

THE LAW: CONSTRUCTION DELIVERY OPTIONS

SYNOPSIS OF SENATE BILL 583: AN ACT relating to the construction or repair of facilities by school districts and institutions of higher education. Section 44.031, Education Code.

All school district contracts valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the following method that provides the best value to the district:

- competitive bidding;
- competitive sealed proposals;
- a request for proposals;
- a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- an interlocal contract;
- a design/build contract ;
- a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or
- a job order contract for the minor repair, rehabilitation, or alteration of a facility .

In determining to whom to award a contract, the district may consider:

- 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 district's needs;
- the vendor's past relationship with the district;
- the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses;
- the total long-term cost to the district to acquire the vendor's goods or services; and
- any other relevant factor that a private business entity would consider in selecting a vendor.

Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received shall be published in the county in which the district's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications; except that on contracts involving less than \$25,000, the advertising may be limited to two successive issues of any newspaper published in the county in which the district's central administrative office is located, and if there is not a newspaper in that county, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the district's central administrative office is located.

COMPETITIVE SEALED PROPOSALS FOR CONSTRUCTION SERVICES.

Except as otherwise provided by this subchapter, a school district using competitive sealed proposals to select a contractor for construction services, to select a construction manager, or to award a job order contract for construction services shall base its selection or award on a combination of price and other factors that the district determines provides the best value to the district.

A school district using competitive sealed proposals may discuss proposals with offerors after proposals have been opened to allow for clarification and changes. The district shall take adequate precautions to ensure that information from competing proposals is not disclosed to other offerors.

DESIGN-BUILD CONTRACTS FOR FACILITIES.

"Design-build contract" means a single contract with a design-build firm for the design and construction of a facility.

"Design-build firm" means a partnership, corporation, or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas.

"Design criteria package" means a set of documents that provides sufficient information to permit a design-build firm to prepare a response to a school district's request for proposals. The design criteria package must specify criteria the district considers necessary to describe the project and may include, as appropriate, the legal description of the site, survey information concerning the site, interior space requirements, special material requirements, material quality standards, conceptual criteria for the project, special equipment requirements, cost or budget estimates, time schedules, quality assurance and quality control requirements, site development requirements, applicable codes and ordinances, provisions for utilities, parking requirements, or any other requirement, as applicable.

A school district may use the design-build method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a design-build firm, the contracting school district and the design-build firm shall follow the procedures provided by Subsections (c)-(j).

The district may designate an engineer or architect to act as its representative. If the district's engineer or architect is not a full-time employee of the district, any engineer or architect designated shall be selected on the basis of demonstrated competence and qualifications in accordance with Subchapter A, Chapter 2254, Government Code.

The district shall prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist potential design-build firms in submitting proposals for the project. The district shall also prepare the design criteria package that includes more detailed information on the project. If the preparation of the design criteria package requires engineering or architectural services that constitute the practice of engineering.

The district shall evaluate proposals and select a design-build firm in two phases:

- ❑ In phase one, the district shall evaluate each offeror's experience, technical competence, and capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. Each offeror must certify to the district that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications. The district shall qualify a maximum of five potential offerors to submit additional information regarding technical proposals, implementation, and costing methodologies in response to a formal request for proposals based on the design criteria package.
- ❑ In phase two, the district shall evaluate offerors on the basis of demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, or other factors as appropriate. The district may not require offerors to submit detailed engineering or architectural designs as part of the proposal. The district shall select the design-build firm that submits the proposal offering the best value for the district.

Following selection of a design-build firm, that firm's engineers or architects shall complete the design, submitting all design elements for review and determination of scope compliance by the district's engineer or architect before or concurrently with construction.

An engineer shall have responsibility for compliance with the engineering design requirements and all other applicable requirements of The Texas Engineering Practice Act. An architect shall have responsibility for compliance with the requirements of applicable statutes.

The district shall provide or contract for, independently of the design-build firm, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the 8-13 facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

The design-build firm shall supply a signed and sealed set of construction documents for the project to the district at the conclusion of construction.

A payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract under this section that includes design services only.

CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AGENT.

A school district may use the construction manager-agent method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-agent, a district shall follow the procedures prescribed by this section.

A construction manager-agent is a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the school district regarding construction, rehabilitation, alteration, or repair of the facility. A construction manager-agent represents the district in a fiduciary capacity, except that it may perform general conditions as provided by the contract.

Before or concurrently with selecting a construction manager-agent, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with applicable statutes. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications.

A district shall select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers or architects.

A district using the construction manager-agent method shall procure, in accordance with applicable law and in any manner authorized by this chapter, a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work.

The district or the construction manager-agent shall procure in accordance with Section 2254.004, Government Code, all of the testing of construction materials engineering, the inspection services, and the verification testing services necessary for acceptance of the facility by the district.

