

**PUBLIC CONTRACTS AND PROCUREMENT REGULATIONS**

**PUBLIC CONSTRUCTION CONTRACTS**

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**Presented by**

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## **I. Public Construction Contract Procurement Procedures**

### **A. Introduction**

This chapter will focus on the use of alternative project delivery (“APD”) methods for public construction projects and professional services that relate to public construction projects. It will seek to provide you with an understanding of the procedures that must be followed by a governmental entity (“GE”) to award a construction contract. It is important to understand from the outset that this topic area is very much driven by the language of the statutes that are in place which governs the actions of the GE in question. This results in some differences in who may use which APD methods depending upon the project being undertaken by a particular GE. Therefore, one has to remember to check the statutes applicable to each GE to determine whether or not the GE may utilize a particular APD method for a particular type of project. It is also important to remember that the definitions of the terms “governmental entity,” “local governmental entity,” and “political subdivision” are often times slightly different and this can impact whether or not a particular statute applies to a particular GE.

It is highly recommended that when confronted with specific questions concerning whether or not a particular GE may utilize an APD method for a particular project that the GE seek competent legal advice to assist in determining whether or not an APD method can be used and in providing assistance in the drafting of bid or proposal documents and the contract to be awarded.

## 1. Historical Background

Public contracts in Texas can be placed into three general categories: goods, services and construction. Historically, public contracts in Texas have been awarded using the traditional competitive sealed bid method, unless there was other statutory authority to deviate from competitive sealed bidding. The requirement to use competitive sealed bidding meant that a GE was required to award the contract to the lowest bidder. This limited a GE to using only the design-bid-build method for a construction project. The design-bid-build method, with the exception of a few statutes that authorized APD methods for certain defined projects, such as jail facilities, has been the dominant method of delivery for public construction projects in Texas.

APD methods have been slowly expanded and phased-in in Texas, to allow various GEs to utilize an APD method other than competitive sealed bidding to award a public contract for a construction project. Authorization for these new APD methods started in 1995 when the Texas Legislature passed authorization to allow Texas School Districts and Higher Education Institutions to use additional APD methods to construct facilities. In 2001, the Texas Legislature expanded the use of APD methods on public projects to allow counties, municipalities, river and port authorities to utilize APD methods in the construction of facilities.

Most of the APD statutes defined the term “facilities” in such a way that it covered the construction of buildings and was defined more by what was excluded than what was included. However, that changed in 2007 with the passage of House Bill No. 1886 (“HB 1886”) which extended authority to GEs to utilize APD methods for civil

engineering and public works type projects that had previously been excluded under the previous definition of facilities.

The 2009 legislature made several changes in the statutes, mostly minor in nature, which apply to public procurements. The two changes that have the most impact are: (1) the value threshold for engaging in competitive procurement was raised from \$25,000 to \$50,000 for schools<sup>1</sup>, counties<sup>2</sup>, governmental entities (to include municipalities)<sup>3</sup>, port commissions and authorities and navigation districts<sup>4</sup>, port and harbor facilities<sup>5</sup>; and (2) adjustment to the size of entities that may now use design build for horizontal construction projects.

As stated previously, while the procedures for use of an APD method for GEs are almost identical in each instance, there can be small differences between the procedures used by state agencies, counties and municipalities and other local governmental entities. This paper will point out the major differences, where applicable, between state agencies, universities, counties, school districts, and municipalities and other local governmental entities.

## 2. Initial Considerations

One of the key factors in a GE using an APD is how comfortable the GE is with any particular APD method. The comfort zone for the GE may be impacted by the GE's previous experience on its own construction projects and/or observations of progress or

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<sup>1</sup> House Bill 987, amending Section 44.031(a) of the Texas Education Code.

<sup>2</sup> House Bill 987, amending Section 262.003(a) of the Texas Local Government Code.

<sup>3</sup> House Bill 987, amending Sections 271.024 and .054, and Sections 281.047(a), 351.137(b) and 375.221 of the Texas Local Government Code.

<sup>4</sup> House Bill 1972, amending Sections 60.403(a), .4035(a), .404(a) and .406(a) of the Texas Water Code.

<sup>5</sup> House Bill 4493, amending Section 54.054(a) of the Texas Transportation Code.

completion of other projects. The opinions of the consulting architect or engineer working with the GE can also have a huge impact on the comfort level of a GE in using any of the APD methods other than competitive sealed bidding.

As a practical matter, the GE and its agents will need to evaluate several initial considerations in determining which of the APD methods will best suit the objectives of the GE in bringing the project to a successful completion. These initial considerations include issues such as: (1) how much design assistance the GE might require; (2) how quickly does the project need to be completed; (3) does the GE have the appropriate staff to oversee the project or will assistance be needed in overseeing the project; (4) what are the GE's cost considerations? Once the GE has sufficiently answered these questions, it can then choose from various APD methods allowed by statute that provides the GE the best value to include: competitive bidding (traditional competitive sealed bidding and best value competitive sealed bidding), competitive sealed proposals, construction manager-agent, construction manager at-risk, design-build and job order contracts.

***B. Professional Services Procurements***

***1. Architect, Engineer and Surveying Services***

Contracts for professional and consulting services for state agencies, counties, municipalities, school districts, universities, special districts and other local governmental entities must be awarded utilizing the provisions found in Chapter 2254 of the TEXAS GOVERNMENT CODE, also known as the "Professional Services Procurement Act" ("PSPA"). The PSPA has defined professional services to include: accounting,

architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing. TEX. GOV'T CODE ANN. § 2254.002 (VERNON 2007). The Texas Attorney General has added several additional professional services, i.e. construction manager-agent and financial consulting services, to the list. Tex. Op. Atty. Gen. No. JM-940 (1988); Tex. Op. Atty. Gen. No. GA-0494 (2006). However, due to reasons that we will discuss in the section covering the construction manager-agent APD method, there are some instances where the selection of a construction manager-agent is no longer selected using the provisions of the PSPA.

Professional services contracts must be awarded based upon the basis of demonstrated competence and qualifications and a fair and reasonable price. TEX. GOV'T CODE § 2254.003 (VERNON 2007). As a result of this requirement, logic seems to dictate that an awarding GE should use a two-step process. For consistency sake, it makes sense to utilize the two-step process mandated for use in selection of architect, engineers or surveyors. First, the GE selects the most highly qualified provider of the services on the basis of demonstrated competence and qualifications. Second, the GE then attempts to negotiate with the selected provider a fair and reasonable price. If an agreement cannot be reached with the first selected provider, then the GE formally ends negotiations with the most highly qualified provided and selects the next most qualified provided and attempts to negotiate with the second most qualified provider. The process will repeat itself until a contract is awarded. TEX. GOV'T CODE ANN. § 2254.004 (VERNON 2007). A contract entered into in violation of the PSPA procedures is void as against public policy. TEX. GOV'T CODE ANN. § 2254.005 (VERNON 2007).

## 2. Consulting Services

Consulting services may be procured by a state agency utilizing the provisions of Subchapter B, Chapter 2254 of the TEXAS GOVERNMENT CODE. The procedures for engaging consulting services does not include those disciplines that are covered under Subchapter A (which is discussed in the preceding paragraph), nor does it cover private legal counsel, investment counselors, actuaries, medical or dental services, or other consultants who may be needed as determined by the governing board of a retirement systems trust fund. TEX. GOV'T CODE ANN. § 2254.024 (VERNON 2007). A state agency may only contract with a consultant if there is a substantial need and the service cannot be adequately performed by its own personnel or from another state GE. TEX. GOV'T CODE ANN. § 2254.026 (VERNON 2007). Selection of the consultant shall be through evaluation of demonstrated competence, knowledge, and qualifications and reasonableness of the proposed fee for services. If all other items are equal between the consultants being evaluated, then preference may be given to the consultant whose principal place of business is in the state or who will manage the contract wholly from an office in the state. TEX. GOV'T CODE ANN. § 2254.027 (VERNON 2007).

Prior to entering into a major consulting contract, one which may exceed \$15,000.00, or \$25,000.00 if a school or university, a notice of intent to entering into the contract must be provided to the Legislative Budget Board and the Governor's Budget and Planning Office. It is also necessary to obtain a finding of fact from the Governor's Budget and Planning Office that the major consultant contract is necessary. Failure to obtain this finding of fact will render the consulting contract void. TEX. GOV'T CODE

ANN. § 2254.028 (VERNON 2007). There is a requirement that notice be published in the Texas Register no later than the 30<sup>th</sup> day before the date the consulting contract begins. This notice must include: (1) an invitation to consultants to provide offers of consulting services; (2) name of the individual who should be contacted by potential offerors; (3) closing date for acceptance of offers; and (4) the procedures to be utilized in selection. TEX. GOV'T CODE ANN. § 2254.029 (VERNON 2007). Once the consultant is selected, the GE must publish another notice in the Texas Register no later than the 20<sup>th</sup> day after entering into the consultant contract. This notice must include: (1) description of the activities that the consultant will conduct; (2) the name and business address of the consultant; (3) the total value and the beginning and end dates of the contract; and (4) the dates on which documents, films, recordings or reports that may be required of the consultant will be presented to the GE are due. TEX. GOV'T CODE ANN. § 2254.030 (VERNON 2007).

### ***C. Construction Procurements***

#### **1. General Comments**

As has been previously stated until 1995, traditional competitive sealed bidding was the only method available for the majority of GEs to engage in and complete construction projects. The old rules made no distinction between the types of construction projects, whether for a building, waste water treatment plant, road or port facility. As you will see in the paragraphs that follow, that has changed. The APD methods now available for most building construction projects to include: traditional competitive sealed bid, best value competitive sealed bid, competitive sealed proposals,



construction manager-agent, construction manager at-risk, design build, and job order contracts. You will also see that civil works projects can now be procured utilizing traditional competitive sealed bidding, competitive sealed proposals, construction manager at-risk and design build APD methods.

Again, it is important to note that the following provides you with a general understanding of the various APD methods and how they may be used in under the Texas statutes for various types of construction projects. You will see that construction projects of all types may be undertaken under the APD legislation, although there are still minor differences present depending upon the type of project and the GE that is undertaking the construction project.

