

NEW LEGISLATION ON CONSTRUCTION PROCUREMENT

AND ALTERNATIVE PROJECT DELIVERY

HB 447 AND HB 1886 80TH LEGISLATURE

MISCELLANEOUS PROVISIONS

- **Indemnification:** Provides that any provision in contract with a governmental entity for architectural or engineering services is void if it requires the design professional to indemnify or defend the owner for anything other than liability associated with the design professional's negligent acts, intentional torts, intellectual property infringements, or failure to pay a subcontractor.
- **Enforcement of PSPA:** Provides that the Professional Services Procurement Act can be enforced against governmental entities other than state agencies through declaratory or injunctive relief within 10 days of the award of the contract. The bill also removes an outdated reference to fee curves which has never been removed from the Act in spite of the fact that professional associations are barred from developing them.
- **Local Government Corporations:** Provides that all local government corporations must comply with procurement laws related to the design and construction of projects that apply to the governmental entity that set up the corporation, other than certain projects with private venture funding.
- **School District Lawsuits for Defective Design/Construction:** Requires a school district bringing a legal action to recover damages for the defective design or construction of an instructional facility financed with state assistance to notify the education commissioner, share the net proceeds with the state, and use the recovery to repair the defect. [This provision was intended to discourage plaintiffs attorneys from soliciting school districts to pursue defecting litigation in the hope of open-ended recovery, which is a growing problem.]
- **Restrictions on Interlocal Agreements for Design and Construction:** Prohibits an interlocal contract from being used to purchase engineering or architectural services unless the services are in connection with the design or construction of a specific facility to be jointly owned, used or financed by the parties to the contract. [This provision is intended to prohibit the use of "buy boards" to purchase design services.] The bill includes a similar provision for construction services, with an exception for job order contracting services where public notice and governing board approval of the contracts are required.

- **Change Orders:** Provides that in a city of 500,000 or more, a change order of \$100,000 or less may be delegated to an administrative official. A contract of \$1 million or more may not be increased by more than 25 percent. If a change to a contract of less than \$1 million increases it to more than \$1 million, subsequent changes may not increase it by more than 25 percent. (Similar provisions are applied to cities, counties and school districts.)
- **Small Contractor Assistance Program:** Expands state's small contractor assistance program for bonding assistance to apply to projects over \$1 million (current law is \$20 million).

NEW CONSOLIDATED ALTERNATIVE PROJECT DELIVERY
STATUTE
(Chapter 2264, Government Code)

HB 447 combines alternative project delivery procedures from Chapter 44, Education Code (dealing with school districts), Chapter 271, Local Government Code (dealing with local governmental entities), and Chapter 2166, Government Code (dealing with the new State Facilities Commission, formerly the Purchasing and General Services Commission.) In this new consolidated Chapter 2264, Government Code, certain alternate project delivery methods are expanded to include infrastructure projects. With the changes

- Except for certain exclusions, the new chapter applies to state agencies, cities, counties, school districts, junior colleges, special districts and authorities, entities owned by or that operate facility for the benefit of a municipality, and all political subdivisions of the state. Those specifically excluded are TxDOT (and any project receiving state or federal highway funds), NTTA, ports (which have a separate statute), universities (also governed by a separate statute), energy performance contracts, and a few other specialized entities.
- Selection criteria: an entity may consider price, experience and reputation, quality, impact on HUB compliance, safety record, personnel, financial capability, and other relevant criteria listed in the request for bids or proposals.
- In using a method other than competitive bidding, an entity must, before advertising, determine the method that provides best value. Selection criteria and weighting must be included in the RFP/RFQ.
- For all methods, if an architect/engineer is required, the professional has full responsibility for compliance with practice acts and must be selected in accordance with PSPA. Similarly, for all methods, the owner must provide or

contract for the construction materials testing, engineering and inspection and verification testing services independent of the contractor, CM, or design-builder.

