

SUBJECT: Procurement procedures for construction-related public projects

COMMITTEE: State Affairs — favorable, with amendment

VOTE: 7 ayes — Marchant, B. Cook, J. Davis, Elkins, Goodman, Lewis, Villarreal
0 nays
2 absent — Madden, Gattis

SENATE VOTE: On final passage, April 16 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — Steve Stagner, Texas Council of Engineering Companies
Against — None

BACKGROUND: Design-build is a system of contracting for construction projects under which an owner enters into a single contract with an individual firm or joint venture team that controls both design and construction for the project. Traditionally, an owner would contract with an engineer or architect to prepare plans and specifications for a project, then contract separately with a constructor to build the project in accordance with plans.

In 1995, the 74th Legislature enacted SB 1 by Ratliff, the omnibus public education reform bill, which included a section modifying the basic purchasing statutes for school districts. The bill permits districts to choose from a range of purchasing methods, including design-build contracts. It offers no procedural guidelines but simply references and authorizes the procedures.

Prior to the enactment of SB 1, a series of attorney general opinions held that public entities in Texas could not use design-build procedures because the practice was incompatible with the Professional Services Procurement Act, which prohibits competitive bidding for professional services.

In addition to design-build procedures, other alternative project delivery processes include:

- construction manager-agent — a legal entity that provides consultation to an owner in a fiduciary capacity regarding construction, rehabilitation, or repair of a facility, separate from contracts for design or construction; and
- construction manager-at-risk — a legal entity that assumes the risk for construction, rehabilitation, or repair of a facility at a contracted price as a general contractor and that provides consultation on construction during and after design.

The 75th Legislature in 1997, through SB 583 by Ratliff, established procedures for school districts and higher education institutions to use in entering into design-build contracts for the construction, rehabilitation, alteration, or repair of facilities. It also established guidelines involving construction manager-agents and construction managers-at-risk. The provisions of this bill were codified in Education Code, chapters 44 and 51. In 1999, the 76th Legislature enacted SB 669 by Ratliff, which modified the construction-related contracting procedures for school districts and certain institutions of higher education contained in chapters 44 and 51.

The 77th Legislature in 2001 enacted SB 510 by Armbrister, permitting local governments to use a “best value” process to award a construction contract. The bill specified several methods for selecting a contract, including a design-build contract. In addition, the legislation set guidelines for arrangements using construction manager-agents and construction managers-at-risk. The provisions of this bill were codified as subchapter H, ch. 271, Local Government Code.

Also in 2001, the Legislature, as part of the General Services Commission sunset bill, SB 311 by Zaffirini, created the Texas Building and Procurement Commission (TBPC) and granted it alternative construction contracting methods, including design-build and manager-at-risk.

DIGEST: SB 1331, as amended, would amend sections of the Government Code and the Education Code to conform with provisions in existing statute concerning the construction manager-agent and construction manager-at-risk project delivery processes.

The bill would add Government Code, sec. 2166.2535, authorizing the TBPC to use a construction manager-agent to represent the commission in a fiduciary capacity. The new language would be consistent with the construction manager-agent provisions found in Education Code, secs. 44.037 and 51.781, which apply to contracts for school districts and institutions of higher education, and with Local Government Code, sec. 271.117, which applies to municipalities, counties, school districts, conservation and reclamation districts, hospital organizations, or other political subdivisions.

The bill would amend Government Code, sec. 2166.2532 and Education Code, secs. 44.038 and 51.782 to stipulate that an architect or engineer could serve as the construction manager-at-risk for a project involving the TBPC, a school district, or an institution of higher education only if the architect or engineer was hired as such under a separate or concurrent procurement. The new language would be consistent with provisions in Local Government Code, sec. 271.118, relating to construction manager-at-risk specifications.

In addition, SB 1331 would amend Education Code, sec. 44.040 to provide for selecting a contractor through competitive bidding. It would require a school district to select or designate an engineer or architect to prepare construction documents. The engineer or architect would have full responsibility for complying with engineer and architect specifications in the Occupations Code. The new language would be consistent with provisions in Education Code, sec. 44.038 relating to construction manager-at-risk specifications and sec. 44.039, which deals with selecting a contractor for construction services through sealed proposals.

The bill would take effect September 1, 2003, and would apply only to a construction project for which a bid, proposal, offer, or qualification, as applicable, was first advertised or otherwise solicited on or after the effective date.

**SUPPORTERS
SAY:**

SB 1331 primarily is an effort to conform existing procurement procedures, particularly those affecting the TBPC, to other provisions already in statute and to clean up language from 2001 legislation that authorized the TBPC.

Over several sessions, beginning in 1995, the Legislature has granted the use of alternative project delivery techniques, among them design-build,

construction manager-agent, and construction manager-at-risk, for certain construction-related, competitive proposals and contracts. This authority has been extended to school districts, certain institutions of higher education, and local governments, including municipalities, counties, school districts, water districts, hospital organizations, or other political subdivisions. Construction industry professionals have worked to ensure that, to the greatest extent possible, the alternative project delivery provisions are identical in statute, which this bill would help to achieve.

In addition, the bill would provide additional latitude and direction to an architect's or engineer's ability to serve as a construction manager-at-risk for a project with the TBPC, a school district, or an institution of higher education by mirroring similar provisions available to local governments. Current statutes prohibit engineers or architects from serving as construction managers-at-risk for the TBPC, a school district, or certain institutions of higher education, even though the law permits it through a separate procurement procedure for all local governments. Also, the bill would include language affecting engineers' or architects' preparation of construction documents that would conform with sections in the Education Code affecting school districts and institutions of higher education.

**OPPONENTS
SAY:**

No apparent opposition.

NOTES:

The committee amendment to the engrossed version of SB 1331 would require a school district to select or designate an engineer or architect to prepare construction documents, thus conforming with similar requirements elsewhere in the Education Code.