## 2. Limiting Factors

### a. Emergency Procurements

Generally, instances or situations which result from natural disasters or scenarios that endanger public health, safety or welfare, can serve as a basis for exemption from the competitive sealed bidding process where the competitive bidding process makes little sense. These exceptions should also generally apply to other APD methods. A full list of the emergency exemptions are found in §§ 252.022 and 262.024 of the TEXAS LOCAL GOVERNMENT CODE. Other statutes typically provide for similar exceptions for emergency procurements for other GEs that may not be covered by these two statutes.

b. Charters and Other Enabling Documents

When Subchapter H, Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE was created, it contained a provision that indicated that if a municipality was a home-rule municipality, which has a charter provision concerning contract award, then the charter controls over any provision in Subchapter H. This conflict can only be resolved by amending the charter and electing to utilize the provision of Subchapter H. Similarly, if a county or other special district had a set of rules or regulations that addressed procurement and contract award, then those documents would also need to be changed prior to utilizing the APD methods allowed under Subchapter H of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE. If the GE you are dealing with is one of these types of GEs, then the question should be asked as to whether or not the GE has made the appropriate amendments or revisions to its charter, rules or regulations prior to determining which APD method may be used for a particular project.

c. Types of Projects

Another initial limitation that was placed on the use of APD methods was that it could only be used for a contract involving the construction of facilities. The term “facility” is defined as “. . . buildings the design and construction of which are governed by accepted building codes.” This definition specifically excluded many projects which GEs might desire the use of an APD method. The term “facility” does not include: highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil

engineering construction, or buildings or structures that are incidental to projects that are primarily civil engineering construction projects. TEX. LOC. GOV'T CODE ANN. § 271.111(7) (VERNON 2007). This definition is the same in many other statutes that address the use of APD methods such as §§ 44.0312(4) and 51.776(5) of the TEXAS EDUCATION CODE. This created a situation where the GE could use APD methods for “vertical” construction projects, but not “horizontal” construction projects.

In 2003, the Texas Legislature passed revisions to Chapter 60, Subchapters N and added Subchapter O of the TEXAS WATER CODE which eliminated the distinction between vertical and horizontal construction projects for navigation districts and port authorities. In Subchapter O, the term “facility” was defined to mean real property, including buildings, associated structures, utilities, docks, wharves, channels, dredge material placement areas, marine terminal improvements, railroads on or adjacent to the marine terminal, roads and bridges on or adjacent to the marine terminal, and improved or unimproved land. The term was also defined to include roads or bridges incidental to a larger project. TEX. WATER CODE ANN. § 60.451(10) (VERNON 2007). This allowed navigation districts and port authorities who operate under the provisions of Subchapter O to use various APD methods on all construction projects.

The Texas Legislature, with the passage of HB 1886 and the creation of the new Subchapter J, Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE, removed most of the restrictions for the use of APD methods for horizontal construction projects for those GEs who are governed by the provisions of Subchapters H and J. This is possible as HB 1886 specifically amended provisions of Subchapter H of Chapter 271 of

the TEXAS LOCAL GOVERNMENT CODE that defines the term “facilities.” The definition of “facilities” was changed to be defined as buildings, “. . . unless otherwise specifically provided . . .”. In Sections 271.116 – Requests For Competitive Sealed Bids and 271.118 – Construction Manager At-Risk the definition of “facilities” has been expanded to include any improvement to real property. In fact, you will see that for those GEs covered by the changes found in HB 1886 that the only restrictions that remain on APD methods for civil works projects involves the use of the best value competitive sealed bid, construction manager-agent and design-build APD methods.

### 3. Best Value Determination

Before utilizing any APD method, the GE is required to make a determination that the use of a particular method will provide the best value to the GE. This determination must be made before the GE advertises the project. TEX. LOC. GOV'T CODE ANN. § 271.114(a); TEX. EDUC. CODE ANN. §§ 44.035(a) and 51.779(a); and TEX. GOV'T CODE ANN. §§ 2166.151-.157 and 2166.2525 (VERNON 2007). Several of the statutes provide the authority for the GE to delegate the authority to make this determination to a designated representative. TEX. LOC. GOV'T CODE ANN. § 271.114(a); TEX. EDUC. CODE ANN. §§ 44.0312 and 51.777 and TEX. WATER CODE ANN. § 60.457 (VERNON 2007). Section 2166.2525 of the TEXAS GOVERNMENT CODE is silent as to whether or not this authority may be delegated for state agencies; however, it does require that the state agency solicit advice and comment from design and construction professionals concerning the criteria the commission should use in determining which contracting method is best suited for a particular project.

#### 4. Selection Criteria

The GE must also determine what selection criteria it will use to make its selection. While the selection criteria may be slightly different for a particular project and APD method, the selection criteria that can and should be generally considered by the GE are: (1) price; (2) reputation of the vendor; (3) quality of the vendor's goods or services; (4) extent to which the goods or services meet the GE's needs; (5) vendor's past relationship with the GE; (6) impact on rules relating to historically underutilized businesses; (7) total long-term cost to the GE; and (8) any other relevant factor specifically listed in the request for bids or proposals. TEX. LOC. GOV'T CODE ANN. § 271.113(b); TEX. EDUC. CODE ANN. §§ 44.031(b) and 51.779(b); and TEX. WATER CODE ANN. § 60.458 (VERNON 2007). The GE also has to inform the bidders or those submitting proposals of the weighting system that will be used to evaluate the selection criteria in determining the successful bidder or offeror.

#### 5. Advertising

##### a. State Agencies

State agencies, with the exception of universities and the Department of Transportation which are governed by other statutes,<sup>6</sup> are required to advertise the construction project using the lowest and best bid (traditional competitive sealed bidding) and are required to give not less than 30 days after the date of issuance of the bid documents to allow bidders to respond. If it is a small construction project, the time between issuance of the bid documents and receipt of bids may be reduced to 14 days.

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<sup>6</sup> Tex. Trans. Code Chapter 223 (Vernon 2007).

This period may also be shortened if there is a need to prevent undue additional costs to the state agency or there is an emergency situation. TEX. GOV'T CODE ANN. § 2166.253 (VERNON 2007). Any other APD methods that may be authorized for use must be advertised in accordance with applicable rules established by the Texas Facilities Commission (hereinafter referred to as the "Commission").<sup>7</sup> Universities are required to establish procedures for advertising various contracting opportunities and follow them accordingly.

b. Counties, Municipalities and Other Local Governmental Entities

The various provisions of Subchapter C of Chapter 252 and Subchapters B and H of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE set forth the procedures to be used by many of the GEs which are covered by those Subchapters for advertising and awarding contracts for construction projects. Section 271.112(d) of the TEXAS LOCAL GOVERNMENT CODE provides for the proper method of advertising for bids or proposals by GEs. With respect to these GEs, other than counties, notice must be placed in a newspaper of general circulation in the county in which the GE's central administrative office is located, (or in the newspaper nearest the GE if the GE has no newspaper of general circulation), once a week for at least two weeks prior to the deadline for receiving bids, proposals or responses. If a two-step procurement process is used, (e.g., construction manager at-risk or design-build), then the time and place for receipt of the second-step bids or proposals need not be advertised separately, but must

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<sup>7</sup> The Texas Facilities Commission ("TFC") was previously known first as the Texas General Services Commission ("TGSC") and then the Texas Building and Procurement Commission ("TBPC"). Any legislation that refers to the TGSC or the TBPC should now be read to apply to and is generally administered by the TFC.

be included in the advertisement. The process for school districts and junior colleges to advertise and award contracts for construction projects is similar to those required of municipalities. TEX. EDUC. CODE ANN. § 44.031(g) (VERNON 2007). The process for navigation districts and port authorities to advertise and award contracts to those required of municipalities. TEX. WATER CODE ANN. § 60.456 (VERNON 2007).

The advertising process is slightly different for counties. Counties must advertise the time and place for receipt of the second step of a two-step procurement separately from the initial advertisement for the construction project.

c. Special Advertising Requirements - Trench Safety Requirements

If the construction project includes trench excavation will exceed a depth of five feet, the bid or RFP must provide to all bidders or offerors and the contract must include: (1) a referenced to OSHA standards for trench safety in effect during the period of construction; (2) a copy of any special shoring requirements, if any, with a separate line item for payment relating to the special shoring requirements; (3) a copy of any geotechnical information obtained by the GE for use by the contractor in the design of the trench safety system; and (4) a separate line item for payment of costs associated with trench exaction safety protection. TEX. HEALTH & SAFTEY CODE ANN. §§ 756.021-.023 (VERNON 2007).

6. APD Methods

The following paragraphs explain the procedures for using the various APD methods in both vertical and horizontal construction projects. It is important to understand and follow these procedures as failure to make a contract in violation of the

provisions of the various applicable statutes will, in most instances, render the contract void. Some of the statutes allow any interested party, including government attorneys, to bring suit for an injunction to enjoin performance. A party who prevails in an action seeking an injunction is entitled to reasonable attorneys' fees as approved by the court. TEX. LOC. GOV'T CODE ANN. § 271.112(f) and TEX. EDUC. CODE ANN. § 44.032(f) (VERNON 2007).

Again, it is important to remember that the procedures for utilizing the various APD methods varies slightly depending on the GE involved and the type of project or procurement being undertaken. The procedures for state agencies that procure through the TFC are found in Chapter 2166 of the TEXAS GOVERNMENT CODE. The procedures for school districts and junior colleges and universities are found in Chapters 44 and 51 of the TEXAS EDUCATION CODE. The procedures for counties, municipalities and other local governmental entities are found in Subchapters H and J of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE. The procedures for certain navigation districts and port authorities are found in Chapter 60 of the TEXAS WATER CODE. These diverse procedures will be generally covered in the following paragraphs. Where applicable, it will also distinguish between the differences in APD procedures to be utilized for vertical and horizontal construction projects.

a. Competitive Bidding – Traditional Competitive Sealed Bidding

As mentioned before, traditional competitive sealed bidding has been the way public construction contracts have been awarded in Texas since Texas was its own country. A GE must use competitive sealed bidding procedures unless there is another



statutory provision that allows the GE to use another APD method. In the event that the GE is given the statutory authority to utilize more than one APD method to complete a construction project, the GE may still elect to use the traditional competitive bidding procedures. However, the GE must make the determination that competitive sealed bidding provides the best value for that project. Assuming the GE does so, then the contract must be awarded to the lowest responsible bidder.

(1) State agencies

The authority to use competitive sealed bidding is the same for vertical and horizontal construction projects, unless there are other specific statutes or procurement rules or regulations to the contrary. For example, the statutes that govern the competition of public construction procurement vary between those state agencies that utilize the provisions of the Commission and the Texas Department of Transportation. For construction projects that fall under the purview of the Commission, the project would be required to be advertised and the contract shall be awarded to the qualified bidder making the lowest and best bid in accordance with the law on awarding state contracts. The Commission may reserve the right to reject all bids. TEX. GOV'T CODE ANN. § 2166.253 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

The authority to use traditional competitive sealed bidding method is the same for vertical and horizontal construction projects, unless there are other specific statutes or procurement rules or regulations to the contrary. Counties and municipalities may also consider safety records of the bidder as long as they have

provided notice to the prospective bidders that they shall consider the safety records of the bidders. TEX. LOC. GOV'T CODE ANN. §§ 262.0275 and 252.0435 (VERNON 2007).

Municipalities must award contracts to the lowest responsible bidder for the construction of highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction; or, building or structures that are primarily civil engineering construction projects. TEX. LOC. GOV'T CODE ANN. § 252.043(d) (VERNON 2007). Prior to the passage of HB 1886, there was an exception for the award of a contract for the construction of a project described in Subsection (d) if the project required an expenditure of \$1.5 million or less. This exception allowed for the use of competitive sealed proposal procedures described by Section 271.116. TEX. LOC. GOV'T CODE ANN. § 252.043(d-1) (VERNON 2007).

