

SUBJECT: Revising standards for contracts for government construction projects

COMMITTEE: Government Reform — committee substitute recommended

VOTE: 4 ayes — Callegari, Pitts, Leibowitz, W. Smith

1 nay — Miles

2 absent — Berman, Rodriguez

WITNESSES: For — Harold Freeman, Texas Construction Association; Jerry Gallagher, Gallagher Construction Service; David Lancaster, Texas Society of Architects; Curt Martin, Associated General Contractors - Texas Building Branch (AGC-TBB); Steve Stagner, Texas Council of Engineering Companies; Philip Todd, Dallas County Community College District; Bill T. Wilson II, Texas Society of Architects; (*Registered, but did not testify*: Lisa Hughes, Tarrant Regional Water District)

Against — Patrick Eno, Kellogg, Brown & Root; Kenneth K. Eshelman, Centennial Contractors Enterprises, Inc.; David M. “Mike” Faires, Sanders Management Service; Clifford Feeney, Concept Facility Services; Harry Harrington, Greenway Enterprises; Ken Jayne, Center for Job Order Contracting Excellence and Applied Innovative Management; Pedro Romney, Venedom Construction; Gregory Smith, Jamail & Smith Construction; (*Registered, but did not testify*: Elsa Nieves Brown and Scott Clarke, EN Brown General Contractors; Brian Burden, Weatherproofing Technologies; Sam Swart, Hill and Swart Architects Ward Hughling)

On — Nancy Belinsky, San Antonio Water System

BACKGROUND: Under the Education Code and the Local Government Code, school districts, universities, and local government entities may award contracts using the design-build method, the competitive sealed proposal method, the construction manager-agent method, the construction manager-at-risk method, or the job order contracts method. Under the Government Code, a government entity may award a contract using the design-build method, the competitive sealed proposal method, the construction manager-agent

method, or the construction manager-at-risk method. The Government Code currently does not authorize use of the job order contracts method.

DIGEST:

CSHB 447 would add Government Code, ch. 2264 to consolidate statutes on government entities' contracting methods under one chapter. Ch. 2264 would apply to a government entity or quasi-government entity authorized to make a public works contract. The bill also would include hospital districts and transit authorities as entities that could use these contracting methods. While CSHB 447 would allow public junior colleges to use these contracting methods, the bill would not apply to public universities or university systems. Other provisions would allow the use of these contracting methods for water, wastewater, transportation, and utility projects. In the event of a conflict with another law, ch. 2264 would prevail, with a few exceptions.

An entity could award a contract using the following methods in addition to competitive bidding: competitive sealed proposal method; construction manager-agent method; construction manager-at-risk method; design-build method; and job order contracts method. The bill would prohibit entities from offering construction contracts through a "reverse auction procedure" allowed in Government Code, sec. 2155.062 where bidders submit anonymous bids to an Internet location.

CSHB 447 would prohibit the use of an interlocal contract to purchase engineering or architectural services unless the contract was for the design or construction of a facility to be jointly owned, used, or financed by the entities signing the interlocal contract. Interlocal contracts would not be allowed for construction projects unless:

- the services were part of a job order contract;
- the governing body receiving the work approved the contract; and
- public notice was given for the contract for the project.

A government entity could award job contracts for minor construction under the job order contracts method if the work was of a recurring nature but the delivery times were indefinite and if indefinite quantities and orders were awarded substantially on the basis of pre-described and pre-priced tasks. The bill would restrict job order contracts to buildings and associated structures and would set a limit of \$500,000 or a lesser amount approved by the entity's governing board for each job order under the contract.

The bill would change the definition of “facility” to cover any improvement to real property. Under CSHB 447, the design-build method still could be used only for a building.

The chapter would not prevail over a conflicting provision relating to contracting with a historically underutilized business or a conflicting provision in a charter of a home-rule municipality or a rule of a county, river authority, or defense base development authority that required the use of competitive bidding. The governing body of a municipality, county, river authority, or defense base development could choose to have ch. 2264 overrule a conflicting provision in its charter or rule.

Ch. 2264 would not apply to a contract entered into by TxDOT or to energy savings performance contracts.

The bill would take effect September 1, 2007, and would apply only to a contract or construction project for which a government entity first requested bids on or after that date.

**SUPPORTERS
SAY:**

CSHB 447 would streamline government operations by bringing various statutes governing contracting authority that are spread over different codes into one chapter in the Government Code. Bringing all contracting methods under one section would simplify the bidding process for government entities and for design and construction professionals. School districts, cities, counties, state agencies and other government entities all are authorized to award contracts using several methods. Over the years, the separate codes have been “tweaked” so that there is no consistency among them. It makes sense for all government entities and professionals to operate under a single set of rules.

