

2026

Procurement Handbook

for Texas Counties

TEXAS ASSOCIATION OF COUNTIES

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PROCUREMENT HANDBOOK FOR TEXAS COUNTIES

INTRODUCTION

Public procurement can be a long and winding road, and if you take a wrong turn, it is easy to get lost along the way. This handbook is intended to be a guide to help counties determine what steps to take and which path is most appropriate for each type of purchase. Take a journey exploring general procurement of good and services, procurement of professional services, procurement of construction goods and services, the use of cooperatives, and culminating the journey with statutory references that must be included when contracting for each public procurement and recommended practices. This handbook includes a narrative of each process and in-depth analysis of the applicable laws and shortcuts to provide quick answers to address everyday procurement issues. This publication does not cover every competitive bidding law codified in Texas. This publication is not an all-inclusive reference.

1. GENERAL PROCUREMENT OF GOODS & SERVICES

a. Local Government Code Chapter 262

i. Overview of Competitive Bidding

The first leg of our journey is Subchapter C of Local Government Code Chapter 262, known as the County Purchasing Act. This is the primary statutory authority governing county procurement in the state of Texas and is the starting place for the procurement of most types of goods and services. For all purchases of goods or services with an expenditure of over \$100,000, a county must competitively procure such goods or services.¹ The County Purchasing Act sets the framework for this procurement.

Under Local Government Code §262.023², a purchase of one or more “items” that requires an expenditure of more than \$100,000 must go through one of the following:

- The competitive bid or competitive proposal procedures outlined in the County Purchasing Act;
- Use the reverse auction procedure in §2155.062(d), Government Code; or
- Comply with Chapter 2269, Government Code (see section 3.a below).

¹ TEX. LOC. GOV. CODE §262.023(a).

² Amended by SB 1173, 89th (R) Leg., effective September 1, 2025.

FAQ



What is a reverse auction?

A reverse auction allows vendors of goods and services to bid for contracts to provide designated goods or services. Over the course of the auction, the price submitted by vendors begins high and then decreases. The bidders are anonymous to each other but can see the other vendors' price submissions. The bid winner is not necessarily the lowest cost vendor. TEX. GOV'T CODE §§2155.062(d), 2155.085.

Although additional authorities exist in other statutes that apply to specific services and goods (discussed below), the general competitive bidding rules apply to almost everything except real estate. In short, if the county wants to acquire something that costs more than \$100,000, then the commissioners court will likely have to use a competitive procurement method to acquire the item.

Let's start with answering some basic questions: What is a purchase, and what constitutes an item? A "purchase" is defined as "any kind of acquisition, including by a lease or revenue contract."³ Essentially, any item bought and paid for by a county out of revenue constitutes a purchase. "Item" is defined broadly as any service, equipment, good, or other tangible or intangible personal property, including insurance and high technology items, but not "professional services."⁴



ii. Avoid Separate, Sequential, or Component Purchases

It is important to note that counties must avoid separate, sequential, or component purchases that violate the County Purchasing Act. Separate, sequential or component purchases entered into with intent to avoid competitive bidding are illegal and constitute a criminal offense.⁵ A "separate purchase" occurs when a county purchases individual items that would normally be purchased in one purchase.⁶ A "sequential purchase" involves purchasing individual items over a period of time that would normally be

³ TEX. LOC. GOV'T CODE §262.022(6).

⁴ TEX. LOC. GOV'T CODE §262.022(5).

⁵ TEX. LOC. GOV'T CODE §§262.023(c), 262.034.

⁶ TEX. LOC. GOV'T CODE §262.022(7).

purchased in one purchase.⁷ A “component purchase” occurs when a county purchases component parts that would normally be purchased in one purchase.⁸

In one example, a county attorney purchased a laptop, and the county’s cumulative budget for laptops exceeded \$50,000 (the bidding threshold prior to statutory changes made by the 89th Texas Legislature⁹). The auditor questioned whether the county could pay for the laptop because it was purchased outside of the bulk purchase made by the county and without being competitively bid. The attorney general explained that improper separate, sequential, or component purchases must be (1) discrete purchases that in ordinary purchasing practices would be purchased in one transaction and (2) were made with intent to avoid competitive bidding practices. Not all like items purchased by the county need be aggregated for bulk purchase to avoid separate, sequential or component purchases.¹⁰ While the attorney general’s opinion does not answer the particular fact question about the laptop, the opinion provides guidance to counties and establishes the determining factors are whether the purchase of an item is one that normally would be part of a larger purchase by the same county officer from the same supplier and is made separately in order to avoid the application of the County Purchasing Act.¹¹ If the answer to both of these questions is yes, then it likely violates the County Purchasing Act and is a separate, sequential or component purchase.

In another example, an auditor questioned whether it was appropriate to pay for labor on a park project when the work was divided into phases that individually were valued under the bid threshold but cumulatively exceeded the bid threshold. Again, the attorney general could not answer the auditor’s question in the opinion request process because determining what constitutes “ordinary purchasing practices” and establishing requisite intent to avoid competitive bidding requirements would require the taking of evidence and resolution of fact issues.¹² However, the attorney general opined that important facts that must be considered are (1) whether the purchase is undertaken with the intent of

⁷ TEX. LOC. GOV’T CODE §262.022(8).

⁸ TEX. LOC. GOV’T CODE §262.022(2).

⁹ TEX. LOC. GOV. CODE §262.023, amended by SB 1173, 89th (R) Leg., effective September 1, 2025.

¹⁰ Tex. Att’y Gen. Op. No. KP-0358 (2021).

¹¹ *Id.*

¹² Tex. Att’y Gen. Op. No. GA-0604 (2008).

avoiding the requirements of the County Purchasing Act, and (2) whether the purchase would in normal purchasing practices be made in a single purchase.¹³

As these examples demonstrate, separate, sequential, and component purchases have a common element that “in normal purchasing practices they would be purchased in one purchase.”¹⁴ In other words, if the procurement practice varies from the normal purchasing practices in an effort to avoid competitive procurement (i.e., bidding), then it is likely to fall under one of these categories and, therefore, may be illegal. (See sec. 1.a.xvi.3 of this handbook for criminal penalties). Whether a separate, sequential, or component purchase has taken place under Local Government Code §262.023(c) is a fact issue, which should be closely evaluated, and the county may need to consult with the county’s attorney.



iii. Sole-source Exemption

The Legislature has created a statutory exemption for competitive bidding commonly referred to as the “sole-source” exemption.¹⁵ This exemption allows counties to purchase, without the need for competitive bidding, items available for purchase from only one supplier that costs \$100,000 or less. This exemption used to be more broadly applied to all purchases but was amended in the 89th Legislative Session to add a \$100,000 expenditure cap.¹⁶

iv. Other Discretionary Exemptions

By order, the commissioners court may exempt certain items from competitive bidding, commonly known as “discretionary exemption.”¹⁷ When a county uses a discretionary exemption, the procurement requirements under the County Purchasing Act do not apply. A discretionary exemption may be granted for the following items:

- Purchased in the case of public calamity if it is necessary to make the purchase promptly to relieve the necessity of the citizens or preserve county property;
- Necessary to preserve or protect the public health or safety of the county residents;
- Necessary because of unforeseen damage to public property;

¹³ *Id.*

¹⁴ TEX. LOC. GOV'T CODE §§262.022(2), (7), (8).

