

BILL ANALYSIS

Senate Research Center

H.B. 628
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State Affairs
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 628 proposes to consolidate alternate project delivery processes for most governmental entities into a single chapter of the Government Code; expand the types of entities that are authorized to use these procedures to include hospital districts, junior colleges, and others; authorize construction manager-at-risk and competitive sealed proposals for construction services to be used for all types of projects, including water, wastewater, transportation, utilities, and other improvements to real property; prohibit reverse auctions for certain contracts where bonds are required; authorize job order contracting to be used for the maintenance, repair, alteration, renovation, or minor construction of an existing facility; limit the use of interlocal agreements for design and construction services, which are site-specific by nature; and make other technical and conforming changes.

H.B. 628 amends current law relating to contracts by governmental entities and related professional services and to public works performance and payment bonds.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Facilities Commission is rescinded in SECTION 2.07 (Section 2166.2525, Government Code) of this bill.

Rulemaking authority is expressly granted to a governmental entity in SECTION 2.08 (Section 2267.051, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

ARTICLE 1. PUBLIC WORKS PERFORMANCE AND PAYMENT BONDS

SECTION 1.01. Amends Section 2253.021, Government Code, by adding Subsection (h), as follows:

(h) Prohibits a reverse auction procedure from being used to obtain services related to a public work contract for which a bond is required under this section. Defines, in this subsection, "reverse auction."

ARTICLE 2. CONTRACTS BY GOVERNMENTAL ENTITIES

SECTION 2.01. Amends Section 11.168, Education Code, as follows:

Sec. 11.168. New heading: **USE OF DISTRICT RESOURCES PROHIBITED FOR CERTAIN PURPOSES; EXCEPTION.** (a) Creates this subsection from existing text. Prohibits the board of trustees, except as provided by Subsection (b) or Section 45.109(a-1) (relating to contracts allowing school districts to contribute to the costs of designing or building certain facilities at institutions of higher education) or (a-2) (relating to school districts and an institution of higher education paying a portion of the costs of the design, improvement, or construction of certain facilities), from entering into an agreement authorizing the use of school district employees, property, or resources for the provision of materials or labor for the design, construction, or renovation of improvements to real property not owned or leased by the district.

(b) Provides that this section does not prohibit the board of trustees of a school district from entering into an agreement for the design, construction, or renovation of improvements to real property not owned or leased by the district if the improvements benefit real property owned or leased by the district. Provides that benefits to real property owned or leased by the district include the design, construction, or renovation of highways, roads, streets, sidewalks, crosswalks, utilities, and drainage improvements that serve or benefit the real property owned or leased by the district.

SECTION 2.02. Amends Sections 44.031(a), (b), and (f), Education Code, as follows:

(a) Requires that all school district contracts for the purchase of goods and services, except contracts for the purchase of produce or vehicle fuel, valued at \$50,000 or more in the aggregate for each 12-month period, except as provided by this subchapter, be made by the method, of the following methods, that provides the best value for the district:

- (1) competitive bidding for services other than construction services;
- (2) competitive sealed proposals for services other than construction services;
- (3) a request for proposals, for services other than construction services;
- (4) an interlocal contract for services other than construction services;
- (5) a method provided by Chapter 2267, Government Code, for construction services, rather than a design/build contract;
- (6) the reverse auction procedure as defined by Section 2155.062(d) (defining, in this subchapter, "reverse auction procedure"), Government Code; or
- (7) the formation of a political subdivision corporation under Section 304.001 (Aggregations to Political Subdivisions), Local Government Code.

Deletes existing Subdivision (6) relating to a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager. Deletes existing Subdivision (7) relating to a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility. Makes nonsubstantive changes.

(b) Requires the district, except as provided by this subchapter, in determining whom to award a contract, to consider:

- (1)-(7) Makes no changes to these subdivisions;
- (8) for a contract for goods and services, other than goods and services related to telecommunications and information services, building construction and maintenance, or instructional materials, whether the vendor or the vendor's ultimate parent company or majority owner has its principal place of business in this state, or employs at least 500 persons in this state; and
- (9) any other relevant factor specifically listed in the request for bids or proposals.

Makes nonsubstantive changes.

(f) Provides that this section does not apply to a contract for professional services rendered, including services of an architect, attorney, certified public accountant, engineer, or fiscal agent.

SECTION 2.03. Amends Subchapter B, Chapter 44, Education Code, by adding Sections 44.0351 and 44.0352, as follows:

Sec. 44.0351. **COMPETITIVE BIDDING.** (a) Authorizes a school district, except to the extent prohibited by other law and to the extent consistent with this subchapter, to use competitive bidding to select a vendor as authorized by Section 44.031(a)(1).

(b) Provides that, except as provided by this subsection, Subchapter B, Chapter 271 (Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments), Local Government Code, does not apply to a competitive bidding process under this subchapter. Provides that Sections 271.026 (Opening of Bids), 271.027(a) (relating to awarding contracts to certain bidders) and 271.0275 (Safety Record of Bidder Considered), Local Government Code, apply to a competitive bidding process under this subchapter.

(c) Requires a school district to award a competitively bid contract at the bid amount to the bidder offering the best value for the district. Provides that, in determining the best value for the district, the district is not restricted to considering price alone but may consider any other factors stated in the selection criteria. Authorizes the selection criteria to include the factors listed in Section 44.031(b).

Sec. 44.0352. **COMPETITIVE SEALED PROPOSALS.** (a) Requires a school district, in selecting a vendor through competitive sealed proposals as authorized by Section 44.031(a)(2), to follow the procedures prescribed by this section.

(b) Requires the district to prepare a request for competitive sealed proposals that includes information that vendors may require to respond to the request. Requires the district to state in the request for proposals the selection criteria that will be used in selecting the successful offeror.

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

(d) Requires the district to select the offeror that offers the best value for the district based on the published selection criteria and on its ranking evaluation. Requires the district to first attempt to negotiate a contract with the selected offeror. Authorizes the district to discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. Requires the district, if the district is unable to negotiate a satisfactory contract with the selected offeror, to, formally and in writing, end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected.

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

SECTION 2.04. Amends Subchapter B, Chapter 44, Education Code, by adding Section 44.0411, as follows:

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

(b) Prohibits the total contract price from being increased because of the changes unless additional money for increased costs is approved for that purpose from available money or is provided for by the authorization of the issuance of time warrants.

(c) Authorizes the district to grant general authority to an administrative official to approve the change orders.

(d) Prohibits a contract with an original contract price of \$1 million or more from being increased under this section by more than 25 percent. Prohibits the total of the subsequent change orders, if a change order for a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, from increasing the revised contract amount by more than 25 percent of the original contract price.

SECTION 2.05. Amends Subchapter A, Chapter 46, Education Code, by adding Section 46.0111, as follows:

Sec. 46.0111. ACTIONS BROUGHT FOR DEFECTIVE DESIGN, CONSTRUCTION, RENOVATION, OR IMPROVEMENT OF INSTRUCTIONAL FACILITY. (a) Defines, in this section, "net proceeds" and "state's share."

