



## ***TEXAS LEGISLATURE - 80<sup>th</sup> REGULAR SESSION***

### ***BILLS ENACTED INTO LAW***

***June 19, 2007***

The actual text of any bill passed by the Texas Legislature can be reviewed on the Legislature's website at [www.capitol.state.tx.us](http://www.capitol.state.tx.us) and entering the bill number.

#### **Local Toll Authority Primacy/CDA Moratorium** (SB 792 by Williams and W. Smith):

Omnibus bill providing for

- a moratorium, with numerous exceptions, on private equity comprehensive development agreements by TxDOT and local toll authorities
- the ability of local toll entities in Harris, Fort Bend, and Montgomery Counties and North Texas to move forward with a specific set of projects under traditional practices
- the creation of a pilot program under which other projects of local toll authorities must undergo a “market valuation” to potentially define the extent to which net revenues from a project can fund other projects
- additional powers, including CDA authority, for regional tollway authorities (NTTA) and counties acting under Chapter 284 (HCTRA and surrounding counties)

A more complete summary of SB 792 listing projects and exceptions is appended to this report.

#### **State Agency Policies on Recovering the Costs of Consultant Errors and Omissions** (SB

924 by Brimer and Solomons): Establishes guidelines for any state agency policy related to recovering the costs of design consultant errors and omissions. The policies must provide for

- notification of the design consultant at the time the error is discovered;
- an opportunity for the consultant to be involved in the resolution of the problem;
- guidelines for distinguishing an error from other reasons for a change order;
- a process for determining the cost;
- an evaluation of the totality of the consultant's services;
- an internal appeal without requiring prepayment of the claim;
- a process for tracking the errors and omissions of in-house employees; and
- a recognition that some errors likely to occur in any project.

**Disclosure of Conflicts of Interest Between Local Government Officials and Vendors** (HB 1491 by Woolley and Williams): Revises the conflict of interest disclosure statute passed in

2005. The bill makes a number of changes and new definitions intended to ease compliance with the law. The revised law applies to a person who enters into or seeks to enter into a contract with a local governmental entity or a person's agent. However, an agent is newly defined as a third party (such as a lobbyist) and does not apply to a business's employees.

A local government official is required to file a conflict disclosure notice if the official has an employment or other business relationship with a vendor that results in the official receiving taxable income of more than \$2,500 in the previous 12 months or if the official has received gifts worth more than \$250 in a 12-month period. The term "business relationship" is redefined to apply strictly to commercial activity and vague term "affiliation" that was in the previous law is repealed. Also, a gift that is a political contribution or a gift of food, transportation, or lodging accepted as a guest is excluded from the requirement.

A vendor must also file a conflicts disclosure if any of the above situations apply – e.g., if the company has a business relationship with a local government official where the official has received more than \$2,500 in taxable income or has given gifts of over \$250 (other than food, transportation or lodging). The disclosure must be filed within seven days of entering negotiations on a contract, submits a response to an RFP or RFQ, or becomes aware of a conflict.

A knowing violation is a misdemeanor, but it is an exception to the application of this provision if a disclosure is filed within seven days of notification. The bill also provides that the validity of a contract is not affected by compliance.

**Good Samaritan Statute** (HB 823 by Ritter and T. Williams): SB 823 provides that a licensed engineer or registered architect is immune from liability for services provided voluntarily without compensation or expectation of compensation in response to and during a declared state of emergency or state of disaster if the services are provided at the request of a federal, state, or local official acting in his official capacity and are related to a structure, building, roadway, piping or other system. The immunity does not apply in the event of gross negligence or willful or intentional misconduct.

**Design Build and Alternative Project Delivery** (HB 1886 by Callegari and West): Makes a number of changes in construction project delivery procedures. The bill:

- expands the use of competitive sealed proposals and construction management at risk into infrastructure markets. Under current law, these methods of selecting a contractor can only be used for vertical, or building, construction.
- amends the Professional Services Procurement Act to provide for enforcement through declaratory or injunctive relief.
- prohibits the use of interlocal purchasing cooperatives for engineering or architectural services.
- requires local government corporations to comply with procurement laws for entities that set them up, with limited exceptions.
- clarifies that in the use of job order contracts, for job orders that exceed the threshold requiring the involvement of an architect or engineer, the design professional must be selected by and contracted to the owner (rather than the job order contractor).