¹⁵ TEX. LOC. GOV'T CODE §262.003.

¹⁶ TEX. LOC. GOV. CODE §262.003, amended by SB 1173, 89th (R) Leg., effective September 1, 2025.

¹⁷ TEX. LOC. GOV'T CODE §262.024.

- Personal or professional services;
- Individual work performed and paid for by the day¹⁸;
- Land or right-of-way;
- Sole-source items, such as those covered by patents, copyrights, secret processes, or monopolies; creative works such as films, manuscripts or books; electric power, gas, water and other utilities; and captive replacement parts¹⁹;
- Food²⁰;
- Personal property sold at auction by a state licensed auctioneer; at a liquidation sale held in compliance with Business & Commerce Code, Subchapter F, Chapter 17; or by a political subdivision of this state, a state agency, or an entity of the federal government;
- Any work performed under a contract for a community and economic development corporation made by a county under Local Government Code §381.004; and
- Repairs on county vehicles and equipment.

<p>FAQ</p> 	<p>What purchases are considered “necessary” under the law?</p> <p>Whether an item is “necessary to preserve or protect the public health or safety of the residents of the county” is a question left to the commissioners court’s discretion, subject to judicial review under an abuse of discretion standard. <i>See Davray, Inc. v. City of Midlothian, Texas</i>, 2005 WL 1586574 (N.D. Tex. July 6, 2005).</p>
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The professional services discretionary exemption in Local Government Code §262.024(a)(4) does *not* have the same meaning or effect as the term “professional services” in Chapter 2254 of the Government Code, which is discussed in section 2.a of

¹⁸ TEX. LOC. GOV’T CODE §262.024(a)(5). Any individual work performed and paid for by the day, as the work progresses, provided that no individual is compensated under this subsection for more than 20 working days in any three-month period.

¹⁹ See the sample “Sole Source Justification Form” (Exhibit B).

²⁰ *But see* TEX. LOC. GOV’T. CODE §262.024(d), which requires counties to solicit at least three bids by telephone or written quotes at intervals specified by the commissioners court for purchases of food items. Records of the informal food item quotes shall be retained for one year or until audited by the county auditor. Award for food purchase contracts must go to the responsible bidder who submits the lowest and best bid, or all bids shall be rejected and the informal bidding process shall be repeated.

this handbook. If the county wishes to procure services listed in Chapter 2254, the county may NOT use sealed bids to acquire those services. Instead, the county must issue a request for qualifications and negotiate a proposal price *after* selecting the most qualified professional or firm responding to the county's request for qualifications.

The "professional services" referred to in Local Government Code §262.024 are defined under common law. There is very little guidance available about what services are considered personal or professional and can properly be exempted from competitive bidding under Chapter 262. The Texas Attorney General Opinion procedure is not an effective route for obtaining guidance in this area because whether a particular service qualifies as "personal or professional services" is a fact issue left to the discretion of the commissioners court. Generally, a professional service is one that requires predominantly mental or intellectual skill or belonging to a discipline requiring special knowledge or attainment and a high order of learning, skill and intelligence.²¹



v. Notice provisions

Once a county determines it must competitively bid for an item, the county must advertise its intent to make a purchase subject to the County Purchasing Act. At a minimum, notice of a proposed purchase must be published at least once a week for two consecutive weeks in a newspaper of general circulation in the county. The first date of publication must occur at least 14 days before the date of the bid opening. If there is no newspaper of general circulation, then the notice must be posted in a prominent place in the courthouse for 14 days before the date of the bid opening.²²

Notice must include the following:

- (1) a general statement of the proposed purchase;
- (2) the name and telephone number of the purchasing agent;
- (3) the county website;
- (4) specifications describing the item or a statement of where the specifications may be obtained;
- (5) time and place for receiving and opening bids and the name and position of the county official or employee to whom bids are to be sent;

²¹ See, e.g., Tex. Att'y Gen. Op. No. JM-1136 (1990).

²² TEX. LOC. GOV'T CODE §262.025.

- (6) whether the bidder should use lump sum or unit pricing;
- (7) the method of payment by the county; and
- (8) the type of bond required by the bidder.²³

FAQ



Does a website posting fulfill the notice provision?

Although it is best practice for counties to post bidding opportunities on their websites, counties are not required by law to do so, and posting bidding opportunities on the website does not fulfill this notice provision.

1. Specifications

The statutory authority does not identify what minimum specifications a county must provide to prospective bidders. However, if specifications are so vague as to effectively prohibit vendors from bidding on the same material terms and conditions, then a contract awarded would likely be set aside by a court. In one example where county specifications were found to be insufficient, the county was seeking bidders for various road materials. The bid documents did not attempt to specify approximate quantities of materials the county wanted to buy, and the bid documents did not state how long a term the contract was to be in place. These omissions were found to prohibit meaningful competition.²⁴

Generally, a county cannot require a prospective bidder to use a specific brand or model in its bid specifications. In one case, the State Highway Department set forth bid specifications that required all materials furnished under its construction contracts be manufactured in the United States.²⁵ The steel importers sued as taxpayers seeking to set aside the specifications as invalid, illegal or void. The Texas Supreme Court held that the domestic materials requirement was unduly restrictive and, therefore, violated the competitive bid laws.²⁶

²³ *Id.*

²⁴ See Tex. Atty. Gen. Op. No. MW-0449 (1982).

²⁵ *Texas Highway Commission v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525 (Tex. 1963).

²⁶ *Id.*

Similarly, in another case, a city was sued by an unsuccessful bidder for a fire hydrant specification for a particular brand.²⁷ The city argued that the brand name specification was required as a matter of public safety. The trial court disagreed, citing evidence in the record that other brands had the same attributes and qualities cited by the city in its specifications.²⁸

In an attempt to avoid situations like these cases, counties often include language in their bid specifications allowing for substitutes and “or-equal” items rather than requiring only one specific brand or model.

2. Pre-Bid Conferences

Counties are allowed to conduct mandatory pre-bid conferences, meaning that a county may require prospective bidders to attend a pre-bid conference to be eligible to submit a bid.²⁹ The purpose of the pre-bid conference must be to discuss contract requirements and answer questions of prospective bidders.³⁰ After the mandatory pre-bid conference, an additional required notice may be sent by certified mail, return receipt requested, to only those prospective bidders who attended the conference.³¹

vi. Submittal of Bids

A county must receive sealed bids in a fair and confidential manner.³² A county may require electronic bid or proposal submissions if the commissioners court adopts an order requiring electronic transmission and makes available all technology necessary to submit a bid or proposal electronically to any person who submits a hard copy bid or proposal in person. Otherwise, the county must accept hard-copy submissions.³³

vii. Bid Opening

After receiving bids in a sealed manner, the sealed bids must be opened on the date and at the time and place specified in the published notice.³⁴ If the commissioners court

²⁷ *Davray, Inc. v. City of Midlothian, Texas*, 2005 WL 1586574 (N.D. Tex. July 6, 2005).

