TOP TEN CONSTRUCTION PROCUREMENT MISTAKES…

…OR RATHER—HOW TO AVOID MAKING A TOP TEN CONSTRUCTION PROCUREMENT MISTAKE

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This paper and our presentation is a practical discussion about municipal construction procurement. Many of the items discussed are drawn from past experiences and matters that the presenters have encountered in our practice. Some of the ideas and lessons that are discussed come from folks in the audience today and we thank you for sharing those with us.

Rather than presenting a list of the top ten procurement mistakes cities might make, we have began with the presumption that, like most lawyers, ya'll never make mistakes. Therefore, the following discussions are simple reminders of things that city attorneys should be mindful of when assisting cities with construction procurement.

1. DON'T HIRE THE FIRST DESIGN PROFESSIONAL YOU MEET

As you know, chapter 252 of the Local Government Code specifically exempts the procurement of professional services from the competitive bidding requirements. However, just because you don't need to competitively bid contracts for design or engineering services does not mean that you shouldn't shop around.

It's common for cities to have relationships with design and engineering firms that are long established. It is not uncommon for those relationships to be personal and those two factors can sometimes be the source of problems on projects where due diligence was foregone because of confidence in that relationship.

Don't get me wrong, I am not going to advocate that cities scrap old relationships in favor of new on every project. The essence of this particular topic is that cities must evaluate their professional services agreements based on the type of projects that are to be built. And cities should re-evaluate those agreements based on past performance and experience.

For example, a city that I represent entered into an agreement with an architect to perform architectural services for a variety of projects over a period of years. The City was undertaking fairly

ambitious development goals and had plans to construct many different types of projects. Under a master contract with the architect, six different projects were built. Many of those projects involved separate contracts for each project. The city did not re-evaluate their agreement or the architect's capabilities for any of those six projects. The projects ranged from park construction to new emergency services facilities. The architect was a one-man shop and the city did not fully consider whether this individual had the experience and knowledge to construct this wide range of projects. Unfortunately for the city, three of the projects did not go so well and the professional services agreement was terminated.

The take away from this example is that not all architects are specifically qualified for every type of project. Like doctors, lawyers, and other professionals, architects and engineers have specific areas of expertise. While one would not hire an optometrist to perform neurosurgery or a divorce lawyer to prepare a set of construction documents, a city should not hire an architect who specializes in vertical construction to design a horizontal project.

A few items to consider in evaluating the choice of hiring professional design firms are as follows: 1) past performance on similar projects; 2) experience in the area and with the contractors expected to bid the project (note that procurement method is important here); 3) contract management and contract administration style, and 4) other intangibles such as personal skills and management style.

Evaluating past performance is important so that, as an owner, a city will have confidence that the architect or engineer can deliver the type of quality project that an owner expects. While an architect may be capable of moving into new areas or types of projects, confidence in a design professional's abilities comes from knowing that they've done this type of work in the past. Look at an architect's past projects and evaluate the team of professionals that the architect employed at

each discipline. Talk to references and owners from those projects if possible to get their feedback on the performance.

Another way to evaluate a design professional is to investigate the contract management style of the lead engineer or architect. The level of experience a city's staff might have with construction could help determine how involved a city might want a design professional to be on a project. Some professionals are more willing to be involved in a project on a daily basis.

Finally, looking into the way design professionals interact with others is important. If a project ends in litigation, the way your chosen design professional performs at a deposition or trial is very important.

2. FOLLOW THE PROCUREMENT RULES.

The Local Government Code specifies a series of "delivery systems" for local government entities. TEX. LOC. GOV'T CODE ANN. CH. 271. Cities that don't follow these rules do so at their own peril.

This was recently illustrated in *Wright Realty Interests, Ltd. v. City of Friendswood* 333 S.W. 3d 792 (Tex. App. Houston 1st Dist. 2010). There the City asked a developer to purchase land and build recreational facilities. The parties signed a contract providing that the developer would buy the land, build improvements, and sell the developed property to the City. However a year later, the City terminated the contract and failed to pay the developer for work performed or damages under the contract's termination provision. When the developer sued for payment, the City defended on the basis of a plea to the jurisdiction. The 1st Court of Appeals rejected that defense, ruling that immunity was waived when the City entered into a contract for services, under TEX. LOC. GOV'T CODE ANN.§271.152. That Section provides:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit

for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

The Court found that the developer's work in purchasing the land, clearing land, filling ponds with soil, removing fences, digging drainage ditches and a retaining pond, grading sports fields, excavating a parking lot, and installing culverts were services for purposes of Chapter 271.