CONTRACTS FOR FACILITIES: CONSTRUCTION MANAGER-AT-RISK.

A school district may use the construction manager-at-risk method for the construction, rehabilitation, alteration, or repair of a facility. In using that method and in entering into a contract for the services of a construction manager-at-risk, a district shall follow the procedures prescribed by this section.

A construction manager-at-risk is a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the school district regarding construction during and after the design of the facility.

Facility Planning Resources for Texas Public Schools

Before or concurrently with selecting a construction manager-at-risk, the district shall select or designate an engineer or architect who shall prepare the construction documents for the project and who has full responsibility for complying with applicable statutes. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code.

The district shall provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

The district shall prepare a request for competitive sealed proposals that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, the time and place for receipt of proposals, and other information that may assist the district in its selection of a construction manager-at-risk. The district may request that proposals provide the construction manager's proposed fee and its price for fulfilling the general conditions. The district shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the construction manager. (f) The district may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the district, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the district with respect to a given proposal.

The district shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, for each proposal. Within 45 days after the date of opening the proposals, the district shall evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals.

The district shall select the offeror that offers the best value to the district based on the published selection criteria and on its ranking evaluation. If the district is unable to reach a contract agreement with the selected offeror, the district shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

A construction manager-at-risk shall publicly advertise and solicit either competitive bids or competitive sealed proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. A construction manager-at-risk may seek to perform portions of the work itself if the construction manager-at-risk submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the district determines that the construction manager-at-risk's bid or proposal provides the best value for the district.

The construction manager-at-risk and the district or its representative shall receive and open all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process. All bids or proposals shall be made public within seven days after the date of final selection.

If the construction manager-at-risk reviews, evaluates, and recommends to the district a bid or proposal from a trade contractor or subcontractor but the district requires another bid or proposal to be accepted, the district shall compensate the construction manager-at-risk by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the construction manager-at-risk may incur because of the district's requirement that another bid or proposal be accepted.

SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE SEALED PROPOSALS.

In selecting a contractor for construction, rehabilitation, alteration, or repair services for a facility through competitive sealed proposals, a school district shall follow the procedures prescribed by this section.

Facility Planning Resources for Texas Public Schools

The district shall select or designate an engineer or architect to prepare construction documents for the project. If the engineer or architect is not a full-time employee of the district, the district shall select the engineer or architect on the basis of demonstrated competence and qualifications.

The district shall provide or contract for, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district. The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code.

The district shall prepare a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. The district shall state the selection criteria in the request for proposals. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the contractor.

The district may provide for prequalifying offerors before proposals are submitted. Prequalification may not be a conclusive determination that an offeror offers the best value to the district, and a prequalified offeror may be rejected on the basis of subsequently discovered information. A failure to prequalify does not bar a subsequent determination that an offeror offers the best value to the district with respect to a given proposal.

The district shall receive, publicly open, and read aloud the names of the offerors and the monetary proposals, if any, stated in each proposal. Within 45 days after the date of opening the proposals, the district shall evaluate and rank each proposal submitted in relation to the published selection criteria.

The district shall select the offeror that offers the best value to the district based on the published selection criteria and on its ranking evaluation. The district and its engineer or architect may discuss with the selected offeror options for cost reduction. If the district is unable to reach a contract agreement with the selected offeror, the district shall terminate further discussions and proceed to the next offeror in the order of the selection ranking until a contract agreement is reached or all proposals are rejected.

In determining best value for the district, the district is not restricted to considering price alone, but may consider any other factor stated in the selection criteria.

SELECTING CONTRACTOR FOR CONSTRUCTION SERVICES THROUGH COMPETITIVE BIDDING.

Except to the extent prohibited by other law and to the extent consistent with this subchapter, a school district may use competitive bidding to select a contractor to perform construction, rehabilitation, alteration, or repair services for a facility.

A school district shall award a competitively bid contract at the bid amount to the bidder offering the best value to the district according to the selection criteria that were established by the district. The selection criteria may include the factors listed.

JOB ORDER CONTRACTS FOR FACILITIES REPAIR.

A school district may award job order contracts for the minor repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.

The school district shall advertise for, receive, and publicly open competitive sealed proposals for job order contracts based on time and material rates for various types and classifications of work. The rates under a job order contract shall be in effect for at least six months and for not longer than two years.

The district may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology.

The district may award job order contracts to one or more contractors based on price proposals, experience, past performance, proposed personnel and methodology, safety record, and other appropriate factors.

An order for a job or project under the job order contract must be signed by the district's representative and the contractor. The order may be a fixed price, lump-sum contract based on a statement of work negotiated between the district or its representative and the contractor, or the order may be a unit price order based on estimated quantities. The contractor shall provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.