²⁸ *Id.*

²⁹ TEX. LOC. GOV'T CODE §262.0256(a).

³⁰ *Id.*

³¹ TEX. LOC. GOV'T CODE §262.0256(b).

³² TEX. LOC. GOV'T CODE §262.0225(b).

³³ TEX. LOC. GOV'T CODE §262.0225(c), (c-1).

³⁴ TEX. LOC. GOV'T CODE §262.026(a).

determines it is in the best interest of the county, the bid date may be extended. The commissioners court must take action in open court to extend the bid date, and an addendum should be issued reflecting the extension. All bids must be opened at the same time at a location available to the public to observe the bid opening—this is to keep the process fair and transparent for all bidders. The common practice is to open each bid and read the bidder’s name and monetary value of the bid aloud.

Opened bids must be kept on file and be available for inspection upon request for one year after the date of the bid opening.³⁵ Opened bids are also subject to disclosure under Chapter 552 of the Government Code, the Public Information Act.³⁶

viii. Evaluation of Bids

Once the bids are open, how does the county evaluate them? The term “competitive bidding” means that each bidder will bid on the same material terms and will receive fair and equal treatment in the evaluation of those bids.³⁷ Typically, the bids will be evaluated to ensure they comply with the requirements in the request for bids and that the bidders are responsible. Whether a bidder is “responsible” is determined by whether the bidder can comply with the material specifications of the request for bids.³⁸

The county will then tally the qualifying bids to determine the responsible bidder with the lowest and best bid. This information is often input into a bid tabulation sheet that ranks each responsible bidder by the amount of each bid. This information should then be provided to the commissioners court with a recommendation for award of the contract to the responsible bidder providing the lowest and best bid.

³⁵ TEX. LOC. GOV’T CODE §262.026(b).

³⁶ *Id.*

³⁷ See *Labrado v. County of El Paso*, 132 S.W.3d 581, 597-98 (Tex. App.—El Paso 2004) (citing *Collins v. County of El Paso*, 954 S.W.2d 137, 151 (Tex. App.—El Paso 1997, pet. denied)).

³⁸ *Id.*

FAQ



Locals only?

The attorney general opined that requiring a bidder be located within the county would be an illegal restriction on competition. However, the attorney general also conceded that circumstances may exist where the proximity of the bidders determines who the lowest responsible bidder is. *See* Tex. Atty. Gen. Op. No. JH-1086 (1977).



ix. Awarding of Contract

Once the commissioners court is presented with the bids, it has two options, either:

- (1) award the contract to the responsible bidder who provides the lowest and best bid; or
- (2) reject all bids and publish a new notice.³⁹

If the lowest dollar bidder meeting the specifications is not selected for award of the contract, then notice of the proposed award must be given to each lower bidder and they must be provided an opportunity to appear before the commissioners court to present previously unconsidered evidence concerning the lower bid as best, which may include evidence of their responsibility.⁴⁰

FAQ



What if there is a tie?

The County Purchasing Act addresses if there is a tie that commissioners court shall draw lots in a manner prescribed by the county judge to decide between the bidders. TEX. LOC. GOV'T CODE §262.027(b).

x. Bidder Considerations

When selecting a best value bidder, a county is allowed to consider some additional factors beyond price, including whether the bidder provides reasonable health insurance and the bidder's safety record.⁴¹

³⁹ TEX. LOC. GOV'T CODE §262.027(a).

⁴⁰ TEX. LOC. GOV'T CODE §262.027(c).

⁴¹ TEX. LOC. GOV'T CODE §§262.0271; 262.0275.

1. Health insurance

If a county receives one or more bids from a bidder who provides reasonable health insurance to its employees and requires its intended subcontractors to provide reasonable health insurance to the subcontractor's employees, the commissioners court may give preference in awarding the contract to the bidder providing and requiring reasonable health insurance coverage if the bid is within five percent of the lowest and best bid price received by the county from a bidder who does not provide or require reasonable health insurance coverage.⁴²

2. Safety records

The safety history of a bidder may be considered if the commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder. The county must give notice to prospective bidders in the bid specifications that the bidder's safety record may be considered in determining the responsibility of the bidder, and the determination cannot be arbitrary and capricious.⁴³



FAQ

What if the bidder is indebted to the county?

Commissioners court may adopt an order allowing the county to refuse to award a contract to a person who owes a debt to the county. TEX. LOC. GOV'T CODE §262.0276.

xi. Pricing Structures

A county is limited in the structure of pricing allowable for contracts under the County Purchasing Act. Purchases must be on a lump-sum or unit price basis.⁴⁴ Contracts on a time and materials basis (i.e., cost-plus basis) are not permitted for competitive bidding under the Act. For unit price contracts, the request for bids must specify the approximate quantities estimated on the best available information, but the contract will be paid based on the actual quantities purchased.⁴⁵

⁴² TEX. LOC. GOV'T CODE §262.0271.

⁴³ TEX. LOC. GOV'T CODE §262.0275.

⁴⁴ TEX. LOC. GOV'T CODE §262.028.

⁴⁵ *Id.*

xii. Alternative Proposal Processes

As an alternative process to competitive bids, competitive proposals may be sought for the purchase of insurance, high technology items, landscape maintenance, travel management, or recycling.⁴⁶ Competitive proposals focus on a variety of evaluation factors, including price as only one of many factors—in contrast to competitive bids in which price is the primary deciding factor. Public notice for the alternative competitive proposal process follows the same procedures as competitive bidding. The request for proposals must specify the relative importance of price and other evaluation factors.⁴⁷ The commissioners court may conduct discussions with responsible offerors who submitted proposals and who may be selected for award. Offerors must be treated fairly and equally if the commissioners court engages in discussions or revisions of proposals for the purpose of obtaining best and final offers.⁴⁸ Award of the contract shall be made to the responsible offeror whose proposal is determined to be the lowest and best evaluated offer resulting from negotiation and taking into consideration the evaluation factors.⁴⁹

In counties with an appointed⁵⁰ or employed⁵¹ purchasing agent, the purchasing agent may solicit competitive proposals, rather than bids, for items of insurance and high-tech items, or other items if the purchasing agent, with the consent of the commissioners court, determines that it is in the best interests of the county to make a request for proposals.⁵²

Additionally, an alternative multi-step solicitation procedure is authorized under §262.0295.⁵³ Engaging in the multi-step alternative requires the commissioners court to find that it is impractical to prepare detailed specifications for an item to support an award of a purchase contract. After making such a finding, quotations may be solicited through a request for unpriced proposals following the same notice and advertising process undertaken for regular requests for bids. After opening the unpriced proposals on the date specified in the notice, the commissioners court has seven days to mail a

⁴⁶ TEX. LOC. GOV'T CODE §262.030(a).

⁴⁷ TEX. LOC. GOV'T CODE §262.030(b).

⁴⁸ TEX. LOC. GOV'T CODE §262.030(d).

⁴⁹ TEX. LOC. GOV'T CODE §262.030(b).

⁵⁰ TEX. LOC. GOV'T CODE §262.011.

⁵¹ TEX. LOC. GOV'T CODE §262.0115.