- A contract entered into in violation of the chapter is void and may be enforced through injunctive or declaratory relief.
- **Competitive Bidding of Construction:**
 - Except when using another method, an entity must advertise for competitive bids and award to the lowest responsible bidder. An engineer or architect must prepare the construction documents for all projects that meet the threshold of the practice acts.
 - The authority to use competitive bidding for construction services extends to vertical (building) and horizontal (infrastructure) projects.
- **Competitive Sealed Proposals for Construction:**
 - Defined as a procurement method under which a governmental entity requests proposals, ranks offerors on basis of published criteria and weighting (which can include factors other than price), negotiates sequentially in accordance with the rankings, then contracts with a general contractor.
 - The authority to use competitive sealed proposals for construction services extends to vertical (building) and horizontal (infrastructure) projects.
- **Construction Manager-Agent:**
 - Defined as a delivery method by which a governmental entity contracts with a CM-agent to provide administrative services and manage multiple contracts with construction prime contractors.
 - A CM-agent is selected on the basis of qualifications and must procure trade contractors in accordance with applicable law.
 - A CM-agent may not self-perform any aspect of construction or be a party to a construction subcontract.
 - The CM-agent represents the entity in a fiduciary capacity.
 - An architect or engineer must be selected on or before the construction manager; the design-professional may not serve as the CM-agent unless selected in a separate procurement, although this does not prevent the design professional from providing customary construction phase services.
 - Also, if a CM-agent's services are within the definition of engineering or architecture, they must be provided by a licensee.
 - A CM-agent must maintain professional liability or errors and omissions insurance of \$ million per occurrence.
 - The authority to use a construction manager-agent extends to vertical (building) and horizontal (infrastructure) projects.

- **Construction Management-at Risk:**
 - Defined as a delivery method under which a governmental entity contracts with an architect or engineer for design and construction phase services and contracts separately with a CM-at risk to serve as the general contractor and to provide consultation during design and construction.
 - An architect or engineer must be selected on or before the CMAR; the design-professional may not serve as the CMAR unless selected in a separate procurement, although this does not prevent the design professional from providing customary construction phase services.
 - Optional one or two-step process, using either qualifications or qualifications followed by shortlisting and selection.
 - A CMAR may self-perform work on certain conditions, by submitting a bid with other subcontractors.
 - Authority to use CM-at risk extends to vertical (building) and horizontal (infrastructure) projects.

- **Design-Build for Buildings and Structures:**
 - Defined as a delivery method under which the governmental entity contracts with a single entity to provide design and construction.
 - This process applies only to buildings and associated structures. Design-build procedures for infrastructure project are defined by a separate process (see below.)
 - Entity required to designate an architect or engineer separate from the design-build team to act as the owner's representative.
 - Entity prepares RFQ with general information on the site, scope, budget, special systems, and other information. The entity also prepares a design criteria package with more detailed information.
 - Proposers responding to the RFQ are evaluated on the basis of qualifications and experience without regard to price. Each proposer must certify that the architect/engineer was selected on the basis of QBS.
 - A maximum of five proposers may be shortlisted and requested to submit additional information. This may include costing methodology, defined as subcontractor markup, general conditions, contingencies, discounts, staffing, but may not include guaranteed maximum price or bid.
 - Respondents are ranked and negotiations are sequential.

- **Job Order Contracts for Structures:**
 - Defined as a construction procurement method used for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, type, and quantities of work are indefinite.
 - Applies only to buildings and associated structures. May not be used for infrastructure projects.
 - If a job order exceeds the threshold for architectural or engineering services, the governmental entity shall select or designate the A/E.

- The governing body of a governmental entity is required to approve each job order exceeding \$500,000 or a lesser amount if they establish one.
- A JOC term may not exceed two years, renewable annually for three additional years.

