

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 1138  
By: Watson  
Transportation & Homeland Security  
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Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Comprehensive development agreements (CDAs) cover a range of contracting options from the most basic (solely design and construction (design-build)) to the most inclusive (design-build-finance-operate-maintain-concession payment). The ability to contract for multiple services at once can save significant time for full build-out and cost for a major infrastructure project.

The authorization for regional mobility authorities (RMAs) to enter design-build contracts that include both design and construction or design, construction, and traditional financing, expires August 31, 2011.

Public approval of CDAs varies by community, but most opposition has been focused on the most inclusive CDAs. However, the more modest design-build-finance approach, which does not include toll collection, operation, maintenance, ownership, or leasehold, has been more acceptable to Texans.

C.S.S.B. 1138 amends current law relating to design-build contracts and comprehensive development agreements of regional mobility authorities.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Sections 370.305(a) and (b), Transportation Code, as follows:

(a) Deletes existing text of Subsection (a) authorizing a regional mobility authority (authority) to use a comprehensive development agreement with a private entity to construct, maintain, repair, operate, extend, or expand a transportation project. Redesignates existing Subsection (b) as Subsection (a). Provides that a comprehensive development agreement is an agreement with a private entity that, at a minimum, provides for the design and construction of a transportation project, that may provide for the financing, acquisition, maintenance, or operation of a transportation project, and that entitles the private entity to:

(1) a leasehold interest in the transportation project; or

(2) the right to operate or retain revenue from the operation of the transportation project.

(b) Prohibits an authority, unless specifically authorized by the legislature, from entering into a comprehensive development agreement.

SECTION 2. Amends Chapter 370, Transportation Code, by adding Subchapter G-1, as follows:

#### **SUBCHAPTER G-1. DESIGN-BUILD CONTRACTS**

Sec. 370.318. DEFINITIONS. Defines, in this subchapter, "design-build contractor" and "design-build method."

Sec. 370.319. SCOPE OF AND LIMITATIONS ON CONTRACTS. (a) Authorizes an authority to use the design-build method for the design, construction, financing, expansion, extension, maintenance, rehabilitation, alteration, or repair of a transportation project.

(b) Prohibits a design-build contract under this subchapter from granting to a private entity:

(1) a leasehold interest in the transportation project; or

(2) the right to operate or retain revenue from the operation of the transportation project.

(c) Requires the authority and the design-build contractor, in using the design-build method and in entering into a contract for the services of a design-build contractor, to follow the procedures and requirements of this subchapter.

(d) Authorizes an authority to enter into not more than two design-build contracts for transportation projects in any fiscal year.

Sec. 370.320. USE OF ENGINEER OR ENGINEERING FIRM. (a) Requires an authority, to act as an authority's representative, independent of a design-build contractor, for the procurement process and for the duration of the work on a transportation project, to select or designate:

(1) an engineer;

(2) a qualified firm, selected in accordance with Section 2254.004 (Contract for Professional Services of Architect, Engineer, or Surveyor), Government Code, who is independent of the design-build contractor; or

(3) a general engineering consultant that was previously selected by an authority and is selected or designated in accordance with Section 2254.004, Government Code.

(b) Provides that the selected or designated engineer or firm has full responsibility for complying with Chapter 1001 (Engineers), Occupations Code.

Sec. 370.321. OTHER PROFESSIONAL SERVICES. (a) Requires an authority to provide or contract for, independently of the design-build firm, the following services as necessary for the acceptance of the transportation project by the authority:

(1) inspection services;

(2) construction materials engineering and testing; and

(3) verification testing services.

(b) Requires an authority to ensure that the engineering services contracted for under this section are selected based on demonstrated competence and qualifications.

Sec. 370.322. REQUEST FOR QUALIFICATIONS. (a) Requires an authority, for any transportation project to be delivered through the design-build method, to prepare and issue a request for qualifications. Requires that a request include:

- (1) information regarding the proposed project's location, scope, and limits;
- (2) information regarding funding available for the project and a description of the financing to be requested from the design-build contractor, as applicable;
- (3) criteria that will be used to evaluate the proposals, which must include a proposer's qualifications, experience, technical competence, and ability to develop the project;
- (4) the relative weight to be given the criteria; and
- (5) the deadline by which proposals must be received by the authority.

(b) Requires an authority to publish notice advertising the issuance of a request for qualifications in the Texas Register and on an Internet website maintained by the authority.

(c) Requires an authority to evaluate each qualifications statement received in response to a request for qualifications based on the criteria identified in the request. Authorizes an authority to interview responding proposers. Requires an authority, based on the authority's evaluation of qualifications statements and interviews, if any, to qualify or short-list proposers to submit detailed proposals.

(d) Requires an authority to qualify or short-list at least two firms to submit detailed proposals under Section 370.323. Requires an authority, if the authority receives only one responsive proposal to a request for qualifications, to terminate the procurement.

(e) Authorizes an authority to withdraw a request for qualifications or request for detailed proposals at any time.

Sec. 370.323. REQUEST FOR DETAILED PROPOSALS. (a) Requires an authority to issue a request for detailed proposals to proposers short-listed under Section 370.322. Requires that a request for detailed proposals include:

- (1) information on the overall project goals;
- (2) budget or cost estimates;
- (3) materials specifications;
- (4) special material requirements;
- (5) a schematic design approximately 30 percent complete;
- (6) known utilities, provided that an authority is not required to undertake an effort to locate utilities;
- (7) quality assurance and quality control requirements;
- (8) the location of relevant structures;
- (9) notice of any rules or goals adopted by the authority relating to awarding contracts to historically underutilized business;
- (10) available geotechnical or other information related to the project;
- (11) the status of any environmental review of the project;

(12) detailed instruction for preparing the technical proposal required under Subsection (c), including a description of the form and level of completeness of drawings expected; and

(13) the relative weighting of the technical and cost proposals required under Subsection (c) and the formula by which the proposals will be evaluated and ranked.