School districts, junior colleges, navigation districts and port authorities may utilize traditional sealed bidding on vertical or horizontal construction projects. TEX. WATER CODE ANN. § 60.454(6) (VERNON 2007).

b. Competitive Bidding – Best Value Competitive Sealed Bidding

(1) State agencies

Currently, this APD method cannot be utilized by the Commission under the provisions of Chapter 2166 of the TEXAS GOVERNMENT CODE. Currently, this APD method does not appear to be available for use by Texas universities for award of construction contracts. TEX. EDUC. CODE ANN. § 51.778 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

(a) Vertical Construction

The best value competitive bidding process for GE under Subchapter H of the TEXAS LOCAL GOVERNMENT CODE incorporates the “best value” method for selecting the winning bid, rather than the “lowest responsible bid” concept inherent in traditional competitive sealed bidding. Subchapter B of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE does not apply to the best value competitive sealed bidding method under Subchapter H, except for Sections 271.026 (dealing with public opening of bids and changing bids after opening), 271.027(a) (government entity’s right to reject any and all bids), and 271.0275 (right to consider safety record of bidders). Section 271.115 of the TEXAS LOCAL GOVERNMENT CODE mandates the selection of the bid offering the best value to the municipality according to the selection criteria that were established. This APD method allows for the use of the same selection criteria as set forth in Section 271.113(b) which include: (1) the purchase price; (2) the reputation of the vendor and of the vendor’s goods or services; (3) the quality of the vendor’s goods or services; (4) the extent to which the goods or services meet the GE’s needs; (5) the vendor’s past relationship with the GE; (6) the impact on the ability of the GE to comply with rules relating to HUBs; (7) the long-term cost to the GE to acquire the vendor’s goods or services; and (8) any other relevant factor specifically listed in the request for bids or proposals. Note, however, that the contract must be awarded at the bid amount offered by the bidder whose bid is considered to offer the best value. In other words,

there can be no negotiations between the GE and the bidder who provided the best value sealed bid.

This method may be utilized by school districts and junior colleges. The procedures for the award of the construction contract will generally be the same as those required for a municipality. TEX. EDUC. CODE ANN. § 44.040(d) (VERNON 2007). Since this method may be utilized by school districts, this method may also be utilized by navigation districts and port authorities if they choose to utilize this APD method. TEX. WATER CODE ANN. § 60.4125(a) (VERNON 2007).

(b) Horizontal Construction

Since the provisions of HB 1886 did not address any changes concerning the use of the best value competitive sealed bidding method, there currently is no authority for most GEs to utilize best value competitive sealed bidding for horizontal construction projects. Therefore, only traditional competitive sealed bidding may be used absent any other statutory authority.

This also appears to be true for navigation districts and port authorities. While there is language contained in § 60.4125(a) of the TEXAS WATER CODE that allows for best value competitive sealed bids, conflicting language is found in § 60.454(6) of the TEXAS WATER CODE which lists competitive sealed bids. Since the language regarding best value competitive sealed bidding is conflicting, it would be prudent not to utilize best value competitive sealed bidding for horizontal construction projects until further guidance is provided by the attorney general, courts or the conflicting language is clarified by the state legislature.

c. Requests For Competitive Sealed Proposals (“RFCSP”)

(1) State agencies

For construction projects that fall under the purview of the Commission, the Commission may choose to use the RFCSP method to provide it the best value for completing a particular construction project. TEX. GOV'T CODE ANN. § 2166.2533 (VERNON 2007).

In the RFCSP method, the Commission shall select or designate an architect or engineer to prepare construction documents. If the architect or engineer is not a full-time employee of the Commission, the Commission shall select the engineer or architect on the basis of demonstrated competence and qualifications according to the process required by § 2254.004 of the TEXAS GOVERNMENT CODE. TEX. GOV'T CODE ANN. § 2166.2533(b) (VERNON 2007).

The Commission shall prepare a RFCSP which includes construction documents, selection criteria, project scope, schedule, and other information to which the contractors may be required to respond as part of the RFCSP. The Commission must also state the selection criteria that will be used to select the successful offeror. The statute is silent as to whether or not the Commission is required to advertise the weighting that will be given to the selection criteria. However, if the Commission has established weighting criteria for each of the selection criteria that will be used to select the successful offeror, then that weighting criteria should be published so that each potential offeror is aware of how the selection will be made. The Commission may

consider price as part of the selection criteria. TEX. GOV'T CODE ANN. §§ 2166.2526 and 2166.2533(d) and (h) (VERNON 2007).

The Commission must publicly open and read aloud the proposals, including price information if such was required, and evaluate and rank the proposals in relation to the published selection criteria within 45 days after the opening. Then the Commission selects the proposal that offers the best value based on the published selection criteria and its ranking evaluation. TEX. GOV'T CODE ANN. § 2166.2533(f) (VERNON 2007).

Following the selection of the offeror that offers the best value for the Commission, the contract negotiation process begins. The Commission negotiates first with the highest ranked offeror. At this stage, the Commission and its architect or engineer may discuss proposed modifications to the proposed scope and time and any price change associated with such modification. If the two parties are unable to reach an agreement, the Commission must inform that offeror in writing that negotiations are ended, and then may negotiate with the next ranked offeror. This continues in the order of the selection ranking until a contract is reached or all proposals are rejected. TEX. GOV'T CODE ANN. § 2166.2533(g) (VERNON 2007).

The Commission must provide for independent testing, verification, and inspection of the finished work required for acceptance of the work by the Commission. TEX. GOV'T CODE ANN. § 2166.2533(c) (VERNON 2007). Testing services must be procured by the Commission in accordance with § 2254.004 of the TEXAS GOVERNMENT CODE.

Universities may utilize this APD method and will use generally the same procedures as described above. However, in the case of the universities, it will be the board or the board's designee that will make the decisions rather than the Commission. TEX. EDUC. CODE ANN. § 51.783 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

The provisions of HB 1886 amended § 271.116 of the TEXAS LOCAL GOVERNMENT CODE to allow the RFCSP method to be utilized for both vertical and horizontal construction projects. There is no difference in the procedures that the GE must follow in awarding a contract for a vertical or horizontal construction project.

In the RFCSP method, if the GE does not employ, as a full time employee, its own architect or engineer to perform this service then the GE must first hire an independent architect or engineer to prepare construction documents according to the process required by § 2254.004 of the TEXAS GOVERNMENT CODE. This requirement remains a constant for all APD methods where design services are performed prior to the bid or RFP. TEX. LOC. GOV'T CODE ANN. § 271.116(b) (VERNON 2007).

The GE prepares a RFCSP which includes construction documents, estimated budget, project scope, schedule, and other information contractors may be required to respond to as part of the RFCSP. The GE must also state the selection criteria and relative weighting of the criteria that will be used to select the successful offeror. Unlike an RFQ under the design-build method, price information may be requested in the RFCSP and may be a part of the selection criteria. TEX. LOC. GOV'T CODE ANN. § 271.116(d) (VERNON 2007).

The GE must publicly open and read aloud the proposals, including price information if such was required, and evaluate and rank the proposals in relation to the published selection criteria within 45 days after the opening. Then the GE selects the proposal that offers the best value based on the published selection criteria and its ranking evaluation. TEX. LOC. GOV'T CODE ANN. § 271.116(e)-(f) (VERNON 2007).

Following the selection of the offeror that offers the best value for the GE, the contract negotiation process begins. The GE negotiates first with the highest ranked offeror. At this stage, the GE and its architect or engineer may discuss proposed modifications to the proposed scope and time and any price change associated with such modification. If the two parties are unable to reach an agreement, the GE must inform that offeror in writing that negotiations are ended, and then may negotiate with the next ranked offeror. This continues in the order of the selection ranking until a contract is reached or all proposals are rejected. In this form of contract procurement, the GE is not restricted to considering price alone in its selection, but may consider any other factor from among the established selection criteria to determine which offeror offers the GE the best value. TEX. LOC. GOV'T CODE ANN. § 271.116(f)-(g) (VERNON 2007).

The GE must provide for independent testing, verification, and inspection of the finished work required for acceptance of the work by the GE. TEX. LOC. GOV'T CODE ANN. § 271.116(c) (VERNON 2007). Testing services must be procured in accordance with § 2254.004 of the TEXAS GOVERNMENT CODE.



Texas navigation districts and port authorities may utilize this APD method for both vertical and horizontal construction projects. TEX. WATER CODE ANN. § 60.463 (VERNON 2007).

Texas school districts and junior colleges may only utilize this APD method for vertical construction projects. The procedures that will be used to compete and award a construction contract will be generally the same as those used by a municipality for vertical construction projects. TEX. EDUC. CODE ANN. § 44.039 (VERNON 2007).

d. Construction Manager-Agent (“CMA”)

As discussed previously, CMAs were historically selected using the provisions of the PSPA. However, as the Texas Legislature has increased the ability of GEs to utilize various APD methods, one method that has been made available to many of them is the CMA method. The Texas Attorney General has indicated that once a GE has specific statutory authority upon which to use the CMA method for a construction project, the GE should rely on that authority and not the PSPA. *See* TEX. ATTY GEN. OP. NO. JC-0224 (2000). This method allows GEs, who may not have the in-house expertise and/or sufficient staff to effectively oversee a construction project, to employ an agent to oversee a project on their behalf.

(1) State agencies

For construction projects that fall under the purview of the Commission, the Commission may choose to use the CMA method to provide it the best

value for completing a particular construction project. TEX. GOV'T CODE ANN. § 2166.2535 (VERNON 2007).

A CMA is defined as a legal entity that provides consultation to the Commission regarding construction, rehabilitation, alteration, or repair of a facility. The Commission may require the CMA to provide administrative personnel, equipment necessary to perform CMA duties, on-site management and other services that may be considered general conditions as specified in the contract. A CMA acts as an overseer on behalf of the Commission to manage the project, and to consult with the Commission during the procurement process by, for example, providing recommendations on the selection of the contractor. A CMA is intended to represent the Commission in a fiduciary capacity, and may not self-perform any portion of the actual design or construction of the project, with the exception of the items listed above. TEX. GOV'T CODE ANN. § 2166.2535(b) (VERNON 2007).

Prior to or concurrent with the selection of a CMA, if the GE does not utilize an architect or engineer which it employs on a full-time basis for the design, the Commission must hire an architect or engineer according to the requirements of Section 2254.004 of the TEXAS GOVERNMENT CODE to design the project. The design architect or engineer may not serve, alone or in combination with any other person, as the CMA, unless hired as the CMA in a separate or concurrent CMA procurement process. This does not prevent the design architect or engineer from providing customary construction phase services under the architect or engineer's original professional

services agreement and applicable licensing laws. TEX. GOV'T CODE ANN. § 2166.2535(c) (VERNON 2007).

