

1-1 By: Watson S.B. No. 1138
1-2 (In the Senate - Filed March 3, 2011; March 16, 2011, read
1-3 first time and referred to Committee on Transportation and Homeland
1-4 Security; April 26, 2011, reported adversely, with favorable
1-5 Committee Substitute by the following vote: Yeas 8, Nays 0;
1-6 April 26, 2011, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1138 By: Watson
1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to design-build contracts and comprehensive development
1-11 agreements of regional mobility authorities.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Subsections (a) and (b), Section 370.305,
1-14 Transportation Code, are amended to read as follows:

1-15 (a) ~~[An authority may use a comprehensive development~~
1-16 ~~agreement with a private entity to construct, maintain, repair,~~
1-17 ~~operate, extend, or expand a transportation project.~~

1-18 ~~[(b)]~~ A comprehensive development agreement is an agreement
1-19 with a private entity that, at a minimum, provides for the design
1-20 and construction of a transportation project, ~~that [and] may [also]~~
1-21 ~~provide for the financing, acquisition, maintenance, or operation~~
1-22 ~~of a transportation project, and that entitles the private entity~~
1-23 ~~to:~~

1-24 (1) a leasehold interest in the transportation
1-25 project; or

1-26 (2) the right to operate or retain revenue from the
1-27 operation of the transportation project.

1-28 (b) An authority may not enter into a comprehensive
1-29 development agreement unless specifically authorized by the
1-30 legislature.

1-31 SECTION 2. Chapter 370, Transportation Code, is amended by
1-32 adding Subchapter G-1 to read as follows:

1-33 SUBCHAPTER G-1. DESIGN-BUILD CONTRACTS

1-34 Sec. 370.318. DEFINITIONS. In this subchapter:

1-35 (1) "Design-build contractor" means a partnership,
1-36 corporation, or other legal entity or team that includes an
1-37 engineering firm and a construction contractor qualified to engage
1-38 in the construction of transportation projects in this state.

1-39 (2) "Design-build method" means a project delivery
1-40 method by which an entity contracts with a single entity to provide
1-41 both design and construction services for the construction,
1-42 rehabilitation, alteration, or repair of a facility.

1-43 Sec. 370.319. SCOPE OF AND LIMITATIONS ON CONTRACTS.

1-44 (a) An authority may use the design-build method for the design,
1-45 construction, financing, expansion, extension, maintenance,
1-46 rehabilitation, alteration, or repair of a transportation project.

1-47 (b) A design-build contract under this subchapter may not
1-48 grant to a private entity:

1-49 (1) a leasehold interest in the transportation
1-50 project; or

1-51 (2) the right to operate or retain revenue from the
1-52 operation of the transportation project.

1-53 (c) In using the design-build method and in entering into a
1-54 contract for the services of a design-build contractor, the
1-55 authority and the design-build contractor shall follow the
1-56 procedures and requirements of this subchapter.

1-57 (d) An authority may enter into not more than two
1-58 design-build contracts for transportation projects in any fiscal
1-59 year.

1-60 Sec. 370.320. USE OF ENGINEER OR ENGINEERING FIRM. (a) To
1-61 act as an authority's representative, independent of a design-build
1-62 contractor, for the procurement process and for the duration of the
1-63 work on a transportation project, an authority shall select or