The Court's opinion didn't squarely address another City defense – the argument that the procurement is void because it failed to follow the procurement process in TEX. LOC. GOV'T CODE ANN. CH. 271, Subchapter H. TEX. LOC. GOV'T CODE ANN. §271.112(f) provides:

> a contract entered into or an arrangement made in violation of this subchapter is contrary to public policy and is void. A court may enjoin performance of a contract made in violation of this subchapter.

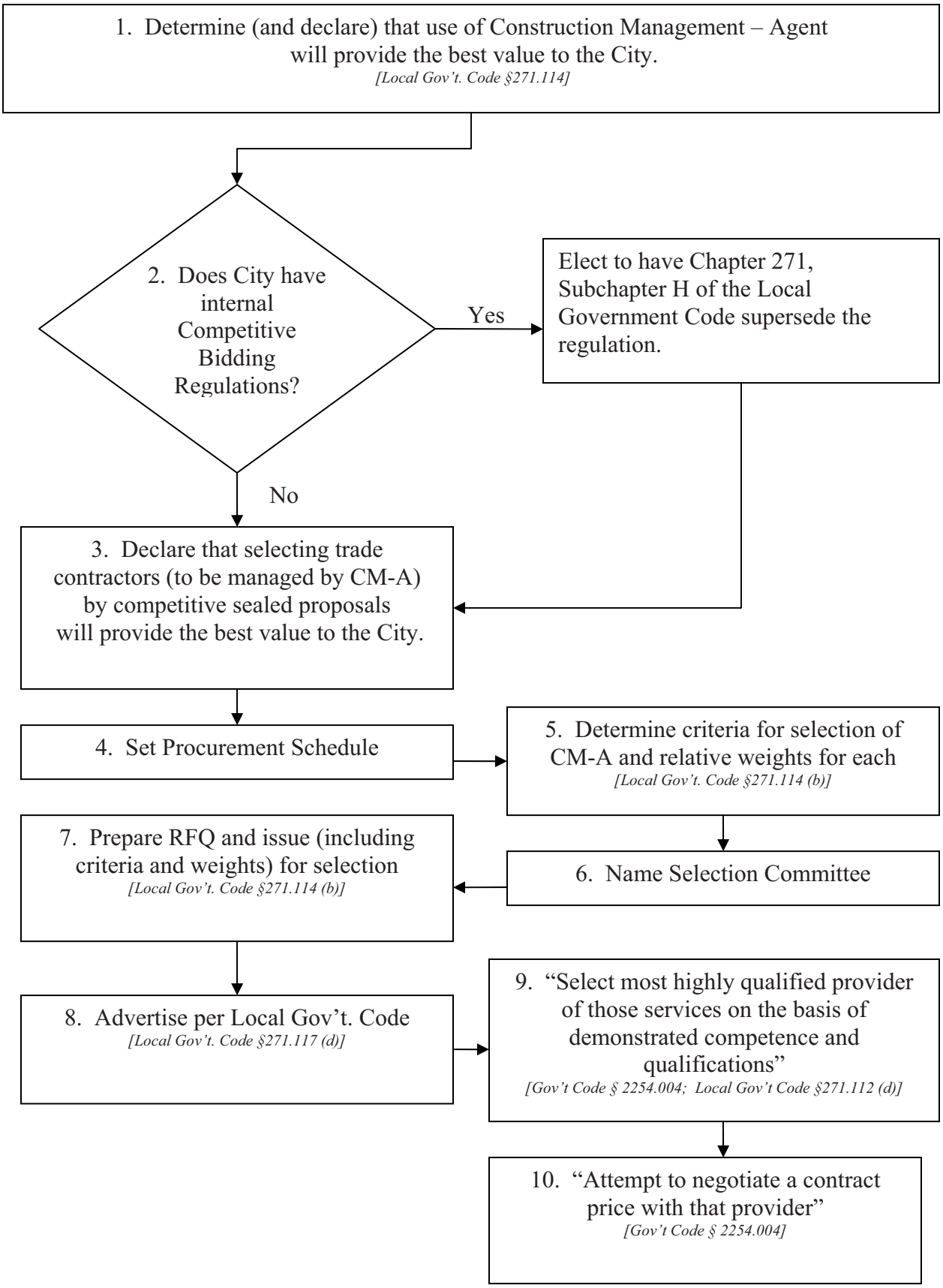
The Court noted the argument, but found that the contract was legally sufficient. The Court expressly held that the contract between the City and the developer "contains the essential terms of the parties' agreement and is covered by § 271.152."

