

Public Contracts and Procurement Regulations

Public Construction Contracts

**Texas City Attorneys Association
Texas Municipal League Convention
Fort Worth
October 22, 2009**



1

Public Construction Projects Overview

- **Introduction of APD to Texas Public Projects**
- **Professional Services Procurement Act**
- **Initial Considerations For Use Of APD**
- **APD Methods**

2

Public Construction Projects ***Introduction of APD to Texas Public Projects***

- Historically, most GEs have been required to award construction contracts by competitive bidding to lowest responsible bidder
- 1995 – APD for schools and institutions of higher education
- 2001 – APD for cities, counties and river authorities to use APD (LGC Ch. 271)

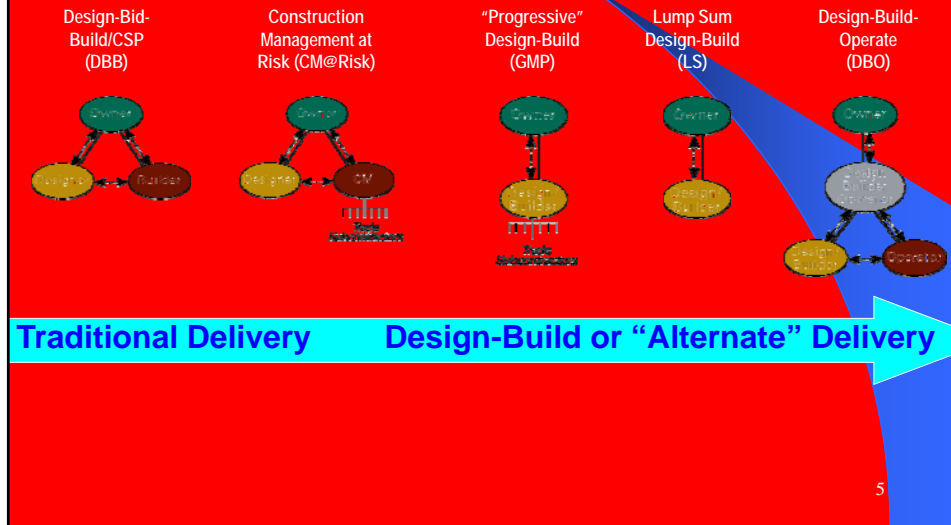
3

Public Construction Contracts ***Introduction of APD to Texas Public Projects***

- 2003 – APD for ports and navigation districts
- 2005 – Houston Metro “Hybrid” system
- 2007 – HB 1886 APD for Civil Works Projects
- 2009 – Various changes to legislation affecting usage of APD by Public Entities

4

Public Construction Contracts Project Delivery Options



Public Construction Contracts Professional Services Procurements

- Professional Services Procurement Act (“PSPA”) covers professional services contracts and consulting contracts
- Professional services include
 - Architects
 - Landscape Architecture
 - Engineering Appraisal
 - Construction Manager-Agent
 - Optometry
 - Accounting
 - Land Surveying
 - Real Estate
 - Medicine
 - Nursing

Public Construction Contracts Professional Services Procurements (Cont'd)

- PSPA professional services contracts awarded based upon demonstrated competence, qualifications and fair and reasonable price
- Two-step process
 - GE advertises and selects most highly qualified provider of services (demonstrated competence and qualifications)
 - GE attempts to negotiate a fair and reasonable price with selected provider

7

Public Construction Contracts Professional Services Procurements (Cont'd)

- Consultant contracts
 - State agency must have substantial need that cannot be fulfilled from staff or another agency
 - Awarded based upon demonstrated competence, qualifications and fair and reasonable price
 - If all things are equal, may give preference to in-state consultant
 - Does not include professional services listed in professional services subchapter

8

Public Construction Contracts Professional Services Procurements (Cont'd)

- **Consultant contracts (Cont'd)**
 - Special rules on major consulting contracts
 - \$15,000 – State Agencies
 - \$25,000 – Schools/Universities
 - Notice of Intent to Legislative Budget Board and Governor's Budget and Planning Office
 - Must obtain finding of fact from Governor's office (void contract without this)
 - Special publishing requirements for these contracts

9

Public Construction Contracts Initial Considerations

- **Does the GE have the authority to utilize the APD method that it seeks to use?**
 - Is the procurement over \$50,000
- **Is the project in question eligible for an APD method?**
 - How much design assistance will GE need?
 - How quickly does project need to be completed?

10

Public Construction Contracts Initial Considerations (Cont'd)

- What are the staffing capabilities and priorities of the GE?
 - Internal staff or consultants?
- Which APD method will produce the “best value” for the GE?
 - What are the GE's cost considerations?