(b) Requires a school district that brings an action for recovery of damages for the defective design, construction, renovation, or improvement of an instructional facility financed by bonds for which the district receives state assistance under this subchapter to provide the commissioner of education (commissioner) with written notice of the action.

(c) Authorizes the commissioner to join in the action on behalf of the state to protect the state's share in the action.

(d) Requires a school district to use the net proceeds from an action brought by the district for the defective design, construction, renovation, or improvement of an instructional facility financed by bonds for which the district receives state assistance under this subchapter to repair the defective design, construction, renovation, or improvement of the instructional facility on which the action is brought or to replace the facility. Provides that Section 46.008 (Standards) applies to the repair.

(e) Provides that the state's share is state property. Requires the school district to send to the comptroller of public accounts (comptroller) any portion of the state's share not used by the school district to repair the defective design, construction, renovation, or improvement of the instructional facility on which the action is brought or to replace the facility. Provides that Section 42.258 (Recovery of Overallocated Funds) applies to the state's share under this subsection.

SECTION 2.06. Amends Section 2155.502(c), Government Code, as follows:

(c) Prohibits the comptroller from listing a multiple award contract on a schedule developed under Subsection (a) if the goods or services provided by that contract:

(1)-(3) Makes no changes to these subdivisions; or

(4) are engineering services as described by Section 1001.003 (Practice of Engineering), Occupations Code, or architectural services as described by Section 1051.001 (Definitions), Occupations Code.

Makes a nonsubstantive change.

SECTION 2.07. Amends Section 2166.2525, Government Code, as follows:

Sec. 2166.2525. DETERMINATION OF CONTRACTING METHOD. Provides that the method of contracting allowed under this subchapter for design and construction services is any method provided by Chapter 2267, rather than requires the Texas Facilities Commission (TFC) to adopt rules that determine the circumstances for use of each method of contracting allowed under this subchapter for design and construction services. Deletes existing text requiring TFC, in developing the rules, to solicit advice and comment from the design and construction professionals regarding the criteria TFC will use in determining which contracting method is best suited for a project.

SECTION 2.08. Amends Subtitle F, Title 10, Government Code, by adding Chapter 2267, as follows:

CHAPTER 2267. CONTRACTING AND DELIVERY PROCEDURES FOR
CONSTRUCTION PROJECTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2267.001. DEFINITIONS. Defines, in this chapter, "architect," "engineer," "facility," "general conditions," "general contractor," and "public work contract."

Sec. 2267.002. APPLICABILITY OF CHAPTER TO GOVERNMENTAL ENTITIES ENGAGED IN PUBLIC WORKS. Provides that this chapter applies to a public work contract made by a governmental entity authorized by state law to make a public work contract, including:

(1) a state agency as defined by Section 2151.002 (Definition), including TFC;

(2) a local government, including:

(A) a county;

(B) a municipality;

(C) a school district;

(D) any other special district or authority, including a hospital district, a defense base development authority established under Chapter 379B (Defense Base Development Authorities), Local Government Code, and a conservation and reclamation district, including a river authority or any other type of water district; and

(E) any other political subdivision of this state;

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

(4) a board of trustees governed by Chapter 54 (Harbor and Port Facilities in Certain Municipalities), Transportation Code.

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

(b) Provides that this chapter does not prevail over a conflicting provision in a law relating to contracting with a historically underutilized business.

(c) Provides that this chapter does not prevail over a conflicting provision in an ordinance or resolution passed by the governing body of a municipally owned electric utility in a procedure described by Section 252.022(c) (setting forth

certain expenditures made by certain utilities to which Chapter 252 does not apply), Local Government Code, that:

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

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

(d) Provides that this chapter does not prevail over any law, rule, or regulation relating to competitive bidding or competitive sealed proposals for construction services, or to procurement of construction services pursuant to Section 49.273 (Contract Award), Water Code, that applies to a river authority or to a conservation and reclamation district created under Section 59 (Conservation and Development of Natural Resources and Parks and Recreational Facilities; Conservation and Reclamation Districts), Article XVI (General Provisions), Texas Constitution, unless the governing body of the river authority or conservation and reclamation district elects to permit this chapter to supersede the law, rule, or regulation.

(e) Provides that this chapter does not prevail over a conflicting provision in a regulation that prescribes procurement procedures for construction services that is adopted by the governing board of a river authority or of a conservation and reclamation district created pursuant to Section 59, Article XVI, Texas Constitution, that owns electric generation capacity in excess of 2,500 megawatts, except with respect to Subchapter H.

Sec. 2267.004. EXEMPTION: TEXAS DEPARTMENT OF TRANSPORTATION; HIGHWAY PROJECTS. Provides that this chapter does not apply to:

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

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

Sec. 2267.005. APPLICABILITY: INSTITUTIONS OF HIGHER EDUCATION. (a) Defines, in this section, "institution of higher education," "public junior college," and "university system."

(b) Provides that this chapter applies to a public junior college but does not apply to any other institution of higher education, or a university system.

Sec. 2267.006. EXEMPTION: REGIONAL TOLLWAY AUTHORITIES. Provides that this chapter does not apply to a regional tollway authority under Chapter 366 (Regional Tollway Authorities), Transportation Code.

Sec. 2267.007. EXEMPTION: CERTAIN LOCAL GOVERNMENT CORPORATION IMPROVEMENT PROJECTS. Provides that this chapter does not apply to an improvement project undertaken by or through a local government corporation exempt from competitive bidding requirements or restrictions under Section 431.110 (Competitive Bidding Exception for Certain Improvements), Transportation Code.

Sec. 2267.008. EXEMPTION: REGIONAL MOBILITY AUTHORITIES. Provides that this chapter does not apply to a regional mobility authority under Chapter 370 (Regional Mobility Authorities), Transportation Code.

Sec. 2267.009. EXEMPTION: COUNTY TOLL AUTHORITIES. Provides that this chapter does not apply to a project of a county under Chapter 284 (Causeways, Bridges, Tunnels, Turnpikes, Ferries, and Highways in Certain Counties), Transportation Code, unless the county adopts an order electing to be governed by this chapter for a project to be developed by the county under Chapter 284.

Sec. 2267.010. EXEMPTION: COORDINATED COUNTY TRANSPORTATION AUTHORITY. Provides that this chapter does not apply to a coordinated county transportation authority under Chapter 460 (Coordinated County Transportation Authorities), Transportation Code.

[Reserves Sections 2267.011-2267.050 for expansion.]

SUBCHAPTER B. GENERAL POWERS AND DUTIES

Sec. 2267.051. RULES. Authorizes a governmental entity to adopt rules as necessary to implement this chapter.