The opinion implies that the City lost its argument regarding the procurement's non-compliance. However, the Court went on to note that the parties did not develop any evidence as to bidding or otherwise following the procurement process. If the City provides evidence that there was no competitive bid or competitive sealed proposal process, will the 1st Court review the question of whether the contract was properly procured?

It is interesting to note that § 271.112(f) does not reveal the consequences of voiding a procurement. The statute provides standing for challengers and authorizes a court to enjoin performance. Thus, the legislation authorizes a disappointed bidder (or proposer) to challenge the procurement. But it does not specify whether a developer in Wright Realty's position may collect damages if the contract is voided. It is silent on the question of whether the developer may recover for services requested.

The practical advice for City Attorneys? If you're purchasing services (i.e., development or construction), you can't get in trouble if you follow the procurement processes set out in Subchapter H of Chapter 271.

Subchapter H has (for the last 10 years) allowed a variety of procurement methods. No one can call it simple, as the processes require navigating a series of actions. For example, one of our lawyers prepared the following flow chart to help a client follow the statutory steps required of a local government entity selecting a Construction Manager – Agent.


1. Determine (and declare) that use of Construction Management – Agent will provide the best value to the City.
[Local Gov't. Code §271.114]
2. Does City have internal Competitive Bidding Regulations?
Yes
Elect to have Chapter 271, Subchapter H of the Local Government Code supersede the regulation.
No
3. Declare that selecting trade contractors (to be managed by CM-A) by competitive sealed proposals will provide the best value to the City.
4. Set Procurement Schedule
5. Determine criteria for selection of CM-A and relative weights for each
[Local Gov't. Code §271.114 (b)]
6. Name Selection Committee
7. Prepare RFQ and issue (including criteria and weights) for selection
[Local Gov't. Code §271.114 (b)]
8. Advertise per Local Gov't. Code
[Local Gov't. Code §271.117 (d)]
9. "Select most highly qualified provider of those services on the basis of demonstrated competence and qualifications"
[Gov't Code § 2254.004; Local Gov't Code §271.112 (d)]
10. "Attempt to negotiate a contract price with that provider"
[Gov't Code § 2254.004]

In summary, our point isn't that 21st century local government procurement in Texas is simple. But it is manageable. And following these rules will keep you out of the kinds of arguments that the City of Friendswood lost in the 1st Court of Appeals.

3. CUSTOMIZE (AND READ) YOUR CONTRACTS

Customization of construction contracts is one of the most important tools a city has in making sure its procurement of construction services goes as planned. Very few construction projects are one-size-fits-all. While it is often possible to use the same language for many types of projects and many types of owners, the specific requirements of unique owners and projects require customized contracts. Off-the-rack contracts can perform just fine, but know that special conditions might be required.

For efficiency's sake, it makes good sense to have a base contract form that can be relied upon time and time again by a city in similar projects. For example, in all projects for vertical construction it makes sense to have a uniform base contract and general conditions. However, many reasons exist for not using the same contract for horizontal construction projects.

For smaller municipal owners that do not procure a large amount of construction services, reliance on a form contract can make sense from an efficiency and expertise standpoint. One problem often created by the use of form contracts such as those created and published by the American Institute of Architects (AIA), the American Consulting Engineer's Council (ACEC), or the American Society of Civil Engineers (ASCE) is that entities that use them rely on them time and time again and fail to read or re-read them. It's not hard to understand that an assumption can be made that one simply "knows" the contract and therefore is fully aware of its terms. However, comfort with a contract should not be confused with knowledge of that same contract. A second

problem common with the use of these contracts is that the documents are written based on certain general assumptions that might not be applicable to each particular project a city builds.