The Commission then selects a CMA based on the same professional services procurement rules provided for the selection of an architect or engineer under §2254.004 of the TEXAS GOVERNMENT CODE, except that the advertising requirements of applicable to the Commission must be met. TEX. GOV'T CODE ANN. § 2166.2535(d) (VERNON 2007).

Under the CMA method, the Commission may engage a single prime contractor, or multiple trade contractors to serve as prime contractors for their respective part of the work in any manner authorized by the statutes governing the Commission. TEX. GOV'T CODE ANN. § 2166.2535(e) (VERNON 2007). The Commission or the CMA (i.e. not the contractor(s)) is responsible for procuring all inspection, testing, and verification services required for the Commission's acceptance of the facility in accordance with §2254.004 of the TEXAS GOVERNMENT CODE. TEX. GOV'T CODE ANN. § 2166.2535(f) (VERNON 2007).

Universities may utilize this APD method and will use generally the same procedures as described above. However, in the case of the universities, it will be the board or the board's designee that will make the decisions rather than the Commission. TEX. EDUC. CODE ANN. § 51.781 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

(a) Vertical Construction

A CMA is defined as a legal entity that provides consultation to the GE regarding construction, during and after the design of a facility. TEX. LOC. GOV'T CODE ANN. § 271.118(b) (VERNON 2007). A CMA acts as an overseer on behalf of the GE to manage the project, and to consult with the GE during the procurement process by, for example, providing recommendations on the selection of the contractor. A CMA is intended to represent the GE in a fiduciary capacity, and may not self-perform any portion of the actual design or construction of the project, with the exception of the general conditions as provided by the contract. General conditions when used in the context of a facilities construction contract customarily include on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials. TEX. LOC. GOV'T CODE ANN. § 271.117(b) (VERNON 2007).

Prior to or concurrent with the selection of a CMA, if the GE does not utilize an architect or engineer which it employs on a full-time basis for the design, the GE must hire an architect or engineer according to the requirements of Section 2254.004 of the TEXAS GOVERNMENT CODE to design the project. The design architect or engineer may not serve, alone or in combination with any other person, as the CMA, unless hired as the CMA in a separate or concurrent CMA procurement process. This does not prevent the design architect or engineer from providing customary construction phase services under the architect or engineer's original professional

services agreement and applicable licensing laws. TEX. LOC. GOV'T CODE ANN. § 271.117(b) (VERNON 2007).

The GE then selects a CMA based on the same professional services procurement rules provided for the selection of an architect or engineer under §2254.004 of the TEXAS GOVERNMENT CODE, except that the advertising requirements of Section 271.112(d) of the TEXAS LOCAL GOVERNMENT CODE must be met.

Under the CMA method, the GE may engage a single prime contractor, or multiple trade contractors to serve as prime contractors for their respective part of the work in any manner authorized by the statutes governing the particular GE. TEX. LOC. GOV'T CODE ANN. § 271.117(e) (VERNON 2007). The GE or the CMA (i.e. not the contractor(s)) is responsible for procuring all inspection, testing, and verification services required for the GE's acceptance of the facility in accordance with §2254.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE ANN. § 271.117(f) (VERNON 2007).

Texas school districts and junior colleges may only utilize this APD method for vertical construction projects. The procedures that will be used to compete and award a construction contract will be generally the same as those used by a municipality for vertical construction. TEX. EDUC. CODE ANN. § 44.037 (VERNON 2007).

(b) Horizontal Construction

The provisions of HB 1886 did not address any changes to the use of the CMA method under Subchapter H. Currently, there is no authority to utilize the CMA APD method for horizontal construction projects under Subchapter H.

However, it would appear that GEs who wish to utilize the CMA method may still do so utilizing the provisions of the PSPA.

Texas navigation districts and port authorities may utilize this method for both vertical and horizontal construction projects. The procedures for award of the construction contract are generally the same as those used by a municipality. TEX. WATER CODE ANN. § 60.461 (VERNON 2007).

e. Construction Manager At-Risk (“CMAR”)

(1) State agencies

For construction projects that fall under the purview of the Commission, the Commission may choose to use the CMAR method to provide it the best value for completing a particular construction project. TEX. GOV'T CODE ANN. § 2166.2532(a) (VERNON 2007). A CMAR is a legal entity that assumes the risk for the construction, rehabilitation, alteration, or repair of a facility at the contracted price in the same manner as a general contractor; but also provides consultation to the Commission regarding construction during and after the design of the facility. TEX. GOV'T CODE ANN. § 2166.2532(b) (VERNON 2007).

The Commission must, prior to or concurrently with selecting a CMAR, select or designate an architect or engineer who will be responsible for the preparation of the design and construction documents for the project. This architect or engineer, if not a full-time employee of the agency or commission, must be selected according to §2254.004 of the TEXAS GOVERNMENT CODE. The Commission's architect/engineer may not serve, alone or in combination with another, as the CMAR

unless he or she is also chosen to act as CMAR under a separate or concurrent selection process. TEX. GOV'T CODE ANN. § 2166.2532(c) (VERNON 2007). The Commission must provide for inspection, testing, and verification required for its acceptance of the work independently of the CMAR. Those testing services shall be selected by the Commission according to §2254.004 of the TEXAS GOVERNMENT CODE. TEX. GOV'T CODE ANN. § 2166.2532(d) (VERNON 2007).

The CMAR is required to be selected according to either a one-step or a two-step process. In the one-step selection process, the Commission issues a RFP. This RFP should include general information on the project site, scope, schedule, selection criteria and relative weighting of selection criteria, estimated budget, time/place for receipt of the proposal, whether a one or two-step selection process will be used, and other information that would assist the Commission in its selection of a CMAR. In the one-step process, the Commission may request, as part of the requested proposals, information regarding proposed fees and prices for the fulfillment of the general conditions. In other words, both qualifications and pricing are evaluated in one step if a one-step process is selected at the outset. TEX. GOV'T CODE ANN. § 2166.2532(e) (VERNON 2007).

In the two-step selection process, the Commission first produces a RFQ, which is identical to the RFP as described above in the one-step process, except that no cost or price information may be requested of offerors in the first step. In the second step, the Commission selects a maximum of five offerors to provide additional information, which may at this step include proposed fees and prices for the completion

of the CMAR's general conditions. This process is similar to the two-step method for selecting a design-build firm. TEX. GOV'T CODE ANN. § 2166.2532(e) (VERNON 2007). The RFQ is published in a manner that is prescribed by the Commission. TEX. GOV'T CODE ANN. § 2166.2532(f) (VERNON 2007).

In both the one-step and two-step processes, the Commission must evaluate and rank the offers according to its published selection criteria within 45 days of their being opened. All proposals must be publicly opened and read aloud, including pricing information included in the proposal at the appropriate step. TEX. GOV'T. CODE ANN. § 2166.2532(g) (VERNON 2007). The Commission then selects the proposal that offers the best value according to the published selection criteria, and the ranking evaluation. Following the selection of the offeror that offers the best value, the contract negotiation process begins. The Commission then negotiates first with the selected offeror. If the two parties are unable to reach an agreement, the Commission is to give formal written notice to that offeror that negotiations are ended and then may negotiate with the next ranked offeror. This continues until a contract is reached or negotiations with all ranked offerors ended. TEX. GOV'T CODE ANN. § 2166.2532(h) (VERNON 2007).

The CMAR is required to properly advertise, in a manner prescribed by the Commission for bids or proposals from trade contractors or subcontractors for all work except minor work that may be included in the general conditions. The CMAR administers this process, and selects the contract procurement method determined to provide the best value from among the various methods available to the Commission. The CMAR may seek to perform any part of the work on the project



as long as the CMAR presents its bid or proposal in the same manner as any trade contractor or subcontractor, and the CMAR's bid or proposal is determined by the Commission to provide the best value. TEX. GOV'T CODE ANN. § 2166.2532(i) (VERNON 2007).

The CMAR, the Commission, and its representative architect/engineer will review the bid and proposals and select the various trade contractors or subcontractors in a manner so as not to disclose the price of the bids or proposals to the public. All bids or proposals are to be made public after the award of the related contract, or seven days after the final selection of bids or proposals, whichever is later. TEX. GOV'T CODE ANN. § 2166.2532(j) (VERNON 2007).

The CMAR may recommend the acceptance of a particular bid or proposal, but the Commission has the right to require another bid or proposal be accepted. If the Commission overrides the recommendation of the CMAR in selection of any trade contractor or subcontractor, it must compensate the CMAR for any changes in price, time, guaranteed maximum cost, or any additional cost or risk associated with the Commission's choice of a trade contractor or subcontractor different from that recommended by the CMAR. TEX. GOV'T CODE ANN. § 2166.2532(k) (VERNON 2007).

The CMAR contracts directly with the selected trade contractors and subcontractors. If any trade contractor or subcontractor defaults the CMAR may complete the work itself, without advertising for completion bids, or may select a replacement trade contractor or subcontractor. TEX. GOV'T CODE ANN. § 2166.2532(l) (VERNON 2007).

If no fixed contract amount or guaranteed maximum price has been determined when the CMAR's contract is executed, the performance and payment bonds shall be in the amount of the estimated budget of the project as set out in the RFP or RFQ. The CMAR must deliver the required bonds not later than the tenth day after the CMAR executes the contract unless the CMAR furnishes a bid bond or other financial security acceptable to the commission to ensure the CMAR will provide the performance and payment bonds once the price is fixed. TEX. GOV'T CODE ANN. § 2166.2532(m) (VERNON 2007).

Universities may utilize this APD method and will generally use the same procedures as described above. However, in the case of the universities, it will be the board or the board's designee that will make the decisions rather than the Commission. TEX. EDUC. CODE ANN. § 51.782 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

The provisions of HB 1886 amended § 271.118 of the TEXAS LOCAL GOVERNMENT CODE to allow the CMAR method to be utilized for both vertical and horizontal construction projects. There is no difference in the procedures that the GE must follow in awarding a contract for a vertical or horizontal construction project.

In the CMAR method, the CMAR assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price in the same manner as a general contractor; but also provides consultation to the GE regarding construction during and after the design of the facility. TEX. LOC. GOV'T CODE ANN. § 271.118(b) (VERNON 2007). The GE must, prior to or concurrently with selecting a

CMAR, select or designate an architect or engineer who will be responsible for the preparation of the design and construction documents for the project. This architect or engineer, if not a full-time employee of the municipality, must be selected according to §2254.004 of the TEXAS GOVERNMENT CODE. The GE's architect/engineer may not serve, alone or in combination with another, as the CMAR unless he or she is also chosen to act as CMAR under a separate or concurrent selection process. TEX. LOC. GOV'T CODE ANN. § 271.118(c) (VERNON 2007). The GE must provide for inspection, testing, and verification required for its acceptance of the work independently of the CMAR. Those testing services shall be selected by the GE according to §2254.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE ANN. § 271.118(d) (VERNON 2007).