⁵² TEX. LOC. GOV'T CODE §262.030(d).

⁵³ TEX. LOC. GOV'T CODE §262.0295.

request for priced bids from those proposals qualified under the criteria set forth in the first phase of the multi-step process. Within thirty days of opening the unpriced proposals, priced bids must be submitted to the commissioners court. The commissioners court may then conduct discussions with those responsible offerors who submit priced bids and who may be selected for award. Offerors must be treated fairly and equally if the commissioners court engages in discussions. Award is to be made to the offeror responsible with the lowest and best evaluated offer.

xiii. Modification of Contract

After the commissioners court awards the contract, but before the contract is executed, the county may negotiate to modify the terms of the contract if the modification is in the best interest of the county and does not substantially change the scope of the contract or cause the contract amount to exceed the next lowest bid.⁵⁴ The modified contract must be approved by the commissioners court.⁵⁵

xiv. Limits on Change Orders

The commissioners court may make changes to plans, specifications, or proposals after a contract is made. However, the county must have available funds for any increase in the contract price.⁵⁶ The commissioners court may grant general authority to an employee to issue, sign, and approve change orders for an increase or decrease of \$50,000 or less.⁵⁷ The original contract price may not be increased by more than 25 percent.⁵⁸ This limit applies to the aggregate of all change orders for a contract. Additionally, the original contract price may not be decreased by 18 percent or more without the consent of the contractor.⁵⁹

xv. Bonds

For public works contracts or contracts exceeding \$100,000, the county may require a bid bond of five percent of the total contract price.⁶⁰ If a county is requiring a bid bond, the

⁵⁴ TEX. LOC. GOV'T CODE §262.0305(a).

⁵⁵ TEX. LOC. GOV'T CODE §262.0305(b).

⁵⁶ TEX. LOC. GOV'T CODE §262.031(a).

⁵⁷ TEX. LOC. GOV'T CODE §262.031(b).

⁵⁸ *Id.* The original contract price may be increased by more than 25 percent if it is necessary to comply with a federal or state statute, rule, regulation, or judicial decision enacted, adopted, or rendered after the contract was made. *Id.*

⁵⁹ *Id.*

⁶⁰ TEX. LOC. GOV'T CODE §262.032(a).

request for bids or proposals should state that the bidder must include a copy of its bid bond with the submission of its bid or proposal.

Within 30 days after execution of a contract over \$50,000, a county may require a contractor to furnish a performance bond for the full amount of the contract.⁶¹ However, if the contract is for \$50,000 or less, a county may require no payment to be made to the contractor until the completion or acceptance of the work or the fulfillment of the purchase obligation to the county.



xvi. Violation of the County Purchasing Act

Violating the County Purchasing Act can have significant consequences for a county: non-payment of its improper contract, taxpayer litigation to enjoin the award of a contract or void the contract, and even criminal penalties. Ratification may not be used to justify the making of an illegal contract. Because the commissioners court lacks authority to enter into a contract in violation of the County Purchasing Act in the first place, a commissioners court lacks authority to subsequently ratify such a contract.⁶²

1. Payment Prohibited

Effectively, if a county violates the County Purchasing Act, the county auditor cannot pay under the contract. Under Chapter 113 of the Local Government Code, the county auditor may not audit or approve a claim for payment unless the claim was incurred as provided by law. If the county auditor determines that the county awarded a contract without complying with the County Purchasing Act, §113.065 of the Local Government Code prohibits the auditor from approving a claim for payment on the contract.⁶³

2. Injunction

Contracts entered into in violation of the County Purchasing Act are not automatically void, they are “voidable” — meaning a court may declare such contracts void in a taxpayer suit, or in some circumstances an unsuccessful bidder suit.⁶⁴

⁶¹ TEX. LOC. GOV'T CODE §262.032(b). This purchase bond requirement is separate from the requirements under Tex. Gov't Code Chapter 2253, which is discussed in section 3.b of this handbook.

⁶² See Tex. Atty. Gen. Op. Nos. GA-0247 (2004) and GA-0383 (2005).

⁶³ *Id.*

⁶⁴ See Tex. Att'y Gen. Op. No. GA-0247 (2004).

Any property tax paying citizen of the county may file suit to enjoin performance of a contract made in violation of the Act.⁶⁵ At least one court held a corporation is a “tax paying citizen” for purposes of filing suit against a governmental entity to enjoin performance of a contract that was awarded in violation of the County Purchasing Act.⁶⁶

3. Criminal penalties

It is a Class B misdemeanor (up to \$2,000 fine and 180 days in jail) to intentionally or knowingly make or authorize separate, sequential, or component purchases to avoid the competitive bidding requirements under §262.023 of the Local Government Code. It is a Class C misdemeanor (up to \$500 fine) to intentionally or knowingly violate the County Purchasing Act in any other manner.⁶⁷

xvii. Limited Waiver of Immunity for Design & Construction Contracts

Local Government Code Chapter 262 includes a limited waiver of immunity from suit for written contracts for engineering, architectural, or construction services. The mandatory venue for suits brought against a county under this provision is the state court in that county.⁶⁸ Additionally, recovery from a county for breach of contract is limited to the following:

(1) the balance due and owed by the county under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work required to carry out the contract;

(3) reasonable and necessary attorney’s fees that are equitable and just; and

(4) interest as allowed by law.⁶⁹

Consequential damages (except any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration), exemplary damages, and damages for unabsorbed home office overhead are prohibited.⁷⁰

⁶⁵ TEX. LOC. GOV’T CODE §262.033.

⁶⁶ See *Labrado*, 132 S.W.3d. at 587-88.

⁶⁷ TEX. LOC. GOV’T CODE §262.034.

⁶⁸ TEX. LOC. GOV’T CODE §262.007(a).

⁶⁹ TEX. LOC. GOV’T CODE §262.0007(b).

⁷⁰ TEX. LOC. GOV’T CODE §262.0007(c).

What does this mean for counties? Essentially, the legislature waived immunity from suit for engineering, architectural, or construction contracts. But counties can only be sued in state court in their own county for breach of contract, and the damages are limited to the four categories described above. This provision gives counties the ability to shield against venue transfers and limits the jurisdiction of the scope of claims and court's authority to award damages.



2. PROCUREMENT OF PROFESSIONAL SERVICES

Certain services to be provided for counties have specific statutes controlling the method of selection and limiting certain contractual terms. Professional services are defined as services within the scope of the practice of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, professional nursing, or forensic science.⁷¹ These services may not be selected through competitive bidding.⁷² Instead, a county must select professional service providers on the basis of demonstrated competence and qualifications. This chapter will cover some of these specific services.⁷³

a. Gov't Code Ch. 2254 – Professional Services

i. Selection of Architects, Engineers, Landscape Architects, and Land Surveyors

Government Code Chapter 2254 implements safety measures for the procurement of construction design-related services. To protect the public interest, the legislature has determined design services for governmental entities must not be selected based on cost—in fact, cost cannot even be considered or known during the selection.⁷⁴ The rationale behind this premise is to ensure the most qualified and competent engineers, architects, and surveyors provide services for designing buildings and facilities to be used by the general public.