So, what should a city do to a form contract or in creating a custom contract to ensure the terms are favorable to the city, but still fair to both parties? An answer follows, but first, I'd like to address the issue of fairness in the contract. Virtually all cities are mindful of the costs of construction. Having a fair contract can keep costs at market value. Demanding the use of an unfair contract can be the source of cost increases and less competitive bids being received by the city.

For example, let's assume a city wanted to build a project, but because of bad experiences in the past, it wanted to ensure that the project would not end in the litigation of a contractor's claim for extra work or delay. It is entirely possible to draft a contract that requires a contractor to waive all of these types of claims. However, the contracting city can expect to see fewer bidders and it might see cost increases in the bids it receives due to the unavailability of remedies to a contractor at the end of the project.

When customizing a standard contract or a form contract, it is common to use special conditions and supplementary conditions to modify the standard general conditions. Personally, I am not a big proponent of this approach as it can be hard to follow when reading and understanding contractual terms. The act of having to mark-up or flip pages back and forth can make following the contract confusing. Obviously, when using a licensed form contract such as the AIA A-201, the creation of special conditions might be the only available alternative for customization depending upon the license acquired from the AIA for use of its document.

I prefer the incorporation of project specific changes into the general conditions of the contract as I find that to be easier to use and understand. If you want to modify the terms governing change orders or change directives, it is much easier to follow the flow and context of the contract when all like terms are located in the same place. Construction contracts are not novels. They are

hard to follow at times and not having a continuous reading of particular sections can make them more tedious then they otherwise tend to be.

In addition to considering the form of the contract you create for your client, consider particular needs and concerns that may be common to municipal owners or unique to a particular project. Consider the incorporation or deletion of an arbitration provision which is common in many construction contracts. Consider a venue provision so any litigation must be in the county where the city is located. Consider the types of damages that might be recoverable for both the contractor and owner. Some projects have virtually no possible delay damages for a city-owner so it might make good sense to include a no damages delay clause. Likewise, if the city does not have a high likelihood of suffering consequential damages, a mutual waiver of consequential damages provision might be warranted. Finally, you might want to consider the costs that are recoverable for the city if the contractor defaults.

Making an effort to fully read and customize construction contracts can provide great security and benefits to your clients. The manner in which you draft your contracts is largely a matter of style and preference, but readability and clarity should be considered in making the determination of exactly how the effort shall go forward.

4. GET YOUR PERFORMANCE AND PAYMENT BONDS.

Performance and Payment bonds are required of all projects over a certain amount. Under the provisions of TEX. GOV'T CODE CH. 2253, a performance bond is required if the contract is in excess of $100,000. A payment bond is required for municipalities if the contract is in excess of $50,000. But they're not just requirements. They also protect you and your constituents.

The performance bond is a financial guarantee – from the surety – that the contractor (or construction manager or design/builder) will complete the project. If the contractor defaults, the surety promises to be responsible for completion.

The payment bond is a similar guaranty. The surety promises that the principal will pay its bills to subcontractors, laborers, and vendors. If the contractor fails to pay, the surety stands behind the contractor and guarantees payment to the subs and suppliers.

Surety bonds are written by "insurance companies". But they're not quite as much like insurance as that might suggest. Insurance policies are based on actuarial likelihood of failure. And insurance companies backstop their risk with reserves and re-insurance. Sureties, by contrast, can't (and don't) try to estimate the likelihood of a default. Instead they underwrite their bonds based on the financial strength of the company (and its principals and sometimes their family members). They backstop their risk with financial guaranties from the company and its principals. These agreements (normally called "General Indemnity Agreements") provide that if the surety has to pay a claimant, the Indemnitors will reimburse the surety.

The cost of the bonds? Surety premiums are regulated and vary by project size. But as a rule of thumb, expect to pay between 1% to 2% of the original contract amount.