The CMAR is selected according to either a one-step or a two-step process. In the one-step selection process, the GE issues a RFP. This RFP should include general information on the project site, scope, schedule, selection criteria and relative weighting of selection criteria, estimated budget, time/place for receipt of the proposal, whether a one or two-step selection process will be used, and other information that would assist the GE in its selection of a CMAR. In the one-step process, the GE may request, as part of the requested proposals, information regarding proposed fees and prices for the fulfillment of the general conditions. In other words, both qualifications and pricing are evaluated in one step if a one step process is selected at the outset. TEX. LOC. GOV'T CODE ANN. § 271.118(e) (VERNON 2007).

In the two-step selection process, the GE first produces a RFQ, which is identical to the RFP as described above in the one-step process, except that no

cost or price information may be requested of offerors in the first step. In the second step, the GE selects a maximum of five offerors to provide additional information, which may at this step include proposed fees and prices for the completion of the CMAR's general conditions. This process is similar to the two-step method for selecting a design-build firm. TEX. LOC. GOV'T CODE ANN. § 271.118(e) (VERNON 2007).

In both the one-step and two-step processes, the GE must evaluate and rank the offers according to its published selection criteria within 45 days of their being opened. All proposals must be publicly opened and read aloud, including pricing information included in the proposal at the appropriate step. TEX. LOC. GOV'T. CODE ANN. § 271.118(f) (VERNON 2007). The GE then selects the proposal that offers the best value according to the published selection criteria, and the ranking evaluation. Following the selection of the offeror that offers the best value, the contract negotiation process begins. The GE then negotiates first with the selected offeror. If the two parties are unable to reach an agreement, the GE is to give formal written notice to that offeror that negotiations are ended and then may negotiate with the next ranked offeror. This continues until a contract is reached or negotiations with all ranked offerors ended. TEX. LOC. GOV'T CODE ANN. § 271.118(g) (VERNON 2007).

The CMAR is required to properly advertise, according to §271.025 of the TEXAS LOCAL GOVERNMENT CODE, for bids or proposals from trade contractors or subcontractors for all work except minor work that may be included in the general conditions. The CMAR administers this process, and selects the contract procurement method determined to provide the best value from among the various

methods available to the GE. The CMAR may seek to perform any part of the work on the project as long as the CMAR presents its bid or proposal in the same manner as any trade contractor or subcontractor, and the CMAR's bid or proposal is determined by the GE to provide the best value. TEX. LOC. GOV'T CODE ANN. § 271.118(h) (VERNON 2007).

The CMAR, the GE, and its representative architect/engineer will review the bid and proposals and select the various trade contractors or subcontractors in a manner so as not to disclose the price of the bids or proposals to the public. All bids or proposals are to be made public after the award of the related contract, or seven days after the final selection of bids or proposals, whichever is later. TEX. LOC. GOV'T CODE ANN. § 271.118(i) (VERNON 2007).

The CMAR may recommend the acceptance of a particular bid or proposal, but the GE has the right to require another bid or proposal be accepted. If the GE overrides the recommendation of the CMAR in selection of any trade contractor or subcontractor, it must compensate the CMAR for any changes in price, time, guaranteed maximum cost, or any additional cost or risk associated with the GE's choice of a trade contractor or subcontractor different from that recommended by the CMAR. TEX. LOC. GOV'T CODE ANN. § 271.118(j) (VERNON 2007).

The CMAR contracts directly with the selected trade contractors and subcontractors. If any trade contractor or subcontractor defaults the CMAR may complete the work itself, without advertising for completion bids, or may select a

replacement trade contractor or subcontractor. TEX. LOC. GOV'T CODE ANN. § 271.118(k) (VERNON 2007).

If no fixed contract amount or guaranteed maximum price has been determined when the CMAR's contract is executed, the performance and payment bonds shall be in the amount of the estimated budget of the project as set out in the RFP or RFQ. The CMAR must deliver the required bonds not later than the tenth day after the CMAR executes the contract unless the CMAR furnishes a bid bond or other financial security acceptable to the GE to ensure the CMAR will provide the performance and payment bonds once the price is fixed. TEX. LOC. GOV'T CODE ANN. § 271.118(l) (VERNON 2007).

Texas navigation districts and port authorities may utilize this method for both vertical and horizontal construction projects. The procedures that will be used to compete and award a construction contract will generally be the same as those used by a municipality. TEX. WATER CODE ANN. § 60.462 (VERNON 2007).

Texas school districts and junior colleges may only utilize this APD method for vertical construction projects. The procedures that will be used to compete and award a construction contract will be generally the same as those used by a municipality for vertical construction. TEX. EDUC. CODE ANN. § 44.038 (VERNON 2007).

f. Design-Build ("DB")

This APD method is the least used in Texas public construction projects, although it is used quite often in private commercial projects throughout the state. While GEs have been allowed to use DB for vertical construction projects for several years, HB

1886 provides new authority, Subchapter J, for the use of DB on horizontal construction projects. As you will see in the paragraphs below, the provisions of Subchapter J for horizontal construction projects is substantially different from the DB procedures for vertical construction projects.

(1) State agencies

For construction projects that fall under the purview of the Commission, the Commission may choose to use the DB method to provide it the best value for completing a particular construction project. TEX. GOV'T CODE ANN. § 2166.2531(b) (VERNON 2007). Under the DB method of construction contract procurement, the Commission awards a single contract to a firm who both designs and constructs the facility. A DB firm is defined as any legal entity or team that includes an architect or engineer, and a builder qualified to engage in the building construction in Texas. The architect/engineer member of the DB team is the architect/engineer of record for the project; however the agency or Commission must designate an independent architect or engineer to act as its representative for the duration of work on the facility. The agency or commission must select the architect or engineer in accordance with §2254.004 of the TEXAS GOVERNMENT CODE, if the agency or Commission does not employ as a full time employee, its own architect or engineer who can serve as that representative. TEX. GOV'T CODE ANN. § 2166.2531(c) (VERNON 2007).

Once the Commission has decided that the DB method is the best value, it must prepare a RFQ and a design criteria package. The design criteria package must specify the criteria for selection as well as the criteria the Commission considers

necessary to design the project. This may include such information as: a legal description of the project site, survey information, interior space requirements, special material requirements, material quality standards, conceptual criteria, special equipment requirements, cost/budget estimates, schedules, quality assurance and control requirements, site development requirements, applicable codes/ordinances, utility provisions, parking requirements, and other requirements as applicable. TEX. GOV'T CODE ANN. §§ 2166.2531(a)(3) and (d) (VERNON 2007).

The Commission is required to evaluate the RFQ responses and select a DB firm using a two-step process. Phase One consists of advertising for RFQ responses and providing the design criteria package for review to those parties who might be interested in providing a response to the RFQ. Once the RFQ responses are received, the Commission evaluates those RFQ responses. The Commission may evaluate the RFQ responses according to the following criteria: (1) offeror's experience; (2) technical competence; (3) capability to perform; (4) past performance of offeror's team and members thereof; and (5) other appropriate factors submitted by the offeror in response to the RFQ. The Commission may not consider cost-related or price-related evaluation factors during this first phase, nor should such information be requested or submitted. The DB teams who have provided responses to the RFQ have to certify to the Commission in this phase that each architect or engineer that is a member of its team was selected based on demonstrated competence and qualifications in the manner provided by §2254.004 of the TEXAS GOVERNMENT CODE. The Commission then selects no more



than five offerors to submit additional information and, if it so chooses, to interview for final selection. TEX. GOV'T CODE § 2166.2531(f)(2) (VERNON 2007).

Phase Two of the process is the ranking and selection of the successful offeror. The Commission evaluates and ranks the selected offerors on the basis of the criteria stated in the RFQ and the results of an interview. Additionally, the Commission may request information on demonstrated competence, safety & durability considerations, feasibility of project as proposed, ability of offeror to meet scheduling requirements, costing methodology, and other appropriate factors. The Commission then ranks the offerors according to the criteria in the RFQ, and selects the DB firm that offers the best value based on the published selection criteria and its ranking evaluations. TEX. GOV'T CODE ANN. § 2166.2531(f)(3) (VERNON 2007).

Following the selection of the DB firm that offers the best value, the contract negotiation process begins. The Commission negotiates first with the selected offeror. If the two parties are unable to reach an agreement, the Commission is to formally and in writing inform that offeror that negotiations are ended, and then may negotiate with the next offeror in the order of the selection ranking process from Phase Two. This continues until a contract is reached or negotiations with all ranked offerors ends. TEX. GOV'T CODE ANN. § 2166.2531(f)(3) (VERNON 2007).

Following selection and contract award, the chosen DB firm then completes the design, and submits all design elements to the Commission or its architect/engineer representative for review and determination of scope compliance. This may be done prior to or during construction. TEX. GOV'T CODE ANN. § 2166.2531(g)

(VERNON 2007). The Commission must contract for testing, inspection and verification necessary for acceptance of the facility independently of the DB firm. Testing services must be procured by the Commission in accordance with §2254.004 of the TEXAS GOVERNMENT CODE. TEX. GOV'T CODE ANN. § 2166.2531(i) (VERNON 2007). The DB firm has the responsibility to provide the Commission with a signed and sealed set of construction documents, (as-built drawings), at the conclusion of the construction. TEX. GOV'T CODE ANN. § 2166.2531(j) (VERNON 2007).

The DB firm's payment and performance bonds are not required to, and may not provide coverage for that portion of the DB contract that includes design services only. If no guaranteed maximum price or fixed price has been established when the contract is awarded, the performance and payment bonds are required to be in the penal sum of the estimated budget for the project as specified in the Design Criteria Package. The DB firm must deliver the performance and payment bonds not later than the 10<sup>th</sup> day after the firm executes the contract. However, if the DB firm provides a bid bond or other financial security acceptable to the Commission to ensure it will provide the performance and payment bonds, the delivery of those bonds can be postponed until a fixed or guaranteed maximum price is established. TEX. GOV'T CODE ANN. § 2166.2531(k) (VERNON 2007).

Universities may utilize this APD method and will use generally the same procedures as described above. However, in the case of the universities, it will be the board or the board's designee that will make the decisions rather than the Commission. TEX. EDUC. CODE ANN. § 51.780 (VERNON 2007).

(2) Counties, Municipalities and Other Local Governmental Entities

(a) Vertical Construction

Under the DB APD method of construction, the GE awards a single contract to a firm who both designs and constructs the facility. A DB firm is defined as any legal entity or team that includes an architect or engineer, and a builder qualified to engage in the building construction in Texas. The architect/engineer member of the DB team is the architect/engineer of record for the project, however the GE must designate an independent architect or engineer to act as its representative for the duration of work on the facility. The GE must select the architect or engineer in accordance with §2254.004 of the TEXAS GOVERNMENT CODE, if the GE does not employ as a full time employee, its own architect or engineer who can serve as that representative. TEX. LOC. GOV'T CODE ANN. § 271.119(b) (VERNON 2007). The DB team contracts directly with the trade contractors or subcontractors, and assumes complete responsibility for both the design and construction of the project.