Sec. 2267.052. NOTICE REQUIREMENTS. (a) Requires a governmental entity to advertise or publish notice of requests for bids, proposals, or qualifications in a manner prescribed by law.

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

(c) Requires the municipality, river authority, conservation and reclamation district created pursuant to Section 59, Article XVI, Texas Constitution, and located in a county with a population of more than 250,000, or defense base development authority, for a contract entered into by a municipality, river authority, conservation and reclamation district created pursuant to Section 59, Article XVI, Texas Constitution, and located in a county with a population of more than 250,000, or defense base development authority under any of the methods provided by this chapter, to publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened. Requires that the notice be published in a newspaper of general circulation in the county in which the defense base development authority's or municipality's central administrative office is located or the county in which the greatest amount of the river authority's or such conservation and reclamation district's territory is located once each week for at least two weeks before the deadline for receiving bids, proposals, or responses. Requires that the notice, if there is not a newspaper of general circulation in that county, to be published in a newspaper of general circulation in the county nearest the county seat of the county in which the defense base development authority's or municipality's central administrative office is located or the county in which the greatest amount of the river authority's or such conservation and reclamation district's territory is located. Provides that, in a two-step procurement process, the time and place the second step bids, proposals, or responses will be received are not required to be published separately.

(d) Requires the county, for a contract entered into by a county under any of the methods provided by this chapter, to publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened. Requires that the notice be published in a newspaper of general circulation in the county once each week for at least two weeks before the deadline for receiving bids, proposals, or responses. Requires that the notice, if there is not a newspaper of general circulation in the county, be posted at the courthouse door of the county, and published in a newspaper of general circulation in the nearest county.

Sec. 2267.053. DELEGATION OF AUTHORITY. (a) Authorizes the governing body of a governmental entity to delegate its authority under this chapter regarding an action authorized or required by this chapter to a designated representative, committee, or other

person.

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

Sec. 2267.054. **RIGHT TO WORK.** (a) Provides that this section applies to a governmental entity when the governmental entity is engaged in:

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

(b) Provides that, in engaging in an activity to which this section applies, a governmental entity:

- (1) is prohibited from considering whether a person is a member of or has another relationship with any organization; and
- (2) is required to ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to an organization.

Sec. 2267.055. **CRITERIA TO CONSIDER.** (a) Authorizes the governmental entity, in determining the award of a contract under this chapter, to consider:

- (1) the price;
- (2) the offeror's experience and reputation;
- (3) the quality of the offeror's goods or services;
- (4) the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;
- (5) the offeror's safety record;
- (6) the offeror's proposed personnel;
- (7) whether the offeror's financial capability is appropriate to the size and scope of the project; and
- (8) any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

(b) Requires the governmental entity, in determining the award of a contract under this chapter, to:

- (1) consider and apply any existing laws, including any criteria, related to historically underutilized businesses; and
- (2) consider and apply any existing laws, rules, or applicable municipal charters, including laws applicable to local governments, related to the use of women, minority, small, or disadvantaged businesses.

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

(b) Requires the governmental entity to base its selection among offerors on applicable criteria listed for the particular method used. Requires the governmental entity to publish in the request for proposals or qualifications the criteria that will be used to evaluate the offerors, and the applicable weighted value for each criterion.

(c) Requires the governmental entity to document the basis of its selection and make the evaluations public not later than the seventh day after the date the contract is awarded.

Sec. 2267.057. ARCHITECT OR ENGINEER SERVICES. (a) Provides that an architect or engineer required to be selected or designated under this chapter has full responsibility for complying with Chapter 1051 (Texas Board of Architectural Examiners; General Provisions Affecting Architects, Landscape Architects, and Interior Designers; Provisions Affecting Only Architects) or 1001 (Engineers), Occupations Code, as applicable.

(b) Requires the governmental entity, if the selected or designated architect or engineer is not a full-time employee of the governmental entity, to select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor).

Sec. 2267.058. USE OF OTHER PROFESSIONAL SERVICES. (a) Requires the governmental entity, independently of the contractor, construction manager-at-risk, or design-build firm, to provide or contract for the construction materials engineering, testing, and inspection services and the verification testing services necessary for acceptance of the facility by the governmental entity.

(b) Requires the governmental entity to select the services for which it contracts under this section in accordance with Section 2254.004.

Sec. 2267.059. SEALED BIDS, PROPOSALS, OR QUALIFICATIONS REQUIRED. Requires a person who submits a bid, proposal, or qualification to a governmental entity to seal it before delivery.

[Reserves Sections 2267.060-2267.100 for expansion.]

SUBCHAPTER C. COMPETITIVE BIDDING METHOD

Sec. 2267.101. CONTRACTS FOR FACILITIES: COMPETITIVE BIDDING. (a) Defines, in this chapter, "competitive bidding."

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

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

Sec. 2267.103. PREPARATION OF REQUEST. Requires the governmental entity to prepare a request for competitive bids that includes construction documents, estimated budget, project scope, estimated project completion date, and other information that a contractor may require to submit a bid.

Sec. 2267.104. EVALUATION OF OFFERORS. Requires the governmental entity to receive, publicly open, and read aloud the names of the offerors and their bids.

Sec. 2267.105. SELECTION OF OFFEROR. Requires the governmental entity, not later than the 10th business day after the date the contract is awarded, to document the basis of its selection and make the evaluations public.

Sec. 2267.106. APPLICABILITY OF OTHER COMPETITIVE BIDDING LAW TO CERTAIN LOCAL GOVERNMENTAL ENTITIES. Provides that, except as otherwise specifically provided by this section, Subchapter B (Competitive Bidding on Certain Public Works Contracts), Chapter 271, Local Government Code, does not apply to a competitive bidding process conducted under this chapter. Provides that Sections 271.026 (Opening of Bids), 271.027(a) (entitling the governmental entity to reject any and all bids), and 271.0275 (Advertisement for Bids), Local Government Code, apply to a competitive bidding process conducted under this chapter by a governmental entity as defined by Section 271.021 (Definitions), Local Government Code.

[Reserves Sections 2267.107-2267.150 for expansion.]

SUBCHAPTER D. COMPETITIVE SEALED PROPOSAL METHOD

Sec. 2267.151. CONTRACTS FOR FACILITIES: COMPETITIVE SEALED PROPOSALS. (a) Defines, in this chapter, "competitive sealed proposals."

(b) Requires a governmental entity, in selecting a contractor through competitive sealed proposals, to follow the procedures provided by this subchapter.

Sec. 2267.152. USE OF ARCHITECT OR ENGINEER. Requires the governmental entity to select or designate an architect or engineer to prepare construction documents for the project.

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

Sec. 2267.154. EVALUATION OF OFFERORS. (a) Requires the governmental entity to receive, publicly open, and read aloud the names of the offerors and any monetary proposals made by the offerors.

(b) Requires the governmental entity, not later than the 45th day after the date on which the proposals are opened, to evaluate and rank each proposal submitted in relation to the published selection criteria.

