

By: Callegari

H.B. No. 1886

A BILL TO BE ENTITLED

AN ACT

relating to the procurement methods of certain political subdivisions and certain other entities for the construction, rehabilitation, alteration, or repair of certain projects.

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

SECTION 1. Chapter 271, Local Government Code, is amended by adding Subchapter J, to read as follows:

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

Sec. 271.181. DEFINITIONS. In this subchapter:

(1) "Local governmental entity" means a municipality, county, or special district or authority.

(2) "Civil works project" means a roadway project, transit project, water supply treatment or transmission project, wastewater treatment or transmission project, desalination project or electric utility project.

(3) "Design-build firm" means a partnership, corporation, or other legal entity or team that includes an engineer and a construction contractor qualified to engage in building construction in Texas.

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

(A) provides sufficient information to convey the intent, goals, criteria, and objectives of the civil works

1 project; and

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

3 (i) assess the scope of work and the risk
4 involved; and

5 (ii) submit a proposal on the project.

6 Sec. 271.182. APPLICABILITY. (a) Before September 1,
7 2009, this subchapter applies to a municipality or county with a
8 population of 500,000 or more or a special district or authority
9 with a population of 500,000 or more in its service area.

10 (b) On or after September 1, 2009, and before September 1,
11 2011, this subchapter applies to a municipality or county with a
12 population of more than 100,000 or a special district or authority
13 with a population of more than 100,000 in its service area.

14 (c) On or after September 1, 2011, and before September 1,
15 2013, this subchapter applies to a municipality or county with a
16 population of more than 25,000 or a special district or authority
17 with a population of more than 25,000 in its service area.

18 (d) On or after September 1, 2013, this subchapter applies
19 to any municipality, county, or special district or authority.

20 Sec. 271.183. APPLICABILITY OF OTHER LAW. (a) Any
21 provision in the charter of a home-rule municipality or regulation,
22 if any, of a county or special district or authority that requires
23 the use of competitive sealed proposals or prescribes procurement
24 procedures and that is in conflict with this subchapter controls
25 over this subchapter unless the governing body of the local
26 governmental entity elects to have this subchapter supersede the
27 charter or regulation.

1 (b) The purchasing requirements of Section 361.426, Health
2 and Safety Code, apply to purchases by a local governmental entity
3 made under this subchapter.

4 (c) Except as provided by this section, to the extent of any
5 conflict, this subchapter prevails over any other law relating to
6 the purchasing of goods and services except a law relating to
7 contracting with historically underutilized businesses.

8 Sec. 271.184. NOTICE REQUIREMENTS. (a) For a contract
9 entered into by a local governmental entity other than a county
10 under any of the methods provided by this subchapter, the entity
11 shall publish notice of the time and place the proposals, or the
12 responses to a request for qualifications, will be received and
13 opened. The notice must be published in a newspaper of general
14 circulation in the county in which the local governmental entity's
15 administrative office is located or the county in which the
16 greatest amount of the entity's territory is located once each week
17 for at least two weeks before the date of the deadline for receiving
18 proposals or responses. If there is not a newspaper of general
19 circulation in that county, the notice must be published in a
20 newspaper of general circulation in the county nearest the county
21 seat of the county in which the local governmental entity's central
22 administrative office is located or the county in which the
23 greatest amount of the entity's territory is located.

24 (b) For a contract entered into by a county under any of the
25 methods provided by this subchapter, the county shall publish
26 notice of the time and place the proposals, or the responses to a
27 request for qualifications, will be received and opened. The

1 notice must be published in a newspaper of general circulation in
2 the county once each week for at least two weeks before the date of
3 the deadline for receiving proposals or responses. If there is not
4 a newspaper of general circulation in the county, the notice shall
5 be:

- 6 (1) posted at the courthouse door of the county; and
7 (2) published in a newspaper of general circulation in
8 the nearest county.

9 Sec. 271.185. CONTRACTS FOR CIVIL WORKS PROJECTS:
10 DESIGN-BUILD. (a) A local governmental entity may use the
11 design-build method for the construction, rehabilitation,
12 alteration, or repair of a civil works project. In using this method
13 and in entering into a contract for the services of a design-build
14 firm, the contracting local governmental entity and the
15 design-build firm shall follow the procedures provided by this
16 subchapter.

17 (b) A contract for a project under this subchapter may cover
18 only a single integrated project. A local governmental entity may
19 not enter into a contract for aggregated projects at multiple
20 locations.

