

- SUBJECT:** Allowing the award of attorney's fees for bidders in government contracts
- COMMITTEE:** Civil Practices — favorable, without amendment
- VOTE:** 7 ayes — B. Cook, Strama, Madden, Miller, Raymond, Talton, Woolley
0 nays
2 absent — P. King, Martinez Fischer
- WITNESSES:** For — (*Registered, but did not testify:* Michael J. Chatron, AGC Texas Building Branch; Harold Freeman, Texas Construction Association; Jim Grace, CenterPoint Energy Inc.)

Against — Michael Pichinson, Texas Conference of Urban Counties
- BACKGROUND:** Government Code, ch. 2252 governs contracts with government entities. "Governmental contract" is defined as a contract awarded by a governmental entity for general construction, an improvement, a service, or a public works project or for a purchase of supplies, materials, or equipment.

"Governmental entity" is defined as:
- the state;
 - a municipality, county, public school district, or special-purpose district or authority;
 - a district, county, or justice of the peace court;
 - a board, commission, department, office, or other agency in the executive branch of state government, including an institution of higher education;
 - the Legislature or a legislative agency; or
 - the Supreme Court of Texas, the Texas Court of Criminal Appeals, a court of appeals, or the State Bar of Texas or another judicial agency with statewide jurisdiction.
- DIGEST:** HB 1268 would add Government Code, sec. 2252.904 to prohibit a governmental contract from allowing a governmental entity that prevailed

in a contract dispute to collect attorney's fees unless the contract provided for the award of attorney's fees to each other prevailing party. A contract provision that violated this requirement would be void and unenforceable.

The bill would take effect September 1, 2007, and would apply to contracts executed on or after that date.

**SUPPORTERS
SAY:**

HB 1268 would level the playing field for contractors in their dealings with governmental entities by allowing parties on either side to collect attorney's fees following a dispute. Currently, governmental contracts often are written to allow for the award of attorney's fees to a governmental entity that prevails when a contractor breaches the contract. These same contracts, however, often contain clauses that prohibit prevailing contractors from receiving attorney's fees for governmental breach of contract. Bidders should be empowered to recover attorney's fees because the negotiating power of the government far exceeds that of the contractor. The governmental entity usually drafts the contract, and the bidder is forced to either accept the government's terms or leave the contract on the table. HB 1268 also would encourage governmental entities to negotiate rather than file suit upon breach, because the contractor would be able to recover attorney's fees.

**OPPONENTS
SAY:**

HB 1268 unfairly would legislate the bargaining process for government contracts, unwisely opening the way for arbitrary dictation of contract terms by governmental entities. Contracts are not always drafted by governmental entities, and sophisticated bidders often submit their standard industry agreements during contract negotiations. The negotiation process allocates risk of loss and reflects market considerations that legislation cannot. For example, contractors often are happy to accept certain inequities in government contracts because the government represents a good risk for contractors in terms of receiving payment. The recovery of attorney's fees is a contract provision that should be negotiated between the parties, not legislated.