11

Public Construction Contracts General Principles – Applicable to All

- Passage of New Subchapters H and J to LGC and other statutes have modified old laws to allow for more than competitive sealed bidding (traditional competitive sealed bidding has not been eliminated)
- Type of project being contemplated will dictate whether or not GE has specific authority
- Emergency Procurement Procedures still in place as an exception to bidding statutes

12

Public Construction Contracts General Principles – Applicable to All (Cont'd)

- Best Value Determinations
 - Must be made in writing before advertising
 - Some GEs may delegate to a designated representative
- Selection Criteria
 - Price
 - Reputation of vendor
 - Quality of vendor's goods or services
 - Extent to which goods or services meet GEs needs
 - Impact on rules relating to HUBs
 - Any other relevant factor listed
 - Weighting criteria must also be advertised
- Results usually required to be published within 7 days of decision¹³

Public Construction Contracts General Principles – Applicable to All (Cont'd)

- Advertising
 - State Agencies
 - Exception of universities and DOT must use traditional competitive sealed bidding for 30, 14 or less days
 - Special Advertising – Trench Safety
 - Trenching beyond the depth of five feet, bid and RFP must include:
 - OSHA standards for trench safety
 - Any special shoring requirements
 - Separate line item for payment on special shoring requirements
 - Any geotechnical information necessary for contractor
 - Separate line item for payment for trench excavation safety protection

Public Construction Contracts General Principles – Applicable to All (Cont'd)

- Advertising (Cont'd)
 - Counties, Municipalities and others GEs
 - Notice of time and place for receipt of bids or proposals must be placed in newspaper of general circulation in county or on the courthouse door and in a newspaper of general circulation in the nearest county if the county has no newspaper of general circulation
 - Once a week for at least two weeks prior to deadline to receive bids, proposals or responses
 - Two-step procurement deadlines do not need to be published separately (Municipalities)
 - Two-step procurement is not mentioned (Counties)

15

Public Construction Contracts APD Under Chapter 271 of Local Government Code (LGC)

- Subchapter H provides six APD methods:
 - Design-Build
 - Construction Manager-Agent
 - Construction Manager At-Risk
 - Competitive Bidding
 - Competitive Sealed Proposal
 - Job Order Method
- HB 1886 allows several of these APD methods to be used for civil works projects

16

Public Construction Contracts

APD Under Chapter 271 of LGC

- Preserves traditional competitive bidding with award to lowest responsible bidder
- GE must determine whether or not it has legal authority to use one of the APD methods
 - Chapter 271, Subchapter H did not override the provisions of a home rule municipalities charter, or any regulation of a county or river authority that requires competitive bidding or prescribes procurement procedures that conflict with Subchapter H
 - GE must elect to have Subchapter H provisions supercede the conflicting charter or regulation provisions to the extent that it wishes to use Subchapter H methods
 - General Law municipalities could use Subchapter H methods

17

Public Construction Contracts

APD Under Chapter 271 of LGC

- The APD methods are available to procure contracts for the construction of a “facility”
 - A facility is any building, the design and construction of which are governed by accepted building codes.
 - Facilities are not civil engineering construction projects (i.e. airport runways, roads, streets, bridges, highways, wharves, utilities and buildings that are incidental to projects that are primarily civil engineering projects)
 - If competitive sealed proposal requirement applies to such civil engineering projects it is awarded to lowest responsible bidder

18

Public Construction Contracts APD Under Chapter 271 of LGC

- Penalty for Failure to Follow Subchapter H Provisions...**the contract is void**
- Any interested party may bring an injunction to enjoin performance of the contract
- A party that prevails in an action seeking an injunction is entitled to reasonable attorney fees

19

Public Construction Contracts Procedures for Use of APD Methods under Ch 271 of LGC And Other Statutory Provisions

Vertical and Horizontal Projects

20

**Public Construction Contracts
APD Procedures Changes in Ch. 271 LGC
by HB 1886**

- Definition of “Facility” is changed in Section 271.111(7)
 - “Facility” means, *unless otherwise specifically provided*, buildings the design and construction of which are governed by accepted building codes. The term does not include:
 - (A) 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
 - (B) buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

21

**Public Construction Contracts
APD Procedures Changes in Ch. 271 LGC
by HB 1886**

- Definition of “Governmental Entity” is changed in Section 271.111(10)
 - GE means municipality, county, *hospital district, water district or authority created under Section 59, Article XVI, Texas Constitution, including a river authority or conservation and reclamation district*, or a defense base development authority established under Chapter 379B.

22

Public Construction Contracts

TRADITIONAL COMPETITIVE SEALED BIDDING

VS

BEST VALUE COMPETITIVE SEALED BIDDING

23

Public Construction Contracts Traditional Competitive Sealed Bidding

- Under the several of the newer statutes, such as Subchapter H, competitive sealed bidding incorporates the “best value” method for selecting the winning bid rather than the “lowest responsible bidder”
- The GE may elect to use traditional competitive bidding, if so and the amount is \$50,000 or more award must be made to lowest responsible bidder
- Parts of Subchapter B (traditional competitive sealed bidding) that apply to Subchapter H competitive bidding are:
 - Public opening of bids and changing of bids after opening (271.026)
 - GE’s right to reject any and all bids (271.027(a))
 - Right to consider safety record of bidders (271.0275)

24

Public Construction Contracts Traditional Competitive Sealed Bidding

- Owner contracts with an Architect or Engineer (A/E) to design the project
- Once design is complete Owner competes the contract and awards to the lowest bidder
- Owner and Contractor should modify the contract as needed for the particular project
- Selected General Contractor hires its own subcontractors and suppliers
- During the construction A/E normally provides some construction management and quality control functions

