CONSTRUCTION IN TEXAS PUBLIC SCHOOLS AFTER THE 2011 LEGISLATIVE SESSION

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WALSH, ANDERSON, GALLEGOS, GREEN and TREVIÑO, P.C.

ATTORNEYS AT LAW

WWW.WALSHANDERSON.COM

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505 E. HUNTLAND DRIVE
SUITE 600
AUSTIN, TEXAS 78752
(512) 454-6864

100 N.E. LOOP 410
SUITE 900
SAN ANTONIO, TEXAS 78216
(210) 979-6633

909 HIDDEN RIDGE
SUITE 410
IRVING, TEXAS 75038
(214) 574-8800

6521 N. 10TH STREET
SUITE C
MCALLEN, TEXAS 78504
(956) 971-9317

500 MARQUETTE, N.W.
SUITE 1360
ALBUQUERQUE, NEW MEXICO 87102
(505) 243-6864

10375 RICHMOND AVENUE
SUITE 750
HOUSTON, TEXAS 77042
(713) 789-6864

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I. Facility Design Requirements.

A. Architects & Engineers. School Districts are required to have plans and specifications prepared by and construction supervised by Architects or Engineers on most school district construction projects.

1. Architects. A new building owned by a political subdivision having construction costs exceeding $100,000 or an alteration or addition to an existing building having construction costs exceeding $50,000 must have architectural plans and specifications prepared by an architect. TEX. OCC. CODE ANN. § 1051.703(a).

2. Engineers.

(a) A political subdivision may not construct a public work involving engineering in which the public health, welfare or safety is involved unless the engineering plans, specifications, and estimates have been prepared by an engineer and the engineering construction is to be performed under the direct supervision of an engineer. TEX. OCC. CODE ANN. § 1001.407.

(b) Exceptions: (1) A public work that involves electrical or mechanical engineering if the contemplated expense for the completed project is $8,000 or less, or (2) a public work that does not involve electrical or mechanical engineering if the contemplated expense for the completed project is $20,000 or less. TEX. OCC. CODE ANN. § 1001.053.

(c) Special Case: Roofs. The Texas Board of Structural Engineers issued a policy advisory opinion dated October 7, 2004 clarifying its interpretation of when an Engineer is required for a re-roofing project. An engineer is required when the project (1) involves addition of roof-mounted equipment or the installation of roof material heavier than the original roofing material, (2) a modification of roof pitch by the addition of rafters, trusses or other structural framing elements, (3) during the project, damage to the building's structural framing elements are discovered, or (4) the roof internal drainage system is modified.

3. Architect **or** Engineer?

(a) There is a dispute between the Texas Board of Professional Engineers and the Texas Board of Architectural Examiners over whether an owner may choose an Architect or Engineer as the prime design professional for a

building construction, alteration or additions project. TEX. OCC. CODE ANN. § 1051.703(b); Op. Tex. Att'y Gen. DM-161 (1992).

(b) This dispute was the subject of Request for Attorney General Opinion RQ-0360-GA (July 7, 2005). The Attorney General issued an opinion which did not decide the dispute because it was a "question of fact that cannot be resolved in the opinion process". Op. Tex. Att'y Gen. GA-0391 (2006).

(c) **Common Practice**. Most school districts, and most owners in the private sector, choose an Architect or architectural firm as the prime design professional on building construction projects. The Architect may have employees who are structural, electrical or mechanical engineers, or may have used independent consultants for the engineering portion of the design. However, some engineering firms perform total building design professional services. For projects which involve primarily a single type of engineering, a school district will often contract with an engineer. For example, if a school district contracts for development of a new school site separately from the contract for construction of a facility, its prime design professional may be a Civil Engineer, or it may contract with a Mechanical Engineer for a renovation of its Heat, Ventilation and Air Conditioning (HVAC) system.

B. Design Standards. All school facilities are required to meet certain design standards. TEX. EDUC. CODE ANN. § 46.008; 19 Texas Administrative Code (TAC) § 61.1036. These include:

1. Building Codes.

(a) School facilities constructed <u>within</u> an area that has adopted local building codes must comply with those codes. This usually means a city building code. Most cities now use the International Building Codes but may use different year-editions of the code. That is, the city may not have adopted the latest year-edition of the code. A school district within a jurisdiction that has a building code must ensure that its Architect or Engineer designs the facility to conform to the requirements of the adopted code. If the code authority conducts pre-permit plan reviews and inspections during construction, the school district is not required to conduct individual plan reviews and inspections. However, if the code authority does not conduct plan reviews and inspections, the school district must contract with a qualified, independent third party to conduct the plan review and inspections. 19 TAC § 61.1036(f)(1).

(b) School districts constructing facilities <u>outside</u> an area that has adopted local building codes must adopt a building code and related fire, plumbing, mechanical, fuel gas, and energy conservation codes: (1) from the latest edition of the family of International Codes and the National Electrical Code,

or (2) codes as adopted by a nearby municipality or county. The school district should make sure its Architect or Engineer understands what code and year-edition of the code the District has adopted. The school district must contract with a qualified, independent third party for plan reviews and a reasonable number of reviews and inspections during the course of construction of the project. 19 TAC § 61.1036(f)(2).

(c) Portable Buildings. "Relocatable Educational Facilities", portable buildings used primarily as an educational facility, purchased or leased after September 1, 2007 must be inspected in accordance with the requirements of Occupations Code Chapter 1202, Subchapter E (formerly Texas Education Code § 46.008(b)). 19 TAC § 61.1036(f)(3). The inspection includes the construction of the foundation system and the erection and installation of the building on the foundation. If the relocatable educational facility is within an area that has adopted local building codes, it should be inspected by the local building inspector. If the relocatable educational facility is outside an area that has adopted local building codes, it must be inspected by a qualified independent third party inspector. The inspector must maintain, at a minimum, a current certification from the ICC as a combination commercial inspector and commercial energy inspector. 19 TAC § 61.1036(f)(3)(C).

2. Texas Accessibility Standards (ADA). School facilities must comply with the requirements of The Texas Architectural Barriers Act, Texas Government Code, Chapter 469, and the Americans with Disabilities Act of 1990 (Title I and Title II) (ADA). 19 TAC § 61.1036(f)(D) & (E).

(a) Plans must be submitted to the Texas Department of Licensing and Regulation (TDLR) for accessibility review if the cost of construction is $50,000 or more. TEX. GOV'T CODE ANN. § 469.101.

(b) Facilities must be inspected for compliance by TDLR not later than one year after construction is complete. TEX. GOV'T CODE ANN. § 469.105.

3. Texas Education Agency Design Standards.

(a) In addition to complying with building codes, school districts are required to comply with specific design standards for educational facilities. These include the minimum number of square feet required in general and special classrooms, special equipment such as fume hoods, eye/face washes, and safety showers in certain science classrooms, minimum number of square feet in gymnasiums and libraries, etc. 19 TAC § 61.1036(d).

(b) The school district must have an Educational Program and Educational Specifications approved by the Board of Trustees. The Educational Specifications must include information on (1) instructional

programs, grade configuration and type of facility, (2) spatial relationships, (3) number of students, (4) list of specialized classrooms and other non-classroom spaces, (5) schedule of number and size of spaces, (6) the budget, (7) administration organization, (8) provisions for outdoor instruction, (9) hours of operation, (10) safety, and (11) security. 19 TAC § 61.1036(a)(2).

(c) Certification. The school district must require that its Architect or Engineer and contractor certify by signature on a certification form provided by the TEA that the facility is designed and constructed according to building codes and the District's educational specifications. 19 TAC § 61.1036(c).

C. Independent Testing. School districts are required to contract for the testing of construction materials engineering and verification testing services necessary for acceptance of the facility by the school district, independently of the contractor, construction manager, or design-build firm. The procurement of the testing services is done under the Professional Services Procurement Act. TEX. GOV'T CODE Ch. 2254. Testing typically includes soil and fill material compaction and density tests, concrete strength tests, inspection of welding, and may include observation and testing of roofing. The requirements for material testing should be included in the technical specifications.

D. Exception to the Prohibition on the Use of District Resources for Certain Purposes. As amended in 2011 by H.B. 628, Texas Education Code § 11.168 provides:

"(a) Except as provided by Subsection (b) or Section 45.109(a-1) or (a-2), the board of trustees of a school district may not enter into an agreement authorizing the use of school district employees, property, or resources for the provision of materials or labor for the design, construction, or renovation of improvements to real property not owned or leased by the district.

(b) This section does not prohibit the board of trustees of a school district from entering into an agreement for the design, construction, or renovation of improvements to real property not owned or leased by the district if the improvements benefit real property owned or leased by the district. Benefits to real property owned or leased by the district include the design, construction, or renovation of highways, roads, streets, sidewalks, crosswalks, utilities, and drainage improvements that serve or benefit the real property owned or leased by the district."

II. <u>Procurement of Professional Services.</u>

Services of Architects, Engineers, and Surveyors must be procured under the Professional Services Procurement Act, Texas Government Code Chapter 2254.

A. **TEX. GOV'T CODE ANN. § 2254** provides:

§ 2254.003(a) "A governmental entity may not select a provider of professional services. . .on the basis of competitive bids submitted for the contract or for the services. . . ."

