

By: Watson
(Phillips)

S.B. No. 1138

A BILL TO BE ENTITLED

AN ACT

relating to design-build contracts and comprehensive development agreements of regional mobility authorities.

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

SECTION 1. Section 370.305, Transportation Code, is amended to read as follows:

Sec. 370.305. COMPREHENSIVE DEVELOPMENT AGREEMENTS.

~~(a) [An authority may use a comprehensive development agreement with a private entity to construct, maintain, repair, operate, extend, or expand a transportation project.]~~

~~[(b)]~~ 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 [and] may [also] 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) ~~[(c)]~~ An authority may negotiate provisions relating to professional and consulting services provided in connection with a comprehensive development agreement.

(c) ~~[(d)]~~ Except as provided by this chapter, the

1 ~~[Subsections (e) and (f), the authority to enter into comprehensive~~
2 ~~development agreements under this section expires on August 31,~~
3 ~~2009.~~

4 ~~[(e) Subsection (d) does not apply to a comprehensive~~
5 ~~development agreement that does not grant a private entity a right~~
6 ~~to finance a toll project or a comprehensive development agreement~~
7 ~~in connection with a project.~~

8 ~~[(1) that includes one or more managed lane facilities~~
9 ~~to be added to an existing controlled-access highway,~~

10 ~~[(2) the major portion of which is located in a~~
11 ~~nonattainment or near-nonattainment air quality area as designated~~
12 ~~by the United States Environmental Protection Agency; and~~

13 ~~[(3) for which the department has issued a request for~~
14 ~~qualifications before the effective date of this subsection.~~

15 ~~[(f) The] authority to enter into a comprehensive~~
16 ~~development agreement [for a project exempted from Subsection (d)~~
17 ~~or Section 223.210(b)] expires August 31, 2011.~~

18 SECTION 2. Chapter 370, Transportation Code, is amended by
19 adding Subchapter G-1 to read as follows:

20 SUBCHAPTER G-1. DESIGN-BUILD CONTRACTS

21 Sec. 370.318. DEFINITIONS. In this subchapter:

22 (1) "Design-build contractor" means a partnership,
23 corporation, or other legal entity or team that includes an
24 engineering firm and a construction contractor qualified to engage
25 in the construction of transportation projects in this state.

26 (2) "Design-build method" means a project delivery
27 method by which an entity contracts with a single entity to provide

1 both design and construction services for the construction,
2 rehabilitation, alteration, or repair of a facility.

3 Sec. 370.319. SCOPE OF AND LIMITATIONS ON CONTRACTS.

4 (a) Notwithstanding the requirements of Chapter 2254, Government
5 Code, an authority may use the design-build method for the design,
6 construction, financing, expansion, extension, related capital,
7 maintenance, rehabilitation, alteration, or repair of a
8 transportation project.

9 (b) A design-build contract under this subchapter may not
10 grant to a private entity:

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

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

15 (c) In using the design-build method and in entering into a
16 contract for the services of a design-build contractor, the
17 authority and the design-build contractor shall follow the
18 procedures and requirements of this subchapter.

19 (d) An authority may enter into not more than two
20 design-build contracts for transportation projects in any fiscal
21 year.

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

27 (1) an engineer;

1 (2) a qualified firm, selected in accordance with
2 Section 2254.004, Government Code, that is independent of the
3 design-build contractor; or

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

7 (b) The selected or designated engineer or firm has full
8 responsibility for complying with Chapter 1001, Occupations Code.

9 Sec. 370.321. OTHER PROFESSIONAL SERVICES. (a) An
10 authority shall provide or contract for, independently of the
11 design-build contractor, the following services as necessary for
12 the acceptance of the transportation project by the authority:

13 (1) inspection services;

14 (2) construction materials engineering and testing;

15 and

16 (3) verification testing services.

17 (b) An authority shall ensure that the engineering services
18 contracted for under this section are selected based on
19 demonstrated competence and qualifications.

20 (c) This section does not preclude the design-build
21 contractor from providing construction quality assurance and
22 quality control services under a design-build contract.