25

Public Construction Contracts Best Value Competitive Sealed Bidding

- The GE in using this method must select the bid offering the best value to the GE according to the established selection criteria
- The contract must be awarded at the bid amount offered by the bidder whose bid is considered to be the best value

26

Public Construction Contracts

Best Value Competitive Sealed Bidding

- Selection criteria and relative weighting of those criteria must be established in the bid specifications
- Selection criteria in determining the best value:
 - The purchase price
 - The reputation of the vendor and of the vendor's goods or services
 - The quality of the vendor's goods or services
 - The extent to which the goods or services meet the GE's needs
 - The vendor's past relationship with the GE

27

Public Construction Contracts

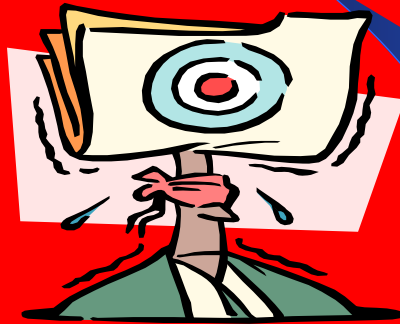
Best Value Competitive Sealed Bidding

- Selection criteria (Cont'd)
 - The impact on the ability of the GE to comply with rules relating to HUBs
 - The total long-term cost of the GE to acquire the vendor's goods or services, and
 - Any other relevant factors specifically listed in the request for bids or proposals

28

Public Construction Contracts

REQUEST FOR COMPETITIVE SEALED PROPOSALS



29

Public Construction Contracts Request For Competitive Sealed Proposals

- Section 271.116(a-1) *In this section "facility" means an improvement to real property.* Now allows any type of project that is an improvement to real property to be completed
- GE must hire an independent architect or engineer to prepare construction documents, if no architect or engineer employed
- GE prepares a request for competitive sealed proposals (RFCSP)
 - construction documents
 - estimated budget
 - project scope
 - schedule
 - pricing information
 - other information that may be required
- The selection criteria and weighting of those criteria must also be in the RFCSP

30

Public Construction Contracts Request For Competitive Sealed Proposals

- All sealed proposals must be publicly opened and read aloud to include pricing information
- 45 days are allowed for evaluation and ranking and then the proposal with the best value per the selection criteria is selected
- The negotiation process begins with the best value offeror selected
- At this stage any proposed modifications to scope or time and any changes to price are discussed as well

31

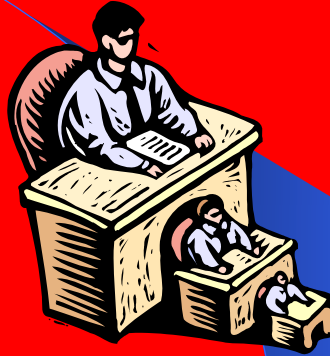
Public Construction Contracts Request For Competitive Sealed Proposals

- No agreement, then GE is to inform the selected offeror that negotiations are at an end and they may negotiate with the next ranked offeror
- This continues until a contract is reached or all proposals are exhausted
- GE must provide for independent testing, verification and inspection services for acceptance of the work

32

Public Construction Contracts

CONSTRUCTION MANAGER-AGENT



Let someone else handle it.

33

Public Construction Contracts Construction Manager - Agent

- Allows GE entity to employ an agent to oversee the project on their behalf
- CMA is defined as a legal entity that provides consultation to the GE regarding construction, during and after the design of a facility
- CMA acts as a manager of the project and consults with the GE during the procurement process by providing recommendations on the selection of a contractor
- CMA also represents the GE in a fiduciary capacity and therefore cannot bid on any part of the project, with the exception of general conditions

34

Public Construction Contracts Construction Manager - Agent

- Prior to or concurrent with the selection of the CMA, the GE must hire an architect or engineer to design the project, using the criteria same as the PSPA, if the GE does not have an architect or engineer on its staff
- If no specific statutory authority for CMA, then GE would still utilize provisions of PSPA to employ CMA

35

Public Construction Contracts Construction Manager - Agent

- Selection Procedures
 - The design architect or engineer cannot serve alone or in combination with anyone else as the CMA unless hired as the CMA in a separate or concurrent selection process
 - The GE may engage a single prime contractor or multiple trade contractors to serve as prime contractors for their respective part of the work
 - The GE or the CMA is responsible for procuring all of the inspection, testing and verification services for the acceptance of the facility

36

Public Construction Contracts **CONSTRUCTION MANAGER AT-RISK**

*Let someone else handle
it...and build it...and take
most of the risk*



37

Public Construction Contracts **Construction Manager At-Risk**

- Section 271.118(a-1) *In this section “facility” means an improvement to real property.* Now allows any type of project that is an improvement to real property to be completed
- CMAR assumes the risk for the construction, rehabilitation, alteration or repair of a facility at a contracted price like a general contractor, but also provides advice to the GE regarding construction during and after the design of the facility
- GE must prior to or concurrent with selecting the CMAR select or designate an architect or engineer to prepare the design and construction documents for the project, using the procedures of the PSPA, if the GE does not have an architect or engineer on its staff