The bill also phases in design-build for roads, water facilities, and other civil works projects, with the following procedures and restrictions:

- design-build procedures are authorized initially for local governmental entities over 500,000 population then, after two years, entities over 100,000.
- the larger entities can use design-build for three projects per year initially, expanding after four years to six projects per year. Entities between 100,000 and 500,000 can do two projects per year initially, expanding to four per year after four years.
- the bill provides for a combination of price and technical proposals, which can be weighted in any proportion.
- the work product in a design-build proposal is the property of the proposer unless a stipend of one-half of one percent of the construction price is paid. If the stipend is paid, the owner can use ideas in the work product at no liability to the proposer. If the stipend is not paid, the owner is liable to unsuccessful proposers, members of the team or assignees for one-half of the cost savings associated with unauthorized use of the work product.

A more complete summary of HB 1886 is appended to this report.

**Water Issues** (SB 3, HB 3, and HB 4 by Puente and Averitt): The bills overlap significantly, with several provisions in two or more bills, but generally they

- provide a process for addressing environmental flows in rivers and estuarine systems through the establishment of an advisory group and scientific panels and regulatory procedures.
- promote water conservation through the creation of a water conservation advisory council, requiring retail public utilities with more than 3,300 connections to develop a conservation plan, providing funding priority for entities that have achieved high conservation goals, clarifying the ability of home-rule cities to enact water conservation ordinances, and other actions.
- increase pumping limits in the Edwards Aquifer Authority.
- create a study commission on Region C and D water planning.
- create a legislative joint interim committee on water funding.
- designates those reservoir sites listed in the 2007 state water plan as sites of unique value.

**Pass-Through Financing and Transportation Reinvestment Fund** (SB 1266 by Brimer and Krusee): Allows pass-through toll recipients to create a reinvestment zone and dedicate up to 50 percent of tax increment to go to transportation reinvestment fund in treasury.

**General Obligation Bonds for Highways** (SJR 64 by Carona and Krusee): Proposes a constitutional amendment that would allow the issuance of general obligation bonds for highways.

**TBPE and Engineering Practice Act Changes** (HB 899 by Smith and Deuell): States that PE's in exempt industries do not have to seal work done for exempt industry, allows TBPE board members to discuss disciplinary matters with other board members even if they participated in

investigation (still not able to vote), creates the position of treasurer at TBPE, and makes other consistency changes.

**School District Purchasing** (HB 273 by Truitt and Harris): HB 273 makes several changes in school district purchasing. Under current law, districts may evaluate several different criteria in addition to price, including quality, past relationship with the district, long-term value, HUB compliance, etc. HB 273 makes it mandatory to consider all of these. Also, the bill provides for certain disclosure of financial information when districts enter into purchasing cooperatives such as buy boards. Districts would be required to document and report management fees.

**Bid Bonds for Special District Construction Projects** (HB 576 by W. Smith and Ellis): For special district contracts over \$250,000 a district must accept a bid bond as a bid deposit if the bond meets other requirements.

**Water District Competitive Bidding and Bid Bonds** (SB 657 by Seliger and Puente): Revises bidding requirements for water districts. The threshold above which the contract must be advertised is raised from \$25,000 to \$50,000. Between \$25,000 and \$50,000 written bids must be solicited from three bidders. The threshold for requiring a bid bond is also raised to \$50,000.

**Protection of Transportation Corridors** (HB 1857 by Murphy and Carona): Gives TxDOT and counties some tools to protect future transportation corridors. Once a corridor is identified, subdivision plats and conveyances within the corridor must record the existence of the corridor.

**Funds for Rural Rail Development** (HB 2660 by T. King): Authorizes the use of the Texas economic development bank fund to be used to make grants and loans to TxDOT for the purposes of rural rail development.

**Repeal of Conflict of Interest Report for Directors and Vendors of Navigation Districts** (SB 1396 by Williams and Morrison): Repeals a statute requiring conflict of interest reporting for directors and vendors of ports and navigation districts.

**Firm Registration for Surveying Firms** (HB 2820 by Jones and Watson): Provides that surveying firms must register as firms and employ a full-time surveyor.

**Control of Access to Highways in Certain Counties** (HB 2991 by Murphy and Williams): Provides Harris County and adjacent counties the authority to deny access to a controlled access highway or determine points of access.

**Acquisition of Road District Powers by a MUD** (HB 3770 by Puente and Hegar): Allows a utility district to petition the TCEQ to finance and construct road improvements, provided that

the road meets the criteria of a thoroughfare, arterial, or collector of the county or city the project is located in. The plans and specifications must be approved by the entity (city, county or TxDOT) that will maintain the road.