2-1 designate:
 2-2 (1) an engineer;
 2-3 (2) a qualified firm, selected in accordance with
 2-4 Section 2254.004, Government Code, who is independent of the
 2-5 design-build contractor; or
 2-6 (3) a general engineering consultant that was
 2-7 previously selected by an authority and is selected or designated
 2-8 in accordance with Section 2254.004, Government Code.
 2-9 (b) The selected or designated engineer or firm has full
 2-10 responsibility for complying with Chapter 1001, Occupations Code.
 2-11 Sec. 370.321. OTHER PROFESSIONAL SERVICES. (a) An
 2-12 authority shall provide or contract for, independently of the
 2-13 design-build firm, the following services as necessary for the
 2-14 acceptance of the transportation project by the authority:
 2-15 (1) inspection services;
 2-16 (2) construction materials engineering and testing;
 2-17 and
 2-18 (3) verification testing services.
 2-19 (b) An authority shall ensure that the engineering services
 2-20 contracted for under this section are selected based on
 2-21 demonstrated competence and qualifications.
 2-22 Sec. 370.322. REQUEST FOR QUALIFICATIONS. (a) For any
 2-23 transportation project to be delivered through the design-build
 2-24 method, an authority must prepare and issue a request for
 2-25 qualifications. A request for qualifications must include:
 2-26 (1) information regarding the proposed project's
 2-27 location, scope, and limits;
 2-28 (2) information regarding funding available for the
 2-29 project and a description of the financing to be requested from the
 2-30 design-build contractor, as applicable;
 2-31 (3) criteria that will be used to evaluate the
 2-32 proposals, which must include a proposer's qualifications,
 2-33 experience, technical competence, and ability to develop the
 2-34 project;
 2-35 (4) the relative weight to be given to the criteria;
 2-36 and
 2-37 (5) the deadline by which proposals must be received
 2-38 by the authority.
 2-39 (b) An authority shall publish notice advertising the
 2-40 issuance of a request for qualifications in the Texas Register and
 2-41 on an Internet website maintained by the authority.
 2-42 (c) An authority shall evaluate each qualifications
 2-43 statement received in response to a request for qualifications
 2-44 based on the criteria identified in the request. An authority may
 2-45 interview responding proposers. Based on the authority's
 2-46 evaluation of qualifications statements and interviews, if any, an
 2-47 authority shall qualify or short-list proposers to submit detailed
 2-48 proposals.
 2-49 (d) An authority shall qualify or short-list at least two
 2-50 firms to submit detailed proposals under Section 370.323. If an
 2-51 authority receives only one responsive proposal to a request for
 2-52 qualifications, the authority shall terminate the procurement.
 2-53 (e) An authority may withdraw a request for qualifications
 2-54 or request for detailed proposals at any time.
 2-55 Sec. 370.323. REQUEST FOR DETAILED PROPOSALS. (a) An
 2-56 authority shall issue a request for detailed proposals to proposers
 2-57 short-listed under Section 370.322. A request for detailed
 2-58 proposals must include:
 2-59 (1) information on the overall project goals;
 2-60 (2) budget or cost estimates;
 2-61 (3) materials specifications;
 2-62 (4) special material requirements;
 2-63 (5) a schematic design approximately 30 percent
 2-64 complete;
 2-65 (6) known utilities, provided that an authority is not
 2-66 required to undertake an effort to locate utilities;
 2-67 (7) quality assurance and quality control
 2-68 requirements;
 2-69 (8) the location of relevant structures;

3-1 (9) notice of any rules or goals adopted by the
3-2 authority relating to awarding contracts to historically
3-3 underutilized businesses;
3-4 (10) available geotechnical or other information
3-5 related to the project;
3-6 (11) the status of any environmental review of the
3-7 project;
3-8 (12) detailed instructions for preparing the
3-9 technical proposal required under Subsection (c), including a
3-10 description of the form and level of completeness of drawings
3-11 expected; and
3-12 (13) the relative weighting of the technical and cost
3-13 proposals required under Subsection (c) and the formula by which
3-14 the proposals will be evaluated and ranked.
3-15 (b) A request for detailed proposals may also include a
3-16 general form of the design-build contract that the authority
3-17 proposes if the terms of the contract may be modified by the
3-18 authority or the design-build contractor prior to contract
3-19 execution.
3-20 (c) Each response to a request for detailed proposals must
3-21 include a sealed technical proposal and a separate sealed cost
3-22 proposal.
3-23 (d) The technical proposal must address:
3-24 (1) the proposer's qualifications and demonstrated
3-25 technical competence;
3-26 (2) the feasibility of developing the project as
3-27 proposed, including identification of anticipated problems;
3-28 (3) the proposed solutions to anticipated problems;
3-29 (4) the ability of the proposer to meet schedules;
3-30 (5) the conceptual engineering design proposed; and
3-31 (6) any other information requested by the authority.
3-32 (e) An authority may provide for the submission of
3-33 alternative technical concepts by a proposer. If an authority
3-34 provides for the submission of alternative technical concepts, the
3-35 authority must prescribe a process for notifying a proposer whether
3-36 the proposer's alternative technical concepts are approved for
3-37 inclusion in a technical proposal.
3-38 (f) The cost proposal must include:
3-39 (1) the cost of delivering the project;
3-40 (2) the estimated number of days required to complete
3-41 the project; and
3-42 (3) any terms for financing for the project that the
3-43 proposer plans to provide.
3-44 (g) Each proposer must:
3-45 (1) select or designate each engineering firm that is
3-46 a member of its team based on demonstrated competence and
3-47 qualifications; and
3-48 (2) certify to the authority that each selection or
3-49 designation was based on demonstrated competence and
3-50 qualifications.
3-51 (h) A response to a request for detailed proposals shall be
3-52 due not later than the 180th day after the final request for
3-53 detailed proposals is issued by the authority. This subsection
3-54 does not preclude the release by the authority of a draft request
3-55 for detailed proposals for purposes of receiving input from
3-56 short-listed proposers.
3-57 (i) An authority shall first open, evaluate, and score each
3-58 responsive technical proposal submitted on the basis of the
3-59 criteria described in the request for detailed proposals and assign
3-60 points on the basis of the weighting specified in the request for
3-61 detailed proposals. The authority may reject as nonresponsive any
3-62 proposer that makes a significant change to the composition of its
3-63 design-build team as initially submitted. The authority shall
3-64 subsequently open, evaluate, and score the cost proposals from
3-65 proposers that submitted a responsive technical proposal and assign
3-66 points on the basis of the weighting specified in the request for
3-67 detailed proposals. The authority shall rank the proposers in
3-68 accordance with the formula provided in the request for detailed
3-69 proposals.