Sec. 2267.155. SELECTION OF OFFEROR. (a) Requires the governmental entity to select the offeror that submits the proposal that offers the best value for the governmental entity based on:

- (1) the selection criteria in the request for proposal and the weighted value for those criteria in the request for proposal; and
- (2) its ranking evaluation.

(b) Requires the governmental entity to first attempt to negotiate a contract with the selected offeror. Authorizes the governmental entity and its architect or engineer to discuss with the selected offeror options for a scope or time modification and any price change associated with the modification.

(c) Requires the governmental entity, if the governmental entity is unable to negotiate a satisfactory contract with the selected offeror, to, formally and in writing, end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected.

[Reserves Sections 2267.156-2267.200 for expansion.]

SUBCHAPTER E. CONSTRUCTION MANAGER-AGENT METHOD

Sec. 2267.201. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT.** (a) Defines, in this chapter, "construction manager-agent method."

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

(c) Authorizes a governmental entity to retain a construction manager-agent for assistance in the construction, rehabilitation, alteration, or repair of a facility only as provided by this subchapter.

Sec. 2267.202. **CONTRACT PROVISIONS OF CONSTRUCTION MANAGER-AGENT.** Authorizes the contract between the governmental entity and the construction manager-agent to require the construction manager-agent to provide:

- (1) administrative personnel;
- (2) equipment necessary to perform duties under this subchapter;
- (3) on-site management; and
- (4) other services specified in the contract.

Sec. 2267.203. **LIMITS ON CONSTRUCTION MANAGER-AGENT.** Prohibits a construction manager-agent from:

- (1) self-performing any aspect of the construction, rehabilitation, alteration, or repair of the facility;
- (2) being a party to a construction subcontract for the construction, rehabilitation, alteration, or repair of the facility; or
- (3) providing or being required to provide performance and payment bonds for the construction, rehabilitation, alteration, or repair of the facility.

Sec. 2267.204. **FIDUCIARY CAPACITY OF CONSTRUCTION MANAGER-AGENT.** Provides that a construction manager-agent represents the governmental entity in a fiduciary capacity.

Sec. 2267.205. **USE OF ARCHITECT OR ENGINEER.** (a) Requires the governmental entity, on or before the selection of a construction manager-agent, to select or designate an architect or engineer in accordance with Chapter 1051 or 1001, Occupations Code, as applicable, to prepare the construction documents for the project.

(b) Prohibits the governmental entity's architect or engineer from serving, alone or in combination with another person, as the construction manager-agent unless the architect or engineer is hired to serve as the construction manager-agent under a separate or concurrent selection process conducted in accordance with this subchapter. Provides that this subsection does not prohibit the governmental entity's architect or engineer from providing customary construction phase services under the architect's or engineer's original professional service agreement in accordance with applicable licensing laws.

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

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

Sec. 2267.207. **SELECTION OF CONSTRUCTION MANAGER-AGENT.** Requires a governmental entity to select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner that an architect or engineer is selected under Section 2254.004.

Sec. 2267.208. **INSURANCE.** Requires a construction manager-agent selected under this subchapter to maintain professional liability or errors and omissions insurance in the amount of at least \$1 million for each occurrence.

[Reserves Sections 2267.209-2267.250 for expansion.]

SUBCHAPTER F. CONSTRUCTION MANAGER-AT-RISK METHOD

Sec. 2267.251. **CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK.** (a) Defines, in this chapter, "construction manager-at-risk method."

(b) Provides that a construction manager-at-risk is a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the governmental entity regarding construction during and after the design of the facility. Authorizes that the contracted price be a guaranteed maximum price.

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

Sec. 2267.252. **USE OF ARCHITECT OR ENGINEER.** (a) Requires the governmental entity, on or before the selection of a construction manager-at-risk, to select or designate an architect or engineer to prepare the construction documents for the project.

(b) Prohibits the governmental entity's architect or engineer for a project from serving, alone or in combination with another person, as the construction manager-at-risk unless the architect or engineer is hired to serve as the construction manager-at-risk under a separate or concurrent selection process conducted in accordance with this subchapter. Provides that this subsection does not prohibit the governmental entity's architect or engineer from providing

customary construction phase services under the architect's or engineer's original professional service agreement in accordance with applicable licensing laws.

Sec. 2267.253. SELECTION PROCESS. (a) Requires the governmental entity to select the construction manager-at-risk in a one-step or two-step process.

(b) Requires the governmental entity to prepare a single request for proposals, in the case of a one-step process, and an initial request for qualifications, in the case of a two-step process, that includes:

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

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

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

(c) Requires the governmental entity to state the selection criteria in the request for proposals or qualifications.

(d) Authorizes the governmental entity, if a one-step process is used, to request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions.

(e) Prohibits the governmental entity, if a two-step process is used, from requesting fees or prices in step one. Authorizes the governmental entity, in step two, to request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the construction manager-at-risk's proposed fee and prices for fulfilling the general conditions.

(f) Requires the governmental entity, at each step, to receive, publicly open, and read aloud the names of the offerors. Requires the governmental entity, at the appropriate step, to also read aloud the fees and prices, if any, stated in each proposal as the proposal is opened.

(g) Requires the governmental entity, not later than the 45th day after the date on which the final proposals are opened, to evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals.

Sec. 2267.254. SELECTION OF OFFEROR. (a) Requires the governmental entity to select the offeror that submits the proposal that offers the best value for the governmental entity based on the published selection criteria and on its ranking evaluation.

(b) Requires the governmental entity to first attempt to negotiate a contract with the selected offeror.

(c) Requires the governmental entity, if it is unable to negotiate a satisfactory contract with the selected offeror, to, formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end.

(d) Requires the governmental entity, not later than the seventh day after the date the contract is awarded, to make the rankings determined under Section 2267.253(g) public.

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

(b) Authorizes a construction manager-at-risk to seek to perform portions of the work itself if:

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

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

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

(b) Requires the governmental entity, if the construction manager-at-risk reviews, evaluates, and recommends to the governmental entity a bid or proposal from a trade contractor or subcontractor but the governmental entity requires another bid or proposal to be accepted, to compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk incurs because of the governmental entity's requirement that another bid or proposal be accepted.

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

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

(b) Requires the construction manager-at-risk to deliver the bonds not later than the 10th day after the date the construction manager-at-risk executes the contract unless the construction manager-at-risk furnishes a bid bond or other financial security acceptable to the governmental entity to ensure that the construction manager will furnish the required performance and payment bonds when a guaranteed maximum price is established.

[Reserves Sections 2267.259-2267.300 for expansion.]

SUBCHAPTER G. BUILDING USING DESIGN-BUILD METHOD

Sec. 2267.301. CONTRACTS FOR FACILITIES: DESIGN-BUILD. Defines, in this chapter, "design-build."