**Contingent Payment Clauses** (SB 324 by Deuell and Chisum): Process for enforcement of pay-when-paid clauses in certain construction contracts (exempts design contracts and civil works project contracts).

**Award of Attorney's Fees** (HB 1268 by Van Arsdale and Ellis): Prohibits provisions in certain contracts that award governmental entities attorney's fees in disputes unless the contract also provides for attorney's fees to be awarded to other parties when they prevail.

**Engineering Recruitment Programs** (HB 2978 by Morrison and Shapiro): Provides for various engineering scholarship and summer camp programs administered by the Higher Education Coordinating Board out of appropriated funds.

**Municipal Debt for Highway System** (SB 1536 by Fraser and Delisi): Authorizes a municipality to issue bonds for a non-toll improvement on highway system.

**TxDOT Information and Report** (SB 255 by Carona and Phillips): Requires TxDOT to publish an annual report online with certain statistics broken down by county.

**Study on Rail Relocation** (HB 160 by Menendez and Wentworth): Requires TxDOT to conduct a study on the feasibility of relocating freight trains carrying residential materials away from residential areas.

**Commuter Rail Districts** (HB 2510 by Martinez and Hinojosa): Provides for the creation of commuter rail districts for counties along the Mexican border.

**Collection of Stormwater Fees by Small Cities** (HB 462 by Miller and Fraser): Allows cities of less than 25,000 and through which the Bosque River runs collect fees for certain infrastructure from state agencies or institutions of higher education.

**Freshwater Supply Districts Bond Authority** (HB 713 by Callegari and Seliger): Allows districts to issue bonds and enter into certain contracts with water districts or water supply corporations.

**Members of TBPC Committee to Review State Building Construction Contracts** (SB 297 by West and Lucio III): Adds one member to the committee and designates that there must be one

member from the Hispanic Contractors Association of Texas and one from the Black Contractors Association.

**Energy Savings Performance Contracts** (SB 831 by Ellis and Straus): Makes several changes to statutes on energy performance contracts. Currently a licensed PE is required to review forecasts. This bill requires the engineer to have a minimum of three years experience in energy calculation and review and states that the engineer's review shall focus primarily on the proposed improvements from an engineering perspective, methodology, cost savings, and efficiency of metering equipment.

**Texas Facilities Commission and Transfer of Duties of Building and Procurement Commission** (HB 3560 by Swinford and Janek): Creates the Texas Facilities Commission and transfers most construction-related responsibilities of TBPC to the newly created commission. Transfers most other procurement-related duties from TBPC to Comptroller.

**Tax Bill Cleanup** (HB 3928 by Keffer and Ogden): Makes a number of technical changes to 2006 tax bill, which goes into effect for 2007 tax year. One change is to provide discounts for taxpayers with total revenue of less than \$1 million. The bill also allows businesses with less than \$10 million in revenue an optional simplified calculation of 0.575 of gross receipts.

## ***LOCAL TOLL AUTHORITY PRIMACY/CDA MORATORIUM SB 792***

- **CDA Term:** Allows a CDA proposer to TxDOT to submit alternative proposals based on different terms of 10 to 50 years (in multiples of 10) from the date of acceptance of the project or start of revenue operations, not to exceed 52 years. Current law language allowing for a term of up to 70 years is repealed. For RMAs, a 52-year term is established.
- **CDA Provision for Buyback:** Requires CDA contracts to contain an explicit mechanism for setting the price for purchase of the private entity's interest.
- **Stipends:** Makes stipends to unsuccessful proposers permissive.
- **Moratorium:** Prohibition on a CDA entered into by any toll project entity including a provision permitting a private participant to operate the project or collect revenue, either directly or through a subcontractor.
  - **Exceptions:**
    - Trinity Parkway
    - Projects with one or more managed lane facilities to be added to an existing controlled access freeway located in a nonattainment or near nonattainment area for which the department has issued a request for

qualifications. However, SH 281 in Bexar County is excluded from the exception, so the moratorium applies.