Are they worth it? Some suggest that you skip the bond and save your money. They reason that if the surety is willing to write the bond, the surety has determined that the contractor is a good credit risk. And if someone else has checked their "Character, Capacity, and Capital," you don't really need the bond. Like the bank that only loans out umbrellas in sunny weather, these pundits propose that the surety wouldn't provide a bond if the contractor was likely to be a risk.

As lawyers, we may be accused of being conservative in recommending bonds for many projects. But the fact is that in this economy, we don't know who will survive. And remember that the surety's ability to collect the costs of a default from Indemnitors is only a happy ending for the

surety. In the meantime, a default on a project may cause your City many unhappy residents and staff.

And for Cities, in the final analysis, the legislature has taken the discretion out of your hands. Bonds aren't discretionary. They are required. TEX. GOV'T CODE § 2253(a)(1)(2). In fact, if you are required to get a performance bond from your contractor and don't, the claimant can make its claim against the City and can recover anything it would have recovered against the bonding company. So make sure the City gets the bond.

We sometimes see a contractor offering a combined bond. Instead of providing a performance bond and a payment bond, they offer one bond – the "Performance and Payment Bond." You should know that this is a distinction with a difference.

A surety's liability on a bond is limited (in most cases) to the face amount (or "Penal Sum") of the bond. So, on a $5,000,000 project, a contractor's bond is (by statute) in the amount of $5,000,000. If a contractor offers a Performance and Payment Bond, the surety's risk is a combined $5,000,000. But if you hold a Performance Bond and a Payment Bond, the surety is at risk to the City for up to $5,000,000 for the contractor's performance and at risk to subs and suppliers for up to $5,000,000 for unpaid bills. Having two bonds not only complies with the statute – it eliminates worries that you are competing with unpaid subs and suppliers for funds to complete the job.

The practical takeaway here is simple. The statute requires cities to get performance and payment bonds. Follow the statute.

5. UNDERSTAND THAT BONDS HAVE SHORT STATUTES OF LIMITATIONS.

Here's a trap for the unwary: We all know by rote the Texas statute of limitations for suit on a contract – it's four years from the date of a breach. And a performance bond is a contract. So isn't the statute of limitations for a performance bond claim 4 years?

The problem is a little-known provision of the Government Code that shortens the statute for performance bond claims. Here is how TEX. GOV'T CODE 2253.078 (a) phrases it:

> Sec. 2253.078. STATUTE OF LIMITATIONS.
> (a) A suit on a performance bond may not be brought after the first anniversary of the date of final completion, abandonment, or termination of the public work contract.
> (b) A suit on a payment bond may not be brought by a payment bond beneficiary after the first anniversary of the date notice for a claim is mailed under this chapter.

So instead of a four-year statute, the Texas performance bond has a one-year limitations period. And instead of running from breach, it runs from "final completion" of the project.

You may have seen some bonds that provide a two-year statute. Or perhaps a 25-month statute of limitations. But here's another trap. The "private" statute of limitations probably doesn't control. Under TEX. GOV'T CODE CH. 2253.023, a bond provided to comply with TEX. GOV'T CODE CH. 2253 "shall be construed to comply with this chapter regarding the rights created, limitation on those rights, and remedies provided." Section 2253.023 goes on to say,

> "(b) A provision in a bond furnished by a prime contractor in an attempt to comply with this chapter that expands or restricts a right or liability under this chapter shall be disregarded, and this chapter shall apply to that bond."

Since the statute provides for suit within one year from final completion, you should expect the surety to argue that it is entitled to the benefit of that statutory limitations period.

Here's the next trap – what is "final completion?" Remember that the bond limitations period is one year from "final completion." And the concept of "final completion" is actually the next trap.

Don't be fooled by common sense here. Most construction lawyers could provide a long monologue on the difference between "Substantial Completion" and "Final Completion." Many contracts define these terms. But if you thought that differing definitions of Final Completion and

Substantial Completion would mean a distinction for purposes of the statute of limitations, you'd be wrong. At least if you were in the Fifth Circuit Court of Appeals.