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

24 (1) the extent to which the entity can adequately
25 define the project requirements;

26 (2) the time constraints for the delivery of the
27 project;

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

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

7 (d) A local governmental entity shall make a formal finding
8 on the criteria described by Subsection (c) before preparing a
9 request for qualifications under Section 271.189.

10 Sec. 271.186. LIMITATION ON NUMBER OF PROJECTS. (a) During
11 the first four years that this subchapter applies to a local
12 governmental entity under Section 271.182, the entity may, under
13 this subchapter, enter into contracts for not more than two
14 projects in any fiscal year.

15 (b) After the period described by Subsection (a):

16 (1) a local governmental entity with a population of
17 500,000 or more may, under this subchapter, enter into contracts
18 for not more than four projects in any fiscal year;

19 (2) a local governmental entity with a population of
20 100,000 or more but less than 500,000 may, under this subchapter,
21 enter into contracts for not more than three projects in any fiscal
22 year; and

23 (3) a local governmental entity with a population of
24 less than 100,000 may, under this subchapter, enter into contracts
25 for not more than two projects in any fiscal year.

26 Sec. 271.187. USE OF ENGINEER. (a) The local governmental
27 entity shall select or designate an engineer who is independent of

1 the design-build firm to act as its representative for the
2 procurement process and for the duration of the work on the civil
3 works project.

4 (b) The local governmental entity shall select the engineer
5 on the basis of demonstrated competence and qualifications as
6 provided by Section 2254.004, Government Code.

7 Sec. 271.188. USE OF OTHER PROFESSIONAL SERVICES. (a) The
8 local governmental entity shall contract for, independently of the
9 design-build firm, the following services necessary for the
10 acceptance of the civil works project by the entity:

11 (1) inspection services;

12 (2) testing of construction materials engineering;

13 and

14 (3) verification testing services.

15 (b) The local governmental entity shall select the services
16 for which it contracts under this section in accordance with
17 Section 2254.004, Government Code.

18 Sec. 271.189. REQUEST FOR QUALIFICATIONS. (a) The local
19 governmental entity shall prepare a request for qualifications that
20 includes:

21 (1) information on the civil works project site;

22 (2) project scope;

23 (3) project budget;

24 (4) project schedule;

25 (5) criteria for selection under Section 271.191 and
26 the weighting of the criteria; and

27 (6) other information that may assist potential

1 design-build firms in submitting proposals for the project.

2 (b) The local governmental entity shall also prepare a
3 design criteria package as described by Section 271.190.

4 Sec. 271.190. CONTENTS OF DESIGN CRITERIA PACKAGE. A
5 design criteria package must include, as appropriate:

6 (1) budget or cost estimates;
7 (2) information on the site;
8 (3) performance criteria;
9 (4) special material requirements;
10 (5) initial design calculations;
11 (6) known utilities;
12 (7) capacity requirements;
13 (8) quality assurance and quality control
14 requirements; and

15 (9) the type, size, and location of structures.

16 Sec. 271.191. EVALUATION OF DESIGN-BUILD FIRMS. (a) The
17 local governmental entity shall receive proposals and shall
18 evaluate each offeror's experience, technical competence,
19 capability to perform, the past performance of the offeror's team
20 and members of the team, and other appropriate factors submitted by
21 the team or firm in response to the request for qualifications,
22 except that cost-related or price-related evaluation factors are
23 not permitted at this stage.

24 (b) Each offeror must certify to the local governmental
25 entity that each engineer that is a member of its team was selected
26 based on demonstrated competence and qualifications, in the manner
27 provided by Section 2254.004, Government Code.

1 (c) The local governmental entity shall qualify a maximum of
2 three offerors to submit additional information and, if the entity
3 chooses, to interview for final selection.

4 Sec. 271.192. SELECTION OF DESIGN-BUILD FIRM. The local
5 governmental entity shall select a design-build firm using one of
6 the following selection options:

7 (1) qualifications-based selection as provided by
8 Section 271.193; or

9 (2) a combination of technical and price proposals as
10 provided by Section 271.194.