38

Public Construction Contracts Construction Manager At-Risk

- The design architect or engineer cannot serve alone or in combination with anyone else as the CMAR unless hired as the CMAR in a separate or concurrent selection process
- The GE is responsible for providing the testing, inspection and verification services required for acceptance of the work independent of the CMAR

39

Public Construction Contracts Construction Manager At-Risk

- The selection process for the CMAR can be **either** a one-step or two-step process
- **One-Step Process:** GE issues a request for proposals which includes general information on the project site, scope, schedule, selection criteria and weighting of selection criteria, estimated budget, time/place for receipt of proposal, whether one or two-step process, and other information
- In the one-step process information regarding proposed fees and prices for fulfillment of the general conditions can be requested

40

Public Construction Contracts Construction Manager At-Risk

- **Two-Step Process:** identical to the one-step, except no information regarding proposed fees and prices for fulfillment of the general conditions can be requested
- Once all proposals have been received, up to five offerors are selected to provide additional information to include information regarding proposed fees and prices for fulfillment of the general conditions

41

Public Construction Contracts Construction Manager At-Risk

- In both the one and two-step process, the GE must:
 - Evaluate and rank the offers according to its published criteria within 45 days of their being opened
 - All proposals must be opened publicly and read aloud, to include pricing information at the appropriate step
 - Following selection of the proposal that offers the best value, negotiation of a contract with the first ranked offeror takes place
 - If GE is unable to negotiate a contract with the first offeror, then it will provide written notice of termination of negotiations and may start negotiation with the next best value offeror

42

Public Construction Contracts Construction Manager At-Risk

- Once selected the CMAR is required to advertise for bids and proposals for various trade contractors and subcontractors for all except minor work
- The CMAR oversees this process and selects the method that it believes will deliver the best value
- The CMAR can self-perform major portions of the work as long as it presents its bid or proposal at the same time and in same manner as all others and the GE determines that it is the best value

43

Public Construction Contracts Construction Manager At-Risk

- The bids or proposals are reviewed by the CMAR, the GE and its representative and the best proposals or bids are selected in a manner so that the price is not disclosed
- All bids or proposals are made public after the award of the related contract or seven days after the final selection of bids or proposals, whichever is later
- The CMAR may recommend the acceptance of a particular bid or proposal and if the GE directs that another bid or proposal be used then the CMAR can request changes in price, time, guaranteed maximum cost or additional risk based upon that decision

44

Public Construction Contracts DESIGN-BUILD



One firm, one price, one facility

45

Public Construction Contracts Design-Build Method – General Principles

- A single contract is awarded to a firm who both designs and constructs the facility
- Design-build (DB) firm is defined as any legal entity or team which includes an architect or engineer and a builder qualified to engage in construction in Texas
- The DB team contracts directly with the trade contractors and subcontractors and assumes complete responsibility for design and construction

46

Public Construction Contracts Design-Build Method – General Principles

- Procedures for DB projects for facilities did not change under Section 271.119
- New Subchapter J – Design Build Procedures for Certain Civil Works Projects provides new DB APD procedures, including a two-step DB evaluation process
 - Two step process

47

Public Construction Contracts Design-Build Method (Vertical)

- Selection of the DB firm is based upon
 - qualifications and
 - the proposal that offers the best value to the Owner
- Once selected the DB firm contracts directly with the trade contractors and subcontractors and assumes complete responsibility for design and construction

48

Public Construction Contracts Design-Build Method – Pre-Selection (Vertical)

- Once it is determined that DB is the best value method, a request for qualifications and design criteria package must be prepared
- Design criteria package must specify criteria for selection as well as criteria that governmental entity considers necessary to design the project, such as:
 - 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 and ordinances, utility provisions, parking requirements, and other applicable requirements
- The selection process for the DB method is a two-step process

49

Public Construction Contracts Design-Build Method – Selection Step 1 (Vertical)

- **Phase One** of selection process occurs after the RFQ and design criteria package have been prepared and after advertising
- The GE may evaluate qualifications according to the following criteria:
 - Offeror's experience, technical competence, capability to perform, past performance of offeror's team and members thereof and other appropriate factors submitted by the offeror in response to the request for qualifications
- The GE **may not** consider cost-related and price-related in this phase and should not request this type of information

50

Public Construction Contracts Design-Build Method – Selection Step 1 (Vertical)

- Each DB offeror must certify to the GE that each architect or engineer that is a member of its team was selected based on demonstrated competence and qualifications
- The GE selects **no more than five offerors** to submit additional information, and to interview for final selection, if the entity so chooses

51

Public Construction Contracts Design-Build Method – Selection Step 2 (Vertical)