Architects and Engineers cannot even include their hourly rates in their proposal for design professional services.

⁷¹ TEX. GOV'T CODE §2254.002(b).

⁷² TEX. GOV'T CODE §2254.003(a).

⁷³ *Id.*

⁷⁴ *Id.*

The statute requires a county select the most highly qualified providers on the basis of demonstrated competence and qualifications.⁷⁵ Once this selection is made, a county can attempt to negotiate a fair and reasonable price with the design provider.⁷⁶ If a satisfactory contract cannot be negotiated with the highest ranked provider, then the county may formally end negotiations with that provider, and select the next most highly qualified provider and attempt to negotiate a contract for a fair and reasonable price.⁷⁷ This process is repeated until a contract is entered into between the county and a provider.⁷⁸ If a contract is entered into in violation of chapter 2254, then it is void as against public policy.⁷⁹ If a county is unable to negotiate a contract with any highly qualified provider, it should reissue a procurement advertising, and begin the process anew.

How does a county select such design providers? While Government Code Chapter 2254 clearly states the basis of the selection and the negotiation process, it does not set forth any required process for procurement. Most Texas counties implement a request for qualifications process. This is a simple method wherein a county issues a request for qualifications seeking statements of qualifications from design providers. Design providers then submit statements describing their qualifications and experience. The county then ranks each design provider based on the information provided to determine the most highly qualified provider based on demonstrated competence and qualifications. The request for qualifications should state general information about the project; however, it may not include any request for cost information, including hourly rates.

Construction materials engineering, testing, and inspection services and the verification testing services necessary for acceptance of a facility by the county should be selected under §2254.004. *See* TEX. GOV'T CODE §2269.058.

⁷⁵ TEX. GOV'T CODE §2254.004(a)(1).

⁷⁶ TEX. GOV'T CODE §2254.004(a)(2).

⁷⁷ TEX. GOV'T CODE §2254.004(b).

⁷⁸ TEX. GOV'T CODE §2254.004(c).

⁷⁹ TEX. GOV'T CODE §2254.005.

The provisions of Chapter 2254 also apply to contracts with private entities seeking to act as the county's agent in the design, development, financing, maintenance, operation, or construction of a civil works project or improvement to real property.⁸⁰

ii. Selection of Physicians, Optometrists, and Registered Nurses

If a county is procuring the professional services of physicians, optometrists, or registered nurses and the number of contracts to be awarded is not limited, then the county may select the provider on the basis of the provider's agreement to payment of a set fee, as a range, or lump-sum amount; and the provider's affirmation and the county's verification that the provider has the necessary occupational licenses and experience.⁸¹ Contracts awarded under § 2254.008 for professional services of physicians, optometrists, or registered nurses are not subject to competitive advertising and proposal evaluation requirements.⁸²



iii. Contingent Fee Contracts for Legal Services

The process to procure a contingent fee contract for legal services is a winding and complex one. A contingent fee contract states payment for legal services is contingent on the outcome of the matter for which the services were obtained. For a county to procure legal services under a contingent fee contract, it must select the attorney or law firm on the basis of demonstrated competence, qualifications, and experience, and attempt to negotiate a contract for a fair and reasonable price. However, prior to entering into a contingent fee contract for legal services, the county must provide written notice to the public at or before the time required for notice of a public meeting stating the following:

- (1) The reasons for pursuing the matter that is the subject of the legal services;
- (2) The competence, qualifications, and experience demonstrated by the attorney or law firm;
- (3) The nature of any relationship, including the beginning of the relationship between the county and the attorney or law firm;
- (4) The reasons the legal services cannot be adequately performed by the attorneys and supporting personnel of the county;

⁸⁰ TEX. LOC. GOV'T CODE §271.908.

⁸¹ TEX. GOV'T CODE §2254.008(a).

⁸² TEX. GOV'T CODE §2254.008(b).

- (5) the reasons the legal services cannot be reasonably obtained from attorneys in private practice under a contract providing for the payment of hourly fees without contingency; and
- (6) The reason entering into a contingent fee contract for legal services is in the best interest of the residents of the county.⁸³

Additionally, the county must approve the contract in an open meeting called for the purpose of considering these six matters.⁸⁴

If the contingent fee contract is approved, the commissioners court must state in writing that the county finds: (1) a substantial need for the legal services, (2) the legal services cannot be adequately performed by the attorneys and supporting personnel of the county, and (3) the legal services cannot be reasonably obtained from attorneys in private practice (a) under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained, or (b) because the county does not have funds to pay the estimated amounts required under a contract providing only for the payment of hourly fees.⁸⁵

Lastly, the county must obtain approval of the contract by the attorney general before a contingent fee contract for legal services is effective and enforceable.⁸⁶

If the attorney general refuses to approve the contract, the county may contest the attorney general's refusal through a hearing with the State Office of Administrative Hearings.

b. Anti-Indemnity Statutes

Texas law contains anti-indemnity statutes for construction contracts. Texas Local Government Code §271.904 applies to contracts for engineering, architectural, or land surveying services to governmental entities.⁸⁷ Essentially, this statute prohibits

⁸³ TEX. GOV'T CODE §2254.1036(a).

⁸⁴ *Id.*

⁸⁵ TEX. GOV'T CODE §2254.1036(b).

⁸⁶ TEX. GOV'T CODE §2254.1038.

⁸⁷ TEX. LOC. GOV'T CODE §271.904.

indemnity or hold harmless clauses that requires one party to indemnify against a claim caused by the negligence of the other party requiring such indemnification.⁸⁸ In other words, the county cannot require an architect, engineer, or surveyor to indemnify or hold harmless the county for damage if it was caused by the county. This type of indemnity is commonly referred to as “broad form” indemnity. Likewise, a county cannot not require an engineer, architect, or surveyor to defend the county against claims based wholly or partly on the negligence of, fault of, or breach of contract by the county or its agents.⁸⁹ However, a county can require the design professional to name the county as an additional insured under the engineer’s, architect’s, or land surveyor’s general liability insurance policy and provide any defense provided by the policy.⁹⁰

Local Government Code §271.9041 also contains an anti-indemnity provision for appraisal services. Indemnification and hold harmless provisions are allowed if the damages are caused by or result from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by the appraiser’s agent, a consultant under contract, or another person over which the appraiser exercises control. The statute, however, prohibits a defense obligation where the governmental entity is wholly or partially negligent, at fault, or in breach of contract.

Similarly, under Insurance Code chapter 151, subchapter C, a provision in a construction contract is void and unenforceable as against public policy when it requires the indemnitor to indemnify, hold harmless, or defend a party for their own negligence, fault, or breach.⁹¹ The only exception is for a claim of bodily injury or death of an employee of the indemnitor.⁹²

Counties cannot avoid these laws by attempting to contract around them. The laws explicitly make the anti-indemnification laws non-waivable.⁹³ Any provision to the contrary is void and unenforceable. Also, the laws expressly state that the construction

⁸⁸ TEX. LOC. GOV’T CODE §271.904(a).

⁸⁹ TEX. LOC. GOV’T CODE §271.904(b).

⁹⁰ TEX. LOC. GOV’T CODE §271.904(c).