23 Sec. 370.322. REQUEST FOR QUALIFICATIONS. (a) For any
24 transportation project to be delivered through the design-build
25 method, an authority must prepare and issue a request for
26 qualifications. A request for qualifications must include:

27 (1) information regarding the proposed project's

1 location, scope, and limits;

2 (2) information regarding funding that may be
3 available for the project and a description of the financing to be
4 requested from the design-build contractor, as applicable;

5 (3) criteria that will be used to evaluate the
6 proposals, which must include a proposer's qualifications,
7 experience, technical competence, and ability to develop the
8 project;

9 (4) the relative weight to be given to the criteria;

10 and

11 (5) the deadline by which proposals must be received
12 by the authority.

13 (b) An authority shall publish notice advertising the
14 issuance of a request for qualifications in the Texas Register and
15 on an Internet website maintained by the authority.

16 (c) An authority shall evaluate each qualifications
17 statement received in response to a request for qualifications
18 based on the criteria identified in the request. An authority may
19 interview responding proposers. Based on the authority's
20 evaluation of qualifications statements and interviews, if any, an
21 authority shall qualify or short-list proposers to submit detailed
22 proposals.

23 (d) An authority shall qualify or short-list at least two
24 but not more than five firms to submit detailed proposals under
25 Section 370.323. If an authority receives only one responsive
26 proposal to a request for qualifications, the authority shall
27 terminate the procurement.

1 (e) An authority may withdraw a request for qualifications
2 or request for detailed proposals at any time.

3 Sec. 370.323. REQUEST FOR DETAILED PROPOSALS. (a) An
4 authority shall issue a request for detailed proposals to proposers
5 short-listed under Section 370.322. A request for detailed
6 proposals must include:

7 (1) information on the overall project goals;

8 (2) the authority's cost estimates for the
9 design-build portion of the project work;

10 (3) materials specifications;

11 (4) special material requirements;

12 (5) a schematic design approximately 30 percent
13 complete;

14 (6) known utilities, provided that an authority is not
15 required to undertake an effort to locate utilities;

16 (7) quality assurance and quality control
17 requirements;

18 (8) the location of relevant structures;

19 (9) notice of any rules or goals adopted by the
20 authority in accordance with Section 370.183 relating to awarding
21 contracts to disadvantaged businesses;

22 (10) available geotechnical or other information
23 related to the project;

24 (11) the status of any environmental review of the
25 project;

26 (12) detailed instructions for preparing the
27 technical proposal required under Subsection (c), including a

1 description of the form and level of completeness of drawings
2 expected;

3 (13) the relative weighting of the technical and cost
4 proposals required under Subsection (c) and a formula by which the
5 proposals will be evaluated and ranked that allocates at least 70
6 percent weight to the cost proposal; and

7 (14) the criteria and weighting for each aspect of the
8 technical proposal.

9 (b) A request for detailed proposals shall also include a
10 general form of the design-build contract that the authority
11 proposes if the terms of the contract may be modified as a result of
12 negotiations prior to contract execution.

13 (c) Each response to a request for detailed proposals must
14 include a sealed technical proposal and a separate sealed cost
15 proposal.

16 (d) The technical proposal must address:

17 (1) the proposer's qualifications and demonstrated
18 technical competence, not including any information submitted and
19 evaluated under Section 370.322(a)(3);

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

22 (3) the proposed solutions to anticipated problems;

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

24 (5) the conceptual engineering design proposed; and

25 (6) any other information requested by the authority.

26 (e) An authority may provide for the submission of
27 alternative technical concepts by a proposer. If an authority

1 provides for the submission of alternative technical concepts, the
2 authority must prescribe a process for notifying a proposer whether
3 the proposer's alternative technical concepts are approved for
4 inclusion in a technical proposal.

5 (f) The cost proposal must include:

6 (1) the cost of delivering the project;

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

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

11 (g) A response to a request for detailed proposals shall be
12 due not later than the 180th day after the final request for
13 detailed proposals is issued by the authority. This subsection
14 does not preclude the release by the authority of a draft request
15 for detailed proposals for purposes of receiving input from
16 short-listed proposers.

