and methodology.

12 Sec. 2267.406. AWARDED OF JOB ORDER CONTRACTS. The  
13 governmental entity may award job order contracts to one or more job  
14 order contractors in connection with each solicitation of  
15 proposals.

16 Sec. 2267.407. USE OF JOB ORDER CONTRACT. A job order  
17 contract may be used to accomplish work only for the governmental  
18 entity that awards the contract unless:

19 (1) the solicitation for the job order contract and  
20 the contract specifically provide for use by other persons; or

21 (2) the governmental entity enters into an interlocal  
22 agreement that provides otherwise.

23 Sec. 2267.408. USE OF ARCHITECT OR ENGINEER. If a job order  
24 contract or an order issued under the contract requires  
25 architectural or engineering services that constitute the practice  
26 of architecture within the meaning of Chapter 1051, Occupations  
27 Code, or the practice of engineering within the meaning of Chapter

1 1001, Occupations Code, the governmental entity shall select or  
2 designate an architect or engineer to prepare the construction  
3 documents for the project.

4 Sec. 2267.409. JOB ORDER CONTRACT TERM. The base term for a  
5 job order contract may not exceed two years. The governmental  
6 entity may renew the contract annually for not more than three  
7 additional years.

8 Sec. 2267.410. JOB ORDERS. (a) An order for a job or  
9 project under a job order contract must be signed by the  
10 governmental entity's representative and the contractor.

11 (b) The order may be:

12 (1) a fixed price, lump-sum contract based  
13 substantially on contractual unit pricing applied to estimated  
14 quantities; or

15 (2) a unit price order based on the quantities and line  
16 items delivered.

17 Sec. 2267.411. PAYMENT AND PERFORMANCE BONDS. The  
18 contractor shall provide payment and performance bonds, if required  
19 by law, based on the amount or estimated amount of any order.

20 [Sections 2267.412-2267.450 reserved for expansion]

21 SUBCHAPTER J. ENFORCEMENT

22 Sec. 2267.451. VOID CONTRACT. (a) A contract, including a  
23 job order, entered into in violation of this chapter and any bonds  
24 issued in connection with the contract are voidable as against  
25 public policy.

26 (b) An action to void a contract under this section does not  
27 excuse the obligation of the governmental entity to pay for any

1 service performed or material delivered in good faith by a  
2 contractor, architect, engineer, design-builder, or construction  
3 manager before the date on which the contract is determined to be  
4 void.

5 Sec. 2267.452. DECLARATORY OR INJUNCTIVE RELIEF. (a) This  
6 chapter may be enforced through an action for declaratory or  
7 injunctive relief filed not later than the 10th day after the date  
8 on which the contract is awarded.

9 (b) This section does not apply to enforcement of a contract  
10 entered into by a state agency. In this subsection, "state agency"  
11 has the meaning assigned by Section 2151.002. The term includes the  
12 Texas Building and Procurement Commission.

13 SECTION 2.10. Section 252.048, Local Government Code, is  
14 amended by adding Subsection (c-1) to read as follows:

15 (c-1) If a change order for a public works contract in a  
16 municipality with a population of 500,000 or more involves a  
17 decrease or an increase of \$100,000 or less, or a lesser amount as  
18 provided by ordinance, the governing body of the municipality may  
19 grant general authority to an administrative official of the  
20 municipality to approve the change order.

21 SECTION 2.11. Section 271.054, Local Government Code, is  
22 amended to read as follows:

23 Sec. 271.054. COMPETITIVE BIDDING REQUIREMENT. Before the  
24 governing body of an issuer may enter into a contract requiring an  
25 expenditure by or imposing an obligation or liability on the  
26 issuer, or on a subdivision of the issuer if the issuer is a county,  
27 of more than \$25,000, the governing body must:

1           (1) submit the proposed contract to competitive  
2 bidding; or

3           (2) use an alternate method of project delivery  
4 authorized by Chapter 2267, Government Code.

5           SECTION 2.12. Section 271.060, Local Government Code, is  
6 amended by amending Subsection (b) and adding Subsection (c) to  
7 read as follows:

8           (b) The total price of a contract may not be increased by a  
9 change order unless provision has been made for the payment of the  
10 added cost by the appropriation of current funds or bond funds for  
11 that purpose, by the authorization of the issuance of certificates,  
12 or by a combination of those procedures.

13           (c) A contract with an [The] original contract price of \$1  
14 million or more may not be increased by more than 25 percent. If a  
15 change order for a contract with an original contract price of less  
16 than \$1 million increases the contract amount to \$1 million or more,  
17 subsequent change orders may not increase the revised contract  
18 amount by more than 25 percent. [The original price may not be  
19 decreased by more than 25 percent without the consent of the  
20 contractor.]

21                                   ARTICLE 3. ADDITIONAL EXEMPTIONS

22           SECTION 3.01. Section 44.901, Education Code, is amended by  
23 adding Subsection (j) to read as follows:

24           (j) Chapter 2267, Government Code, does not apply to this  
25 section.