Sec. 2267.302. APPLICABILITY OF SUBCHAPTER TO BUILDINGS; EXCEPTIONS. Provides that this subchapter applies only to a facility that is a building

or an associated structure, including an electric utility structure. Provides that this subchapter does not apply to:

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

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

Sec. 2267.303. **CONTRACTS FOR BUILDINGS: DESIGN-BUILD.** Authorizes a governmental entity to use the design-build method for the construction, rehabilitation, alteration, or repair of a building or associated structure only as provided by this subchapter. Requires the governmental entity, in using that method, to enter into a single contract with a design-build firm for the design and construction of the building or associated structure.

Sec. 2267.304. **DESIGN-BUILD FIRMS.** Requires that a design-build firm under this subchapter be a sole proprietorship, partnership, corporation, or other legal entity or team that includes an architect or engineer and a construction contractor.

Sec. 2267.305. **USE OF ARCHITECT OR ENGINEER AS INDEPENDENT REPRESENTATIVE.** Requires the governmental entity to select or designate an architect or engineer independent of the design-build firm to act as the governmental entity's representative for the duration of the project.

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

(b) Requires the governmental entity to also prepare the design criteria package that includes more detailed information on the project. Requires that those services, if the preparation of the design criteria package requires architectural or engineering services that constitute the practice of architecture within the meaning of Chapter 1051, Occupations Code, or the practice of engineering within the meaning of Chapter 1001, Occupations Code, be provided in accordance with the applicable law.

(c) Requires that the design criteria package include a set of documents that provides sufficient information, including criteria for selection, to permit a design-build firm to prepare a response to the governmental entity's request for qualifications and to provide any additional information requested. Requires that the design criteria package specify criteria the governmental entity considers necessary to describe the project and authorizes the package to include, as appropriate, the legal description of the site, survey information concerning the site, interior space requirements, special material requirements, material quality standards, conceptual criteria for the project, special equipment requirements, cost or budget estimates, time schedules, quality assurance and quality control requirements, site development requirements, applicable codes and ordinances, provisions for utilities, parking requirements, and any other requirement.

(d) Prohibits the governmental entity from requiring offerors to submit architectural or engineering designs as part of a proposal or a response to a request for qualifications.

Sec. 2267.307. **EVALUATION OF DESIGN-BUILD FIRMS.** (a) Requires the governmental entity, for each design-build firm that responded to the request for

qualifications, to evaluate the firm's experience, technical competence, and capability to perform, the past performance of the firm and members of the firm, and other appropriate factors submitted by the firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted.

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

(c) Requires the governmental entity to qualify a maximum of five responders to submit proposals that contain additional information and, if the governmental entity chooses, to interview for final selection.

(d) Requires the governmental entity to evaluate the additional information submitted by the offerors on the basis of the selection criteria stated in the request for qualifications and the results of any interview.

(e) Authorizes the governmental entity to request additional information regarding demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, or costing methodology. Defines, as used in this subsection, "costing methodology."

(f) Requires the governmental entity to rank each proposal submitted on the basis of the criteria set forth in the request for qualifications.

Sec. 2267.308. **SELECTION OF DESIGN-BUILD FIRM.** (a) Requires the governmental entity to select the design-build firm that submits the proposal offering the best value for the governmental entity on the basis of the published selection criteria and on its ranking evaluations.

(b) Requires the governmental entity to first attempt to negotiate a contract with the selected firm.

(c) Requires the governmental entity, if the governmental entity is unable to negotiate a satisfactory contract with the selected firm, to, formally and in writing, end all negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked firms end.

(d) Requires the governmental entity, not later than the seventh day after the date the contract is awarded, to make the rankings determined under Section 2267.307(f) public.

Sec. 2267.309. **SUBMISSION OF DESIGN AFTER SELECTION.** Requires that firm's architects or engineers, after selection of the design-build firm, to submit all design elements for review and determination of scope compliance to the governmental entity or the governmental entity's architect or engineer before or concurrently with construction.

Sec. 2267.310. **FINAL CONSTRUCTION DOCUMENTS.** Requires the design-build firm to supply a set of construction documents for the completed project to the governmental entity at the conclusion of construction. Requires that the documents note any changes made during construction.

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

(b) Requires that the penal sums of the performance and payment bonds delivered to the governmental entity, if a fixed contract amount or guaranteed

maximum price has not been determined at the time the design-build contract is awarded, each be in an amount equal to the construction budget, as specified in the design criteria package.

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

[Reserves Sections 2267.312-2267.350 for expansion.]

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

Sec. 2267.351. DEFINITIONS. Defines, in this subchapter, "civil works project," "design-build firm," and "design criteria package."

Sec. 2267.352. APPLICABILITY. Provides that this subchapter applies to a governmental entity that:

- (1) has a population of more than 100,000 within the entity's geographic boundary or service area; or
- (2) is a board of trustees governed by Chapter 54, Transportation Code.

Sec. 2267.353. CONTRACTS FOR CIVIL WORKS PROJECTS: DESIGN-BUILD. (a) Authorizes a governmental entity to use the design-build method for the construction, rehabilitation, alteration, or repair of a civil works project. Requires the contracting governmental entity and the design-build firm, in using this method and in entering into a contract for the services of a design-build firm, to follow the procedures provided by this subchapter.

(b) Authorizes a contract for a project under this subchapter to cover only a single integrated project. Prohibits a governmental entity from entering into a contract for aggregated projects at multiple locations. Provides that, for purposes of this subsection:

(1) if a metropolitan transit authority created under Chapter 451 (Metropolitan Rapid Transit Authorities), Transportation Code, enters into a contract for a project involving a bus rapid transit system created under Chapter 451, Transportation Code, the bus rapid transit system is a single integrated project; and

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

(c) Requires a governmental entity to use the following criteria as a minimum basis for determining the circumstances under which the design-build method is appropriate for a project:

- (1) the extent to which the entity can adequately define the project requirements;
- (2) the time constraints for the delivery of the project;
- (3) the ability to ensure that a competitive procurement can be held; and

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

(d) Requires a governmental entity to make a formal finding on the criteria described by Subsection (c) before preparing a request for qualifications under Section 2267.357.

Sec. 2267.354. LIMITATION ON NUMBER OF PROJECTS. (a) Provides that, before September 1, 2013:

(1) a governmental entity with a population of 500,000 or more within the entity's geographic boundary or service area may, under this subchapter, enter into contracts for not more than three projects in any fiscal year; and

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

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

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

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

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

(b) Authorizes a governmental entity that has a population of 100,000 or more but less than 500,000 or is a board of trustees governed by Chapter 54, Transportation Code, before September 1, 2015, to enter into contracts under this subchapter for not more than two projects in any fiscal year.