- Loop 9
  - Grand Parkway (SH 99)
  - I-69 south of Refugio County
  - SH 161
  - A non-Trans Texas Corridor project in a single-county RMA created before 1/1/2005 in a county less than 125,000
  - Special provisions for SH 121 allowing NTTA to operate the project if it matches Cintra proposal
  - Projects in a border county with a population over 300,000, except that in a border county over 600,000 (El Paso) the exception applies only to projects adopted by MPO in TIP before 5/1/2007.
- **County Approval:** If a CDA proceeds under the managed lane exception, the commissioners court where a majority of the project is located must pass a resolution acknowledging that future penalties for competing facilities could exist and agreeing with the project in spite of this fact. If TxDOT incurs a penalty for construction of a competing project, the payment must be made with money that would otherwise be allocated to projects in that county.
- **Sale of Project:** A toll project entity is prohibited from selling a toll project to a private entity.
  - **Study Committee:** Creates a legislative study committee of three each appointed by Governor, Lt. Governor, and Speaker to study the public policy implications of private equity CDAs and the implications of selling an existing toll project to a private entity. A report is due by 12/1/2008.
  - **CDA Sunset:** CDA sunset date is moved from 2011 to 2009, except that sunset for nonfinance CDAs (e.g., pure design-build) involving managed lane projects is left at 2011. The same provisions are applied to RMA CDA authority.
  - **TransTexas Corridor Info:** Requires TxDOT to make public in a timely manner all TTC documents, plans, contracts.
  - **Use of CDA Revenues:** Requires that CDA payments, project savings, refinancing dividends and other revenue received by TxDOT be allocated between department districts within the MPO where a project is located based on the percentage of toll revenues from users in each department district. The department may not reduce funding to a district because of payments to the district under a CDA.
  - **HCTRA/Fort Bend Projects:** Counties operating under Chapter 284 are allowed to proceed on
    - Beltway 8 East between US 59-N and US 90-E
    - Hardy Downtown Connector
    - SH 288 between US 59 and Grand Parkway
    - US 290 toll lanes between IH 610 and Grand Parkway

- Fairmont Parkway East between Beltway 8 and Grand Parkway
  - South Post Oak Road extension between IH 610 and Beltway 8
  - Westpark Toll Road Phase II between Grand Parkway and FM 1463
  - Fort Bend Parkway between SH 6 and Brazos River
  - Montgomery County Parkway between SH 242 and Grand Parkway and, if Grand Parkway not commenced, a connection to IH-45
- **County Toll Authority Primacy:** The county acting under 284 is designated as the entity with the primary responsibility for the financing, construction, and operation of a toll project within the county. The projects listed above may be developed at any time. Consistent with federal law, the department is required to assist the county by allowing use of right-of-way without payment, except to reimburse the department for actual costs of acquisition.
  - **Right of First Refusal:** For projects other than those listed above, TxDOT must give the county the first option on a toll project in the county on terms agreeable to the county and consistent with historic practices. The right-of-first refusal must be exercised within six months of a notice from the Commission and one or more contracts must be entered into within two years.
  - **Local Entity First Option/Market Valuation Pilot Project:** Establishes a procedure that governs projects other than those HCTRA/Fort Bend/Montgomery projects listed. Also exempted from the procedure eastern extension of George Bush Turnpike, Phase 3 and 4 extensions of Dallas North Tollway and extensions into Grayson County, Lewisville Lake Bridge, Southwest Parkway in Tarrant County, and other projects for which TxDOT has issued an RFQ or RFCP before 5/1/2007 (other than SH 161, which is subject to market valuation). Under this procedure, the local entity is designated the entity with primary responsibility for financing, constructing, and operating a project within its jurisdiction. The process is:
    - The local entity and the department must mutually agree on the terms and conditions for the development of the project, including initial toll rates and toll escalation methodology. The terms and conditions for Grand Parkway must be approved by the MPO in the region. Without agreement, neither can develop the project, creating an effective mutual veto.
    - After the terms are agreed to, the local entity and the department mutually determine which entity, including a third party, will develop a market valuation for the project using the terms and conditions. This requirement to develop a market valuation may be waived by the department and the local entity. A third party that develops a market valuation may not be an investor in that project.
    - A local toll entity has the first option to develop the project under the agreed terms and conditions. HCTRA and NTTA would have six months after the date the market valuation is approved to decide to exercise the option. In an area of an RMA, the MPO for the region shall determine whether the toll project should be developed using the business terms in the market valuation. If so, the RMA has six months to exercise the option.
    - If the local option is exercised, the local entity has two years after environmental approvals to enter into construction contracts and either make a payment into a subaccount for the value of the project as determined by the market valuation or

commit to construction additional transportation projects in the amount of the value of the project.