- **Phase Two** of selection process occurs after the selection of up to as many as five offerors to submit additional information and/or be interviewed
- The GE ranks and evaluates the selected offerors based upon the criteria stated in the RFQ and the results of any interviews conducted
 - Additional information concerning demonstrated competence, safety and durability considerations, feasibility of project as proposed, ability of offeror to meet scheduling requirements, costing methodology, and other appropriate factors
- The offerors are then ranked in accordance with the criteria in the request for qualifications and the DB firm offering the best value is selected

52

**Public Construction Contracts
Design-Build Method – Post-Selection
(Vertical)**

- If a bid bond or other financial security has been provided to ensure the provision of the performance and payment bonds, the delivery of those bonds can be postponed until the guaranteed maximum or fixed price is established
- Once selection of the best value offeror occurs, the GE begins negotiations
- If the GE and the first selected offeror are unable to come to an agreement, the GE informs the first selected offeror in writing that negotiations are at an end and starts negotiations with the next ranked offeror

53

**Public Construction Contracts
Design-Build Method – Post-Selection
(Vertical)**

- This continues until a contract is negotiated or negotiations with all ranked offerors are unsuccessful
- Once a contract is negotiated, the chosen DB firm then completes the design and submits it to the GE or its representative for review of scope and compliance
- The GE is required to contract for testing, inspection and verification necessary for the acceptance of facility
 - These services must be procured pursuant to the PSPA

54

Public Construction Contracts Design-Build Method – Post-Selection (Vertical)

- The DB firm must provide a signed sealed set of construction documents at the conclusion of the project
- The DB firm's payment and performance bonds are not required to and may not provide coverage of 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 no later than the 10th day after the firm executes the contract

55

Public Construction Contracts Design-Build Method (Civil Works)

- "Civil works project" means:
 - roads, streets, bridges, utilities, water supply projects, water 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 described by Paragraph (A) and associated with civil engineering construction; and
 - buildings or structures that are incidental to projects or facilities that are described by Paragraphs (A) and (B) and that are primarily civil engineering construction projects

(Sec. 271.181(2)(a-c))

56

Public Construction Contracts Design-Build Method (Civil Works)

- “Local governmental entity” means
 - Municipality or municipally owned water utility with a separate governing board appointed by the governing body of a municipality
 - County
 - River authority
 - Defense base development authority established under Chapter 379B
 - Any other special district or authority authorized by law to enter into a public works contract for a civil works project

- Does not include
 - Regional toll way authority (Chapter 366, Trans. Code) or Regional mobility authority (Chapter 370, Transportation Code)
 - 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

(Sec. 271.181(5))

Public Construction Contracts Design-Build Method (Civil Works)

- **CONTRACTS FOR CIVIL WORKS PROJECTS**
 - LGE may use the design-build method for the construction, rehabilitation, alteration, or repair of a civil works project (Sec. 271.185(a))
 - Contract for a project may cover only a single integrated project and contract may not allow for aggregated projects at multiple locations (Sec. 271.185(b))
 - Exceptions:
 - A metropolitan transit authority created under Chapter 451, Transportation Code, enters into a contract for a project involving a bus rapid transit system created under Chapter 451, Transportation Code, the bus rapid transit system is a single integrated project; (Sec. 271.185(b)(1))
 - a water treatment plant, including a desalination plant, that includes treatment facilities, well fields, and pipelines is a single integrated project (Sec. 271.185(b)(2))

58

Public Construction Contracts Design-Build (Civil Works)

- WHO CAN USE DB?
 - Originally statute stated:
 - Before September 1, 2009, LGE with population of 500,000 or more within its geographic boundaries or service area. (Sec. 271.182(a))
 - On or after September 1, 2009, and before September 1, 2011, LGE with a population of more than 100,000 within its geographic boundaries or service area. (Sec. 271.182(b))
 - Senate Bill 229 (2009) dropped population to 100,000 for immediate use
 - Limitations on the number of projects

59

Public Construction Contracts Design-Build Method (Civil Works)

LIMITATIONS ON NUMBER OF PROJECTS

- | | |
|---|---|
| • 500,000 or more | • 100,000 or more (less than 500,000) |
| – First 4 years no more than 3 projects in FY (Sec. 271.186(a)(1)) | – First 4 years no more than 2 projects in FY (Sec. 271.186(a)(2)) |
| – 5 th year and after no more than 6 projects in FY (Sec. 271.186(b)(1)) | – 5 th year and after no more than 4 projects in FY (Sec. 271.186(b)(2)) |

60

Public Construction Contracts Design-Build Method (Civil Works)

- **LIMITATIONS ON NUMBER OF PROJECTS (Cont'd)**
 - A municipally owned water utility (“MOWU”) (separate governing board appointed by the governing body of a municipality) with a population of 500,000 or more may:
 - First 4 years may independently contract for no more than 1 civil works project in FY (Sec. 271.186(a)(3)(A))
 - 5th year and after no more than 2 projects in FY (Sec. 271.186(b)(3)(A))
 - Can enter into additional contracts in FY but limited to the maximum number allowed to the municipality under Sec. 271.186(a)(1) and (b)(1), BUT
 - counts against maximum number for municipality (Sec. 271.186(a)(3)(B)(i) and (b)(3)(B)(i))
 - governing body of municipality must approve contract (Sec. 271.186(a)(3)(B)(ii) and (b)(3)(B)(ii))
 - In determining the number of eligible projects, a MOWU with a separate governing board appointed by the governing body of the municipality is considered part of the municipality (Sec. 271.186(c))