DESIGN-BUILD FOR CIVIL WORKS
(Subchapter J, Chapter 271, Local Government Code)

- Applies to projects involving roads, streets, bridges, utilities, water supply projects, wastewater plants, desalination projects, water distribution and wastewater conveyance facilities, airport runways and taxiways, stormwater drainage projects, transit projects, and other projects associated with civil engineering construction. However, if the project involves state or federal highway funds, the purchasing requirements of the funding entity apply unless waived by the funding entity.
- Applies to municipalities, counties, river authorities, municipally owned water utility with a separate governing board, or any special district or authority authorized by law to enter into a public works contract.
- Phase in:
 - After September 1, 2007 and before September 1, 2011, entities with a population of 500,000 in its boundaries or service area can use design-build for three projects per year. After September 1, 2011, the limitation on entities above 500,000 is increased to six per year.
 - After September 1, 2009 and before September 1, 2013 entities with a population between 100,000 and 500,000 in its boundaries or service area can use design-build for two projects per year. After September 1, 2013, the limitation for entities in this population bracket increases to four per year.
 - Special provisions are made for municipally owned water utilities with a separate governing board with population above 500,000. These entities may enter into one DB project each year (two after 2011) independently and may utilize others from the parent municipality's allotment with the consent of the municipality's governing board.
- A DB contract must be for a single integrated project and not for aggregated projects at multiple locations. However, a bus rapid transit system by a metropolitan transit agency and a water plant that includes well fields and conveyance facilities are both to be considered single, integrated projects.
- Before entering into a DB contract, a local governmental entity must make a finding on the ability to adequately define the project, the time constraints for the

- project, the ability to ensure that a competitive procurement can be held, and the capability to oversee and manage the project.
- The owner is required to select or designate an engineer to act as the owner's agent for the duration of the project.
 - The owner is required to provide or contract for, independently of the DB firm, the inspection, construction materials engineering and testing, and verification testing services necessary for the acceptance of the facility and must procure these services in accordance with Professional Services Procurement Act.
 - Process for entering into a design-build contract:
 - The owner must prepare an RFQ with information on the project site, scope, budget, schedule, selection criteria, and other information.
 - The owner must also prepare a design criteria package which may include, as appropriate performance criteria, material requirements, initial design calculations, known utilities, QA/QC requirements, etc.
 - Initial evaluation/shortlisting: Initial shortlisting is on the basis of competence and qualifications, with price information not allowed. Each offeror must certify to the owner that the engineers on the team were selected on basis of qualifications and experience as provided by PSPA.
 - A request for proposals is issued to the shortlisted firms or teams. It must include a design criteria package, a geotechnical baseline report or other information providing minimum geotechnical design parameters (if the site is identified), instructions for preparing the technical proposal, the relative weighting of technical and price proposals and the formula by which proposals will be evaluation. There is no minimum weighting of price proposals, so the selection could be pure QBS, pure price, or a mix.
 - The technical proposal must address project approach, anticipated problems, proposed solutions, conceptual design, ability to meet schedule and other requested information.
 - The owner must first open and score the technical proposals and subsequently open a score price proposals, assigning points to each based on the weighting assigned in the RFP, then select the highest ranked firm.
 - The owner must negotiate with the highest ranked firm; if not successful, end negotiations and move to the next highest ranked, continuing in order.
 - The owner must assume all risks associated with scope changes and modifications, unknown or differing site conditions (unless otherwise provided), regulatory permitting, natural disasters and force majeure events, and the costs associated with property acquisition.
 - Unless a stipend is paid, the proposer retains all rights to the work product submitted in a proposal. All copies must be returned. The owner may not make use of any unique or nonordinary design element, technique or process that was

not in the submittal of the winning proposer, unless a license is acquired from the unsuccessful proposer. Employees of the governmental entity who receive proposals must sign a confidentiality agreement preventing the unauthorized release. Any unauthorized release or any unauthorized use by the owner of a unique or nonordinary work product may be enforced through injunctive or declaratory relief. The owner is liable to any unsuccessful proposer, any member of the team or an assignee for one-half of the cost savings associated with the unauthorized use of the work product.

- Alternatively, the owner may offer a stipend of one-half of one percent of the contract amount. If accepted and paid, the owner may make use of the work product with no liability to the unsuccessful offeror.