In a 2010 opinion, the Fifth Circuit ruled that the City of Mont Belvieu didn't sue a performance bond surety timely. *Hartford Fire Ins. Co. v. City of Mont Belvieu*, 611 F.3d 289 (5th Cir. Tex. 2010). The essential facts were undisputed. A contractor experiencing financial difficulty was having trouble completing a park project. The City took occupancy of the park in May 2001. A change order in 2002 declared that "the date of substantial completion" was July 19, 2001. The City transmitted the change order to the contractor and its surety with a letter indicating that the City would look to the contractor and the surety for completion of the punch list and warranty claims.

Discussions continued over warranty claims. In October 2003 (27 months after substantial completion) Hartford agreed to pay $32,000 in claims concerning punch list items and warranty repairs. But in 2004 relations deteriorated. Ultimately Mont Belvieu sued the surety (the contractor was destitute).

The Fifth Circuit ruled that the City was too late. Rejecting claims of promissory estoppel and quasi-estoppel, the Fifth Circuit ruled that the one-year statute of limitations controlled. Most remarkable was the Court's opinion that the statute of limitations ran from substantial completion of the project, rather than "final completion" as described by TEX. GOV'T CODE CH. 2253.078(a).

You can read the opinion and the precedents cited to decide for yourself whether the Fifth Circuit is right. But the practical takeaway here is that bond claim rights can be deceiving. You should know the terms of your bond.

In fact, we go a step further. We suggest that you write your own bond. TEX. GOV'T CODE CH. 2253 doesn't prescribe bond forms. So cities can draft the terms of their own bonds. Don't go overboard – after all, the surety will object to onerous bond terms and may not execute a bond if it departs too far from the norm. But why not try to distinguish your bond from the Mont Belvieu

bond. Define what's included in "final completion." After all, you expect your contractor to complete the punch list and respond to warranty claims. Why not draft the bond so that the surety may be sued up to one year after your definition of final completion?

6. Intervene at the First Sign of Trouble

Every now and then construction projects encounter problems. When that happens, it is important for the city to get involved. Prior to beginning the project, city attorneys should remind their clients that the city attorney or its staff should be made aware of any significant problems that arise in a project. By significant, I do not mean a minor dispute over a work item or change order. I do however think that city attorneys need to be involved if that disagreement leads to a rejected request for a change and a reservation of rights or a protest. It would be appropriate to involve the lawyers if a notice of non-payment or a bond notice is received. It would also be appropriate to involve the lawyers if allegations of defective work or non-performance are made against the general contractor or one of its subcontractors.

From a project staffing perspective, the city's project representative and design professionals should be instructed to keep careful written records of all activities on the project that are related to any dispute. This instruction should include the daily logs of work items and correspondence by way of email, letter and fax.

Apart from merely documenting the substance of a dispute, as the owner, the city should ensure it is or becomes involved in a project's daily activities once trouble starts. As the owner, a city is in a unique position of having the highest investment in the project and its finished product. Because of that connection to the project, the owner must be involved in the resolution of issues as they arise. Too often, owners take a back seat when problems arise and let the project engineer or contractor address issues and work things out. This tactic makes some sense because the outside

engineer or architect does serve as the owner's representative and has expertise the municipal owner may not have in the particulars of a technical construction issue, but it can hurt an owner's strength of position.

This tactic can lead to problems depending on the types of issues that are involved. If a project is suffering from payment issues, then that may be a sign of bigger problems to come for an owner. If subcontractors or suppliers are sending bond notices for non-payment and the owner has properly paid the general contractor's pay applications, then there is a good indication that one of two things are happening on the project — neither of which is good for an owner: 1) either the general contractor is experiencing cash flow issues and is allocating funds from this project to pay other debts, thereby creating additional problems on the city's project, or 2) the general and subcontractors are involved in performance disputes that are causing the general contractor to withhold money until its performance concerns are rectified.

The owner needs to get involved in either situation. If payment issues are arising because the general contractor is improperly allocating funds, bigger problems are likely on the horizon. A city should step in quickly and secure joint check agreements so the subcontractors that are performing the work get paid and continue their performance. Additionally, the owner needs to notify the surety of issues because over-payment can negatively affect the city's performance bond protection. It may become necessary to trap funds until problems are resolved or withhold payments until consent of the surety is provided by the contractor.

