

CHANGES IN TEXAS CONSTRUCTION PROJECT DELIVERY LAWS

80TH LEGISLATURE 2007

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Changes in laws related to construction project delivery have been a staple of Texas legislative sessions since the mid-1990s, when alternatives to competitive bidding began to be widely discussed. However, the Regular Session of the 80th Legislature (2007) may have enacted the most significant changes in some years with the passage of House Bill 1886 by Rep. Bill Callegari and Sen. Royce West. These bills were the product of a joint effort of the Texas Council of Engineering Companies and the Design-Build Institute of America, with significant involvement by the Texas Municipal League and several of the state's largest cities.

In addition, construction industry associations put a major effort into the passage of another bill – H.B. 447 – that was subsequently vetoed by the Governor. H.B. 447 included many of the same changes addressed in H.B. 1886, but also included other major reforms. Not the least of these was the consolidation of many alternate project delivery statutes into a new Government Code chapter, making the procedures common and easier to use for most governmental entities. H.B. 447 also intended a significant reform of job order contracting, which is a method of indefinite quantity, indefinite delivery contracting. At least one Texas JOC project was stopped by litigation and the contracting method has been the subject of considerable controversy within the Texas construction community. H.B. 447 would have imposed some generally accepted limits on the method. The veto message for H.B. 447 was not understandable and reflected a minimal understanding of the bill. For example, it stated that H.B. 447 limited the options available to governmental entities when it in fact did the opposite. Nevertheless, the veto negated a significant effort at reform.

As to the bill that passed, however, H.B. 1886 is significant in its own right. The changes it makes to Texas' public procurement law include:

- Expanding the use of competitive sealed proposals for construction, construction management-at risk, and design-build into horizontal, or civil engineering, construction;
- Limiting the ability of interlocal purchasing cooperatives, or buy boards, to purchase design services;

- Providing for enforcement of the Professional Services Procurement Act through injunctive relief;
- Providing that the owner must hire an architect/engineer to prepare construction documents for job order contracts (e.g., the A/E may not be hired by the contractor); and
- Requiring local government corporations to comply with the procurement laws of the entity that created the corporation, except in limited circumstances.

Definition of Eligible Governmental Entity

Initially, H.B. 1886 makes a slight expansion of the types of governmental entities that can use alternate project delivery techniques. Prior to the passage of the bill, the methods could be used largely by cities, counties, river authorities, and defense base redevelopment authorities.

H.B. 1886 expands the eligibility to include hospital districts, conservation and reclamation districts, and water districts or authorities created under Section 59, Article XVI of the Texas Constitution (thus bringing in other kinds of water districts other than river authorities).

Expansion of Competitive Sealed Proposals for Construction and Construction Management-at Risk Into Infrastructure Market

Since the inception of the various statutes on alternative project delivery, these methods have been limited to vertical construction, defined as a building or associated structure. In the past, the statutes specifically excluded highways, roads, streets, bridges, water supply projects, water plants, wastewater plants, wharfs, docks, airport runways or taxiways, drainage projects and similar projects.

Perhaps the most significant elements of H.B. 1886 is that it expands most of the alternative project delivery methods into horizontal construction. This may not be plainly apparent to anyone making a cursory examination of the bill. However, this expansion is accomplished by revising the definition of “facility” in Sec. 271.116 and Sec. 271.118 Local Government Code, which cover competitive sealed proposals for construction (CSP) and construction management-at risk (CM-at risk or CMAR), to mean include any improvement to real property.

The major exceptions to this are job order contracting and construction manager-agent. The term “facility” in these sections continues to be defined as vertical or building construction, meaning that job order contracting and CM-agency may not be used for infrastructure construction.

Under Chapter 271, competitive sealed proposals and CM-at risk are basically different ways to select a construction contractor. Under both of these methods, the law is very clear that a design professional (engineer or architect) must be selected separately (and generally prior to) the selection of the contractor using qualifications-based selection as is customary for professional services. Under the CSP method for contractor selection, a design professional must prepare construction documents prior to seeking proposals for a

contractor. Under CM-at risk, the design professional must be selected prior to or concurrently with selecting the CMAR.

Essentially, the competitive sealed proposal process allows for considerations other than price to be considered in the selection of the construction contractor. These alternative criteria can include reputation, quality, past relationships with the governmental entity, and any other relevant criteria that is defined in the request for proposals. The weighting to be assigned to the evaluation criteria must be stated in the RFP.