11 Sec. 271.193. PROCEDURES FOR QUALIFICATIONS-BASED
12 SELECTION. A local governmental entity that selects a design-build
13 firm using the qualifications-based selection option:

14 (1) may request that the firms identified under
15 Section 271.191(c) provide additional information regarding
16 demonstrated competence and qualifications, project approaches,
17 the ability of the firm to meet schedules or other factors as
18 appropriate, except that price or cost-related criteria may not be
19 utilized;

20 (2) may not require firms to submit and may not accept
21 or consider conceptual or detailed engineering or architectural
22 designs as part of the proposal; and

23 (3) shall:

24 (A) rank each proposal submitted on the basis of
25 the criteria set forth in the request for qualifications and the
26 results of any interview; and

27 (B) select the design-build firm that is most

1 highly qualified on the basis of the published selection criteria
2 and on its ranking evaluations.

3 Sec. 271.194. PROCEDURES FOR COMBINATION OF TECHNICAL AND
4 COST PROPOSALS. (a) A local governmental entity that selects a
5 design-build firm using a combination of technical and cost
6 proposals shall request proposals from firms identified under
7 Section 271.191(c). A firm must submit a proposal not later than
8 the 90th day after the date the local governmental entity makes a
9 public request for the proposals from the selected firms. The
10 request for proposals must include:

11 (1) a design criteria package;
12 (2) a geotechnical baseline report;
13 (3) detailed instructions for preparing the technical
14 proposal and the items to be included, including a description of
15 the form and level of completeness of drawings expected; and
16 (4) the relative weighting of the technical and price
17 proposals and the formula by which the proposals will be evaluated
18 and ranked.

19 (b) The technical proposal component under this section
20 must be weighted a minimum of 50 percent.

21 (c) Each proposal must include a sealed technical proposal
22 and a separate sealed price proposal.

23 (d) The technical proposal must address:

24 (1) project approach;
25 (2) anticipated problems;
26 (3) proposed solutions to anticipated problems;
27 (4) ability to meet schedules;

1 (5) conceptual engineering design; and
2 (6) other information requested by the local
3 governmental entity.

4 (e) The local governmental entity shall first open,
5 evaluate, and score each responsive technical proposal submitted on
6 the basis of the criteria described in the request for proposals and
7 assign points on the basis of the weighting specified in the request
8 for proposals. The local governmental entity may reject as
9 nonresponsive any firm that makes a significant change to the
10 composition of its firm as initially submitted. The local
11 governmental entity shall subsequently open, evaluate, and score
12 the price proposals from firms that submitted a responsive
13 technical proposal and assign points on the basis of the weighting
14 specified in the request for proposals. The local governmental
15 entity shall select the design-build firm in accordance with the
16 formula provided in the request for proposals.

17 Sec. 271.195. NEGOTIATION. After selecting the highest
18 ranked design-build firm under Section 271.193 or 271.194, the
19 local governmental entity shall first attempt to negotiate a
20 contract with the selected firm. If the local governmental entity
21 is unable to negotiate a satisfactory contract with the selected
22 firm, the entity shall, formally and in writing, end all
23 negotiations with that firm and proceed to negotiate with the next
24 firm in the order of the selection ranking until a contract is
25 reached or negotiations with all ranked firms end.

26 Sec. 271.196. ASSUMPTION OF RISKS. The local governmental
27 entity shall assume:

1 (1) all risks and costs associated with:

2 (A) scope changes and modifications;

3 (B) unknown or differing site conditions;

4 (C) regulatory permitting; and

5 (D) natural disasters and other force majeure
6 events; and

7 (2) all costs associated with property acquisition.

8 Sec. 271.197. STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS.

9 (a) Not later than the 30th day after the date a contract is
10 executed under this subchapter, the local governmental entity shall
11 offer unsuccessful design-build firms that submit a response to the
12 entity's request for additional information under Section
13 271.191(c) a stipend that is equal to a minimum of one-half of one
14 percent of the final contract price for preliminary engineering
15 costs associated with development of the proposal. A greater
16 amount may be negotiated with a firm as compensation for the use of
17 intellectual property. If the offer is accepted and paid, the local
18 governmental entity may make use of any work product contained in
19 the proposal, including the techniques, methods, processes, and
20 information contained in the proposal. The use by the local
21 governmental entity of any design element contained in an
22 unsuccessful proposal is at the sole risk and discretion of the
23 entity and does not confer liability on the recipient of the stipend
24 under this subsection.

25 (b) If a design-build firm rejects the offer of the stipend,
26 the firm retains all rights to the work product and the local
27 governmental entity may not make use of any unique design element,

1 technique, method, or process contained in the unsuccessful
2 proposal that was not also contained in the successful proposal at
3 the time of the original submittal. If the local governmental
4 entity wants to acquire the rights to the work product of an
5 unsuccessful firm and the local governmental entity and that firm
6 are unable to reach an agreement on the value of the work product,
7 the matter may be submitted to binding arbitration.