§ 2254.004(a) "In procuring architectural, engineering, or land surveying services, a governmental entity shall:

(1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and

(2) then attempt to negotiate with that provider a contract at a fair and reasonable price. . . ."

B. **Selection.** The decision to contract with an Architect or Engineer should be **made by the Board of Trustees** unless that authority has been delegated to the Superintendent or other representative or committee.

C. **Formalities.** There are no other formalities for the selection of an Architect or Engineer. That is, a school district is not required to publish notice in a newspaper or issue requests for qualifications or proposals. However, school districts often issue requests of qualifications ("RFQ"), evaluate responses, and may interview one or more Architects or Engineers before making their selection. If the District does issue a RFQ, it should include the form of Owner/Architect Agreement in the RFQ, see section E below. If the District does not use a formal process, it should still document the reasons for its selection; for example, have the architect submit a statement of qualifications.

D. **Fair and Reasonable Price.**

1. Although a school district cannot award a contract to an Architect or Engineer on the basis of competitive bids, it is required to negotiate a contract at a "fair and reasonable price". Some Architects and Engineers do not want to disclose their price prior to a selection by the school district. The Texas Attorney General has ruled that the no-bid requirement does not prevent a school district from requesting an architect or engineer's fees in the RFQ. Op. Tex. Att'y Gen. JM-457 (1986), JM-155 (1984). However, the Texas Board of Architectural Examiners has established a rule that architects may provide information on the cost of professional services only after a governmental entity has selected the architect. Accordingly, if the school district's RFQ requests cost information, some architects may refuse to provide the information.

2. Basic Services. Most architect and engineer's fees are a percentage of the "cost of construction" for basic services. For medium to large building construction

projects, we routinely see fees close to 6% for new construction and up to 8% for remodeling. The fees on small projects and specialty projects may be higher, or the architect may propose a lump sum or hourly fee. Basic services usually include architectural services and structural, mechanical, electrical and plumbing engineering services.

3. Additional Services. Many services may not be included in the basic services fee. These typically include civil engineering and acoustical and kitchen consultants. Some of these additional services fees can be "negotiated" to be included in the basic services fees.

4. Reimbursable Expenses. Certain expenses are not included in Basic Services, the most important are printing and travel expenses.

E. Architects and Engineers Agreements.

1. Architects typically use forms of agreements drafted by the American Institute of Architects ("AIA").

(a) The most common forms are B101-2007 (formerly B151-1997, the one-part form) "Standard Form of Agreement Between Owner and Architect" and B102 (formerly B141-1997, the two-part form) "Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services". For typical building construction projects, the B102-2007 will be used with the B201-2007, "Standard Form of Architects Services: Design and Construction Contract Administration". All of these forms are drafted in favor of the architect.

(b) **Note: After May 31, 2009, the AIA stopped publishing the 1997 series of Owner/Architect agreements in either paper or electronic format.**

2. Engineers typically use forms of agreements drafted by the Engineers Joint Contract Documents Committee ("EJCDC").

3. Modification of Standard Agreements. Standard form agreements should be modified so that they meet the school district's expectations of the duties of the architect or engineer. Modifications should include:

(a) Review of the fill-in-the-blank provisions of the agreement to ensure that the district's expectations are met regarding such matters as: the design schedule, the number of visits to the jobsite during construction, and markup on additional services.

(b) Add provisions requiring mediation as a condition precedent to litigation, establishing venue in the county of the school district, and certification of the project as required by the TEA.

(c) Modify provisions for Architect's insurance and standard of care.

(d) Select "litigation" (not arbitration) as the method of dispute resolution.

(e) Delete any limitation of liability provisions.

(f) Consider adding geotechnical reports and surveys to the architect's responsibility.

F. Project Design Schedule. After the design contract is executed by the school district and architect, the architect will begin design of the Project. Design is typically divided into three phases: Schematic Design, Design Development and Construction Documents. At the end of each phase, the Architect should prepare a budget for the work and the school district should review and approve the design documents and budget. Completion of each phase also triggers the District's obligation to pay the architect for that phase of the work. In most cases, after the Construction Documents are complete, the project will be advertised for competitive bids, competitive sealed proposals, or the Construction Manager will submit a guaranteed maximum price.

G. Other Consultants.

1. Independent Materials Testing Consultants. See I.C above.

2. Geotechnical Engineers and Surveyors.

(a) Standard AIA Owner/Architect Agreements provide that the Owner will contract directly with the Geotechnical Engineer and Surveyor (if a survey is required for the project). School districts should, if possible, require the design professional to contract with the Geotechnical Engineer as an additional service. Some design professionals are willing to assume this risk; others are not.

(b) Whether to contract with these consultants directly is ultimately a business decision related to risk. For example, if the District contracts with the Geotechnical Engineer and a problem arises with the foundation, it is likely that the Contractor will attribute the problem to the Architect. In turn, the Architect will claim that the geotechnical report was the cause of the problem. When that happens, the District is drawn into the conflict and has to participate (usually monetarily) in the solution. If instead, the Geotechnical Engineer has contracted with the Architect, the District can take

the position that regardless of whether the problem is a defect in the construction, architectural design or geotechnical report, the District is not responsible, so it is up to the Contractor and Architect to correct the problem. This places the District in a much stronger bargaining position and can save considerable time and money in settling a conflict. This, of course, is precisely why the Architect does not want to assume this risk.

(c) Most of the contracts proposed by Geotechnical Engineers have a limitation of liability provision capping damages for any negligence on the part of the Engineer and limiting the Owner's recovery to a specific sum, often as low as $25,000. Needless to say, $25,000 is insufficient to address a serious foundation problem, particularly if the problem is not discovered until after completion of the structure. Most of the Engineers are reluctant to increase their liability limits. In the event that the District elects to contract directly with a Geotechnical Engineer, a careful review of the contract and review by counsel is always recommended.

3. Project or Program Managers.

(a) A "Project Manager" or "Program Management Consultant" may be hired by the District on large projects or to oversee a group of projects like a bond program, to coordinate and manage the Project and participants, or oversee the District's entire program. These consultants can be the District's eyes and ears on the ground and can be useful in a situation where there is not a person already employed by the District who can act in this role. However, hiring consultants for these roles adds an additional layer of cost to the project or program and the cost of a consultant should be carefully evaluated against the cost to hire an in-house Program or Project Manager if a need exists.

(b) Procurement. There is some controversy about the procurement requirements for program managers. Many of the firms providing program management services are operated by or employ Architects and/or Engineers. These firms take the position that they are "professionals" and procurement of their services must be done under the Professional Services Procurement Act. TEX. GOV'T CODE Chapter 2254. However, some firms offering program management services are made up of people who may be experienced in construction but are not Architects or Engineers. These firms are not "professionals" for purposes of procurement and their services should be procured by the "Request For Proposal" method under TEX. EDUC. CODE § 44.031(a)(3).

III. Procurement of Construction Services. TEX. GOV'T CODE § 2267.

A. History.

1. **Pre-1995.** Prior to 1995, the only permitted method of procurement of construction contracts over $25,000 in value was competitive bidding.

2. **Post-1995.** School districts are allowed to use a number of methods of procurement for all goods and services, including construction services, in contracts valued at $25,000 or more, in the aggregate, for each 12-month period. TEX. EDUC. CODE § 44.031(a).

3. These methods allow school districts greater flexibility, but impose complex requirements which must be followed carefully.

4. **2009.** In 2009, the Texas Legislature raised the amount triggering procurement of goods and services (with some exceptions) to $50,000 (81st Leg, H.B. 987) effective June 19, 2009.

5. **2011**. In 2011, the Texas Legislature modified the language of Texas Education Code § 44.031(a) to "all school district contracts for the purchase of goods and services valued at $50,000 or more." Accordingly, Chapter 44 does not apply to contracts for sales or real estate. Additionally, House Bill 628 amended Chapter 44, including moving all construction delivery methods, except Interlocal Contracts and Energy Saving Performance Contracts, to new Texas Government Code Chapter 2267 ("Chapter 2267"), resulting in a list of seven, rather than the nine, procurement methods in Chapter 44 and seven methods for procurement of construction services in Chapter 2267.

B. Methods. House Bill 628 in the 82nd Legislature ("HB 628") removed all of the methods of procurement of construction services, except Energy Saving Performance Contracts (see section III D.8 below) and Interlocal Contracts (section III.D.7 below) from Chapter 44 of the Education Code and moved them, with some changes, to Chapter 2267 of the Government Code. The purpose of this change was to place procurement of construction services for school districts, cities, counties and most other political subdivisions under the same statute. The methods, described below are: Competitive Bidding, Competitive Sealed Proposals, Construction Manager-Agent, Construction Manager-At-Risk, Design-Build for Facilities, Design-Build for Civil Works and Job Order Contracts. Construction contracts less than $50,000 are not required to be procured by the methods in Chapter 2267, but procurement should be done in a reasonable manner. Additionally, under Chapter 44 of the Education Code it is a criminal violation to divide up contracts that in normal purchasing practice would be purchased in one purchase in order to avoid the requirements of Chapter 44. TEX. EDUC. CODE § 44.032. Districts should avoid engaging in this activity.

C. Selection of method of procurement of construction services. TEX. GOV'T CODE § 2267.

1. The governmental entity (Board) may adopt rules and procedures for acquisition of goods or services. TEX. GOV'T. CODE § 2267.051, § 2267.054 (1). *See* TASB Policy CH and CV.