(c) Provides that, after the period described by Subsection (a) or (b):

(1) a governmental entity with a population of 500,000 or more within the entity's geographic boundary or service area may, under this subchapter, enter into contracts for not more than six projects in any fiscal year;

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

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

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

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

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

(3) a governmental entity that has a population of 100,000 or more but less than 500,000 or is a board of trustees governed by Chapter 54, Transportation Code, may enter into contracts under this subchapter for not more than four projects in any fiscal year.

(d) Provides that, for purposes of determining the number of eligible projects under this section, a municipally owned water utility with a separate governing board appointed by the governing body of the municipality is considered part of the municipality.

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

(b) Requires the governmental entity, if the engineer is not a full-time employee of the governmental entity, to select the engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004.

Sec. 2267.356. **USE OF OTHER PROFESSIONAL SERVICES.** (a) Requires the governmental entity to provide or contract for, independently of the design-build firm, the following services as necessary for the acceptance of the civil works project by the entity:

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

(b) Requires the governmental entity to select the services for which it contracts under this section in accordance with Section 2254.004.

Sec. 2267.357. **REQUEST FOR QUALIFICATIONS.** (a) Requires the governmental entity to prepare a request for qualifications that includes:

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

(b) Requires the governmental entity to also prepare a design criteria package as described by Section 2267.358.

Sec. 2267.358. CONTENTS OF DESIGN CRITERIA PACKAGE. Authorizes a design criteria package to include, as appropriate, budget or cost estimates, information on the site, performance criteria, special material requirements, initial design calculations, known utilities, capacity requirements, quality assurance and quality control requirements, the type, size, and location of structures, and notice of any ordinances, rules, or goals adopted by the governmental entity relating to awarding contracts to historically underutilized businesses.

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

(b) Requires each offeror to:

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

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

(c) Requires the governmental entity to qualify offerors to submit additional information and, if the entity chooses, to interview for final selection.

Sec. 2267.360. SELECTION OF DESIGN-BUILD FIRM. Requires the governmental entity to select a design-build firm using a combination of technical and cost proposals as provided by Section 2267.361.

Sec. 2267.361. PROCEDURES FOR COMBINATION OF TECHNICAL AND COST PROPOSALS. (a) Requires a governmental entity to request proposals from design-build firms identified under Section 2267.359(c). Requires a firm to submit a proposal not later than the 180th day after the date the governmental entity makes a public request for the proposals from the selected firms. Requires that the request for proposals include:

(1) a design criteria package;

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

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

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

(b) Provides that the technical proposal is a component of the proposal under this section.

(c) Requires that each proposal include a sealed technical proposal and a separate sealed cost proposal.

(d) Requires that the technical proposal address project approach, anticipated problems, proposed solutions to anticipated problems, ability to meet schedules, conceptual engineering design, and other information requested by the governmental entity.

(e) Requires the governmental entity to first open, evaluate, and score each responsive technical proposal submitted on the basis of the criteria described in the request for proposals and assign points on the basis of the weighting specified in the request for proposals. Authorizes the governmental entity to reject as nonresponsive any firm that makes a significant change to the composition of its firm as initially submitted. Requires the governmental entity to subsequently open, evaluate, and score the cost proposals from firms that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals. Requires the governmental entity to select the design-build firm in accordance with the formula provided in the request for proposals.

Sec. 2267.362. **NEGOTIATION.** Requires the governmental entity, after selecting the highest-ranked design-build firm under Section 2267.361, to first attempt to negotiate a contract with the selected firm. Requires the governmental entity, if it is unable to negotiate a satisfactory contract with the selected firm, to, formally and in writing, end all negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked firms end.

Sec. 2267.363. **ASSUMPTION OF RISKS.** Requires the governmental entity to assume:

(1) all risks and costs associated with:

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

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

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

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

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

Sec. 2267.364. **STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS.** (a) Provides that, unless a stipend is paid under Subsection (c), the design-build firm retains all rights to the work product submitted in a proposal. Prohibits the governmental entity from releasing or disclosing to any person, including the successful offeror, the work product contained in an unsuccessful proposal. Requires the governmental entity to return all copies of the proposal and other information submitted to an unsuccessful offeror. Prohibits the governmental entity or its agents from making use of any unique or nonordinary design element, technique, method, or process contained in the unsuccessful proposal that was not also contained in the successful proposal at the time of the original submittal, unless the entity acquires a license from the unsuccessful offeror.

(b) Provides that a violation of this section voids the contract for the project entered into by the governmental entity. Provides that the governmental entity is liable to any unsuccessful offeror, or any member of the design-build team or its assignee, for one-half of the cost savings associated with the unauthorized use of

the work product of the unsuccessful offeror. Authorizes any interested party to bring an action for an injunction, declaratory relief, or damages for a violation of this section. Entitles a party who prevails in an action under this subsection to reasonable attorney's fees as approved by the court.

(c) Authorizes the governmental entity to offer an unsuccessful design-build firm that submits a response to the entity's request for additional information under Section 2267.361 a stipend for preliminary engineering costs associated with the development of the proposal. Requires that the stipend be one-half of one percent of the contract amount and must be specified in the initial request for proposals. Authorizes the governmental entity, if the offer is accepted and paid, to make use of any work product contained in the proposal, including the techniques, methods, processes, and information contained in the proposal. Provides that the use by the governmental entity of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the entity and does not confer liability on the recipient of the stipend under this subsection.

(d) Provides that, notwithstanding other law, including Chapter 552 (Public Information), work product contained in an unsuccessful proposal submitted and rejected under this subchapter is confidential and is prohibited from being released unless a stipend offer has been accepted and paid as provided by Subsection (c).

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

(b) Requires an appropriately licensed design professional to sign and seal construction documents before the documents are released for construction.

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

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

(b) Requires that the penal sums of the performance and payment bonds delivered to the governmental entity, if a fixed contract amount or guaranteed maximum price has not been determined at the time a design-build contract is awarded, each be in an amount equal to the construction budget, if commercially available and practical, as specified in the design criteria package.

(c) Requires the design-build firm, if the governmental entity awards a design-build contract under Section 2267.362, to deliver the bonds not later than the 10th day after the date the design-build firm executes the contract unless the design-build firm furnishes a bid bond or other financial security acceptable to the governmental entity to ensure that the design-build firm will furnish the required performance and payment bonds before the commencement of construction.

[Reserves Sections 2267.368-2267.400 for expansion.]

SUBCHAPTER I. JOB ORDER CONTRACTS METHOD

Sec. 2267.401. JOB ORDER CONTRACTING. Defines, in this chapter, "job order contracting."

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

- (1) a highway, road, street, bridge, utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction; or
- (2) a building or structure that is incidental to a project that is primarily a civil engineering construction project.

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

- (1) the work is of a recurring nature but the delivery times are indefinite; and
 - (2) indefinite quantities and orders are awarded substantially on the basis of prescribed and prepriced tasks.
- (b) Requires the governmental entity to establish the maximum aggregate contract price when it advertises the proposal.
- (c) Requires the governing body of a governmental entity to approve each job, task, or purchase order that exceeds \$500,000.