(b) Authorizes a request for detailed proposals to also include a general form of the design-build contract that the authority proposes, if the terms of the contract may be modified by the authority or the design-build contractor prior to contract execution.

(c) Requires that each response to a request for detailed proposals include a sealed technical proposal and a separate sealed cost proposal.

(d) Requires that the technical proposal address:

(1) the proposer's qualifications and demonstrated technical competence;

(2) the feasibility of developing the project as proposed, including identification of anticipated problems;

(3) the proposed solutions to anticipated problems;

(4) the ability of the proposer to meet schedules;

(5) the conceptual engineering design proposed; and

(6) any other information requested by the authority.

(e) Authorizes an authority to provide for the submission of alternative technical concepts by a proposer. Requires the authority, if an authority provides for the submission of alternative technical concepts, to prescribe a process for notifying a proposer whether the proposer's alternative concepts are approved for inclusion in a technical proposal.

(f) Requires that the cost proposal include:

(1) the cost of delivering the project;

(2) the estimated number of days required to complete the project; and

(3) any terms for financing for the project that the proposer plans to provide.

(g) Requires each proposer to:

(1) select or designate each engineering firm that is a member of its team based on demonstrated competence and qualifications; and

(2) certify to the authority that each selection or designation was based on demonstrated competence and qualifications.

(h) Requires that a response to a request for detailed proposals be due not later than the 180th day after the final request for detailed proposals is issued by the authority. Provides that this subsection does not preclude the release by the authority of a draft request for detailed proposals for purposes of receiving input from short-listed proposers.

(i) Requires an authority to first open, evaluate, and score each responsive technical proposal submitted on the basis of the criteria described in the request for detailed proposals and assign points on the basis of the weighing specified in the request for detailed proposals. Authorizes the authority to reject as nonresponsive any proposer that makes a significant change to the composition of its design-build team as initially submitted. Requires the authority to subsequently open, evaluate, and score the cost proposals from proposers that submitted a responsive technical proposal and assign points on the basis of the weighing specified in the request for detailed proposals. Requires the authority to rank the proposers in accordance with the formula provided in the request for detailed proposals.

Sec. 370.324. NEGOTIATION. (a) Requires an authority, after ranking the proposers under Section 370.323(i), to first attempt to negotiate a contract with the highest-ranked proposer. Authorizes an authority, if an authority has committed to paying a stipend to unsuccessful proposers in accordance with Section 370.325, to include in the negotiations alternative technical concepts proposed by other proposers.

(b) Requires the authority, if an authority is unable to negotiate a satisfactory contract with the highest-ranked proposer, formally and in writing, to end all negotiations with that proposer and proceed to negotiate with the next proposer in the order of the selection ranking until a contract is reached or negotiations with all ranked proposers end.

Sec. 370.325. STIPEND AMOUNT FOR UNSUCCESSFUL PROPOSERS. (a) Provides that, unless a stipend is paid under Subsection (c), a proposer retains all rights to the work product submitted in a response to a request for detailed proposals. Prohibits an authority, except as required by order of a governmental body or under Section 552.301(e) (requiring a governmental body that requests an attorney general decision within a reasonable time to perform certain actions), Government Code, from releasing or disclosing to any person, including the successful proposer, the work product contained in an unsuccessful proposal. Requires an authority to return all copies of the proposal and other information submitted by an unsuccessful proposer. Prohibits an authority or its agents from making use of any unique or nonordinary design element, technique, method, or process contained in an unsuccessful proposal that was not also contained in the highest-ranked proposal at the time of the original submittal, unless a stipend is paid to the unsuccessful proposer or the highest ranked proposer otherwise acquires a license from the unsuccessful proposer.

(b) Requires the highest ranked proposer, in the event of a violation of this section, to be liable to any unsuccessful proposer for one-half of the cost savings associated with the unauthorized use of the work product of the unsuccessful proposer.

(c) Authorizes an authority to offer an unsuccessful proposer that submits a responsive proposal to the request for detailed proposals a stipend for work associated with the develop of the proposal. Requires that the stipend be a minimum of two-tenths of one percent of the contract amount and be specified in the initial request for detailed proposals. Authorizes the authority, after payment of the stipend, to make use of any work product contained in the unsuccessful proposal, including the techniques, methods, processes, and information contained in the proposal. Provides that the use by the authority of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the authority and does not confer liability on the recipient of the stipend under this subsection.

Sec. 370.326. PERFORMANCE OR PAYMENT BOND. (a) Requires an authority, notwithstanding the requirements of Subchapter B (General Requirements; Liability), Chapter 2253 (Public Work Performance and Payment Bonds), Government Code, to

require a design-build contractor to provide a performance and payment bond or an alternative form of security.

(b) Requires that a performance and payment bond or alternative form of security be in an amount equal to the cost of constructing or maintain the project.

(c) Provides that a payment or performance bond is not required for the portion of a design-build contract under this section that includes design services only.

(d) Authorizes an authority, in addition to performance and payment bonds, to require the following alternative forms of security:

(1) a cashier's check drawn on a financial entity specified by the authority;

(2) a United States bond or note;

(3) an irrevocable bank letter of credit; or

(4) any other form of security determined suitable by the authority.

SECTION 3. Repealers: Sections 370.305(d) (relating to the expiration date of the authority to enter into comprehensive development agreements) and (e) (relating to certain exceptions to the expiration date of the authority under Subsection (d)), and 370.314 (Design-Build Procedures), Transportation Code.

SECTION 4. Effective date: upon passage or the 91st day after the last day of the legislative session.