Construction management-at risk, by contrast, usually involves selecting a contractor before design plans are complete. The CMAR is the contractor and often is involved in the design process, at least as to constructability. The CMAR is usually selected largely on experience and qualifications, with some consideration for the price of general conditions, then provides a guaranteed maximum price to the owner later in the process.

Design-build procedures are also expanded into the infrastructure area on a limited and phased-in basis. However, whereas CSP and CMAR procedures are the same for both vertical and civil engineering construction, HB 1886 creates a different set of statutory rules for design-build for civil works projects. These procedures are spelled out in a new Subchapter J, Chapter 271, Local Government Code.

Job Order Contracting

Although significant reform of job order contracting was derailed by the veto of H.B. 447, H.B. 1886 makes one noteworthy change relating to JOC procedures related to architectural and engineering services. It clarifies that if a contract or a job order requires the preparation of architectural or engineering plans under the relevant practice acts, the A/E services must be selected by and contracted to the owner. In at least some cases in the past, A/E services have been provided through the job order contract.

Design-Build for Civil Works Projects

One of the most significant changes in the package of bills passed by the 80th Legislature is the extension of design-build procedures to civil works construction, albeit on a limited and phased-in basis. This authorization is contained in H.B. 1886. Up to now, the use of design-build procedures has been limited to vertical construction (with a few limited exceptions such as authority granted to navigation districts).

The procedures for civil works design-build are substantially different than those in Chapter 271 for architectural projects. Therefore, the first question any user must determine is the type of facility being constructed. This will determine whether the procurement procedures used fall under Subchapter H or Subchapter J of Chapter 271.

The definition of civil works projects is essentially the set of projects excluded from the vertical definition. It includes

roads, streets, bridges, utilities, water supply projects, water plants, water distribution and wastewater conveyance facilities, desalination projects, airport runways and taxiways, storm drainage and flood control projects, or transit projects;

Buildings or structures incidental to these projects are also included.

The bill applies to local government entities, defined as a municipality (including a municipally owned water utility with a separate board), county, river authority, defense base development authority, or any other special district or authority authorized to enter into a public works contract. The term does not include a regional tollway authority, a regional mobility authority, or a water district with less than 50,000 population. [This threshold was intended to exclude municipal utility districts and small water districts, but the population threshold is an anomaly in the bill. Since other sections of the bill were changed to 100,000 or greater, the real threshold for eligibility is a population of 100,000.]

The authorization to use design-build for civil works is also limited by the size of a governmental entity. Beginning September 1, 2007, entities over 500,000 in population or service area may use the authority. Beginning September 1, 2009, this threshold is lowered to 100,000.

Finally, there are limits on the number of projects for which an entity may use design-build. Entities over 500,000 may use design-build for three projects per year for the first four years, then beginning September 1, 2013 these larger entities have authority for six projects per year. Entities between 100,000 and 500,000, for which authority begins September 1, 2011, have two projects per year for four years then four projects per year after September 1, 2015. Special provisions are made for municipally owned water utilities with a separate governing board.

There was a great deal of discussion during the 80th Legislature about these limitations. The policy reasons for a phase-in were to promote a learning process about what kinds of projects are best suited to design-build. By almost all accounts, design-build requires different staffing and project approaches than traditional projects, and the Texas law is based on that premise.

As noted, the procedural rules for design-build in the civil engineering context are different than those provided in Subchapter H, Chapter 271, Local Government Code, for architectural projects. Initially, a governmental entity must make several findings on the extent to which the project requirements can be adequately defined, the time constraints on the project, the ability to ensure a competitive procurement, and the owner's ability to manage the project. An independent engineer is also required to be the owner's agent and the construction materials engineering and testing and related services must be contracted separately from the design-builder.

The governmental entity is required to develop two documents – a request for qualifications with information on the project site, scope, budget, schedule and criteria for selection (including weighting) and a design criteria package with more detailed information.

The initial step in the selection process is a shortlisting process based exclusively on qualifications. Each proposer must certify that the engineer that is a member of the team was selected on the basis of demonstrated competence and qualifications as provided by the Professional Services Procurement Act.

Any number of initial proposers can be shortlisted and proposals requested from them. The request for proposals must include the design criteria package, a geotechnical baseline report on the project site, instructions on preparing the proposal, and the relative weighting technical and price proposals. This weighting is left open; it can be 100 percent on technical proposals, 100 percent on price or something in between.

The technical proposal is required to address project approach, anticipated problems, proposed solutions, ability to meet schedule, conceptual design, and other information. No more than 180 days may be allowed for submission of proposals.