Should performance disputes arise regarding quality of work, the city needs to protect itself and its rights under the performance bond by providing immediate notice to the contractor's surety of the problems. The city should comply with all contractual provisions and take advantage of all of its contractual remedies. At the outset of these disputes, it is important that the city strictly follow

all of its contractual obligations so that it won't be found to have breached the contract and excused the contractor's further performance or the surety's obligations.

If the performance dispute involves a disagreement over the scope of work or an interpretation of the technical specifications on the project, the city must evaluate the issues fairly. If the design is ambiguous or if items of work were omitted, the city may have to pay the contractor to perform extra work, but it might be able to secure reimbursement for an omission from the designer. Without city involvement in this type of dispute, the designer may get the city involved in a bigger fight or might compromise the city's position because, while the designer is the city's project representation, it is still looking after its own interests.

These are just a few examples of why it makes good sense for a city to intervene at the first sign of trouble. Standing back and letting others deal with problems might lead to larger problems for the city down the road. Stopping problems before they start is always cheaper than litigating them after they have blown up.

7. EVALUATE PROJECT AND THE DELIVERY METHOD.

Delivery systems aren't one size fits all. Subchapter H of TEX. GOV'T CODE CH. 271 defines a variety of "delivery" options for public projects.

Design-build, for example, is a delivery system that has grown substantially in popularity over the last 20 years. Proponents of design-build suggest that it provides single-point responsibility. Design-Build eliminates the owner's separate contracts with the designer and the contractor – and many feel that it also eliminates the owner's role in disputes that can arise between the two.

Design-build offers other advantages. Chief among them is speed in construction. But some owners are wary that combing in the architect (or owner) with the contractor eliminates the

check-and-balance feature of an independent design professional. And if not administered carefully, quality issues can arise.

Construction Management at Risk is a very useful delivery method – in certain circumstances. It allows the owner to bring on a construction manager to assist the designer in developing a design that will maximize the value of construction.

Competitive Sealed Proposals offer a different alternative. Price can be an important factor, but not the sole factor in choosing a contract. But for smaller contractors, answering long RFP's can be daunting.

The practical takeaway here is simple. One size doesn't fit all. Understand your project and its special features. And determine what delivery system offers the "best value" to your City. By doing so, the city also complies with the statutory requirement. TEX. GOV'T CODE CH. § 271.114(a):

> The governing body of a governmental entity that is considering a construction contract using a method specified by Section 271.113(a) other than competitive bidding must, before advertising, determine which method provides the best value for the governmental entity. The governing body may, as appropriate, delegate its authority under this section to a designated representative.

8. DON'T GIVE OR ALLOW LIENS ON PUBLIC PROJECTS

This subtopic is relatively simple and has been the subject of at least two inquiries I've fielded in recent history. Because of those inquiries, I've included it in this paper as a reminder that contractors and suppliers who perform construction services or public projects enjoy protections other than lien rights.

Article II, Section 9 of the Texas Constitution exempts public properly from forced sale. Chapter 43 of the Texas Property Code exempts public property from forced sale, as well.

> Sec. 9. PROPERTY EXEMPT FROM FORCED SALE AND FROM TAXATION. The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the

> Sec. 43.002. EXEMPT PROPERTY. The real property of the state, including the real property held in the name of state agencies and funds, and the real property of a political subdivision of the state are exempt from attachment, execution, and forced sale. A judgment lien or abstract of judgment may not be filed or perfected against the state, a unit of state government, or a political subdivision of the state on property owned by the state, a unit of state government, or a political subdivision of the state; any such judgment lien or abstract of judgment is void and unenforceable. TEX. PROP. CODE ANN. §43.002.

Based on both the Texas Constitution and the property code, creditors of the city on a public construction project, whether they be contractors, subcontractors, or material suppliers, can not perfect a valid lien against public land.

Rather, these people enjoy the protection of surety payment bonds which are statutorily required on all public construction projects owned by cities where the contracted amount exceeds $50,000. TEX. GOV'T CODE ANN. § 2253.021 (a)(2)(B).

Should your clients receive a lien affidavit from a contractor, subcontractor or material supplier, the city should demand the claimant file a Release of Lien immediately.

Another request the city contracting for construction services should be aware of is a request by a contractor for execution of a Contract for Mechanic's Lien. These contracts should not be signed by a city. If signed, I believe they would be invalid and unenforceable, but it is better to tell your clients not to sign any such contract.