Once a GE has decided that the DB APD method is the best value method, it must prepare a RFQ and a design criteria package. The design criteria package must specify the criteria for selection as well as the criteria the GE considers necessary to design the project. This may include such information as: a legal description of the project site, survey information, interior space requirements, special material requirements, material quality standards, conceptual criteria, special equipment requirements, cost/budget estimates, schedules, quality assurance and control requirements, site development requirements, applicable codes/ordinances, utility

provisions, parking requirements, and other requirements as applicable. TEX. LOC. GOV'T CODE ANN. § 271.111(5) (VERNON 2007).

The procedure for the selection of a Design-Builder is a two-step process. Phase One consists of evaluating the responses to the RFQ. After preparing its RFQ and design criteria package, and advertising for proposals, the GE evaluates statements of qualifications submitted by the potential offerors. The GE may evaluate qualifications according to the following criteria: (1) offeror's experience; (2) technical competence; (3) capability to perform; (4) past performance of offeror's team and members thereof; and (5) other appropriate factors submitted by the offeror in response to the RFQ. The GE may not consider cost-related or price-related evaluation factors during this first phase, nor should such information be requested or submitted. The DB offerors have to certify to the GE in this phase that each architect or engineer that is a member of the DB team was selected based on demonstrated competence and qualifications in the manner provided by §2254.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE § 271.119(d)(1) (VERNON 2007). The GE then selects no more than five offerors to submit additional information and, if it so chooses, to interview for final selection. TEX. LOC. GOV'T CODE ANN. § 271.119(d)(1) (VERNON 2007).

Phase Two of the process is the ranking and selection of the successful offeror. The GE evaluates and ranks the selected offerors on the basis of the criteria stated in the RFQ and the results of an interview. Additionally, the GE may request information on demonstrated competence, safety & durability considerations, feasibility of project as proposed, ability of offeror to meet scheduling requirements,

costing methodology, and other appropriate factors. The GE then ranks the offerors according to the criteria in the RFQ, and selects the DB firm that offers the best value based on the published selection criteria and its ranking evaluations. TEX. LOC. GOV'T CODE ANN. § 271.119(d)(2) (VERNON 2007).

Following the selection of the DB firm that offers the best value, the contract negotiation process begins. The GE negotiates first with the selected offeror. If the two parties are unable to reach an agreement, the GE is to inform that offeror in writing that negotiations are ended, and then may negotiate with the next offeror in the order of the selection ranking process from Phase Two. This continues until a contract is reached or negotiations with all ranked offerors ends. TEX. LOC. GOV'T CODE ANN. § 271.119(d)(2) (VERNON 2007).

Following selection and contract award, the chosen DB firm then completes the design, and submits all design elements to the GE or its architect/engineer representative for review and determination of scope compliance. This may be done prior to or during construction. TEX. LOC. GOV'T CODE ANN. § 271.119(e) (VERNON 2007). The GE must contract for testing, inspection and verification necessary for acceptance of the facility independently of the DB firm. Testing services must be procured in accordance with §2254.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE ANN. § 271.119(g) (VERNON 2007). The DB firm has the responsibility to provide the GE with a signed and sealed set of construction documents, (as-built drawings), at the conclusion of the construction. TEX. LOC. GOV'T CODE ANN. § 271.119(h) (VERNON 2007).

The DB firm's payment and performance bonds are not required to, and may not provide coverage for that portion of the DB contract that includes design services only. If no guaranteed maximum price or fixed price has been established when the contract is awarded, the performance and payment bonds are required to be in the penal sum of the estimated budget for the project as specified in the Design Criteria Package. The DB firm must deliver the performance and payment bonds not later than the 10<sup>th</sup> day after the firm executes the contract. However, if the DB firm provides a bid bond or other financial security acceptable to the GE to ensure it will provide the performance and payment bonds, the delivery of those bonds can be postponed until a fixed or guaranteed maximum price is established. TEX. LOC. GOV'T CODE ANN. § 271.119(i) (VERNON 2007).

Texas school districts and junior colleges may only utilize this APD method for vertical construction projects. The procedures that will be used to compete and award a construction contract will be generally the same as those used by a municipality for vertical construction. TEX. EDUC. CODE ANN. § 44.036 (VERNON 2007).

(b) Horizontal Construction

HB 1886 was passed by the Texas Legislature to provide authority for GEs to utilize additional APD methods on civil works projects. HB 1886 makes some changes to existing Subchapter H provisions (for RFCSP and CMAR APD methods) and establishes a new Subchapter J - Design-Build Procedures for Certain Civil Works Projects, of the TEXAS LOCAL GOVERNMENT CODE. While there are no restrictions on the use of RFCSP or CMAR APD methods for horizontal construction

projects, you will see that there are a number of restrictions or limitations placed on which GEs may use the DB APD method and the number of horizontal construction projects on which the DB APD method may be utilized.

There are several definitions that are important to understanding the parameters to this new APD authority. The most two most important definitions to understand are “Civil works projects” and “Local governmental entity.” A “Civil works project” is defined to mean roads, streets, bridges, utilities, water supply plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, airport runways and taxiways, storm drainage and flood control projects, or transit projects; types of projects or facilities related to those just enumerated and associated with civil engineering construction; and buildings or structures that are incidental to projects or facilities that are described in this definition. TEX. LOC. GOV'T CODE ANN. § 271.181(2) (VERNON 2007). A “Local governmental entity” (“LGE”) includes municipalities, counties, river authorities, defense base development authorities, municipally owner water utilities with separate governing boards, or any other special district or authority authorized by law. The definition specifically excepts out coverage for regional toll way authorities created under Chapter 366, TEXAS TRANSPORTATION CODE; a regional mobility authority created under Chapter 370, TEXAS TRANSPORTATION CODE; and a water district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, with a population of less than 50,000. TEX. LOC. GOV'T CODE ANN. § 271.181(6) (VERNON 2007).

While this new legislation has an effective date of September 1, 2007, it has provisions that phase-in its applicability to various LGEs based on population. Originally, the new provision provided that before September 1, 2009 only a LGE, with a population of 500,000 or more within its geographic boundaries or service area, can use the DB APD method. On or after September 1, 2009 and before September 1, 2011, a LGE with a population of 100,000 or more can use the DB APD method. TEX. LOC. GOV'T CODE ANN. § 271.182 (VERNON 2007). The 2009 Legislature passed Senate Bill 229 which removed the restriction for phased-in use by LGEs between 100,000 and 500,000 making DB APD available for immediate use. However, this means that the DB APD method cannot be used by a LGE with a population of less than 100,000 under the current Subchapter J language. While this continues to be a restriction, it is important to remember that this is the only APD method that was limited in this manner and LGEs under 100,000 may utilize the RFCSP or CMAR methods without these restrictions.

Contracts that are issued by LGEs under the provisions of Subchapter J for a DB construction project may cover only a single integrated project. A LGE may not enter into a contract for an aggregated project at multiple locations. TEX. LOC. GOV'T CODE ANN. § 271.185(b) (VERNON 2007). There are a couple of exceptions to this single integrated project rule. First, a metropolitan transit authority created under Chapter 451, TEXAS TRANSPORTATION CODE may contract for a project involving a bus rapid transit system which can be considered a single integrated project. Second, a water



treatment plant, including a desalination plan that includes treatment facilities, well fields, and pipelines can be considered a single integrated project.

LGEs are required to advertise or publish notice of requests for bids, proposals or qualifications in any manner prescribed by law that applies to the LGE, to include the time and place that bids, proposals and RFQ responses shall be received and opened. TEX. LOC. GOV'T CODE ANN. § 271.184 (VERNON 2007). LGEs are also required to make a determination that use of the DB APD method is appropriate for the project. The minimum criteria that a LGE must use in making this determination is: (1) extent to which GE can adequately define the project requirements; (2) the time constraints for delivery of the project; (3) the ability to ensure that a competitive procurement can be held; and (4) the capability of the entity to manage and oversee the project, including the availability of experienced personnel or outside consultants who are familiar with DB method. This determination must be made before the RFQ is published. TEX. LOC. GOV'T CODE ANN. § 271.185(c)-(d) (VERNON 2007).

The legislature also placed a limit on the number of DB contracts that can be awarded or DB projects that can be undertaken by a LGE based upon the population size served by the LGE. Senate Bill 229 did not make any changes to this portion of the statute. During the first four years, a LGE with population of 500,000 or more may award 3 DB contracts/projects in any fiscal year. TEX. LOC. GOV'T CODE ANN. § 271.186(a)(1) (VERNON 2007). After the first four years, a LGE with population of 500,000 or more may award 6 DB contracts/projects in any fiscal year. TEX. LOC. GOV'T CODE ANN. § 271.186(b)(1) (VERNON 2007). For a LGE with a

population of 100,000 or more and less than 500,000, the LGE may award 2 DB contracts/projects in any fiscal year. TEX. LOC. GOV'T CODE ANN. § 271.186(a)(2) (VERNON 2007). After the first four years, a LGE with population of 100,000 or more and less than 500,000 may award 4 DB contracts/projects in any fiscal year. TEX. LOC. GOV'T CODE ANN. § 271.186(b)(2) (VERNON 2007).

Within these limitations is another limitation which applies only to a municipally owned water utility ("MOWU") with a separate governing board appointed by the governing body of a municipality with a population of more than 500,000. In the first four years, a MOWU may enter into 1 DB contract/project independent of the municipality in any fiscal year. Any additional DB contracts/projects come from the limits placed upon the municipality and the number of projects is limited to a total not to exceed that available to the municipality. TEX. LOC. GOV'T CODE ANN. § 271.186(3) (VERNON 2007). After the first four years, a MOWU may enter into 2 DB contract/project independent of the municipality in any fiscal year. Any additional DB contracts/projects come from the limits placed upon the municipality and the number of projects is limited to a total not to exceed that available to the municipality.

Subchapter J is silent as to whether or not a MOWU which serves more than 100,000 and less than 500,000 may use the DB APD method for any civil works contracts or projects. Therefore, it appears that any MOWU that serves more than 100,000 and less than 500,000 may not use the DB APD method under its own authority. One could argue that a MOWU could utilize DB APD method by using one of the contract/project allocations provided to the municipality. Again, while the DB APD

method has limitations, there are no such limitations on the MOWU in utilizing the RFCSP or CMAR APD methods to complete horizontal construction projects.

The LGE is required to select or designate an engineer who is independent of the DB firm to act as its representative for the procurement process and throughout the project. If the engineer is not a full-time employee or staff member of the LGE, then the engineer shall be selected on the basis of demonstrated competence and qualifications as provided by Section 2252.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE § 271.187 (VERNON 2007).

