SUBJECT: Limiting entities to be contracted as construction managers-at-risk

COMMITTEE: Government Transparency and Operation — favorable, without amendment

VOTE: 7 ayes — Elkins, Walle, Galindo, Gonzales, Gutierrez, Leach, Scott Turner

0 nays

WITNESSES: For — Perry Fowler, The Texas Water Infrastructure Network (TxWIN); (*Registered, but did not testify*: Jon Fisher, Associated Builders and Contractors of Texas; Carolyn Brittin, Associated General Contractors of Texas; Jennifer McEwan, Texas Society of Professional Engineers; Tara Snowden, Zachry Corporation; Billy Phenix)

Against — Douglas Varner, CDM Smith; Bill Mullican, Mullican Associates; Shirley Ross, Wells Branch MUD

BACKGROUND: HB 628 by Callegari, enacted by the 82nd Legislature in 2011, gave governmental entities the option to contract for certain projects using the construction manager-at-risk (CMAR) method, an alternative to the traditional process. Unlike with traditional contract bidding, governmental entities are not required to select the lowest bid but instead may choose based on a number of criteria.

Government code, ch. 2269, subch. F governs the CMAR process for governmental entities. Under sec. 2269.251, a CMAR is a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the governmental entity on construction during and after the design phase.

Under sec. 2269.252(b), a governmental entity's architects or engineers for projects may not serve as the CMAR unless they are hired to serve as the CMAR under a separate or concurrent selection process.

DIGEST:

HB 2634 would prevent related entities from acting as both the design engineer and the construction manager-at-risk (CMAR) in government contracting. The bill would forbid entities related to the architect or engineer from acting as the CMAR and would remove the provision in current law that allows related entities to act in this role if they are selected as part of a separate selection process.

HB 2634 also would specify that a related entity for the purposes of CMAR contracting was any organization that had a shared ownership interest, partnership, or revenue-sharing arrangement with the design contractor itself or a subsidiary.

The bill would take effect September 1, 2015, and would apply only to a contract for the services of a CMAR entered into on or after that date.

SUPPORTERS SAY:

HB 2634 would provide fairness in the government contracting process by prohibiting entities related to the architect or engineer from being contracted for the design and construction phases of a project. Because the Government Code allows the same firm to contract for both phases, design engineers can submit designs that favor a particular firm to do the construction. This keeps many qualified construction contractors from being able to bid on projects and makes construction manager-at-risk (CMAR) contracting a de facto design-build process.

Current statute opens a loophole for conflicts of interest. The design engineer is supposed to serve as the owner's representative, but if the design engineer and the CMAR are from the same entity, the designer could be serving the interests of the CMAR, not the contracting government. Design engineers often are involved in the hiring process for CMARs, and if one is an entity related to the design firm, it might not be impartial in the selection process.

OPPONENTS SAY:

HB 2634 would prevent governmental entities from selecting the most qualified contractor for a project and, therefore, could prevent them from getting the best value for taxpayer dollars. Governments need the ability

to procure the CMAR that has the expertise to complete a project, whether or not the CMAR has ties to the design engineer.

The bill could be a step backward toward lowest-bid contracting, which can result in poor-quality work that costs taxpayers more in the long run. Related contractors may have the best understanding of a project. It is often the case that design engineers and CMARs work for the same organization because their organization has core competencies on a particular project that cannot be matched by a general contractor.

Current law requires a separate procurement process for design engineers and CMARs. It also requires published selection criteria that prevent design engineers from favoring one CMAR over another. These policies emerged out of a consensus-based process in 2011 and have helped to reduce bias in the selection of contracted entities.