61

Public Construction Contracts Design-Build Method (Civil Works)

- The architect/engineer of the DB team is architect or engineer of record for the project, but GE must appoint an independent architect or engineer to act as its representative (Sec. 271.187)
- LGE must independently contract for:
 - Inspection Services
 - Construction Materials Engineering and Testing
 - Verification of testing Services (Sec. 271.188)

62

**Public Construction Contracts
Design-Build Method
Overview Pre-Selection (Civil Works)**

- Selection of best value method
- Preparation of RFQ
- Preparation of design criteria package
- Advertising of Project

63

**Public Construction Contracts
Design-Build Method
Pre-Selection (Civil Works)**

- LGE makes determination that DB is best value method before preparing RFQ and design criteria package (Sec. 271.185(d))
 - LGEs shall use the following criteria as a minimum basis for determining the circumstances under which the DB method is appropriate for a project (Sec. 271.185(c))
 - (1) the extent to which the entity can adequately define the project requirements;
 - (2) the time constraints for the 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 the DB method of project delivery

64

Public Construction Contracts Design-Build Method Pre-Selection (Civil Works)

- REQUEST FOR QUALIFICATIONS (RFQs)
 - LGE shall prepare RFQ that includes:
 - information on the civil works project site
 - project scope
 - project budget
 - project schedule
 - criteria for selection under Section 271.191 and the weighting of the criteria
 - other information that may assist potential DB firms in submitting proposals for the project (Sec. 271.189(a)(1-6))

65

Public Construction Contracts Design-Build Method Pre-Selection (Civil Works)

- Design criteria package must specify criteria for selection
 - Budget/cost estimates, information on the site, performance criteria, special material requirements, initial design calculations, known utilities, capacity requirements, quality assurance and quality control requirements, type, size and location of structures, notice of any ordinances, rules or goals for utilizing HUBs (Sec. 271.190)
 - Additional criteria mentioned in Ch. 271 LGC
 - Legal description of the project site, survey information, interior space requirements, material quality standards, conceptual criteria, special equipment requirements, schedules, site development requirements, applicable codes and ordinances, parking requirements
 - Does not have “catch-all” phrase “other applicable requirements”

66

Public Construction Contracts Design-Build Method Pre-Selection (Civil Works)

- Advertising of Project
 - LGE shall advertise or publish notice of requests for bids, proposals, or qualifications in any manner prescribed by law (Sec. 271.184(a))
 - LGE shall publish notice of the time and place the bid or proposals or the request for qualifications will be received and opened in any manner prescribed by law (Sec. 271.184(b))
 - Need to provide deadline for technical and cost proposals, only one advertisement necessary

67

Public Construction Contracts Design-Build Method Overview Selection (Civil Works)

- RFQ Evaluation
- Technical Proposal and Cost Proposal Evaluation

68

**Public Construction Contracts
Design-Build Method
Selection Step 1 (Civil Works)**

- RFQ and design criteria package prepare and project advertised
- RFQ Evaluation Criteria:
 - Offeror's experience, technical competence, capability to perform, past performance of offeror's team and members thereof and other appropriate factors submitted by the offeror in response to the RFQ
 - LGE **may not** consider cost-related and price-related in this phase and should not request this type of information

(Sec. 271.191)

69

**Public Construction Contracts
Design-Build Method
Selection Step 1 (Civil Works)**

- RFQ Evaluation Criteria (Cont'd):
 - Each DB offeror must select or designate engineer and certify to the LGE that selection based on demonstrated competence and qualifications in manner provided for in PSPA
 - LGE selects offerors to submit additional information, and to interview for final selection, if the entity so chooses (not limited to 5 offerors) (Sec. 271.191(c))

70

**Public Construction Contracts
Design-Build Method
Selection Step 2 (Civil Works)**

- Occurs after the LGE has determined offerors for next step
- LGE shall prepare RFP requesting Technical and Cost Proposals
- Technical Proposal must be submitted NLT than 180th day after LGE makes a request for Technical Proposals
- Cost Proposal is required and must be submitted at the same time as Technical Proposal in separate sealed envelope

71

**Public Construction Contracts
Design-Build Method
Selection Step 2 (Civil Works)**

- Criteria for Request for Proposal (Sec. 271.193)
 - LGE shall prepare RFP that includes:
 - design criteria package
 - if project site is identified, geotechnical baseline report or other information providing DB firm with minimum geotechnical parameters
 - detailed instructions for submitting technical proposal and items to be included, including a description of form and level of completeness of drawings
 - relative weighting of technical and price proposals and formula for evaluation and ranking

72

**Public Construction Contracts
Design-Build Method
Selection Step 2 (Civil Works)**

- Technical Proposal must address:
 - Project approach, anticipated problems, proposed solutions to anticipated problems, ability to meet schedules, conceptual engineering design, and other information requested by LGE (Sec. 271.193(d))
- Technical Proposal Evaluation Criteria (Sec. 271.193(e)):
 - Technical Proposal is opened and scored awarding points based upon weighted criteria set forth in RFP
 - Hold interviews (prior to final selection)
 - May reject as nonresponsive if significant change to composition of DB firm from what is originally submitted