2. The Board **must** select the method of procurement of construction services that provides the best value to the district **before advertising**; except when the District is using competitive bidding. A Board may select the method for each project, a series of projects such as all projects in a bond issue, or for all of the district's construction projects, but it must be by express Board action, it cannot be delegated to the administration. TEX. GOV'T CODE § 2267.056(a).

3. **Emergency exception**.

(a) Facility destroyed, severely damaged or experiences a major unforeseen operational or structural failure, and the Board determines that methods otherwise required would prevent or substantially impair the conduct of classes or other school activities, the school district is not required to comply with normal procurement requirements. TEX. EDUC. CODE § 44.031(h).

(b) Note that use of the emergency exception requires Board action which may not be possible when an immediate response is required due to a fire, flood or hurricane. In 2009, the Texas legislature enacted new Texas Education Code § 44.0312(c) which permits a Board of Trustees to delegate to the Superintendent or another designated person the authority to contract for repair work in an emergency. School districts should consider whether to delegate this authority as a standard policy.

D. Authorized methods of procurement of construction services.

1. Competitive Bidding. TEX. LOC. GOV'T CODE § 271.026, 271.027(a) & 271.0275; TEX. GOV'T CODE Chapter 2267, Subchapter C. This is the traditional method of completing construction documents, advertising in a newspaper in the county, and accepting and opening sealed bids. Prior to HB 628 enacted in 2011, Competitive Bidding allowed a school district to consider factors other than price. However, HB 628 reverted to the pre-1995 criteria and now requires the school district to award the contract to the "lowest responsible bidder". TEX. GOV'T CODE § 2267.101. A major disadvantage is that if the lowest responsible bidder is higher than the school district's budget, the school district cannot negotiate for a change in scope of work and price. In order to seek a lower price, the school district has to reject all bids, revise the construction documents, and rebid the project; a costly and time consuming process.

2. Competitive Sealed Proposals. TEX. GOV'T CODE Chapter 2267, Subchapter D. This method permits a school district to "discuss with the selected offeror options for a scope or time modification and any price change associated with the modification." TEX. GOV'T CODE § 2267.155(b). That is, if the project is over budget, the school district may consider reducing the scope of the project and ask the contractor to negotiate a lower price. The request for proposals must include the selection criteria and weight of criteria and the award is based on the contractor providing the "best value for the governmental entity". For this reason, in most cases, school districts should use the competitive sealed proposal method rather than competitive bid method.

3. Construction Manager-at-Risk. TEX. GOV'T CODE Chapter 2267, Subchapter F. This method was borrowed from the private sector where it is sometimes referred to as "fast track". The Construction Manager-at-Risk method may be procured in either a one-step or two-step process. One hundred percent complete Construction Documents are not required for either a one-step or two-step process. A Construction Manager-at-Risk ("CMAR") can be procured concurrently with or after selection of an architect.

(a) After the District selects a CMAR, it will enter an Agreement which establishes the CMAR's fee and general conditions price, but not the complete price of the Project. When the Construction Documents (plans and specifications) are complete, the CMAR must publically advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for performance of all major elements of the work.

(b) A CMAR may seek to perform portions of the work itself if the CMAR submits proposals in the same manner as other trade contractors or subcontractors and the District determines that the CMAR's proposal provides the best value for the District. TEX. GOV'T CODE § 2267.255.

(c) All bids or proposals submitted to the CMAR must be made available to the District "upon request" and to the public after the later of the award of the contract or the seventh day after the date of final selection of the bid or proposal. Always require the CMAR to submit the bids or proposals to the District; the TEA Audit Division will require the District to have this information.

(d) If the CMAR recommends a bid or proposal and the District requires another bid or proposal be accepted, the District must compensate the CMAR for any additional cost or risk. TEX. GOV'T CODE § 2267.256(b).

(e) After the CMAR receives and analyzes bids or proposals, it will submit a Guaranteed Maximum Price (GMP) for the entire Project. If the

District accepts the GMP, the District and CMAR will execute an Amendment to the Agreement establishing the GMP, schedule and any clarifications or changes to the scope of work on the Project.

(f) The GMP is the cost of the Work plus the CMAR's fee and general conditions not to exceed the amount established. The District should audit the CMAR's monthly pay applications to insure that only the actual cost of the work, plus fee and general conditions, is invoiced.

4. Construction Manager-Agent. TEX. GOV'T CODE Chapter 2267, Subchapter E. A Construction Manager-Agent (CMA) must be selected on the basis of demonstrated competence and qualifications in the same manner as an architect or engineer under § 2254.004 of the Professional Service Procurement Act. This method does not require a specific form of RFP or RFQ, however, it would be good practice to follow a procedure similar to the procedure used for Construction Managers-at-Risk (CMAR) except that the school district cannot select the Construction Manager-Agent on the basis of competitive bids for the services.

Although this method sounds similar to CMAR, it is very different. A Construction Manager-Agent ("CMA") has no liability ("risk") for the project cost or schedule. The CMA is merely an agent or consultant to the owner. The owner is the "general contractor" and takes all of the risk for cost and schedule that a general contractor or CMAR would normally have. Instead of one contract with a general contractor or CMAR, the owner will have numerous contracts and purchase orders directly with trade contractors and suppliers.

5. Design/Build Contract. TEX. GOV'T CODE Chapter 2267, Subchapters G and H. Design-Build is a method of project delivery in which the district contracts with a single entity to take responsibility for both the design and construction of a project. Subchapter G applies to a facility which is a building or an associated structure, including an electric utility structure. Subchapter G does not apply to a highway, road, street, bridge, underground utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction; or a building or structure that is incidental to a project that is primarily a civil engineering construction project which is regulated by Subchapter H.

(a) Under Subchapter G, selection of a Design-Builder is a two-step process. The District may not consider cost-related or price-related factors in step one. The District may qualify not more than five offerors and in step two request additional information including "costing methodology".

(b) The school district must engage an Architect or engineer independent of the Design-Build firm to "act as the [school district's] representative for the duration of the Project". TEX. GOV'T CODE § 2267.305.

(c) The TEA suggests that Districts consider contracting with a separate construction manager to supervise design-build activities in light of the complexity of monitoring a design-build project. *Texas Education Agency's (TEA) Financial Accountability System Resource Guide* (January 2010 Update 14).

6. Job Order Contract. TEX. GOV'T CODE Chapter 2267, Subchapter I. Under this method, a contractor submits unit prices for specific types of work to be ordered in the future, for example the price of a square foot of 4' sidewalk, or a lineal foot of 6' chain link fence. The unit price may also be a "factor" to be applied to a published estimating price book, such as R.S. Means Facilities Construction Cost Data. For example, the contractor may propose to perform work for 80% of the unit prices set out in the price book. A district using this method should require the contractor to complete an estimate based on the contractor's "take-off" of work quantities prior to beginning the work.

(a) A school district may award job order contracts for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, types and quantities of work required are indefinite. The school district may establish contractual unit prices by: (1) specifying one or more published construction unit books; or (2) providing a list of work items and requiring the offerors to bid or propose one or more multipliers to be added to the price book or pre-price work items. The school district must advertise for, receive, and publicly open sealed proposals for job order contracts. The school district may award job order contracts to one or more contractors in connection with each solicitation of bids or proposals. The term of a job order contract may not exceed two years and the District may not renew the contract annually for more than three additional years.

(b) If the Project requires architectural or engineering services, the District must select an Architect or Engineer to prepare Construction Documents for the project TEX. GOV'T CODE § 2267.408.

(C) Any project with a value of more than $500,000.00 must be approved by the Board of Trustees.

7. Interlocal Contract (Purchasing Cooperatives). TEX. EDUC. CODE § 44.031(a)(4), TEX. GOV'T CODE Chapter 791.

(a) Until recently, most Interlocal Contracts were for the procurement of goods, not services. However, some cooperatives currently offer "job order contracts" (see 6 above) for construction services to school districts throughout the state.

(b) Interlocal Contracts are contracts made in accordance with Texas Government Code § 791. They permit a local government to contract or agree with another local government to perform governmental functions and services. A local government may also enter an Interlocal Contract with a state agency, or similar agency of another state.

(c) An Interlocal Contract between a governmental entity and a purchasing cooperative may not be used to purchase engineering or architectural services. TEX. GOV'T CODE § 791.011(h) (80th Leg. H.B. 1886, eff. Sept. 1, 2007). Some Interlocal Contract procurements which were done before September 1, 2007 and did include engineering or architectural services may be "grandfathered".

(d) If the Interlocal Contract is valued at $25,000 or more, the school district must document any contract-related fee, including any management fee and the purpose of the fee, and annually submit a written report to the Board of Trustees setting out the amount, purpose and disposition of the fee. School districts should require the purchasing cooperative to provide this information. TEX. EDUC. CODE § 44.0331.

(e) Interlocal contractual payments must fairly compensate the party who performs the services or functions under the contract. In addition, the parties to an Interlocal Contract may create an administrative agency or designate an existing local government to supervise the performance of the contract. The agency or designated local government can then employ personnel, perform administrative activities and provide administrative services necessary to perform the Interlocal Contract. TEX. GOV'T CODE §§ 791.011-791.025.