4-1 Sec. 370.324. NEGOTIATION. (a) After ranking the
 4-2 proposers under Section 370.323(i), an authority shall first
 4-3 attempt to negotiate a contract with the highest-ranked proposer.
 4-4 If an authority has committed to paying a stipend to unsuccessful
 4-5 proposers in accordance with Section 370.325, an authority may
 4-6 include in the negotiations alternative technical concepts
 4-7 proposed by other proposers.

4-8 (b) If an authority is unable to negotiate a satisfactory
 4-9 contract with the highest-ranked proposer, the authority shall,
 4-10 formally and in writing, end all negotiations with that proposer
 4-11 and proceed to negotiate with the next proposer in the order of the
 4-12 selection ranking until a contract is reached or negotiations with
 4-13 all ranked proposers end.

4-14 Sec. 370.325. STIPEND AMOUNT FOR UNSUCCESSFUL PROPOSERS.
 4-15 (a) Unless a stipend is paid under Subsection (c), a proposer
 4-16 retains all rights to the work product submitted in a response to a
 4-17 request for detailed proposals. Except as required by order of a
 4-18 governmental body or under Section 552.301(e), Government Code, an
 4-19 authority may not release or disclose to any person, including the
 4-20 successful proposer, the work product contained in an unsuccessful
 4-21 proposal. An authority shall return all copies of the proposal and
 4-22 other information submitted by an unsuccessful proposer. An
 4-23 authority or its agents may not make use of any unique or
 4-24 nonordinary design element, technique, method, or process
 4-25 contained in an unsuccessful proposal that was not also contained
 4-26 in the highest-ranked proposal at the time of the original
 4-27 submittal, unless a stipend is paid to the unsuccessful proposer or
 4-28 the highest-ranked proposer otherwise acquires a license from the
 4-29 unsuccessful proposer.

4-30 (b) In the event of a violation of this section, the
 4-31 highest-ranked proposer shall be liable to any unsuccessful
 4-32 proposer for one-half of the cost savings associated with the
 4-33 unauthorized use of the work product of the unsuccessful proposer.

4-34 (c) An authority may offer an unsuccessful proposer that
 4-35 submits a responsive proposal to the request for detailed proposals
 4-36 a stipend for work associated with the development of the proposal.
 4-37 The stipend must be a minimum of two-tenths of one percent of the
 4-38 contract amount and must be specified in the initial request for
 4-39 detailed proposals. After payment of the stipend, the authority
 4-40 may make use of any work product contained in the unsuccessful
 4-41 proposal, including the techniques, methods, processes, and
 4-42 information contained in the proposal. The use by the authority of
 4-43 any design element contained in an unsuccessful proposal is at the
 4-44 sole risk and discretion of the authority and does not confer
 4-45 liability on the recipient of the stipend under this subsection.

4-46 Sec. 370.326. PERFORMANCE OR PAYMENT BOND.
 4-47 (a) Notwithstanding the requirements of Subchapter B, Chapter
 4-48 2253, Government Code, an authority shall require a design-build
 4-49 contractor to provide a performance and payment bond or an
 4-50 alternative form of security.

4-51 (b) A performance and payment bond or alternative form of
 4-52 security shall be in an amount equal to the cost of constructing or
 4-53 maintaining the project.

4-54 (c) A payment or performance bond is not required for the
 4-55 portion of a design-build contract under this section that includes
 4-56 design services only.

4-57 (d) In addition to performance and payment bonds, an
 4-58 authority may require the following alternative forms of security:

4-59 (1) a cashier's check drawn on a financial entity
 4-60 specified by the authority;

4-61 (2) a United States bond or note;

4-62 (3) an irrevocable bank letter of credit; or

4-63 (4) any other form of security determined suitable by
 4-64 the authority.

4-65 SECTION 3. Subsections (d) and (e), Section 370.305, and
 4-66 Section 370.314, Transportation Code, are repealed.

4-67 SECTION 4. This Act takes effect immediately if it receives
 4-68 a vote of two-thirds of all the members elected to each house, as
 4-69 provided by Section 39, Article III, Texas Constitution. If this

5-1 Act does not receive the vote necessary for immediate effect, this
5-2 Act takes effect on the 91st day after the last day of the
5-3 legislative session.

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