73

**Public Construction Contracts
Design-Build Method
Selection Step 2 (Civil Works)**

- Cost Proposal Evaluation Criteria (Sec. 271.193(e)):
 - Cost information is not opened until after Technical Proposal has been scored
 - Only Cost Proposals of responsive offerors are opened
 - Scored awarding points based upon weighted criteria set forth in RFP
- Rank all responsive offerors based upon published criteria and make final selection

74

**Public Construction Contracts
Design-Build Method
Overview Post-Selection (Civil Works)**

- Negotiation of Contract
- Assumption of Risks
- Bonds
- Stipends
- Design Completion and Contract Documents

75

**Public Construction Contracts
Design-Build Method
Post-Selection (Civil Works)**

- Negotiation (Sec. 271.194)
 - LGE will attempt to negotiate with selected DB firm
 - End unsuccessful in writing and move to next firm
 - Continue until successful contract negotiated
- Assumption of Risks (Sec. 271.195)
 - scope changes and modifications, as requested by LGE
 - unknown or differing site conditions unless otherwise provided by LGE in the RFP and final contract
 - regulatory permitting, if LGE is responsible by law or contract
 - natural disasters and other force majeure events unless otherwise provided by LGE in the request for proposals and final contract; and
 - all costs associated with property acquisition, excluding costs associated with acquiring a temporary easement or work area associated with staging or construction for the project

76

**Public Construction Contracts
Design-Build Method
Post-Selection (Civil Works)**

- **PERFORMANCE AND PAYMENT BONDS**
 - Not required for portion of contract that includes design services only
 - If contract amount is not determined at the time of award, penal sum of bonds must each be in an amount equal to the construction budget, if commercially available and practical, as specified in the design criteria package
 - If LGE awards contract under Section 271.193, bonds required not later than the 10th day after the date the DB firm executes the contract unless the DB firm furnishes a bid bond or other financial security acceptable to LGE to ensure that the DB firm will furnish the required performance and payment bonds before the commencement of construction

(Sec. 271.199(a-c))

77

**Public Construction Contracts
Design-Build Method
Post-Selection (Civil Works)**

- **STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS**
 - DB firm retains all rights to work product unless LGE pays stipend
 - LGE may not release, disclose or provide unsuccessful offeror information even to successful offeror
 - LGE may not use any unique or nonordinary design element, technique, method, or process without a license
 - Violation of section voids contract, LGE will be liable for ½ of the cost savings from use and DB can get injunction and attorney fees

(Sec. 271.196(a-b))

78

Public Construction Contracts

Design-Build Method

Post-Selection (Civil Works)

- **STIPEND AMOUNT FOR UNSUCCESSFUL OFFERORS**
(Cont'd)

- Stipend must be $\frac{1}{2}$ of one percent of the contract amount and must be specified in the initial RFP
- If stipend accepted, LGE may use any work product
- Use of any work product is at LGE's risk and does not place liability on party receiving stipend
- No work product may be released not even under Texas Open Records Act unless stipend is accepted, otherwise confidential

(Sec. 271.196(c-d))

79

Public Construction Contracts

Design-Build Method

Post-Selection (Civil Works)

- **Design Completion & Construction Documents**

- DB firm's engineers shall submit all design elements for review and determination of scope compliance to LGE before or concurrently with construction
- Licensed design professional shall sign and seal construction documents before the documents are released for construction (Sec. 271.197)
- DB firm must supply LGE with record set of construction documents at end of project (Sec. 271.198)

80

Public Construction Contracts

JOB ORDER CONTRACTS METHOD

*Is it time for new
shingles already?*



81

Public Construction Contracts Job Order Contracts Method

- May be used when the contract is for minor repairs, 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: ceiling tile replacement, door hanging, recarpeting, repainting interiors or exteriors

82

Public Construction Contracts Job Order Contracts Method - Procedures

- GE must properly advertise for and publicly open sealed proposals
- The base term for the contract is for any specified period plus any renewal option set for in the request for proposals
 - If term not specified, cannot exceed two years and is not renewable beyond that without further advertisement and solicitation of proposals
- GE may award contract to one or more offerors on the same solicitation, based on combination of price and other factors to include...

83

Public Construction Contracts Job Order Contracts Method

- Experience,
- Past performance,
- Proposed personnel,
- Methodology,
- Safety record, and
- *Other appropriate factors*

84

Public Construction Contracts Job Order Contracts Method - Procedures

- After award, specific work projects are authorized by the execution of a job order
 - The job order can be a fixed price lump sum order or a unit price order
- Job Order > \$25,000 → Payment bond is required
- Job Order > \$100,000 → Performance bond is also required

Bonding is per job order, not entire job order contract.