(f) An Interlocal Contract must: 1) be authorized by the governing body of each contracting party unless the party is a municipally-owned electric utility; 2) state the purpose, terms, rights, and duties of the contracting parties; and 3) specify that each party paying for the performance of the function or services must take those payments from current revenues.

(g) Senate Bill 760 of the 82nd Texas Legislative Session, which amended Texas Government Code § 791.011, permits Interlocal Contracts between governmental entities to be for a specified number of years rather than having to be renewed annually.

(h) The Interlocal Contract must be approved by the Board of Trustees.

8. Energy Savings Performance Contracts. TEX. EDUC. CODE § 44.901. Energy Savings Performance Contracts are a form of design-build contract with its own unique procurement procedure. They also permit the school district to finance the cost of design and construction over a term of up to 20 years. If the cost is financed, the annual payments on the contract may not be more than the annual energy savings generated by the work.

(a) Energy Savings Performance Contracts include contracts for energy or water conservation measures to reduce energy or water consumption or operating costs of new or existing school facilities, including contracts for installment or implementation of: insulation; window or door system modification that reduce energy consumption; automatic energy control systems; heating, ventilating, or air-conditioning system modifications or replacements; lighting fixtures that increase energy efficiency; energy recovery systems; electric system improvements; and other energy or water conservation-related improvements or equipment. (This list is not exhaustive.)

(b) The contractor is selected under the procedures of the Professional Services Procurement Act, except that the District must advertise in the manner required for competitive bidding.

(c) Before entering into an Energy Savings Performance Contract, the board must require the selected provider to file a performance bond in accordance with Chapter 2253 of the Government Code. The board may also require a separate bond to cover the guaranteed savings specified by the contract. (However, these bonds are not available from bonding companies.)

(d) An Energy Savings Performance Contract may be financed: 1) under a Lease/Purchase Contract that has a term no greater than 20 years and that meets federal tax requirements; 2) with the proceeds of bonds; or 3) under a contract with the provider of the conservation measures that has a term not to exceed 20 years.

(e) House Bill 1728, in the 82nd Legislature, provides that a school district may use any available money, other than money borrowed from the state, to pay the contractor and that the school district is not required to pay the costs solely out of the savings realized under the Energy Savings Performance Contract. In addition, the school district may contract with the energy savings performance contractor for work that is related to, connected with, or otherwise ancillary to the energy savings.

(f) An Energy Savings Performance Contract must contain guarantees regarding the amount of the savings to be realized by the school district.

E. What method provides the best value for the school district?

1. If a school district considers a construction contract using a method other than competitive bidding, the school district is required to select the method of procurement that provides the "best value for the district." TEX. GOV'T CODE § 2267.056. The statute does not describe how a school district determines which method provides the best value.

2. A Texas Attorney General opinion says that school districts "should establish, by rule, its own procedure and criteria to determine the purchasing method that will provide the best value in a particular instance." Op. Tex. Att'y Gen. No. JC-0037 (1999) at 4. The school district's "rules" are included in the district's policy manual at section CH and the CV series; however these policies usually will not give much direction on which method to choose.

3. The Attorney General goes on to suggest that the criteria listed in § 44.031(b) (before amended) could "inform" the decision. The criteria listed in Texas Government Code § 2267.055 are listed in Section IV(C) below.

4. Suggestion. The two most common methods of procurement by school districts are Competitive Sealed Proposals and Construction Manager-at-Risk.

(a) Start by considering Competitive Sealed Proposals. Because this method requires contractors to submit a competitive price for the full scope of work on the project, this method ensures the school district that it is receiving the lowest price on the project, at least at the date and time of the proposal opening. Do not use Competitive Bidding. A school district gets all of the advantages of Competitive Bidding by using Competitive Sealed Proposals, plus, if the project is over budget, the school district can negotiate the price with the contractor under a Competitive Sealed Proposal, but not under a Competitive Bid.

(b) If the school district believes a project would benefit from contractor input during the design phase, would like more control over selection of subcontractors, or is considering a multi-phase project, it should consider the Construction Manager-at-Risk method.

(c) If the school district's schedule requirements cannot be met by the Competitive Sealed Proposal Method or Construction Manager-at-Risk methods, or if a major component of the project is designed by a supplier (such as a pre-engineered steel building), consider a Design-Build Contract. A school district should expect that the project price will be higher using this method than with more competitively procured methods.

(d) For "minor" projects, or special projects with repetitive items of work, in which schedules are a problem, consider the Job Order Contract method, either by direct procurement by the school district or through an Interlocal Agreement.

(e) Do not confuse Construction Manager-at-Risk with Construction Manager-Agent. A Construction Manager-at-Risk (under a properly prepared contract) is like a general contractor; responsible for the contract price and construction schedule. A Construction Manager-Agent is responsible for nothing; the school district is in essence the "general contractor" and assumes most of the risk on the project. In addition, many Construction Manager-Agents charge fees as high as Construction Managers-at-Risk.

(f) Beware of contractors, construction managers, design-builders and other entities who contact the school district before it has selected a method of procurement and claim they can complete a project for less cost than others. There are no "silver bullets" in construction; in most cases, if you pay less, you get less.

IV. Procurement Procedures for Construction Services.

A. Construction Documents.

1. "Construction Documents" means plans and specifications for construction of the project.

2. Construction Documents should be 100% complete prior to requesting Competitive Bids and Competitive Sealed Proposals.

3. Construction Documents are not required for Construction Manager-at-Risk, Construction Manager-Agent or Design-Build procurements.

B. Preparation of Request for Proposals, Request for Competitive Sealed Proposals, or Requests for Qualifications. The type of "request" depends on the type of procurement. Typically, the request documents are prepared by the school district's architect. **All request documents should be reviewed by the school district and its legal counsel before they are issued.**

1. Competitive Bids and Competitive Sealed Proposals require a Request for Proposals ("RFP") which should include 100% complete Construction Documents (plans and specifications), and should include the form of Owner/Contractor Agreement, general conditions, supplementary conditions, and general requirements. **A school district should have the agreement, general conditions and supplementary conditions reviewed by legal counsel before the RFP is issued.**

2. The Construction Manager-at-Risk method may be procured in either a one-step or two-step process. One hundred percent complete Construction Documents are not required for either a one-step or two-step process. A Construction Manager-at-Risk can be procured concurrently with or after selection of an architect. The school district can select the Construction Manager-at-Risk as soon as it has determined the project location, project scope, schedule, selection criteria, and estimated budget. TEX. GOV'T CODE §§ 2267.251, 2267.253.

(a) In a one-step process, the school district issues a Request for Proposals ("RFP") which includes price proposals. Typically, the Construction Manager will be required to submit a price proposal for its "fee" (main office overhead and profit) and "general conditions" (jobsite overhead) as a percentage of the "cost of construction" or as a lump sum.

(b) In a two-step process, the school district first issues a Request for Qualifications ("RFQ") which cannot require price proposals. Based on responses, the school district selects no more than five Construction Managers to submit price proposals.

(c) Often, the RFPs or RFQs prepared by architects do not contain the form of agreement between the owner and construction manager, or general and supplementary conditions. **School districts should include the form of agreement, general and supplementary conditions in the RFP or RFQ to avoid having to negotiate the form of agreement after the Construction Manager is selected.**

3. The Construction Manager-Agent method does not require a specific form of RFP or RFQ, however, it would be good practice to follow a procedure similar to the procedure used for Construction Managers-at-Risk except that the school district cannot select the Construction Manager-Agent on the basis of competitive bids for the services. TEX. GOV'T CODE §§ 2267.201, 2267.207. Again, the school district should include the form of Owner/Construction Manager Agreement, general, and supplementary conditions in the RFQ.

4. The Design-Build method requires the school district to issue an RFQ and Design Criteria Package which contains "sufficient information to permit a design-build firm to prepare a response" to the request. The RFQ must include general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist the potential design-build firms in submitting proposals. The Design Criteria Package must contain more detailed information on the project. TEX. GOV'T CODE § 2267.306. The selection must be made in two phases. TEX. GOV'T CODE § 2267.307.

(a) In phase one, the school district qualifies no more than five design-build firms without considering cost or price-related evaluation factors.

(b) In phase two, school district may request additional information including "costing methodology". Costing methodology means policies on subcontractor markup, definition of general conditions, range of cost for general conditions, policies on retainage, policies on contingencies, discount for prompt payment, and expected staffing for administrative duties; it does not include a guaranteed maximum price or bid for overall design or construction.

C. Criteria and Weight of Criteria. TEX. GOV'T CODE §§ 2267.055, 2267.056. The school district is required to include the criteria and weight of criteria in the RFP or RFQ for Competitive Sealed Proposals, Construction Manager-at-Risk, and Design-Build methods. Criteria and weight of criteria are not required for Competitive Bids. Once this is published, the school district is obligated to evaluate the proposals based on the published criteria and weight. Unless the "price" criteria is weighted at 100%, it is possible that the number one ranked proposer will not be the lowest price proposer. **The school district should carefully consider the criteria and weight of criteria before the RFPs or RFQs are issued to ensure it will result in the district receiving the best value for the district.**

1. The district may consider: (1) the price; (2) the offeror's experience and reputation; (3) the quality of the offeror's goods and services; (4) the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses; (5) the offeror's safety record; (6) the offeror's proposed personnel; (7) whether the offeror's financial capability is appropriate to the size and scope of the project; and (8) any other relevant factor specifically listed in the district's request for bids or proposals. The district must publish in the request for bids, proposals, or qualifications the evaluative criteria and their assigned weights. TEX GOV'T CODE § 2267.056.