A joint interim study by the General Investigating and Ethics Committee and the Public Education Committee concluded that job order contracting remains a valuable tool for school districts to make repairs, and CSHB 447 incorporates the recommendations of the interim report. Requiring local governing bodies to approve the contracts and to provide public notice would provide transparency to the process.

CSHB 447 would place additional restrictions on interlocal job order contracts among government entities. According to the interim report, Galveston ISD executed a job order contract through an interlocal agreement managed by Houston ISD in 2005 for a large middle school

renovation project. A district judge later ruled that Galveston ISD used the interlocal agreement to bypass competitive procurement requirements and violated the law. The bill could help prevent potential future misuse of interlocal agreements.

Management of job order contracts requires the fostering of long-term relationships between the manager of the contractor and the government entity as compared to narrow focus on the lowest bid for a one-time contract.

CSHB 447 would require that the government entity, rather than the manager of the project, be responsible for hiring engineers and architects. Otherwise, it would not change existing requirements on when those professionals would have to be retained. Skilled and state-licensed professionals are needed to design and build the facilities that will serve Texans for many decades to come.

The bill also would not change current requirements to encourage government entities to contract with historically underutilized businesses. Expanding the use of alternative contracting methods could help those firms gain additional work through government contracts.

CSHB 447 would provide for innovation and flexibility in contracting for buildings as well as other forms of infrastructure even as it recognizes the unique nature of their design and construction. It properly would restrict the use of Internet-based “reverse auctions.” Building a school building is different from purchasing textbooks or tires, and a West Texas school district would have different requirements for a new facility compared with one being built in Houston.

Statewide standards — including statutory limits on contract changes requiring government body approval — are required for consistency throughout Texas. Allowing too many local exemptions would defeat the purpose of bringing all the procedures into one code and would make it difficult and costly for design and construction firms to operate statewide. The bill would allow local government bodies the flexibility they need to make those policy decisions.

CSHB 447 would not discourage competition in public sector capital project development nor increase the cost or time needed to complete those projects. Generally, CSHB 447 would make no substantive changes

in existing law other than to provide additional transparency and safeguards to the contracting process.

OPPONENTS
SAY:

The enactment of CSHB 447 would not necessarily speed up construction time for public buildings or save additional money. Government entities still would have to meet the same notice and bidding schedules.

No “bright line” exists on when a job order contract ceases to be a repair or renovation and becomes essentially a new construction project. The situation involving the interlocal agreement between the Galveston and Houston school districts demonstrates how quickly the line can be crossed. CSHB 447 would have to provide meaningful guidance on making that distinction even as it tried to prohibit misuse of job order contracts.

CSHB 447 would be a full employment act for architects and engineers. Government and non-profit entities can use interlocal agreements to manage projects successfully and at lower cost because they do not have to factor in the profit required by a private firm. Making minor repairs to a bathroom does not require hiring a structural engineer to supervise or review the work. Just because someone has a state license does not mean that he is a more competent manager for a construction project.

Historically underutilized businesses have struggled for many years to gain a share of government contracts offered through the competitive bidding process. Use of alternative bidding methods and reliance on new relationships could freeze historically underutilized businesses out of construction and professional contracts again. Owners of these businesses pay taxes, and equity requires that they have a fair opportunity to provide goods and services to government entities.

Alternative methods of contracting could interfere with free market competition where buyers make the decision based on the lowest price. These methods also could increase costs and delays on taxpayer-funded projects.

OTHER
OPPONENTS
SAY:

Moving all the contracting provisions into one code is a good idea, but the different entities that enter into contracts retain certain characteristics. School districts, for example, have unique needs, and CSHB 447 should be amended to transfer portions of the Education Code that remain relevant to school district contracting processes.

Provisions of CSHB 447 should apply to the Texas Department of Transportation and universities. These entities spend millions of public dollars on large construction projects.

NOTES:

The committee substitute added the provision that would prohibit interlocal agreements for construction, engineering, and architectural services, except when the two entities would jointly own or pay for the facility. The substitute would raise the threshold for change order approval for municipalities with a population of 500,000 or more to increases of \$100,000 or more. The substitute also would require that government entities approve job order changes of more than \$500,000 and would allow the local entities to set that limit to less than \$500,000.

The companion bill, SB 356 by Jackson, has been referred to the Senate Government Organization Committee.

A similar bill, HB 2525 by Callegari, was enacted by the 79th Legislature during the 2005 regular session, but was vetoed by Gov. Perry.