85

Public Construction Contracts Pre-Bid Conferences

- Pre-Bid Conferences at the discretion of the GE
- Can be held before or after site visit
- Generally used to clarify or address issues in bid documents or allow for site visit

86

Public Construction Contracts Electronic Bids

- State Agencies – limited to use by TxDOT and Regional Transportation Authorities
 - Texas Facilities Commission, Division of Facilities Design and Construction Management sets procedures
- Counties
 - May use for procurements under Chapter 262
 - Cannot reject hard copy bids or proposals
 - County purchasing agent adopts rules in conformance with Section 262.011(o) to ensure identification, security and confidentiality
- Municipalities
 - May use for Chapter 271, Subchapters A and B
 - Cannot reject hard copy bids or proposals
 - Governing body adopts rules in conformance with Section 252.0415

87

Public Construction Contracts Electronic Bids

- Municipalities
 - May use for Chapter 271, Subchapters A and B
 - Cannot reject hard copy bids or proposals
 - Governing body adopts rules in conformance with Section 252.0415
- School Districts
 - HB 987, new Section 44.0313
 - Says nothing about hard copy bids or proposals
 - Board of Trustees required to adopt rules in conformance with new Section

88

**Public Construction Contracts
Socioeconomic Requirements or Preferences
Small/Disadvantaged/Minority Owned Businesses**

- State programs
 - HUBs
 - Business controlled 51 percent by one or more persons from an economically disadvantaged group who have proportionate interest and actively participate in business control, operation and management
 - Additional requirements depending on what type of business, general contractor, subcontractor and prime contractor
 - Mentor/Protégé
 - In 1999, Agencies with biennial appropriation over \$10 million must have one
 - After 4/1/00, each contract exceeding \$100,000 subcontracting opportunities and have HUB plan
 - Small Business Assistance Program
 - State projects exceeding \$1 million
 - Provides assistance like centralized workers comp, bonding and insurance

89

**Public Construction Contracts
Socioeconomic Requirements or Preferences
Small/Disadvantaged/Minority Owned Businesses**

- Counties
 - May develop programs to improve extent of minority and women-owned businesses participate Section 381.001
- Municipalities
 - May develop programs to increase participation Section 106.001(c), Tx. Civ. Prac. Remedies Code

90

Public Construction Contracts Socioeconomic Requirements or Preferences Small/Disadvantaged/Minority Owned Businesses

- Regional Certification programs
 - Allows counties, municipalities, special districts or other political subdivisions to create a regional certification program
 - North Central Texas Regional Certification Agency
- In-State Preferences
 - Not allowed to award to non-resident bidder unless non-resident bidder underbids the lowest bid submitted by resident bidder by amount not less than the amount by which Texas bidder would be required to underbid non-resident bidder in non-bidder's state where office/principal place of business
 - Comptroller is required to publish annual list of all states who regulate award of contracts
 - Section 271.9051 of the Local Government Code amended to limit applicability of local bidder preference
 - allow preference to "resident of municipality" who is within 5% of lowest bidder for municipalities with population of less than 250,000 with contracts not to exceed \$100,000.

91

Public Construction Contracts Socioeconomic Requirements or Preferences Products/Labor Rates/Architectural Barriers

- American Steel – Products of United States and Texas
 - TxDOT has same preferences as found in federal Buy American Act whether or not federal funds are used
 - Certain GEs entering into contracts for landscaping services may require preference for Texas grown vegetation or services by Texas company
- Prevailing Wage
 - Texas version of federal Davis-Bacon Act requires laborers to be paid no less than the rate of per diem wages, including holiday and overtime, for work in locality where project is being performed
 - May adopt USDOL rates, if survey is less than 3 years old
- Texas Architectural Barriers Act
 - Allows promulgation of standards to eliminate unnecessary barriers encountered in public buildings by persons with disabilities
 - Applies to all commercial buildings

92

Public Construction Contracts Other Legislative Changes

- Attorney Fees - H.B. 987 amends Section 271.153 of LGC to allow recovery of “reasonable and necessary attorney’s fees that are equitable and just” in a breach of contract case
- Bid Protests - H.B. 3668 adds a new subsection (b) to Section 252.061 of the LGC to allow an unsuccessful bidder to enjoin the award of a contract that violates statutory procurement requirements

93

Public Construction Contracts Other Legislative Changes

- H.B 2515 amended several statutes
 - Payment Bond - Amends Section 2253.021 of Gov’t Code by adding provision that requires payment bond on all contracts in excess of \$50,000 if the GE is a municipality or a joint board created under Subchapter D, Chapter 22, Trans. Code
 - Liens on Public Contracts – Amends Section 53.231 of the Prop. Code contractor who provides notice for all contracts under \$50,000 with municipality or a joint board has lien on money, bonds, or warrants due the contractor for the improvements
 - Notice Requirement – Amends Section 53.234 to read “The lien claimant must give notice (*before any payment is made to the contractor and*) not later than the 15th day of the second month following the month in which labor was performed or material was furnished.”

94

Questions?



Timothy D. Matheny
Ford Nassen & Baldwin, P.C.
8080 North Central Expressway, Ste 1600
Dallas, Texas, 75206
(214) 523-5133



95