2. Criteria number (8) above permits the school district to list any additional criteria, or any number of criteria, in the RFP or RFQ as long as the criteria and weight of criteria will reasonably result in the best value for the district. School districts should consider what criteria will describe the "best value" on the particular project and use those criteria in the RFP or RFQ.

3. Section 2267.055(b) provides: "In determining the award of a contract under this chapter, the governmental entity shall. . .consider and apply any existing laws, including any criteria, related to historically underutilized businesses." There are no state laws or regulations requiring a school district to consider historically underutilized businesses (HUB). Unless the school district has adopted its own policy with respect to HUBs, it should not use this criteria.

4. Local Businesses. School districts sometimes ask if they are permitted to favor businesses located in the school district or the local area in contracting. Until September 1, 2005, school districts were not permitted to do so. That is, they could

not use criteria for selection which favored a local business. Specifically, Op. Tex. Att'y Gen. No. DM-113 (1992) said independent school districts could not adopt procurement policies that reward bidders purely on the basis of the bidder's residence or location because that criteria does not bear an objective relationship to the bidder's ability to perform or the quality of the work. However, House Bill 664, enacted in the Seventy-Ninth Regular Session of the Texas Legislature provides for consideration of a bidder's location in limited circumstances. Specifically H.B. No. 664 adds Subsection (b-1) to Texas Education Code Section 44.031 as follows:

> In awarding a contract by competitive sealed bid under this section, a school district that has its central administrative office located in a municipality with a population of less than 250,000 may consider a bidder's principal place of business in the manner provided by Section 271.9051, Local Government Code.

Section 271.9051, Local Government Code provides in pertinent part:

> (b) In purchasing . . . services, if a municipality receives one or more competitive sealed bids from a bidder whose principal place of business is in the municipality and whose bid is within five percent of the lowest bid price received by the municipality from a bidder who is not a resident of the municipality, the municipality may enter into a contract for construction services in an amount of less than $100,000 or a contract for other purchases in an amount of less than $500,000 with
>
> > (1) the lowest bidder; or
> >
> > (2) the bidder whose principal place of business is in the municipality if the governing body of the municipality determines, in writing, that the local bidder offers the municipality the best combination of contract price and additional economic development opportunities for the municipality created by the contract award, including the employment of residents of the municipality and increased tax revenues to the municipality.

Any school district considering using this Subsection to give a five percent "preference" to a local bidder should be very cautious. First, it appears that the Subsection applies only to "competitive bidding", not to competitive sealed proposals, construction manager methods or design-build contracts. Second, it requires the school district to consider "additional economic development opportunities" including "employment of residents" and "increased tax revenues". It may be difficult for a school district to show that additional economic development activities benefit the school district.

5. Information to Ask for In the Solicitation. In preparing the RFP or RFQ, it is important to ask the respondent to provide information that will assist the District in evaluating their Proposal or Qualifications Statement based on the criteria published in the solicitation. There are a number of ways to gather this kind of information, either by attaching a questionnaire with specific questions or simply asking for the information in the body of your "request". Districts sometimes ask for information in the Solicitation that has no connection to the criteria being evaluated. The best rule of thumb in this regard is to remember that, "If you ask it you must evaluate it". A recommended practice is to make a list of the included evaluation criteria and ask a few (3 to 5) specific questions regarding each category; and if appropriate, request documentation to support the answers (e.g. financial statements, letters of recommendation, safety records etc.).

D. Publication of Notice. TEX. EDUC. CODE § 44.031(g), TEX. GOV'T CODE § 2267.052. Notice of the time by when and place where the bids or proposals will be received and opened must 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. If the county has no newspaper, notice must be published in a newspaper in the county nearest the county of the district's central administrative office.

Comment: The publication statute requires two publications, each in separate weeks. The statute does not expressly require that there be a full week interval between the publications. The interval between the second or final publication and the opening of bids is also not prescribed by statute.

E. Receive and Open Bids, Proposals or Responses of Requests for Qualifications. TEX. EDUC. CODE § 44.031(g).

The school district must receive and publicly open bids, proposals or responses for qualifications in the county of the district's central administrative office.

F. Selection or Ranking of Contractors, Construction Managers-at-Risk or Design-Build Firms.

1. Although the statute refers to "selection" of contractors, in the Competitive Sealed Proposal, Construction Manager-at-Risk, Design-Build and Job Order Contract methods, the action required by the school district is actually a ranking of proposals based on the best value for the district.

2. The ranking must be made by the Board of Trustees unless the Board expressly delegated the authority and provided notice of the delegation in the RFP or RFQ. If the authority is not delegated, any ranking, selection, or evaluation of bids,

proposals or qualifications for construction services other than by the Board in an open public meeting is advisory only. TEX. EDUC. CODE § 44.0312(a), (b).

3. The most common practice for ranking proposals appears to be that the Board **does not** delegate the ranking but does designate a person or committee to make an advisory ranking. The advisory ranking is presented to the Board and the Board takes action to accept or reject the recommendations. If the Board rejects the advisory ranking, the Board may rank the proposals, but it is bound by the criteria and weight of criteria in the RFP or RFQ.

4. The District is required to document the basis of its selection and make the evaluations public not later than the seventh day after the date the contract is awarded. TEX GOV'T CODE § 2267.056.

G. Negotiation and Execution of Construction Agreements.

1. After the Board of Trustees has approved a ranking of contractors, construction managers, or design-build firms, the school district must first attempt to negotiate with the first-ranked proposer. If the school district is unable to negotiate a contract with the first-ranked proposer, it must, formally and in writing end negotiations with that proposer and proceed to negotiate with the next proposer in the order of the selection ranking until a contract is reached or all negotiations with all ranked proposers ends. TEX GOV'T CODE §§ 2267.155, 2267.254. That is, a school district cannot negotiate with a proposer before the Board has approved the ranking of proposals and cannot negotiate with more than one proposer at the same time.

2. Negotiation of an Agreement is usually a formality if (1) the form of agreement is included in the Procurement Documents and (2) the proposed price is within the District's budget. If the price is not within the budget, except in Competitive Bid procurements, the District can negotiate with the contractor a "scope or time modification" and any price change associated with the modification. TEX. GOV'T CODE §2267.155(b). These negotiations are commonly called "value engineering". If the District and contractor agree on value engineering changes to the Scope of Work, they should be formally documented by the architect in the Construction Documents.

H. Protests by Vendors. TEX. EDUC. CODE § 44.032(f) provides that a court may enjoin performance of a contract made in violation of the procurement laws. Such a suit may be brought by a citizen of the county in which the school district is located or "any interested party". Claims of a violation of the procurement laws are often made by disappointed bidders, especially by a low-price bidder who was not ranked number one. Typically, the complaining party will call or write the district claiming the contract should have been awarded to him or her. A school district receiving such a complaint should review the procurement to make sure it was properly done and, if so, defend its decision. If there is a flaw in the procurement, the District should consider rescinding the award of the contract and

rejecting all bids. For construction contracts, an action for declaratory or injunctive relief related to a contract must be filed not later than the 10th day after the date on which the contract is awarded. TEX. GOV'T CODE §2267.452.

I. Texas Education Agency Audits. The Texas Education Agency (TEA) Audit Division has the authority and responsibility to investigate alleged violations of the procurement laws by school districts. Typically, the investigation will be triggered by a complaint from a contractor or a citizen within the District. The TEA will notify the District of the general nature of the complaint and request documents relevant to the complaint. If the District's response does not prove the District did not violate the procurement laws, the TEA audit team may visit the District, review additional documents and conduct interviews. The TEA will submit a preliminary finding to which the District may respond. After the District's response, the TEA will issue a final report.

V. Forms of Contracts.

A. AIA Documents. The American Institute of Architects (AIA) promulgates standard forms of agreement for various types of contracts. These are the most common forms of agreement in all commercial construction, including school district construction. The advantage of AIA forms is that architects, contractors and their attorneys are familiar with them; accordingly, less time is required to review and negotiate these forms of agreement.

The most commonly used AIA form agreements, by type of procurement are:

1. Competitive Bid and Competitive Sealed Proposal – A101-2007 *Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM.*

2. Construction Manager-at-Risk – A133-2009 *Standard form of Agreement Between Owner and Construction Manager as Constructor Where the Basis of Payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*. (Formerly AIA A121CMc-2003 *Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is Also the Constructor*).[1] This form can be modified in a number of subtle ways to make it more or less favorable to the owner. Many construction managers will attempt to negotiate a contract with contingencies and allowances which shift the risk for price to the owner. The form should be modified to make the construction manager responsible for the contract price and the schedule after the construction manager has submitted and the school district has approved the "guaranteed maximum price" ("GMP"). The GMP is established by Exhibit A, Guaranteed Maximum Price Amendment. The GMP proposal should be carefully reviewed by the District to insure the cost of the work is based on the actual bids or proposals received by the CMAR, that no general

[1] We do not recommend the use of A134-2009, *Standard Form of Agreement Between Owner and Construction Manager as Constructor, where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price.*

conditions work is included in the cost of the work, and that the CMAR has not included contingencies or allowances which are not permitted in the Agreement. The construction manager should not be permitted to begin work on the project until the GMP is approved unless it is critical to the schedule and the school district understands the risk it is taking.