Sec. 2267.404. CONTRACTUAL UNIT PRICES. Authorizes the governmental entity to establish contractual unit prices for a job order contract by:

- (1) specifying one or more published construction unit price books and the applicable divisions or line items; or
- (2) providing a list of work items and requiring the offerors to propose one or more coefficients or multipliers to be applied to the price book or prepriced work items as the price proposal.

Sec. 2267.405. COMPETITIVE SEALED PROPOSAL METHOD. (a) Authorizes a governmental entity to use the competitive sealed proposal method under Subchapter D for job order contracts.

- (b) Requires the governmental entity to advertise for, receive, and publicly open sealed proposals for job order contracts.
- (c) Authorizes the governmental entity to require offerors to submit information in addition to rates, including experience, past performance, and proposed personnel and methodology.

Sec. 2267.406. AWARDED OF JOB ORDER CONTRACTS. Authorizes the governmental entity to award job order contracts to one or more job order contractors in connection with each solicitation of proposals.

Sec. 2267.407. USE OF JOB ORDER CONTRACT. Authorizes a job order contract to be used to accomplish work only for the governmental entity that awards the contract unless:

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

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

Sec. 2267.408. **USE OF ARCHITECT OR ENGINEER.** Requires the governmental entity, if a job order contract or an order issued under the contract requires architectural or engineering services that constitute the practice of architecture within the meaning of Chapter 1051, Occupations Code, or the practice of engineering within the meaning of Chapter 1001, Occupations Code, to select or designate an architect or engineer to prepare the construction documents for the project.

Sec. 2267.409. **JOB ORDER CONTRACT TERM.** Prohibits the base term for a job order contract from exceeding two years. Authorizes the governmental entity to renew the contract annually for not more than three additional years.

Sec. 2267.410. **JOB ORDERS.** (a) Requires that an order for a job or project under a job order contract be signed by the governmental entity's representative and the contractor.

(b) Authorizes the order to be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities, or a unit price order based on the quantities and line items delivered.

Sec. 2267.411. **PAYMENT AND PERFORMANCE BONDS.** Requires the contractor to provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

[Reserves Sections 2267.412-2267.450 for expansion.]

SUBCHAPTER J. ENFORCEMENT

Sec. 2267.451. **VOID CONTRACT.** Provides that a contract, including a job order, entered into in violation of this chapter is voidable as against public policy.

Sec. 2267.452. **DECLARATORY OR INJUNCTIVE RELIEF.** (a) Authorizes this chapter to be enforced through an action for declaratory or injunctive relief filed not later than the 10th day after the date on which the contract is awarded.

(b) Provides that this section does not apply to enforcement of a contract entered into by a state agency. Defines, in this subsection, "state agency." Provides that the term includes TFC.

SECTION 2.09. Amends Section 252.048, Local Government Code, by adding Subsection (c-1), to authorize the governing body of the municipality, if a change order for a public works contract in a municipality with a population of 500,000 or more involves a decrease or an increase of \$100,000 or less, or a lesser amount as provided by ordinance, to grant general authority to an administrative official of the municipality to approve the change order.

SECTION 2.10. Amends Section 271.054, Local Government Code, to require the governing body of an issuer, before the governing body is authorized to enter into a contract requiring an expenditure by or imposing an obligation or liability on the issuer, or on a subdivision of the issuer if the issuer is a county, of more than \$50,000, to submit the proposed contract to competitive procurement, or use an alternate method of project delivery authorized by Chapter 2267, Government Code.

SECTION 2.11. Amends Section 271.060, Local Government Code, by amending Subsection (b) and adding Subsection (c), as follows:

(b) Deletes existing text prohibiting the original price from being decreased by more than 25 percent without the consent of the contractor.

(c) Creates this subsection with existing text. Prohibits a contract with an original contract price of \$1 million or more from being increased by more than 25 percent. Prohibits subsequent change orders, if a change order for a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, from being increased the revised contract amount by more than 25 percent.

SECTION 2.12. Amends Subchapter B, Chapter 223, Transportation Code, by adding Section 223.049, as follows:

Sec. 223.049. CONTRACT WITH LAND OWNER FOR IMPROVING ACCESS TO LAND. (a) Authorizes TxDOT, without complying with the competitive bidding procedures of Subchapter A (Competitive Bids), to contract with an owner of land, including a subdivision, adjacent to a highway that is part of the state highway system to construct an improvement on the highway right-of-way that is directly related to improving access to or from the owner's land.

(b) Requires an owner that enters into a contract with TxDOT under this section to:

(1) comply with applicable TxDOT design and construction standards;

(2) comply with all laws, rules, regulations, and ordinances, including environmental requirements, that would be applicable if TxDOT were performing the work;

(3) execute a performance and payment bond in accordance with Chapter 2253 (Public Work Performance and Payment Bonds), Government Code; and

(4) make available for inspection by TxDOT all books and other records in the possession of the owner that are related to the project.

(c) Prohibits state and federal funds from being used for the design, development, financing, or construction of a highway improvement under a contract described by this section.

ARTICLE 3. ADDITIONAL EXEMPTIONS

SECTION 3.01. Amends Section 44.901, Education Code, by adding Subsection (j) to provide that Chapter 2267, Government Code, does not apply to this section.

SECTION 3.02. Amends Section 51.927, Education Code, by adding Subsection (k) to provide that Chapter 2267, Government Code, does not apply to this section.

SECTION 3.03. Amends Section 2166.406, Government Code, by adding Subsection (k) to provide that Chapter 2267 does not apply to this section.

SECTION 3.04. Amends Chapter 302, Local Government Code, by adding Section 302.007, as follows:

Sec. 302.007. EXEMPTION FROM OTHER CONTRACTING LAW. Provides that Chapter 2267, Government Code, does not apply to this chapter.

SECTION 3.05. Amends Subchapter E, Chapter 335, Local Government Code, by adding Section 335.077, as follows:

Sec. 335.077. EXEMPTION FROM CONSTRUCTION CONTRACTING LAW. Provides that Chapter 2267, Government Code, does not apply to this chapter.

SECTION 3.06. Amends Subchapter Q, Chapter 451, Transportation Code, by adding Section 451.8025, as follows:

Sec. 451.8025. EXEMPTION FROM OTHER CONTRACTING LAW. Provides that Chapter 2267, Government Code, does not apply to this subchapter.

SECTION 3.07. Amends Subchapter C, Chapter 452, Transportation Code, by adding Section 452.1095, as follows:

Sec. 452.1095. EXEMPTION FROM OTHER CONTRACTING LAW FOR CERTAIN AUTHORITIES. (a) Provides that Chapter 2267, Government Code, does not apply to an authority consisting of one subregion governed by a subregional board created under Subchapter O (Subregional Board in Subregion Having Principal Municipality With Population of More Than 800,000).