- If local option is not exercised or is exercised and the entity fails to move forward, the department has two years to enter into a contract.
  - If the department does not exercise its option or does not enter into a contract in two years, the local entity and the department may meet again to agree on terms.
  - Consistent with federal law, if a local entity exercises its option TxDOT must assist the entity by allowing access to right-of-way without payment except for reimbursement of costs incurred.
  - The requirement for MPO approval of terms and conditions for Grand Parkway expire August 31, 2009. Otherwise, the entire section expires August 31, 2011.
- **284 County Powers:** Provides enhanced authority for counties acting under Chapter 284, including powers of RMAs, CDA authority, the ability to use surplus revenue for non-toll projects.
  - **Regional Tollway Authority Powers:** Provides enhanced authority for regional tollway authorities (NTTA), including CDA authority, design-build. Procedures for design-build must not materially conflict with the provisions of HB 1886 (CEC's design-build bill), if that is enacted into law. If an authority is requested to participate in a project designated as part of the Trans-Texas Corridor, the authority has all the powers of TxDOT related to the Corridor.
  - **RTA Restrictions on Gifts and Contributions:** Provides that a director of a regional tollway authority may not solicit or accept any benefit from a person the director knows is interested in or is likely to become interested in a contract or any matter involving the exercise of the director's discretion. Offering a prohibited gift is also a violation.
  - **RMA Design-Build:** Provides that an RMA's procedures related to design-build may not materially conflict with HB 1886, if enacted.
  - **Provisions Applicable to CDAs:** Enacts a number of provisions applicable to all CDAs where TxDOT has selected an apparent best value proposer after 5/1/2007 including:
    - Attorney General review of the agreement
    - Requirement to provide Legislative Budget Board copies of agreement, proposal submitted, financial forecast
    - Review by state auditor
    - Requirement to develop a formula for making termination payments. The formula must calculate an estimated amount of loss to the private participant. The formula must be based on investments, expenditures and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the agreement, plus an agreed markup. The formula may not include estimate of future revenue not including in the agreed base case financial forecast.
    - Prohibition on covenants that limit or prohibit the construction of a facility. Zone of competition limited to four miles. Competition payments may not apply to TIP project, safety project, HOV lane, or nonhighway facility.
    - Requirement to disclose financial information prior to entering into an agreement.

- **Expansion of Bond Authority:** The Commission’s ability to use bonds backed by the Highway Fund is expanded from \$3 billion to \$ billion.

## ***CONSTRUCTION PROCUREMENT, DESIGN-BUILD AND ALTERNATIVE PROJECT DELIVERY HB 1886***

### **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 that 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.
- **Restrictions on Interlocal Agreements for Design and Construction:** Prohibits the use of an interlocal purchasing cooperative (“buy board”) to purchase engineering or architectural services
- **A/E Services in Job Order Contracts:** Amends various statutes related to job order contracting to clarify that when a job order contract exceeds the threshold requiring the involvement of an engineer or architect, the design professional must be selected by and contracted with the owner (rather than the job order contractor).

### **EXPANSION OF COMPETITIVE SEALED PROPOSALS AND CONSTRUCTION MANAGEMENT-AT RISK**

Under current law, the use of competitive sealed proposals for construction services (CSP) and construction management-at risk (CMAR) are limited to vertical, or architectural, construction. H.B. 447 expands these two methods for selecting a contractor so that they can be used for all types of facilities.

- **Competitive sealed proposals** is essentially a mechanism for selecting a contractor using considerations other than price alone.
  - An owner initially contracts with an architect or engineer to develop construction documents, just as in the traditional low bid process.
  - The governmental entity then develops a request for proposals that includes the construction documents, selection criteria (with weighting), budget, scope, schedule and other information.
  - Upon receiving proposals, the owner must publicly open and read aloud prices, rank offerors on basis of published criteria and weighting, and negotiate sequentially in accordance with the rankings until a contract is reached. During negotiations, the law allows the owner to discuss scope, time or price modifications with the proposer.
  - The law requires that the governmental entity must provide or contract for, independently of the contractor and through QBS, the inspection, testing, and materials engineering necessary for acceptance of the facility.
  
- **Construction Management at Risk** is 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 before or concurrently with the selection of 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.
  - The selection process may be either a one or two-step process. In a one-step process, the owner issues an RFP with information on the site, scope, schedule budget, and selection criteria (with weighting) and makes a best value selection based on the selection criteria. In a two-step process, the owner issues a request for qualifications and develops a shortlist based on qualifications, without regard to price. In the second step, proposals are requested from shortlisted firms and a selection is made.
  - Negotiations are conducted with the highest ranked offeror. If unsuccessful, negotiations with the highest ranked offeror are ended and negotiations are held with the next highest ranked firm, continuing in order.
  - A CMAR may self-perform work on certain conditions, by submitting a bid with other subcontractors.
  - As with CSP, inspection and materials testing necessary for acceptance must be procured independently of the contractor and through QBS.

**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.