3. Construction Manager-Agent – C132-2009 *Standard Form of Agreement Between Owner and Construction Manager as Advisor*. (Formerly AIA B801/CMa *Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is NOT a Constructor* (1992 edition)).

4. Design-Build – A141-2004 *Standard Form of Agreement Between Owner and Design-Builder*.

5. Job Order Contract – None, A101-2007 can be modified for this method.

6. Energy Savings Performance Contracts – A141-2004 *Standard Form of Agreement Between Owner and Design-Builder*.

B. EJCDC Forms. The Engineers' Joint Contract Documents Committee (EJCDC) promulgates standard contract forms for use by its members. If a school district's prime design professional is an engineer, the engineer is likely to propose an EJCDC form.

C. Proprietary Forms. In some parts of the state, "proprietary" forms of agreement are used with some frequency. These are custom drafted, usually by a contractor or construction manager or their attorney. School districts should be very cautious about using proprietary forms of agreement (unless they are drafted by the school district's attorney) because they are typically even more favorable to the contractor than the AIA or EJCDC forms.

D. Modification of "form" documents. AIA documents are drafted by committees made up primarily of representatives of architects and contractors. Accordingly, they protect architects first, contractors second, and owners last. AIA documents are drafted for use throughout the United States on all types of private and public commercial construction projects. They are not specific to Texas, to school districts, or to the specific requirements of the Texas Education Code and Texas Government Code Chapter 2267. In addition, many provisions do not reflect the expectations of school district construction project owners. However, form documents can be modified by amendments and supplementary conditions to make them adequate for school district use. Districts should modify the contracts and attach the modifications to procurement documents. **In forms of procurement in which the contract documents are included in the RFP or RFQ, the modifications to AIA Documents should be reviewed by the school district and its legal counsel before the RFP or RFQ is issued.**

E. The "Contract". A construction contract typically includes a "Form of Agreement" which may only be a few pages long. The AIA A101-2007 is only seven pages. However,

the most important provisions of the agreement are included in other documents which are incorporated by reference in the Form of Agreement. In the case of the A101, these include:

- General Conditions, A201-2007;
- Supplementary Conditions, drafted by the architect, owner or the owner's attorney, which modify the General Conditions;
- Specifications prepared by the architect of engineer and which are usually included in a "Project Manual";
- Drawings, that is, the project plans; and
- Addenda, sometimes issued during the bidding process to clarify plans and specifications.

In addition, the contract may include the Request for Proposals and the contractor's bid or proposal form, a survey of the project site, and the geotechnical report. After the contract is signed by both parties, it may be modified by Change Orders or Change Directives which become part of the contract. Finally, the contract will include certain certificates such as the Certificate of Substantial Completion, the Certificate of Final Completion, and the Texas Education Agency required Certification of Project Completion.

The District should keep a complete copy of all Contract Documents, as well as close out documents (warranties, operations and maintenance manuals, "as-built" drawings, etc.) at a central location and maintain the Contract Documents for ten (10) years.

VI. Statutory Requirements in Construction Contracts. State law provides a number of provisions that are required in construction contracts executed by school districts.

A. Performance and Payment Bonds. TEX. GOV'T CODE Chapter 2253. A school district must require a contractor, before beginning work, to execute a performance bond if the contract is in excess of $100,000, and a payment bond if the contract is in excess of $25,000. TEX. GOV'T CODE § 2253.021(a).

1. A performance bond is for the protection of the school district in case of default of the contractor. TEX. GOV'T CODE § 2253.021(b).

2. A payment bond is for the protection of subcontractors and material suppliers to the contractor and protects school districts from payment claims from those subcontractors and material suppliers. TEX. GOV'T CODE § 2253.021(c).

3. If a school district fails to obtain a payment bond from the prime contractor, the school district assumes the liability of a surety to pay valid claims, and claimants may obtain a lien on contract funds due the prime contractor. TEX. GOV'T CODE § 2253.027.

4. The District should require the contractor to submit original performance and payment bonds before any work begins.

B. Prevailing Wages. TEX. GOV'T CODE § 2258. School district contracts must require that the contractor pay prevailing wages. The prevailing wage schedule must be approved by the Board of Trustees and must be included in the RFP.

1. A public body must determine the prevailing rates for per diem wages, legal holidays, and overtime by: (1) conducting survey of wages for workers in a similar class of contract work; or (2) using the prevailing rate determined by U.S. Department of Labor in accordance with the Davis-Bacon Act. Public body must determine prevailing rate of per diem wages as a sum certain; and specify the wage rates in the call for bids and in the contract itself. The determination of the wage rate is final. TEX. GOV'T CODE § 2258.002.

2. Contractors and subcontractors must not pay less than the prevailing local wage rate as ascertained by the public body. Otherwise, the contractor or subcontractor will have to pay a statutory penalty. If a public body fails to specify the prevailing wage rates in the body of the contract, the contractor is relieved of all liability. TEX. GOV'T CODE § 2258.003(a)-(c).

C. Workers' Compensation Insurance. TEX. LABOR CODE Chs. 401 & 406, 28 TEX. ADMIN. CODE § 110.110.

1. All employees of contractors and subcontractors on school district construction contracts must be covered by workers' compensation insurance. TEX. LABOR CODE § 406.003. An exception to the coverage requirement is a worker who is a sole proprietor, partner or corporate officer of a business entity who owns at least 25% of the business entity. TEX. LABOR CODE § 406.097(c).

2. The contractor must certify in writing to the public body that the contractor provides workers' compensation insurance coverage for every employee working on the project. The contractor must obtain a certificate proving coverage of the subcontractor's employees. TEX. LABOR CODE § 406.096.

3. The contract must include the language contained in 28 TEX. ADMIN. CODE § 110.110 (c)(7).

D. Retainage. Construction contracts which take more than one month to perform typically provide for monthly progress payments based on the percentage of construction completed during the month. All construction contracts should contain a provision for "retainage." Retainage is the part of the payment not required to be paid within the month after the month in which the work was performed. TEX. GOV'T CODE § 2253.001(7). The purpose of retainage is to protect the prime contractor's subcontractors and vendors, and the prime contractor's payment bond surety, from payment claims. It also protects owners to some degree in case of contractor defects and delays. On most commercial construction projects, including school district projects, the amount of retainage is 5% of the payment

amount. On a contract in which there is no payment bond, the retainage should be 10%. TEX. PROP. CODE § 53.101. If the retainage is more than 5%, and the contract amount is more than $400,000, a government entity must: (1) deposit the retainage of a public works contract in an interest-bearing account; and (2) pay interest earned on the retainage to the prime contractor upon completion of contract. TEX. GOV'T CODE §§ 2252.032, 2252.033.

Standard AIA contracts provide that retainage must be paid when the contractor achieves substantial completion. These should be modified to provide that retainage is paid only when the contractor achieves final completion.

E. Application and Certification for Payment AIA Document G702 and Schedule of Values. Before the first monthly pay request, the Contractor or CMAR should submit a "Schedule of Values" on AIA Document G703, *Continuation Sheet for G702 - 1992 Edition*; a detailed breakdown of the Scope of Work by each trade, type of work and sometimes area of the Project. This will be the basis of the Contractors' monthly Application for Payment. The Contractor will show the percentage of work completed for each line item of the Schedule of Values. The District should carefully review the Schedule of Values to insure it is not "front loaded". Front loading is shifting costs that will be incurred by the Contractor late in the Project to categories of work performed earlier. It results in the District paying for work in advance.

The District and the architect should carefully review each monthly Application for Payment to insure the percentage of work claimed as completed has, in fact, been completed. It is important not to pay the contractor more than the value of the work completed because if the contractor defaults, the District needs to have sufficient funds to complete the project. In addition, if the District makes a claim on the Payment or Performance Bond, the surety may seek to avoid liability because the Owner "compromised" its ability to perform by overpaying the contractor.

F. Other Requirements.

1. Trench Safety. Bid documents and contracts on projects where trench excavation will exceed a depth of five feet must include: (1) a reference to OSHA standards for trench safety during the period of construction; (2) a copy of special shoring requirements, if any, with a separate pay item for the special shoring requirements; (3) a copy of any geotechnical information obtained by the owner for use by the subcontractor in the design of the trench safety protection; and (4) a separate pay item for trench excavation safety protection. TEX. HEALTH & SAFETY CODE § 756.023(a).

2. Prohibition of Alcohol, Tobacco, Controlled Substances and Firearms. Contracts should contain prohibitions of possession on school property of items prohibited by state law.

3. National Pollutant Discharge Eliminations System Regulations. Contracts should make contractors responsible for NPDES requirements.

4. Criminal History Record Information Review. SB 9, 80th Leg., TEX. EDUC. CODE § 22.0834, 19 TAC Rule § 153.1117. Senate Bill 9, sometimes called the "fingerprint bill" probably will not apply to most construction contractors because generally the contractor's employees will not have "direct contact with students". However, on some projects, such as additions or remodeling of operating schools, where the contractor's employees may have direct contact with students, the school district must require criminal history record checks. School districts should require all contractors to submit certification that either (1) the contractor's employees are not subject to criminal history record checks or (2) the contractor has obtained criminal history record checks on its employees.