Next, the LGE must prepare a RFQ and a design criteria package. The LGE will prepare a RFQ that includes: information on the civil works project site, project scope, project budget, project schedule; selection criteria and weighting factors and other information. TEX. LOC. GOV'T CODE § 271.189 (VERNON 2007). The LGE will also prepare a design criteria package which may include: budget or cost estimates, information on the site, performance criteria, special materials requirements, initial design calculations, known utilities, capacity requirements, quality assurance and quality control requirements, the type, size, and location of structures, and notice of any ordinances/rules, or goals adopted by the LGE relating to HUBs. TEX. LOC. GOV'T CODE § 271.190 (VERNON 2007).

The procedure for the selection of a DB firm is a two-step process. Phase One consists of advertising and evaluation of the responses to the RFQ. The LGE may evaluate qualifications according to the following criteria: (1) offeror's experience; (2) technical competence; (3) capability to perform; (4) past performance of

offeror's team and members thereof; and (5) other appropriate factors submitted by the offeror in response to the RFQ. The LGE may not consider cost-related or price-related evaluation factors during this first phase, nor should such information be requested or submitted. The DB offerors have to certify to the LGE in this phase that each architect or engineer that is a member of the DB team was selected based on demonstrated competence and qualifications in the manner provided by §2254.004 of the TEXAS GOVERNMENT CODE. TEX. LOC. GOV'T CODE § 271.191 (VERNON 2007). Unlike the selection process for DB vertical construction projects, the LGE is not restricted in the number of offerors that it may select to proceed to the next phase of the evaluation process. The LGE may select any number of offerors to submit additional information and, if it so chooses, to interview for final selection. TEX. LOC. GOV'T CODE ANN. § 271.191(c) (VERNON 2007).

In Phase Two of the selection process, the LGE will select the successful DB firm by using a combination of technical and costs proposals. TEX. LOC. GOV'T CODE ANN. § 271.192 (VERNON 2007). Both the technical and cost proposals are considered to be part of the RFP response and have to be submitted within no later than the 180<sup>th</sup> day after the public solicitation of the RFP. The technical and cost proposals are required to be received at the same time. However, the cost proposal will remain sealed in an envelope until after the evaluation and scoring of the technical proposal. The RFP is required to contain: the design criteria package; if the project site is known, geotechnical baseline report or other information concerning minimum geotechnical design parameters; detailed instructions for preparing the technical

proposals, including a description of the form and level of completeness of drawings expected; and the relative weighting of the technical and cost proposals. TEX. LOC. GOV'T CODE ANN. § 271.193(a) (VERNON 2007).

The technical proposal must address project approach, anticipated problems, proposed solutions, ability to meet schedules, conceptual engineering design and any other information requested by LGE. The technical proposal will be opened first, evaluated and scored. Then the cost proposal will be opened evaluated and scored. TEX. LOC. GOV'T CODE ANN. § 271.193(d)-(e) (VERNON 2007). After selecting the highest ranked offeror, LGE will then attempt to negotiate a contract. If unable to successfully negotiate a contract, the LGE will proceed to the next ranked firm and so on until the list is exhausted or a contract is negotiated. TEX. LOC. GOV'T CODE ANN. § 271.194 (VERNON 2007). It is important that the LGE and DB firm be aware of the fact that in using the DB APD method for civil work projects, the LGE will assume certain risks as stated in this section to include: scope changes and modifications requested by LGE, unknown differing site conditions (unless otherwise provided), regulatory permitting, and natural disasters and other force majeure events (unless otherwise provided). TEX. LOC. GOV'T CODE ANN. § 271.195 (VERNON 2007).

Another unique provision to Subchapter J is the requirement to pay stipends in certain situations. The LGE may offer a stipend to any of the unsuccessful offerors that responded to the RFP in exchange for the right to use work product submitted by the unsuccessful offerors. The stipend must be one-half of one percent of the contract. If the stipend offer is accepted and paid, LGE may make use of

any work product contained in proposal. Unless a stipend is paid by the LGE, the unsuccessful offeror retains all rights to the work product submitted in the proposal. The information contained in the unsuccessful offeror's proposal is confidential and the LGE may not release or disclose to any person (including successful offeror). Failure to follow this provision renders the contract void and the LGE is liable to any unsuccessful offeror whose work product was used for one-half of the costs savings associated with the unauthorized use of the work product. TEX. LOC. GOV'T CODE ANN. § 271.196 (VERNON 2007).

Once the DB firm has been selected, all design elements will be submitted for review and determination of scope compliance to LGE before or concurrently with construction. TEX. LOC. GOV'T CODE ANN. § 271.197 (VERNON 2007). The DB firm is required to supply to the LGE with a record set of construction documents for the Project. TEX. LOC. GOV'T CODE ANN. § 271.198 (VERNON 2007).

As with other statutes authorizing the use of the DB method, this new law addresses when the performance and payment bonds must be provided to the LGE. Performance and payment bonds are not required for the portion of contract that is design services only. If a fixed contract amount or guaranteed maximum price has not been determined at the time of contract award, the bonds delivered must be in an amount equal to the construction budget, if commercially available and practical, as specified in the design criteria package. The selected DB firm is required to deliver the bonds not later than the 10th day after the contract execution unless a bid bond or other financial security is provided. TEX. LOC. GOV'T CODE ANN. § 271.199 (VERNON 2007).

Texas navigation districts and port authorities may utilize the DB APD method for both vertical and horizontal construction projects. The procedures that will be used to compete and award a construction contract are a sort of hybrid between the procedures used by GEs for vertical and horizontal construction projects. The use of engineers and independent inspection and testing services is the same. The selection criteria is the same. The requirement to provide drawings for review for compliance and submission of a final “as-built” set of drawings is the same. The requirements for providing a performance and payment bond are the same. There are some differences. For example, navigation districts and port authorities are required to utilize a two-step process for selection of a DB firm. However, the navigation districts and port authorities are limited to selecting no more than five offerors at the end of the Phase One to proceed on to Phase Two for all projects without regard to whether they are vertical or horizontal construction projects. TEX. WATER CODE ANN. § 60.460 (VERNON 2007).

g. Job Order Contract (“JOC”)

This APD method may currently be utilized by universities, school districts and junior colleges and all GEs that fall under the provisions of Subchapter H of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE. The procedures for the use of this APD method are generally the same for each GE. State agencies that procure services through the Commission may be able to take advantage of a purchasing/contracting mechanism known as the “multiple award contract schedule” to purchase some of the same type of services that are covered under the JOC APD method. The procedures for

the Commission's use of the multiple award contract schedule are set forth in Subchapter I of Chapter 2155 the TEXAS GOVERNMENT CODE and will not be covered in this paper.

The JOC APD method for procurement may be used when the contract is for the minor construction, repair, rehabilitation or alteration of a facility; the work called for by the contract is of a recurring nature, but delivery times and quantities are indefinite; and the orders are awarded substantially on the basis of pre-described and pre-priced tasks (e.g., unit prices). Examples of the type of work that would qualify for job order procurement would be ceiling tile replacement, door hanging, sidewalk construction, and repainting. TEX. LOC. GOV'T CODE ANN. §§ 271.120(a) and (b)(1)-(2) and TEX. EDUC. CODE ANN. §§ 44.041(a) and 51.784(a) (VERNON 2007).

The GE must properly advertise for and publicly open sealed proposals for JOCs. TEX. LOC. GOV'T CODE ANN. § 271.120(c) and TEX. EDUC. CODE ANN. §§ 44.041(c) and 51.784(c) (VERNON 2007). The base term of the JOC is for any period plus any renewal option set forth in the RFP. If the GE does not advertise that term, it cannot exceed two years, and is not renewable without further advertisement and solicitation of proposals. TEX. LOC. GOV'T CODE ANN. § 271.120(h) and TEX. EDUC. CODE ANN. §§ 44.041(h) and 51.784(h) (VERNON 2007).

The GE may award JOCs to one or more of the offerors in the same solicitation. It is not required to award a contract to whoever submits the lowest rates. TEX. LOC. GOV'T CODE ANN. § 271.120(e) and TEX. EDUC. CODE ANN. §§ 44.041(e) and 51.784(e) (VERNON 2007). Instead, the GE may award on the basis of a combination of price and other factors including: (1) experience; (2) past performance; (3) proposed



personnel; (4) methodology; (5) safety record, and (6) other appropriate factors. TEX. LOC. GOV'T CODE ANN. § 271.120(d) and TEX. EDUC. CODE ANN. §§ 44.041(d) and 51.784(d) (VERNON 2007).

Under a JOC, specific work projects are authorized by the execution of a job order by the GE and the contractor. The order may be a fixed price, lump sum order or a unit price order based on estimated quantities. TEX. LOC. GOV'T CODE ANN. § 271.120(f) and TEX. EDUC. CODE ANN. §§ 44.041(f) and 51.784(f) (VERNON 2007). If the amount or estimated amount of the job order is in excess of \$25,000, then the contractor must post a payment bond on the job order. If the job order is \$100,000 or more, a performance bond is also required. Note, however, that the bonds are provided on each specific job order and not on the overall job order contract. Given the nature of job order work, it is possible that many job orders may not be of a size that would require performance bonds. However, it also means that a contractor may be required to post multiple bonds for multiple job orders during the same time period.

HB 1886 makes some minor changes to the wording of § 271.120(i) of the TEXAS LOCAL GOVERNMENT CODE and §§ 44.041(i) and 51.784(i) of the TEXAS EDUCATION CODE, but it does not address the use of JOC APD method for horizontal construction projects. Therefore, it would appear at this time that they cannot be used for horizontal construction projects as JOCs are still limited by the definition of the term "facility" found in Subchapter H. Therefore, JOCs can currently only be utilized for those projects associated with vertical construction.

However, this does not apply to navigation districts and port authorities. Both of these types of entities may utilize JOCs for either vertical or horizontal construction projects. The procedures that will be utilized by navigation districts and port authorities will generally be the same as those utilized by municipalities for vertical construction projects. TEX. WATER CODE ANN. § 60.464 (VERNON 2007).

***D. Pre-Bid Conferences***

In most public construction competitions and procurements, the GE or its agents will establish a date for a pre-bid conference in the bidding documents or RFP documents. This pre-bid conference will normally be held by the GE to address any questions concerning the bidding documents or RFP documents. These pre-bid conferences can also be used to clarify issues or address questions that the bidders or offerors may have concerning the project plans or specifications. Pre-bid conferences may be held before or after a site visit depending on the type of project being undertaken. Pre-bid conferences are at the discretion of the GE. TEX. GOV'T CODE ANN. § 2166.304; TEX. LOC. GOV'T CODE ANN. §§ 262.0256 and .027; TEX. LOC. GOV'T CODE ANN. § 271.0565; and TEX. WATER CODE ANN. § 49.271(d) (VERNON 2007).