(b) Authorizes an authority to which this section applies to adopt design-build procedures that do not materially conflict with Subchapter H, Chapter 2267, Government Code.

SECTION 3.08. Amends Section 60.401, Water Code, by adding Subsection (d) to provide that Chapter 2267, Government Code, does not apply to this subchapter.

SECTION 3.09. Amends Section 60.452(c), Water Code, to provide that Chapter 2267, Government Code, rather than Subchapter J (Design-Build Procedures for Certain Civil Works Projects), Chapter 271, Local Government Code, does not apply to this subchapter.

ARTICLE 4. CONFORMING AMENDMENTS

SECTION 4.01. Amends Section 252.021(a), Local Government Code, as follows

(a) Requires the municipality, before a municipality may enter into a contract that requires an expenditure of more than \$50,000 from one or more municipal funds, to:

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

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

(3) comply with a method described by Chapter 2267, Government Code, rather than Subchapter H (Alternative Project Delivery Methods for Certain Projects) or J, Chapter 271.

SECTION 4.02. Amends Section 252.022(d), Local Government Code, to provide that this chapter does not apply to an expenditure described by Section 252.021(a) (requiring the municipality, before a municipality may enter into a contract that requires an expenditure of more than \$50,000 from one or more municipal funds, to comply with certain methods and procedures) if the governing body of a municipality determines that a method described by Chapter 2267, Government Code, rather than Subchapter H, Chapter 271, provides a better value for the municipality with respect to that expenditure than the procedures described in this chapter and the municipality adopts and uses a method described in that subchapter with respect to that expenditure.

SECTION 4.03. Amends Sections 252.043(d-1) and (e), Local Government Code, as follows:

(d-1) Authorizes a contract for construction of a project described by Subsection (d) (requiring that the contract be awarded to the lowest responsible bidder if the competitive

sealed bidding requirement applies to the contract for construction of certain projects) that requires an expenditure of \$1.5 million or less to be awarded using the competitive sealed proposal procedure prescribed by Subchapter D, Chapter 2267, Government Code, rather than Section 271.116 (Selecting Contractor for Construction Services Through Competitive Sealed Programs).

(e) Requires that the contract, if the competitive sealed bidding requirement applies to the contract for construction of a facility, as that term is defined by Section 2267.001, Government Code, rather than Section 271.111 (Definitions), be awarded to the lowest responsible bidder or awarded under the method described by Chapter 2267, Government Code, rather than Subchapter H, Chapter 271.

SECTION 4.04. Amends Sections 262.023(a) and (b-1), Local Government Code, to make conforming changes.

SECTION 4.05. Amends Section 1002.110, Special District Local Laws Code, as follows:

Sec. 1002.110. PUBLIC WORKS CONTRACTS. Provides that, with respect to the construction of public works, the district has all of the powers and duties conferred on a municipality under Chapter 2267, Government Code, rather than Subchapter H, Chapter 271, Local Government Code, with respect to the construction of a facility. Provides that, to the extent of any conflict, this section prevails over any other law relating to the construction of public works engaged in by the district.

SECTION 4.06. Amends Section 1024.105(b), Special District Local Laws Code, as follows:

(b) Authorizes the board of directors of the district to act as a governmental entity under Chapter 2267, Government Code, rather than Subchapter H, Chapter 271, Local Government Code, for purposes of using the procurement procedures authorized by that chapter. Requires that notice under Section 2267.052(c), Government Code, rather than notice under 271.112(d) (requiring certain municipalities and authorities to publish notice of the time and place the bids or proposals, or the responses to a request for qualifications, will be received and opened), Local Government Code, for purposes of this subsection, be provided by the district in the same manner as provided for a conservation and reclamation district created under Section 59, Article XVI, Texas Constitution.

SECTION 4.07. Amends Section 366.185(d-1), Transportation Code, to prohibit the rules adopted under Subsection (d) (requiring the authority to adopt rules governing the award of contracts for engineering, design, construction, and maintenance services in a single procurement) from materially conflicting with the design-build procedures provided by Subchapter H, Chapter 2267, Government Code, rather than Subchapter J, Chapter 271, Local Government Code, and requires the rules to provide materially similar injunctive and declaratory action enforcement rights regarding the improper disclosure or use of unique or nonordinary information as provided in that subchapter.

SECTION 4.08. Amends Section 370.314(b), Transportation Code, to make a conforming change.

SECTION 4.09. Amends Sections 460.406(c) and (d), Transportation Code, as follows

(c) Authorizes the governing body of the coordinated county transportation authority created under this chapter to authorize the negotiation of a contract without competitive sealed bids or proposals if:

(1)-(11) Makes no changes to these subdivisions; or

(12) the contract is one awarded for an alternate project delivery under Subchapters E, F, and G, Chapter 2267, Government Code, rather than an alternate project delivery under Sections 271.117 (Contracts for Facilities:

Construction Manager-Agent), 271.118 (Contracts for Facilities: Construction Manager-at-Risk), and 271.119 (Design-Build Contracts for Facilities), Local Government Code.

(d) Provides that, for the purposes of entering into a contract authorized by Subsection (c)(12), an authority is considered a "governmental entity" as described by Section 2267.002, Government Code, rather than as defined by Section 271.111, Local Government Code.

ARTICLE 5. REPEALER

SECTION 5.01. Repealers: (1) Sections 44.0315 (Definitions), 44.035 (Evaluation of Bids and Proposals for Construction Services), 44.036 (Design-Build Contracts for Facilities), 44.037 (Contracts for Facilities: Construction Manager-Agent), 44.038 (Contracts for Facilities: Construction Manager At-Risk), 44.039 (Selecting Contractor for Construction Services Through Competitive Sealed Proposals), 44.040 (Selecting Contractors for Construction Services Through Competitive Bidding), and 44.041 (Job Order Contracts for Facility Construction or Repair), Education Code;

(2) Sections 2166.2511 (Definitions), 2166.2526 (Evaluation of Bids and Proposals for Construction Services), 2166.2531 (Design-Build Method), 2166.2532 (Construction Manger-At-Risk-Method), 2166.2533 (Competitive Sealed Proposal Method), and 2166.2535 (Construction Manager-Agent), Government Code;

(3) Subchapters H (Alternative Project Delivery Methods for Certain Projects) and J (Design-Build Procedures for Certain Civil Works Projects), Chapter 271 (Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments), Local Government Code; and

(4) Section 431.101(e) (providing that Section 394.904(a), Local Government Code, applies to property and improvements owned by a local government corporation, and providing that Section 394.904(b) of that code applies to each contract awarded by the local government corporation), Transportation Code.

ARTICLE 6. TRANSITION; EFFECTIVE DATE

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

(b) Provides that a contract or construction project for which a governmental entity first advertises or otherwise requests bids, proposals, offers, or qualifications, or makes a similar solicitation, before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 6.02. Effective date: September 1, 2011.