⁹¹ TEX. INS. CODE §151.102.

⁹² TEX. INS. CODE §151.103.

⁹³ TEX. LOC. GOV’T CODE §271.904(a),(b); TEX. INS. CODE §151.151.

contract cannot require insurance coverage that requires or provides broad form insurance coverage for the insured party's own negligence.

c. Design Standard of Care

Texas Local Government Code §271.904 also establishes a standard of care for architects, engineers, and surveyors in governmental contracts.⁹⁴ A contract may only include a provision that requires the design professional to perform services:

with the professional skill and care ordinarily provided by competent engineers, architects, or land surveyors practicing under the same or similar circumstance and professional license; and as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer, architect, or land surveyor.⁹⁵

A contractual provision establishing any different standard of care is void and unenforceable, and the above standard applies.⁹⁶

3. PROCUREMENT OF CONSTRUCTION GOODS & SERVICES

a. Limited waiver of immunity; venue restriction

Counties enjoy governmental immunity, and unless there is an explicit waiver of immunity by the legislature, a county cannot be sued. In Local Government Code §262.007, the legislature created a limited waiver of immunity from suit for written contracts for engineering, architectural, and construction services.⁹⁷ In addition to the limited waiver of immunity, venue was also statutorily set in the same county in the state court for suits brought against a county.⁹⁸

The amount of money recoverable under a breach of contract claim is limited to the following: (1) the balance due and owed by the county under the contract, including any increased cost to perform the work resulting from owner-caused delays or acceleration; (2) the amount owed for change orders or additional work required to carry out the contract; (3) reasonable and necessary attorneys' fees; and (4) interest as allowed by law.⁹⁹

⁹⁴ TEX. LOC. GOV'T CODE §271.904(d).

⁹⁵ *Id.*

⁹⁶ TEX. LOC. GOV'T CODE §271.904(e).

⁹⁷ TEX. LOC. GOV'T CODE §262.007(a).

⁹⁸ *Id.*

⁹⁹ TEX. LOC. GOV'T CODE §262.007(b).

The statute prohibits consequential damages, exemplary damages, and damages for unabsorbed home office overhead.¹⁰⁰



b. Construction Contracts

i. Public Work Contract Procurement

Chapter 2269 of the Texas Government Code is the prevailing statute for public works contracts.¹⁰¹ The law defines “public work contract” as a contract for constructing, altering, or repairing a public building or carrying out or completing any public work.¹⁰² This broad definition encompasses most, if not all, county construction projects. Thus, when a county needs to procure construction services chapter 2269 is where it should turn.

Chapter 2269 is divided into subchapters that describe different types of procurements available to counties for public work contracts. This guide will explore the process for procurement of each alternative method of procurement allowable under the statute.

A county may adopt procurement rules necessary to implement chapter 2269.¹⁰³ Also, a commissioners court may delegate its authority under chapter 2269 to a designated representative, committee, or other person.¹⁰⁴ The county must provide notice of the delegations, the limits of the delegation, and the name or title of each person designated.¹⁰⁵

A county must give public notice of the time and place for receiving and opening the bids or proposals, or responses to a request for qualifications.¹⁰⁶ It must be published in a newspaper of general circulation in the county once a week for at least two weeks before

¹⁰⁰ TEX. LOC. GOV'T CODE §262.007(c).

¹⁰¹ TEX. GOV'T CODE §2269.003.

¹⁰² TEX. GOV'T CODE §2269.001(6).

¹⁰³ TEX. GOV'T CODE §2269.051.

¹⁰⁴ TEX. GOV'T CODE §2269.053(a).

¹⁰⁵ TEX. GOV'T CODE §2269.053(b).

¹⁰⁶ TEX. GOV'T CODE §2269.052(d).

the deadline for accepting bids, proposals, or responses.¹⁰⁷ All bids, proposals, or responses should be sealed before delivery.¹⁰⁸

If a county does not have a newspaper of general circulation, the notice shall be posted at the courthouse door of the county AND public in a newspaper of general circulation in the nearest county.

For all selection methods under 2269, a county can consider the following criteria: (1) the price; (2) the offeror’s experience and reputation; (3) the quality of the offeror’s goods or services; (4) the impact on the ability of the county 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 request for bids, proposals, or qualifications.¹⁰⁹

ii. Subchapter C – Competitive Bidding

It is important to note that competitive bidding is the default method of procurement for public work projects. In other words, unless the commissioners court finds it provides the best value for the county to use another process, the county must use the competitive bidding procurement method.¹¹⁰ Under chapter 2269, “competitive bidding” is defined as a procurement method by which a county contracts with a contractor for the construction, alteration, rehabilitation, or repair of a facility by awarding the contract to the lowest responsible bidder.¹¹¹ It is often referred to as a “design bid build” method—where the owner hires an architect or engineer to design the project, then the owner bids the project for a general contractor, and the general contractor then builds the project.

¹⁰⁷ *Id.*

¹⁰⁸ TEX. GOV’T CODE §2269.059.

¹⁰⁹ TEX. GOV’T CODE §2269.055.

¹¹⁰ TEX. GOV’T CODE §2269.056.

¹¹¹ TEX. GOV’T CODE §2269.101(a).

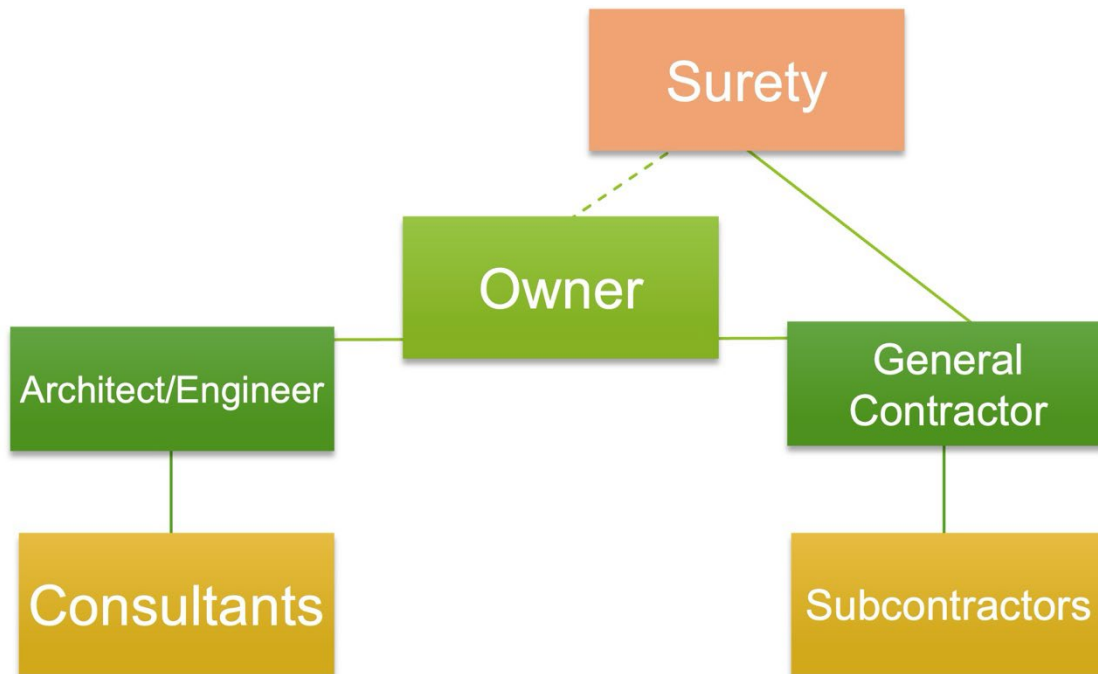


Table 1. Visual depiction of competitive bidding entities.