9. CAREFULLY DRAFT BID/PROPOSAL CRITERIA

Competitive sealed proposals (and competitive bids) are ultimately about competition. As a City Attorney, you want to help the City enhance competition. And you want to help the municipality avoid bid protests.

The statute is actually as broad as any public grant of discretion. A competitive proposal may consider a number of factors, by statute:

> § 271.113. PROCUREMENT PROCEDURES.
> (a) In entering into a contract for the construction of a facility, a governmental entity may use any of the following methods that provides the best value for the governmental entity:
> (1) competitive bidding;
> (2) competitive sealed proposals for construction services;
> (3) a design-build contract;
> (4) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or
> (5) a job order contract for the minor repair, rehabilitation, or alteration of a facility.
> (b) Except as provided by this subchapter, in determining to whom to award a contract, the governmental entity may consider:
> (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 governmental entity's needs;
> (5) the vendor's past relationship with the governmental entity;
> (6) the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;
> (7) the total long-term cost to the governmental entity to acquire the vendor's goods or services; and
> (8) any other relevant factor specifically listed in the request for bids or proposals.

Note the last factor. Could it be any broader?

But with discretion comes responsibility. We can imagine a city pushing the "relevance" of factors to a point where a reviewing court might determine the factors not to be "relevant" – and possibly an abuse of a city's discretion.

Equally important is the clarity of the process. We have seen more than one competitive proposal that failed to describe exactly how the selection process would proceed.

The practical takeaways here are two:

- Make sure that the competitive sealed proposal (or competitive bid) explains clearly how the process will work; and
- Limit the "relevant factors" to factors that are truly important – and that truly foster competition in the procurement.

10. CITIES CAN ACT AS THEIR OWN GENERAL CONTRACTORS, BUT…

In general, there is no statutory prohibition against a city serving as its own general contractor on a construction project. If the city has resources and employees with the time and ability to run a construction project, the city might be able to save some money by not paying a general contractor to coordinate and supervise a project. However, if the city chooses to go this route, it must be careful to comply with the procurement laws in awarding large subcontracts and it must also avoid any appearance of impropriety.

Chapter 252 requires competitive bidding on any contract that involves an expenditure over $50,000. TEX. LOC. GOV'T CODE ANN. §252.021(a). Keep in mind that the language in that section specifically says a "contract" not a "project". *Id.* As such, if a city wants to enter into multiple contracts for work that, when combined, will construct a "project", then it may do so. However, a city may not break a particular scope of work up into smaller subparts in order to avoid competitive bidding requirements. Section 252.062 specifically prohibits that conduct and proscribes criminal penalties for officials who might partake is such actions.

> Sec. 252.062. CRIMINAL PENALTIES. (a) A municipal officer or employee commits an offense if the officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 252.021. An offense under this subsection is a Class B misdemeanor.
>
> (b) A municipal officer or employee commits an offense if the officer or employee intentionally or knowingly violates Section 252.021, other than by conduct

> described by Subsection (a). An offense under this subsection is a Class B misdemeanor.
>
> (c) A municipal officer or employee commits an offense if the officer or employee intentionally or knowingly violates this chapter, other than by conduct described by Subsection (a) or (b). An offense under this subsection is a Class C misdemeanor. TEX. LOC. GOV'T CODE ANN. §252.062

For example, if the plumbing scope requires $80,000 to complete, it is inappropriate to split that work up into two contracts to avoid competitive bidding. While it might be possible to split the plumbing scope up into rough and finish out, I would advise against such a choice as it appears to violate the spirit and possibly the language of section 252.062. If it's plumbing, use one contract. The same holds true for framing, mechanical, paint, etc.

If the city bids out the larger contracts but chooses to contract with individual vendors and subcontractors to perform the smaller scopes of work without competitive bidding, then chapter 252 allows that process. (Of course, my next speech might have to be on coordination of trades, resolution of in-project disputes, termination, the use of replacement contractors, and the recovery of completion costs.)

11. CONCLUSION

That's it. Keep these lessons in mind and you can help your clients avoid procurement mistakes.