26           SECTION 3.02. Section 51.927, Education Code, is amended by  
27 adding Subsection (k) to read as follows:



1        (k) Chapter 2267, Government Code, does not apply to this  
2 section.

3        SECTION 3.03. Section 2166.406, Government Code, is amended  
4 by adding Subsection (k) to read as follows:

5        (k) Chapter 2267 does not apply to this section.

6        SECTION 3.04. Chapter 302, Local Government Code, is  
7 amended by adding Section 302.007 to read as follows:

8        Sec. 302.007. EXEMPTION FROM OTHER CONTRACTING LAW.

9 Chapter 2267, Government Code, does not apply to this chapter.

10        SECTION 3.05. Subchapter E, Chapter 335, Local Government  
11 Code, is amended by adding Section 335.077 to read as follows:

12        Sec. 335.077. EXEMPTION FROM CONSTRUCTION CONTRACTING LAW.

13 Chapter 2267, Government Code, does not apply to this chapter.

14        SECTION 3.06. Section 22.084, Transportation Code, is  
15 amended by adding Subsection (c) to read as follows:

16        (c) Chapter 2267, Government Code, does not apply to an  
17 agreement entered into under this section.

18        SECTION 3.07. Section 370.305, Transportation Code, is  
19 amended by adding Subsection (c-1) to read as follows:

20        (c-1) Chapter 2267, Government Code, does not apply to  
21 agreements entered into pursuant to this section.

22        SECTION 3.08. Subchapter Q, Chapter 451, Transportation  
23 Code, is amended by adding Section 451.8025 to read as follows:

24        Sec. 451.8025. EXEMPTION FROM OTHER CONTRACTING LAW.

25 Chapter 2267, Government Code, does not apply to this subchapter.

26        SECTION 3.09. Subchapter C, Chapter 452, Transportation  
27 Code, is amended by adding Section 452.1095 to read as follows:

1       Sec. 452.1095. EXEMPTION FROM OTHER CONTRACTING LAW FOR  
2 CERTAIN AUTHORITIES. Chapter 2267, Government Code, does not apply  
3 to an authority consisting of one subregion governed by a  
4 subregional board created under Subchapter O.

5       SECTION 3.10. Section 60.401, Water Code, is amended by  
6 adding Subsection (d) to read as follows:

7       (d) Chapter 2267, Government Code, does not apply to this  
8 subchapter.

9       SECTION 3.11. Section 60.452, Water Code, is amended by  
10 adding Subsection (d) to read as follows:

11       (d) Chapter 2267, Government Code, does not apply to this  
12 subchapter.

13                                   ARTICLE 4. CONFORMING AMENDMENT

14       SECTION 4.01. Section 252.021(a), Local Government Code, is  
15 amended to read as follows:

16       (a) Before a municipality may enter into a contract that  
17 requires an expenditure of more than \$50,000 from one or more  
18 municipal funds, the municipality must:

19               (1) comply with the procedure prescribed by this  
20 subchapter and Subchapter C for competitive sealed bidding or  
21 competitive sealed proposals;

22               (2) use the reverse auction procedure, as defined by  
23 Section 2155.062(d), Government Code, for purchasing; or

24               (3) comply with a method described by Chapter 2267,  
25 Government Code [~~Subchapter H or J, Chapter 271~~].

26       SECTION 4.02. Section 252.022(d), Local Government Code, is  
27 amended to read as follows:

1 (d) This chapter does not apply to an expenditure described  
2 by Section 252.021(a) if the governing body of a municipality  
3 determines that a method described by Chapter 2267, Government Code  
4 [~~Subchapter H, Chapter 271~~], provides a better value for the  
5 municipality with respect to that expenditure than the procedures  
6 described in this chapter and the municipality adopts and uses a  
7 method described in that subchapter with respect to that  
8 expenditure.

9 ARTICLE 5. REPEALER

10 SECTION 5.01. The following are repealed:

- 11 (1) Sections 44.0315, 44.035, 44.036, 44.037, 44.038,  
12 44.039, 44.040, and 44.041, Education Code;
- 13 (2) Sections 2166.2511, 2166.2526, 2166.2531,  
14 2166.2532, 2166.2533, and 2166.2535, Government Code;
- 15 (3) Section 252.043(d-1), Local Government Code;
- 16 (4) Subchapters H and J, Chapter 271, Local Government  
17 Code; and
- 18 (5) Section 431.101(e), Transportation Code.

19 ARTICLE 6. TRANSITION; EFFECTIVE DATE

20 SECTION 6.01. (a) The changes in law made by this Act apply  
21 only to a contract or construction project for which a governmental  
22 entity first advertises or otherwise requests bids, proposals,  
23 offers, or qualifications, or makes a similar solicitation, on or  
24 after the effective date of this Act.

25 (b) A contract or construction project for which a  
26 governmental entity first advertises or otherwise requests bids,  
27 proposals, offers, or qualifications, or makes a similar

1 solicitation, before the effective date of this Act is governed by  
2 the law as it existed immediately before the effective date of this  
3 Act, and that law is continued in effect for that purpose.

4 SECTION 6.02. This Act takes effect September 1, 2009.