8 (c) If a local governmental entity requests and receives
9 proposals and subsequently cancels the request or suspends the
10 selection process for more than 270 days after the date the local
11 governmental entity requests the design-build firms to provide
12 additional information, each offeror who submitted a proposal as
13 requested shall receive the minimum stipend required by this
14 section.

15 Sec. 271.198. COMPLETION OF DESIGN. (a) Following
16 selection of a design-build firm under this subchapter, the firm's
17 engineers shall submit all design elements for review and
18 determination of scope compliance to the local governmental entity
19 before or concurrently with construction.

20 (b) An appropriately licensed design professional shall
21 sign and seal construction documents before the documents are
22 released for construction.

23 Sec. 271.199. FINAL CONSTRUCTION DOCUMENTS. The
24 design-build firm shall supply to the local governmental entity a
25 signed and sealed set of construction documents for the project at
26 the conclusion of construction.

27 Sec. 271.200. PERFORMANCE OR PAYMENT BOND. A payment or

1 performance bond is not required for, and may not provide coverage
2 for, the portion of a design-build contract under this section that
3 includes design services only. If a fixed contract amount or
4 guaranteed maximum price has not been determined at the time a
5 design-build contract is awarded, the penal sums of the performance
6 and payment bonds delivered to the local governmental entity must
7 each be in an amount equal to the project budget, as specified in
8 the design criteria package. The design-build firm shall deliver
9 the bonds not later than the 10th day after the date the
10 design-build firm executes the contract unless the design-build
11 firm furnishes a bid bond or other financial security acceptable to
12 the local governmental entity to ensure that the design-build firm
13 will furnish the required performance and payment bonds when a
14 guaranteed maximum price is established.

15 SECTION 2. Sections 2252.902(a) and (b), Government Code,
16 are amended to read as follows:

17 (a) In this section, "construction contract" means a
18 contract or agreement made and entered into by a ~~[state]~~
19 governmental entity, engineer, design-build firm, contractor,
20 construction manager, subcontractor, supplier, or equipment
21 lessor, concerning the planning, design, construction, alteration,
22 or repair, of ~~[a state public building or carrying out or~~
23 ~~completing]~~ any ~~[state]~~ public work.

24 (b) Except as provided by Subsection (c), a covenant,
25 promise, or agreement contained in a construction contract, or in
26 an agreement collateral to or affecting a construction contract, is
27 void and unenforceable to the extent that ~~[it indemnifies]~~ a person

1 is required to indemnify, hold harmless, or defend another person
2 against all or any portion of loss or liability for damage other
3 than a loss or liability for damage caused or resulting from the
4 negligence of the indemnitor [~~that:~~

5 [~~(1) is caused by or results from the sole, joint, or~~
6 ~~concurrent negligence of the indemnitee, its agent, employee, or~~
7 ~~another independent contractor directly responsible to the~~
8 ~~indemnitee; and~~

9 [~~(2) arises from:~~

10 [~~(A) personal injury or death;~~

11 [~~(B) property damage;~~

12 [~~(C) a fine, penalty, administrative action, or~~
13 ~~other action assessed by a governmental entity directly against the~~
14 ~~indemnitee, its agent or employee, or an independent contractor~~
15 ~~directly responsible to the indemnitee; or~~

16 [~~(D) any other loss, damage, or expense that~~
17 ~~arises from an occurrence described by Paragraph (A), (B), or (C)].~~

18 SECTION 3. Section 431.101(e), Transportation Code, is
19 amended to read as follows:

20 (e) A local government corporation is subject to each
21 statute, code, and other law relating to the design and
22 construction of projects, including the procurement of design and
23 construction services, that apply to the local government that
24 created the corporation [~~Section 394.904(a), Local Government~~
25 ~~Code, applies to property and improvements owned by a local~~
26 ~~government corporation. Section 394.904(b) of that code applies to~~
27 ~~each contract awarded by the local government corporation].~~

1 SECTION 4. The changes in law made by this Act apply only to
2 a contract for which a request for proposals or a request for
3 qualifications is first published or distributed on or after the
4 effective date of this Act. A contract for which a request for
5 proposals or a request for qualifications is first published or
6 distributed before the effective date of this Act is governed by the
7 law in effect at the time the request is published or distributed,
8 and the former law is continued in effect for that purpose.

9 SECTION 5. This Act takes effect September 1, 2007.