The Texas Association of School Boards ("TASB") has prepared a "Frequently Asked Questions" document and model contractor certification forms. These are available on the TASB website, www.tasb.org/services/legal/esource/business/documents/crim_hist_contractor.pdf.

5. Felony Conviction Notification. A person or business entity that enters into a contract with a school district must give advance notice to the district if the person or an owner or operator of the business entity has been convicted of a felony. The notice must include a general description of the conduct resulting in the conviction of a felony. TEX. EDUC. CODE § 44.034(a). This form can, and generally is, included in an RFP or solicitation for bids in order to make the contractor aware of the need to disclose this information. Under the provisions of the statute, the contractor can be terminated for failure to disclose or for misrepresenting any information they are required to provide. TEX. EDUC. CODE § 44.034(b).

VII. Other Contract Provisions.

A. Contingency. A contingency budget is an amount of money to pay for changes and unforeseen costs on a construction project. Unforeseen costs also include the architects non-negligent errors and omissions. The contingency may be in an "allowance" included in the contract amount, or may be budgeted by the school district outside the contract amount. Many public entities budget 5% of the contract amount for contingencies.

B. Change Orders.

1. Construction contracts generally contain change order procedures which allow for amendments to the original contract in the event of unanticipated changes. A change order may increase or decrease the contract amount and may modify the schedule. That is, a change order may change the date required for substantial completion. Change order documents should include a description of the change to the work, including, where appropriate, plans and specifications. Change orders

should contain language providing that the change order amount and schedule change, if any, is the entire compensation to the contractor for the described change to prevent the contractor from later claiming additional cost for overhead, additional time, or delay damages.

2. The law now prohibits an original contract with a price of $1 million or more from being increased by more than 25 percent. If a change order for a contract with an original price of less than $1 million increases the contract amount to $1 million or more, subsequent change orders may not increase the revised contract amount by more than 25 percent. Additionally, a school district may grant authority to an official or employee responsible for purchasing or for administering a contract to approve a change order that involves an increase or decrease of $50,000 or less. TEX. LOC. GOV'T CODE ANN. § 271.060.

C. Liquidated Damages. Construction contracts, especially on public projects, may contain a liquidated damages provision that provides for payment of a certain amount per day of delay if a construction project does not achieve substantial completion within the required time. Courts do not favor liquidated damages provisions because they often appear to be "penalties" which are unenforceable in contracts. The amount of liquidated damages per day should be a reasonable forecast of just compensation for the harm caused by the delay which is impossible or difficult to estimate accurately at the time the contract was executed. If the liquidated damages are unreasonably high, a court may view them as an unenforceable penalty. Further, the decision whether to include a liquidated damages provision in a contract should be made after careful consideration because there is case law suggesting that a liquidated damage provision may establish a limit to an Owner's ability to recover actual delay damages which exceed the liquidated damages amount.

D. Warranties. The warranty provisions of AIA form agreements are not satisfactory. Provisions should be added requiring a warranty of good and workmanlike performance and setting out the contractor's specific obligations.

E. Schedule. Provisions should be added to require the contractor to submit periodic schedule updates and allow the owner to order acceleration of the work when the contractor is behind schedule.

F. Disclaimer of Design Warranty. Provisions should be added disclaiming any warranty of design by the owner. These provisions may not be enforceable in all circumstances, but will provide owners with a defense against certain claims by contractors that designs are defective.

G. Notice of Claims. Generally the standard notice periods in form agreements should be made shorter in order for owners to act more quickly in cases of contractor defaults.

H. No-damage-for-delay. AIA Owner/Contractor agreements permit either party to seek to recover actual damages (as opposed to liquidated damages) for a delay caused by the

other party. Because these are sometimes abused by contractors, owners should include provisions that do not permit contractors to recover delay damages. No-damage-for-delay provisions are not enforceable in all circumstances, but will provide owners a defense against these claims.

I. Indemnity. Standard provisions providing that contractors indemnify owners for damage claims should be made stronger in favor of owners.

J. Dispute Resolution Provisions.

1. Arbitration. All pre-2007 AIA form contracts contain binding arbitration provisions. This means that neither party can sue the other in court. Rather, the dispute is heard and decided by an arbitrator who may or may not be a lawyer. Decisions by arbitrators usually cannot be appealed. It is often in a school district's best interest to have access to the state court in the county in which the school district is located. Accordingly, many school districts choose to delete binding arbitration provisions. The 2007 AIA Owner/Contractor Agreement, A101-2007, provides for election of the method of binding dispute resolution in Section 6.2. Unless a school district makes the decision to be subject to binding arbitration, the box for "Litigation" should be selected.

2. Mediation. Mediation is a procedure in which the parties agree to a neutral mediator who meets with the parties formally and attempts to come to an agreed settlement to a dispute. It is totally voluntary; neither party has an obligation to agree to settle. Mediation is inexpensive, compared to arbitration and litigation, and is often successful. However, the mediation provision in AIA form agreements is unnecessarily complex and expensive. Owners should modify form agreements to provide for notice of disputes and a simple mediation procedure as a condition precedent to litigation.

VIII. <u>Dispute Resolution.</u>

A. Delay Claims: Substantial Completion and Final Completion.

1. Substantial Completion is defined in law and in most contracts as "the stage in the progress of the work when the work or a designated portion thereof is sufficiently complete in accordance with the construction documents so that the owner can occupy or utilize the work for its intended use." The required date of substantial completion is the time when liquidated damages apply until actual substantial completion is achieved; accordingly, it is the subject of many disputes. Typically, the architect will issue a Certificate of Substantial Completion which is signed by the architect, contractor and owner. The Certificate of Substantial Completion should include a "punchlist" of items of work which must be completed by the contractor before final completion is achieved and a time in which all

punchlist items must be complete. Disputes often arise because the contractor does not complete the punchlist work timely, or at all.

2. Final Completion is the point when the work is fully and finally completed. That is, the punchlist work is complete and all close-out documents are submitted. Close-out documents include operations and maintenance manuals for equipment, warranty documents and may include "as-built" documents showing changes in the work and the location of buried elements such as underground piping. Although some contracts attempt to impose liquidated damages for failure to achieve final completion, these provisions may be unenforceable. The owner's best protection against failure to achieve final completion is the retainage withheld. In some cases, and with proper notice, an owner may have to complete the contractor's work using the retainage.

B. Contractor Default and Construction Defects.

1. Financial Default. The performance bond should protect an owner from financial default or bankruptcy of a contractor. However, owners must be very careful to follow the notice provisions of the contract and the performance bond to ensure that the performance bond surety is not released from liability under the bond. In addition, as noted in section VI.E above, if a surety claims that the Owner has overpaid the Contractor, it may seek to avoid liability because the Owner has "compromised" its ability to perform. Owners should expect that such a financial default will result in delays to the construction. Even the most diligent surety will require some time, often months, to take over the project.

2. Construction Defects. A wide variety of construction defects can occur on any project. These may be "minor", such defects which affect appearance only, or major defects such as roof leaks and foundation failures. Owners and architects must be diligent in inspecting the work in progress and providing proper notice to the contractor as required by the contract. In addition, owners should withhold payment from contractors for the reasonable value of correcting defective work. Failure to withhold the value of defective work may not only leave the owner without enough money to correct the work itself, it may release the performance bond surety from liability.

C. Design Defects. In many cases, what appears to the owner to be a construction defect will be claimed by the contractor to be a design defect; that is an error or omission of the architect. An architect or engineer is only liable to the owner for "professional negligence". Professional negligence is the failure to use ordinary care, which is the use of that degree of care which architects of ordinary knowledge and skill, engaged in architectural practice in the area, would use under the same or similar circumstance. That is, if the architect's error or omission is not professional negligence, the owner, not the architect, is liable.

1. Certificate of Merit. In order for an owner to file a lawsuit or arbitration proceeding against an architect or engineer for professional negligence, the owner must file a "certificate of merit". A certificate of merit is an affidavit of a third-party licensed architect or licensed professional engineer, competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, that sets forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission and the factual basis for each claim. TEX. CIV. PRAC. & REM. CODE § 150.002(b).

D. Litigation.

1. Litigation of construction contracts is complex, document-intensive, and expensive. Juries often don't understand the complexity of construction contracts, plans and specifications, and the construction process and schedule. Accordingly, even a party with a strong legal case faces a high degree of risk. In addition, in some cases, even though a party prevails in the litigation, it may not recover its own attorney's fees and costs. These fees and costs can exceed the amount of damages claimed. Under most school district professional liability insurance policies, costs of litigation over contracts are not covered. As a result, most construction disputes settle before trial. Owners involved in a dispute with a contractor should look at it as "business transaction", evaluate the cost and risk of trial, and be willing to consider a reasonable settlement.

2. Sovereign Immunity. Under the Texas Tort Claims Act, school districts have sovereign immunity from most tort claims. TEX. CIV. PRAC. & REM. CODE Ch. 101. That is, school districts have a defense to lawsuits alleging negligence, except for negligence arising from the use of motor vehicles. TEX. CIV. PRAC. & REM. CODE § 101.051. Until recently, most Courts of Appeal held that school districts did not have immunity from lawsuits for claims arising from contracts. However, a recent Dallas Court of Appeals case held that a school district had immunity from a contract claim.