17 (h) An authority shall first open, evaluate, and score each
18 responsive technical proposal submitted on the basis of the
19 criteria described in the request for detailed proposals and assign
20 points on the basis of the weighting specified in the request for
21 detailed proposals. The authority may reject as nonresponsive any
22 proposer that makes a significant change to the composition of its
23 design-build team as initially submitted that was not approved by
24 the authority for the purpose of the request for detailed
25 proposals. The authority shall subsequently open, evaluate, and
26 score the cost proposals from proposers that submitted a responsive
27 technical proposal and assign points on the basis of the weighting

1 specified in the request for detailed proposals. The authority
2 shall rank the proposers in accordance with the formula provided in
3 the request for detailed proposals.

4 Sec. 370.324. NEGOTIATION. (a) After ranking the
5 proposers under Section 370.323(h), an authority shall first
6 attempt to negotiate a contract with the highest ranked proposer.
7 If an authority has committed to paying a stipend to unsuccessful
8 proposers in accordance with Section 370.326, an authority may
9 include in the negotiations alternative technical concepts
10 proposed by other proposers.

11 (b) If an authority is unable to negotiate a satisfactory
12 contract with the highest ranked proposer, the authority shall,
13 formally and in writing, end all negotiations with that proposer
14 and proceed to negotiate with the next proposer in the order of the
15 selection ranking until a contract is reached or negotiations with
16 all ranked proposers end.

17 Sec. 370.325. ASSUMPTION OF RISKS. (a) Unless otherwise
18 provided in a final request for detailed proposals or an addendum or
19 supplement included in the final request, the authority shall
20 assume:

21 (1) all risks and costs associated with:

22 (A) scope changes and modifications, as
23 requested by the authority;

24 (B) unknown or differing site conditions;

25 (C) environmental clearance and other regulatory
26 permitting for the project; and

27 (D) natural disasters and other force majeure

1 events; and

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

5 (b) Notwithstanding Subsection (a), an authority and
6 contracting parties may agree that a design-build contractor should
7 assume some or all of the risks or costs of a project described in
8 Subsection (a) if the agreement is reflected in the final request
9 for detailed proposals or an addendum or supplement to the final
10 request.

11 Sec. 370.326. STIPEND AMOUNT FOR UNSUCCESSFUL PROPOSERS.

12 (a) In accordance with the request for detailed proposals, an
13 authority shall pay an unsuccessful proposer that submits a
14 responsive proposal to the request for detailed proposals a stipend
15 for work product contained in the proposal. The stipend must be
16 specified in the initial request for detailed proposals in an
17 amount of at least two-tenths of one percent of the contract amount,
18 but may not exceed the value of the work product contained in the
19 proposal to the authority. If the authority determines that the
20 value of the work product is less than the stipend amount, the
21 authority must provide the proposer with a detailed explanation of
22 the valuation, including the methodology and assumptions used in
23 the valuation. After payment of the stipend, the authority may make
24 use of any work product contained in the unsuccessful proposal,
25 including the techniques, methods, processes, and information
26 contained in the proposal. The use by the authority of any design
27 element contained in an unsuccessful proposal is at the sole risk

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

3 (b) In a request for detailed proposals, an authority may
4 provide for the payment of a partial stipend in the event a
5 procurement is terminated prior to securing project financing and
6 execution of a design-build contract.

7 Sec. 370.327. PERFORMANCE OR PAYMENT BOND.

8 (a) Notwithstanding the requirements of Subchapter B, Chapter
9 2253, Government Code, an authority shall require a design-build
10 contractor to provide a performance or payment bond or an
11 alternative form of security or combination of forms of security.

12 (b) A performance or payment bond or alternative form of
13 security shall be in an amount equal to the cost of constructing or
14 maintaining the project.

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

18 (d) In addition to performance and payment bonds, an
19 authority may require the following alternative forms of security:

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

22 (2) a United States bond or note;

23 (3) an irrevocable bank letter of credit drawn from
24 any Texas or federally chartered bank; or

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

27 SECTION 3. Section 370.314, Transportation Code, is

1 repealed.

2 SECTION 4. This Act takes effect immediately if it receives
3 a vote of two-thirds of all the members elected to each house, as
4 provided by Section 39, Article III, Texas Constitution. If this
5 Act does not receive the vote necessary for immediate effect, this
6 Act takes effect on the 91st day after the last day of the
7 legislative session.