In a request for competitive bids, a county must include the following information:

- construction documents,
- estimated budget,
- project scope,
- estimated project completion date, and
- other information that a contractor may require to submit a bid.¹¹²

Upon receipt of the sealed bids, the county shall receive, publicly open, and read aloud the names of the offerors and their bid amount.¹¹³ The county must document the basis of its selection and make evaluations public within seven days after the date the contract is awarded.¹¹⁴

Chapter 2269 expressly states that subsection B of Local Government Code chapter 271 does not apply to competitive bidding for public work contracts, with the exception of sections 271.026, 271.027(a), and 271.0275.¹¹⁵ This requires bids to be opened only by the

¹¹² TEX. GOV'T CODE §2269.103.

¹¹³ TEX. GOV'T CODE §2269.104.

¹¹⁴ TEX. GOV'T CODE §2269.105.

¹¹⁵ TEX. GOV'T CODE §2269.106.

commissioners court at a public meeting or by an officer or employee of the county at or in an office of the county.¹¹⁶ Once opened a bid may not be changed for the purpose of correcting an error in the bid price. However, a bidder has a common law right to withdraw a bid due to a material mistake in the bid.¹¹⁷ The county is entitled to reject any and all bids.¹¹⁸ To determine the responsibility of the bidders, a county may consider the safety record of the bidder, if: (1) the commissioners court adopted a written definition and criteria for accurately determine the safety record of a bidder; (2) the commissioners court has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and (3) determinations are not arbitrary and capricious.¹¹⁹



iii. Alternative Methods of Procurement

To use methods of procurement other than competitive bidding, the commissioners court first must determine which method authorized under chapter 2269 provides the best value to the county before advertising notice.¹²⁰ The commissioners court should take action in open court to make the best value determination on the record prior to or concurrently with the issuance of the request for proposals or qualifications.

The county must include in its request for proposals or qualifications (1) the criteria that will be used to evaluate the offerors; (2) the applicable weighted value for each criterion; and (3) a detailed methodology for scoring each criterion.¹²¹ The county must document the basis of its selection and make evaluations public within seven days after the date the contract is awarded.¹²²

1. Subchapter D – Competitive Sealed Proposal

Competitive sealed proposals provide an alternative to competitive bidding, allowing the county to consider multiple factors other than only price during the selection process. “Competitive sealed proposals” is defined as a procurement method by which a county

¹¹⁶ TEX. LOC. GOV'T CODE §271.026.

¹¹⁷ *Id.*

¹¹⁸ TEX. LOC. GOV'T CODE §271.027(a).

¹¹⁹ TEX. LOC. GOV'T CODE §271.0275.

¹²⁰ TEX. GOV'T CODE §2269.056(a).

¹²¹ TEX. GOV'T CODE §2269.056(b).

¹²² TEX. GOV'T CODE §2269.056(c).

requests proposals, ranks the offers, negotiates as prescribed, and then contracts with a general contractor for the construction, rehabilitation, alteration, or repair of a facility.¹²³ Competitive sealed proposals is another version of the “design bid build” method—where the owner hires an architect or engineer to design the project, then the owner bids (through the proposal process) the project for a general contractor, and the general contractor then builds the project.

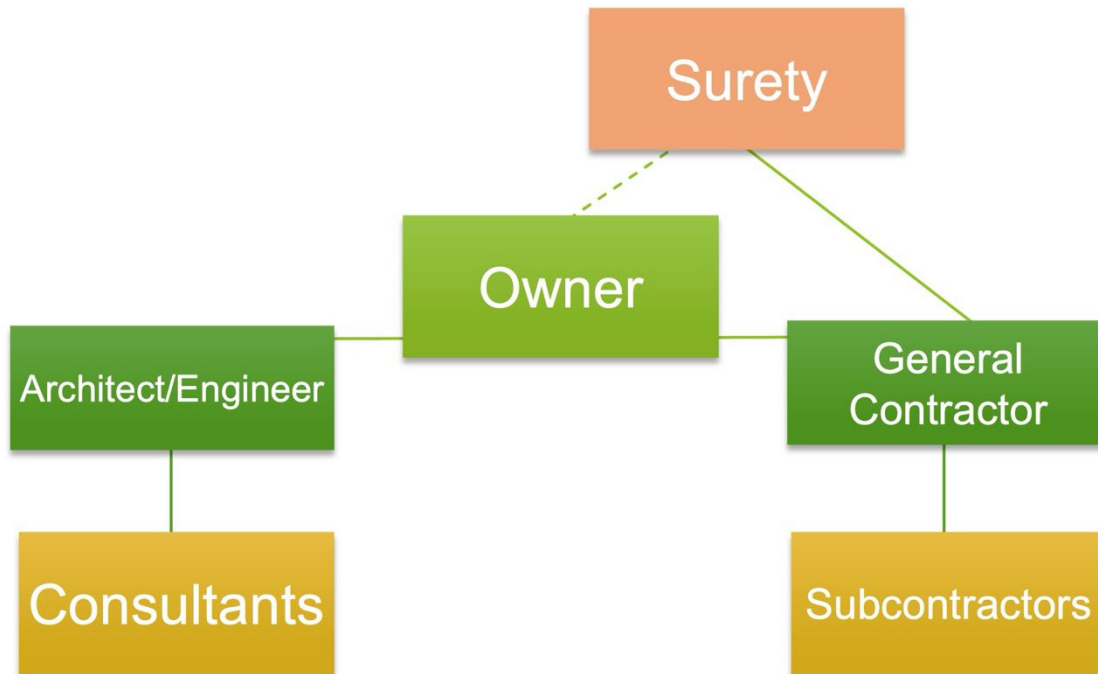


Table 2. Visual depiction of competitive sealed proposal entities.

This method is achieved through a request for proposals. Prior to issuing a request for proposals, the county must select or designate an architect or engineer to prepare the construction documents for the project.¹²⁴ A request for competitive sealed proposals must include:

- Construction documents,
- Selection criteria and the weighted value for each criterion,
- Estimated budget,
- Project scope,
- Estimate project completion date, and

¹²³ TEX. GOV'T CODE §2269.151(a).

¹²⁴ TEX. GOV'T CODE §2269.152.

- Other information that a contractor may require to respond to the request.¹²⁵

For civil works projects¹²⁶, the price must be at least 50 percent of the total weighted value of all selection criteria, unless the commissioners court determines that a lower weighted value to price is in the public interest, then it must be at least 36.9 percent of the total weighted value.¹²⁷ In addition to price, selection criteria should be tailored to the project needs and often include items such as qualifications and experience with the type, size, and scope of the project, key personnel experience, past performance, safety record, financial capacity, and references.