As a result of that case, the 79th Texas Legislature adopted H.B. 2039, enacting new Local Government Code Chapter 271, Subchapter I (§§ 271.151-.160) which waives sovereign immunity for local governmental entities (including school districts) to suit for the purpose of adjudicating a claim for breach of a written contract. Awards are limited to the balance owed, including owner-caused delays or accelerations, amount owed for change orders or additional work, and interest. Consequential, exemplary, or unabsorbed home office overhead damages are not allowed.

A 2009 amendment to Section 271.153 permits recovery of "reasonable and necessary attorney's fees that are equitable and just." (81st Leg. H.B. 987).

The AIA standard forms of agreement do not include a provision for recovery of attorney's fees. Accordingly, school districts should consider adding a provision for recovery of attorney's fees by the prevailing party.

3. A 2011 amendment to Section 46 of the Texas Education Code, added new section "46.0111 ACTIONS BROUGHT FOR DEFECTIVE DESIGN, CONSTRUCTION, RENOVATION, OR IMPROVEMENT OF INSTRUCTIONAL FACILITY." This section requires a school district which recovers in a lawsuit against an architect or contractor to pay the state a share of the recovery that exceeds the school district's cost of repair. The state's share is based on the percentage of assistance provided by the state to the school district.

IX. Conflicts of Interest and Disclosure.

A. Conflicts of Interest. TEX. LOCAL GOV'T CODE Chapter 171.

1. If a district board member, or family member, has a substantial interest in a business entity, the board member must file an affidavit of conflict and refrain from participating in the consideration of the matter for which the business entity has proposed to do business with the district. A person has a substantial interest in a business entity if: (1) the person owns 10 percent or more of the voting stock or share of the business entity or owns either 10 percent or more or $15,000 or more of the fair market value of the business entity; or (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year. TEX. LOCAL GOV'T CODE § 171.002. "Family member" means children, spouses, parents, step-children and parents-in law or children in-law, see Section IV.I.5 below. A sample affidavit of conflict of interest is the TASB Policy Manual BBFA (EXHIBIT).

2. It is a Class A misdemeanor to knowingly violate § 171.004, act as a surety for a business entity that has work, business or a contract with the governmental entity, or act as a surety on any official bond required of an officer of the governmental entity. TEX. LOCAL GOV'T CODE § 171.003.

3. If a board member with a conflict does vote on a contract, and if the contract would not have been approved without that vote, the contract is voidable by a court.

B. Disclosure of Relationships with Local Government Officers. TEX. LOCAL GOV'T CODE Chapter 176.

1. **Summary.** Chapter 176 contains requirements for the disclosure of business and employment relationships and gifts between officers of local government entities and those who contract with the entities. These requirements affect not only local government officers, but also persons doing business with local governmental entities.

2. **Overview of Chapter 176 Requirements:**

(a) Conflicts Disclosure Statement (§ 176.003) – If a local government entity enters into or is considering entering into a contract for the sale or purchase of real property, goods or services with a person (including an agent of a person), an officer of the local government is required to file a Conflicts Disclosure Statement if the officer or a family member of the officer:

(1) is receiving taxable income from an employment or other business relationship with the person, other than investment income, that exceeds $2,500 during the 12-month period preceding the officer's awareness of the contract or consideration of the person; or

(2) has received gifts with an aggregate value of more than $250 in the 12-month period before the officer became aware of the contract or consideration of the person.

(b) Conflict of Interest Questionnaire (§ 176.006) – A person (or their agent) who enters or seeks to enter into a contract with a local government entity for the sale or purchase of real property, goods or services, and has a business relationship with an officer of the local government entity must file a Conflict of Interest Questionnaire if they:

(1) have an employment or other business relationship with an officer of the local governmental entity or an officer's family member as described in (a)(1) above; or

(2) have given an officer of the local governmental entity or an officer's family member one or more gifts with the aggregate value specified in (a)(2) above.

(c) List, Posting Requirements – The local governmental entity is required to make a list of the officers of the entity available to the public and provide access to the statements and questionnaires filed under Chapter 176 on its Internet website.

(d) The mandatory forms of Conflict of Interest Statement ("CIS") and Questionnaire ("CIQ") are available from the Texas Ethics Commission website: www.ethics.state.tx.us. The Ethics Commission also has on its website a document titled "2012 Texas Conflicts of Interest Laws Made Easy" (conflict_easy.pdf).

(e) Chapter 176 is discussed at length in Texas Attorney General Opinion GA-0446 (August 2, 2006).

3. **Who is a "Person" to Whom Chapter 176 Applies?**

(a) Section 176.002 makes Chapter 176 applicable to any person who:

(1) enters or seeks to enter into a written contract for the sale or purchase of real property, goods, or services with a local governmental entity; or

(2) is an agent of such a person in their business with a local governmental entity.

(b) This does not include a state, a political subdivision of a state, the federal government, a foreign government, or an employee of any of these entities acting in their official capacity.

4. **What is a "Business Relationship"?**

(a) Under amended Section 176.001 (1-a), a "business relationship" is a connection between the vendor and the local government officer or their family member based on a commercial activity of one of the parties, but does not include a connection based on:

(1) a transaction that is subject to government rate or fee regulation;

(2) a transaction conducted at a price and subject to terms available to the public; or

(3) a purchase or lease of goods or services from a vendor that is state or federally chartered and subject to regular examination and reporting to a state or federal agency.

5. **Who is a "Local Government Officer"?**

(a) Members of the Board of Trustees and the Superintendent and any other district employee which the school district designates as subject to the requirements of Sections 176.003 and 176.004. TEX. LOCAL GOV'T CODE § 176.005.

6. **Who Qualifies as a Family Member of an Officer?**

(a) Chapter 176 defines "family member" as a person related to another person within the first degree of consanguinity or affinity, as described by Subchapter B, Chapter 573, of the Texas Government Code.

(b) This definition would include children, spouses, parents, step-children and parents-in law or children in-law, except that relationships by affinity would end upon divorce.

X. What to Do.

A. Know and Follow the Statutes:

1. Select the best qualified architect or engineer to design the project.

2. The Board of Trustees must select the method of procurement that provides the best value for the district before publishing notice for bids, proposals or responses.

3. The Board of Trustees must adopt a prevailing wage schedule before issuing the request for bids, proposals or qualifications.

4. Evaluate criteria and weight of criteria for selection of the contractor and include the criteria and weight of criteria in the request for bids, proposals or qualifications.

5. Publish notice of the RFP or RFQ in a newspaper of general circulation in the county in which the school district is located.

6. Open bids or proposals upon receipt, in public.

7. Report conflicts of interest by Board members and the Superintendent.

8. The Board of Trustees must take formal action on the ranking of contractors, construction managers or design-build firms.

9. Attempt to negotiate a contract with the number one ranked proposer, if a contract cannot be negotiated, end negotiations formally and in writing and go to the next-ranked proposer.

B. Use Good Business Practices:

1. Do not permit an architect or engineer to begin performing work without a fully executed contract.

2. Have architect's and engineer's contracts reviewed by legal counsel before execution.

3. For procurement of construction services, include the form of contract, general conditions, and supplementary conditions in all requests for bids, request for proposals or requests for qualifications.

4. Have the RFP or RFQ reviewed by legal counsel before it is issued.

5. Ensure that the school district has a fully executed contract and receives all performance and payment bonds and insurance certificates before the contractor begins performing work.

C. Manage the Design:

1. Review the architect or engineer's pay application to ensure it conforms to the requirements of the owner/architect agreement.

2. Require the architect or engineer to make formal presentations to the Board of Trustees on completion of the schematic design, design development, and construction document phases of the design, including submission of a budget for the work.

3. In Construction Manager-at-Risk projects, require the CMAR to submit an updated budget and schedule with each phase of the project design.

D. Manage the Project:

1. Keep a record set of all construction contracts and documents in a central location including the owner/architect agreement, RFP or RFQ documents, the contractor's, construction manager's, or design-build firm's proposals, the owner/contractor or owner/construction manager contract, the project manual (including the general conditions, supplementary conditions and technical specifications), addenda, bonds and insurance certificates, change orders, completion certificates, and project close-out documents.

2. Review the construction documents and develop a check list of all activities that must be completed. Some of these will be one-time activities, such as submission of bonds and insurance certificates, request for substantial completion and final completion inspections, and submission of close out document. Others will be periodic, such as project construction meetings and monthly review of applications for payment.

3. Require the contractor to submit a project schedule update monthly, review the updated schedule, and notify the contractor in writing if it is behind schedule.

4. Require sufficient independent testing of materials, review the test reports and notify the contractor in writing of unsatisfactory results.

5. Inspect the progress of the work frequently and notify the contractor in writing of defects.

6. Review the original Schedule of Values submitted by the contractor and each monthly Application of Payment to insure the District does not pay the contractor for work which has not been completed. On Construction Manager-At-Risk projects, require the CMAR to submit documentation of cost of the work.

7. In case of a dispute, make sure the school district complies with all notice requirements in the contract or bond forms.