The statute requires that technical proposals must be opened and scored first, then cost proposals from firms that submitted a responsive technical proposal are opened and scored. The selection must be made in accordance with formula provided in the RFP. Negotiations must be conducted sequentially in order of rankings.

The issue of stipends for unsuccessful proposers was an issue throughout the legislative session. The payment of a stipend is considered a best practice by the Design-Build Institute of America, one that promotes more proposals and higher quality proposals and that provides access to the work product of unsuccessful proposers. Throughout the debate, the engineering industry pushed for either a mandatory stipend or strong protections for intellectual property in the proposals of unsuccessful proposers. The Texas Council of Engineering Companies and a coalition of cities agreed on a mandatory stipend when the bill passed the House, but several senators involved in the bill in the Senate rejected this compromise.

The final bill, therefore, provides that unless a stipend is paid, the design-build team retains all rights to the work product. Nothing in the work product of an unsuccessful proposer may be disclosed and no use may be made of any unique or non-ordinary design element, technique, method or process contained in the unsuccessful proposal that was not also in the successful proposal when it was submitted, unless a license is obtained.

There are powerful sanctions against unauthorized use of an unsuccessful proposer's work product. These sanctions include liability for one-half of the cost savings, along with attorney's fees, and enforcement by declaratory or injunctive relief.

These sanctions can be avoided by the payment of a stipend of one-half of one percent of the contract amount. If the stipend is offered and paid, the governmental entity may

make use of any design element in the proposal, at no liability to the unsuccessful proposer.

One other provision in the bill is worth noting – it explicitly limits the transfer of certain elements of risk to the design-builder. The owner must assume the risk of scope changes, unknown or differing site conditions (with some exceptions), regulatory permitting, natural disasters, and the costs of property acquisition. This language does not mean that tasks such as right-of-way acquisition or permitting cannot be assigned to a design-builder; rather, it means that the owner must assume the cost risks associated with these tasks (i.e., cannot require the design-builder to accomplish these tasks for a predetermined fee).

Interlocal Agreements for Design Services

H.B. 1886 also addressed the use of interlocal agreements to purchase design services. This issue was precipitated by the growth in interlocal purchasing cooperatives, or “buy boards,” and the role of these boards in the procurement of job order contracting. In the view of the design and construction industry, purchasing coops are appropriate vehicles for the purchase of commodities and goods, since a desk or a computer or a vehicle work the same in any location. Design services (and other services for that matter) are more site specific and are heavily dependent on personnel, management, and related considerations.

Therefore, the legislation specifically prohibits a contract between a governmental entity and a purchasing cooperative for the purchase of engineering or architectural services. Buy boards cannot be used to purchase engineering or architectural services.

Enforcement of Professional Services Procurement Procedures

Under long-standing law, governmental entities are required to purchase engineering and architectural services on the basis of competence and qualifications rather than price (Chapter 2254, Government Code). However, the only real enforcement in this statute is that it provides that a contract entered into in violation of the law is void.

This legislation adds to Chapter 2254 the power for an interested person to enforce the Act through injunctive or declaratory relief. Similar language has been in Chapter 271, Local Government Code for alternative project delivery processes and is carried over into Chapter 2264, Government Code. Injunctive relief for enforcement is also provided in many other statutes.

Local Government Corporations

Since alternative project delivery statutes have generally restricted the use of design-build procedures in civil infrastructure work, there have been examples of governmental entities using local government corporations as a subterfuge to avoid procurement law that might otherwise apply to the entity itself. A loophole that allowed this was created

in 1999, but largely closed in 2001. However, some ambiguity has remained as to the permitted authority of LGCs.

H.B. 1886 resolves this ambiguity and clearly requires local government corporations created by a governmental entity to comply with procurement laws that apply to the governmental entity that created the corporation. The only exceptions to this requirement remaining in law are for LGCs constructing projects with a private venture participant in a reinvestment zone or projects 50 percent or more funded by a private entity. These exceptions are for legitimate public-private partnerships. Otherwise, with the expansion of design-build authority, the need to use (and the option of using) LGCs as a subterfuge is eliminated.

Conclusion

Expanding “alternative delivery methods” to civil construction markets may have far-reaching effects.

We predict that most local governments will follow the same pattern established by the K-12 schools, universities, and others who broke this ground earlier. They will begin cautiously. But once they appreciate the discretion and flexibility that these delivery methods allow, they will enthusiastically embrace them. Instead of “alternatives”, they will become the norm.