***E. Electronic Bids***

1. State Agencies

Currently, statutory authority for use of electronic bids by state agencies is limited and can only be found in statutes governing the Texas Department of Transportation and Regional Transportation Authorities. TEX. GOV'T CODE ANN. §§ 223.013 and 452.106(c) (VERNON 2007). The Texas Facilities Commission, Division of Facilities Design and

Construction Management is authorized to establish procedural rules for any APD method other than competitive sealed bidding.

2. Counties

Counties have been provided the authority to accept bids and proposals in either hard-copy format or by electronic transmission. The option of utilizing electronic transmissions is limited to use for procurements under Chapter 262, Subchapter C of the TEXAS LOCAL GOVERNMENT CODE. Regardless of whether a county determines that it will use electronic transmission for a particular project, the county cannot reject any bids that are submitted by hard-copy. TEX. LOC. GOV'T CODE ANN. § 262.0235 (VERNON 2007). The county purchasing agent must adopt rules in conformance with Section 262.011(o) to ensure the identification, security, and confidentiality of electronic bids or proposals before utilizing electronic transmission for any project. TEX. LOC. GOV'T CODE ANN. § 262.0235 (VERNON 2007).

3. Municipalities

Municipalities have been provided the authority to accept bids and proposals in either hard-copy format or by electronic transmission. The option of utilizing electronic transmissions may be utilized for procurements under Chapter 271, Subchapters A and B of the TEXAS LOCAL GOVERNMENT CODE. Regardless of whether a municipality determines that it will use electronic transmission for a particular project, the municipality cannot reject any bids that are submitted by hard-copy. TEX. LOC. GOV'T CODE ANN. § 271.0245 (VERNON 2007). The governing body of the municipality must adopt rules to ensure the identification, security, and confidentiality of electronic bids or

proposals before utilizing electronic transmission for any project. TEX. LOC. GOV'T CODE ANN. § 252.0415 (VERNON 2007).

#### 4. School Districts

In 2009, School Districts were provided the authority to accept bids and proposals in either hard-copy format or by electronic transmission. The option of utilizing electronic transmissions may be utilized for procurements under Section 44.0313 of the TEXAS EDUCATION CODE. The new section does not address whether a school district may reject any bids that are submitted by hard-copy. The board of trustees of the school district must adopt rules to ensure the identification, security, and confidentiality of electronic bids or proposals before utilizing electronic transmission for any project. TEX. EDUCATION CODE § 44.0313(a) (VERNON 2009).

### ***F. Socio-Economic Requirements***

#### 1. Historically Underutilized Businesses

State agencies that enter into construction contracts are required to make a good faith effort to increase the construction contract awards that the agency expects to make during a physical year to “historically underutilized businesses” (hereinafter referred to as “HUBs” based upon rules adopted by the Texas Comptroller who replaced the General Services Commission as the responsible agency for implementing HUB programs. TEX. GOV'T CODE ANN. §§ 2161.0011 and .182 (VERNON 2007).

The term HUB is defined to mean:

(1) a corporation formed to the purpose of making a profit in which at least 51 percent of all classes of the shares of stock or other equitable securities are

owned by one or more persons who: (i) are economically disadvantaged because of their identification as members of certain groups, including Black Americans, Hispanic Americans, women, Asian Pacific Americans, and Native Americans, and have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control; and (ii) have a proportionate interest and actively participate in the corporation's control, operation, and management;

(2) a sole proprietorship created for the purpose of making a profit that is 100 percent owned, operated, and controlled by a person described in (1)(i);

(3) a partnership formed for the purpose of making a profit in which at least 51 percent of the assets and interest in the partnership is owned by one or more persons who: (i) are described in (1)(i); and (ii) have a proportionate interest and actively participate in the partnership's control, operation, and management;

(4) a joint venture in which each entity in the joint venture is a HUB;

(5) a supplier contract between a HUB and a prime contractor under which the HUB is directly involved in the manufacture or distribution of supplies or materials or otherwise warehouses and ships the supplies. TEX. GOV'T CODE ANN. § 2161.001 (VERNON 2007).

To qualify as a HUB, the business must also meet the following specific requirements: (1) as a general contractor, it must perform all estimating and contract administration functions with its employees; (2) as a subcontractor, it must perform all of its work with its own employees, or, if the subcontractor uses an employee leasing firm for the purpose of providing salary and benefit administration, with employees who in all

other respects are supervised and perform on the job as if they were employees of the subcontractor; and (3) a prime contractor who intends to subcontract specific trades may do so if the dollar value of the subcontracts does not exceed 75 percent of the original value of the contract, and all work in the trade of the prime contractor is accomplished by employees of the contractor, or, if the prime contractor uses an employee leasing firm for the purposes of salary and benefit administration, with employees who in all other respects are supervised and perform on the job as if they were employees of the prime contractor. A person who falsely claims HUB status or a general contractor who knowingly hires a person falsely claiming HUB status is liable for civil penalties.

In legislation enacted in 1999, the General Services Commission was mandated to design a mentor-protégée program to foster long term relationships between prime contractors and HUBs and to increase the ability of HUBs to contract with the State and to receive state subcontracts. TEX. GOV'T CODE ANN. § 2161.065 (VERNON 2007). Each state agency that had a biennial appropriation exceeding \$10 million was to implement that program. Also, beginning with contracts entered into as a result of requests for bids or solicitations issued after April 1, 2000, each state agency, before entering a contract exceeding \$100,000 must determine whether there will be subcontracting opportunities under the contract and, if so, include a HUB subcontracting plan requirement in the bid documents obligating the contractor to make a good faith effort to implement the plan it submits as part of its bid or proposal. Contractors who fail to implement the plan in good faith may be barred from further contracting with the agency. TEX. GOV'T CODE ANN. § 2161.251 *et seq* (VERNON 2007).

Counties are authorized to develop programs to improve the extent to which minority and women-owned businesses (defined to include businesses more than 50 percent of which are owned and controlled in management and daily operations by minorities and women, respectively) are awarded county contracts. Such programs may include the establishment of a contract percentage goal for those businesses. TEX. LOC. GOV'T CODE ANN. § 381.001 (VERNON 2007).

Municipalities have been statutorily authorized to develop programs to increase the participation of minority and women-owned businesses in public contract awards. TEX. CIV. PRAC. & REM. CODE ANN. § 106.001(C) (VERNON 2007).

## 2. Small Businesses

Texas has a small business participation assistance program for state construction projects exceeding \$1 million. The program is designed to increase small business participation on such projects by providing technical assistance and financing assistance (including the centralized purchasing of workers' compensation insurance, other insurance, and payment and performance bonds). TEX. GOV'T CODE ANN. § 2166.259 (VERNON 2007).

## 3. Regional Certification Programs

Texas statutes allow any combination of counties, municipalities, special districts, or other political subdivisions, by ordinance, resolution, rule, order, or other means, may agree to establish a regional business certification program to be used in connection with their purchasing program. A consolidated entity will administer the program and may adopt rules, regulations, or other provisions designed to streamline and centralize the

certification process for qualified business, including small and emerging businesses, that allow certified businesses to participate in the contracting and procurement process of any member of the regional certification programs. An example of this type of program is the program run by the North Central Texas Regional Certification Agency which is established by Cities of Dallas, Fort Worth, Lancaster, Mesquite; Dallas and Tarrant County; Dallas-Fort Worth International Airport; Dallas Area Rapid Transit; Fort Worth Transportation Authority; North Texas Tollway Authority; Dallas County Community College District; Tarrant County College District; Dallas County Schools; Dallas Independent School District; and Tarrant Regional Water District. TEX. LOC. GOV'T CODE ANN. § 280.004 (VERNON 2007).

#### 4. In-State Preferences

For purposes of the nonresident bidder statute, GEs in Texas may not award a contract to a nonresident bidder unless the nonresident bidder underbids the lowest bid submitted by a responsible Texas resident bidder by an amount that is not less than the amount by which a Texas resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located. TEX. GOV'T CODE ANN. § 2252.002 (VERNON 2007). Texas resident bidder is defined as a bidder who principal place of business is in Texas, including a bidder whose ultimate parent company or majority owner has its principal place of business in Texas. TEX. GOV'T CODE ANN. § 2252.001(4) (VERNON 2007). The Comptroller of the State of Texas is required to annually publish a list in the Texas Register of all states that regulate the award of public contracts to a bidder whose



principal place of business is not located in that state and a citation reference to the most recent law or regulation relating to the evaluation of a bid and award of a contract to a bidder whose principal place of business is not located in that state.

Section 271.9051 of the TEXAS LOCAL GOVERNMENT CODE gives municipalities with a population less than 250,000 the right to give preference to a bidder who is a “resident of the municipality” and whose bid is within five (5) percent of the lowest bid. House Bill 2082, amends this provision and limits the applicability of this provision to contracts which call for an expenditure of less than \$100,000.

5. Preference for American Steel and Texas and United States Products

Highway construction contracts awarded by the Texas Department of Transportation provide for the same preference for steel and steel products that are required by the federal Buy American Act, whether or not federal funds are involved in the project. TEX. TRANSP. CODE ANN. § 223.045 (VERNON 2007).

Contracts that are awarded by certain GEs for landscaping services may require that preference be given to Texas grown vegetation or services provided by a Texas bidder. TEX. EDUC. CODE ANN. § 44.042 and TEX. GOV'T CODE ANN. § 2155.444 (VERNON 2007).

6. Prevailing Wage Requirements

Texas has a state version of the federal Davis-Bacon Act requiring laborers on public construction projects to be paid no less than the rate of per diem wages, including rates for holiday and overtime work, for work of a similar character generally prevailing in the locality in which the work is to be performed. GEs must conduct a survey to

determine the prevailing construction wages in the involved locality or, in lieu of a survey, may adopt a wage rate determination made by the U.S. Department of Labor pursuant to the Davis-Bacon Act if such determination is less than three years old. Contractors and subcontractors violating the wage requirements can be fined a statutorily predetermined amount per day for each violation. TEX. GOV'T CODE ANN. § 2258.001-.058 (VERNON 2007).

6. Texas Architectural Barriers Act

The Texas Architectural Barriers Act authorizes the promulgation of standards to eliminate, insofar as possible, unnecessary barriers encountered in public buildings by persons with disabilities. These standards apply to all commercial buildings, not just those buildings which fall within the definition of "public accommodations" under the federal Americans with Disabilities Act. CHAPTER 469, TEX. GOV'T CODE ANN. (VERNON 2007).

**G. CONCLUSION**

Since the last arguably perfect construction project involved the construction of the Garden of Eden, it is inevitable that problems will arise on a construction project. However, the ultimate success of the project depends in large part on proper selection of the right APD method for that particular construction project. The GE's vision, understanding and planning are important elements in insuring that the proper APD method is selected. A proper evaluation of the project and the various APD methods that could be used, should allow the GE to choose the method that will lead to the quick, timely and relatively problem free completion of the project. Should the GE fail to give

adequate attention to the proper evaluation and selection of an APD method, or the selection of the contractor that will carry out the construction of the project, the opportunity for many additional and likely unnecessary problems to arise on the project will increase.