Upon receipt of proposals, the county must publicly open and read aloud the names of the offerors and any monetary proposals included.¹²⁸ Within 45 days of the proposal opening, the county must evaluate and rank each proposal submitted based on the published selection criteria.¹²⁹ Based on the selection criteria and ranking, the county must select the offeror that submits the proposal that offers the best value for the county.¹³⁰

The county then attempts to negotiate a contract with the selected offeror and may negotiate options for scope or time modifications and any price change associated with the modification.¹³¹ If a satisfactory contract is not negotiated, then the county must formally provide written notice to the offeror ending negotiations, and then proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or all proposal are rejected.¹³²

¹²⁵ TEX. GOV'T CODE §2269.153(b).

¹²⁶ Civil works projects include roads, streets, bridges, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm drainage and flood control projects, or transit projects; types of projects or facilities related to these and associated with civil engineering construction; and buildings or structures that are incidental to projects or facilities described above and that are primarily civil engineering construction projects. *See* TEX. GOV'T CODE §2269.351.

¹²⁷ TEX. GOV'T CODE §2269.153.

¹²⁸ TEX. GOV'T CODE §2269.154(a).

¹²⁹ TEX. GOV'T CODE §2269.154(b).

¹³⁰ TEX. GOV'T CODE §2269.155(a).

¹³¹ TEX. GOV'T CODE §2269.155(b).

¹³² TEX. GOV'T CODE §2269.155(c).

Within seven business days after the date the contract is awarded, the county must make the evaluations, including any scores, public and provide them to all offerors.¹³³

2. Subchapter E – Construction Manager-Agent

Construction manager-agent method, commonly referred to as “CMA,” is a construction consultant in an administrative or project management role, as opposed to a general contractor providing construction services such as in a competitive bid. “Construction manager-agent” is defined as a delivery method by which a county contracts with a construction manager-agent to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors.¹³⁴ Using the CMA method, a county still needs to separately procure a design professional (architect or engineer) and one or multiple prime contractors by trade (often called trade contractors).¹³⁵ The CMA’s role is to oversee these contracts by providing management services on behalf of the county in a fiduciary capacity.¹³⁶

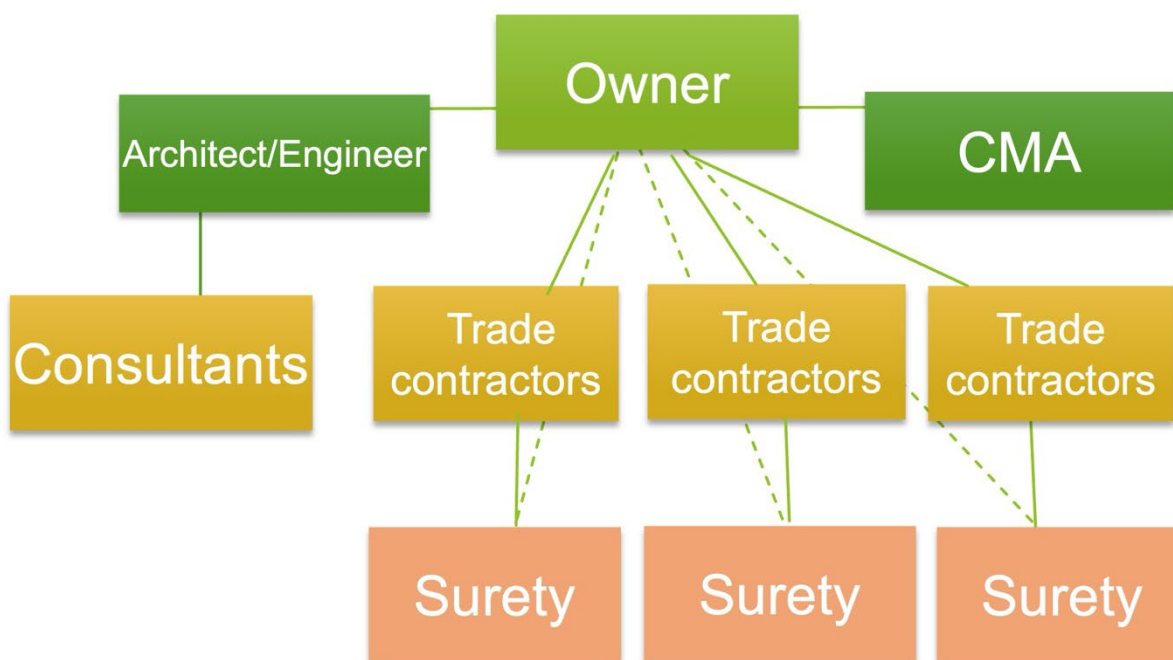


Table 3. Visual depiction of construction manager-agent entities.

¹³³ TEX. GOV'T CODE §2269.155(d).

¹³⁴ TEX. GOV'T CODE §2269.201(2).

¹³⁵ TEX. GOV'T CODE §2269.205-.206.

¹³⁶ TEX. GOV'T CODE §2269.204.

The CMA contract may include administrative personnel, equipment necessary to perform CMA duties, on-site management, and other services specified in the contract.¹³⁷ The CMA may not self-perform any aspect of the construction work or be a party to the construction subcontracts for the construction work.¹³⁸ The county cannot require the CMA to provide performance and payment bonds for the construction.¹³⁹

Prior to selecting the CMA, the county must select or designate an architect or engineer for the project.¹⁴⁰ The architect or engineer cannot serve, alone or in combination with another, as the CMA unless the architect or engineer is hired to serve as the CMA under a separate or concurrent selection process.¹⁴¹

The CMA must be selected on the basis of demonstrated competence and qualifications in the same manner that an architect or engineer is selection under Texas Government Code §2254.004 (*See* sec. 2.a.i of this handbook).¹⁴² The CMA must maintain professional liability or errors and omissions insurance in the amount of at least \$1 million for each occurrence.¹⁴³

3. Subchapter F – Construction Manager-at-Risk

Construction Manager-at-Risk, commonly referred to as CMAR, is a process where a construction manager is brought into a project prior to the completion of the design to provide input during the design phase and then serve as general contractor during the construction phase. The statute defines “construction manager-at-risk” as a delivery method by which a county contracts with an architect or engineer for design and construction phase services and contracts separately with a construction manager-at-risk to serve as the general contractor and provide consultation during the design and construction, rehabilitation, alteration, or repair of a facility.¹⁴⁴ The selected architect or engineer may not serve as the CMAR.¹⁴⁵

¹³⁷ TEX. GOV'T CODE §2269.202.

¹³⁸ TEX. GOV'T CODE §2269.203.

¹³⁹ *Id.*

¹⁴⁰ TEX. GOV'T CODE §2269.205(a).

¹⁴¹ TEX. GOV'T CODE §2269.205(b).

¹⁴² TEX. GOV'T CODE §2269.207.

¹⁴³ TEX. GOV'T CODE §2269.208.

¹⁴⁴ TEX. GOV'T CODE §2269.251(a).

¹⁴⁵ TEX. GOV'T CODE §2269.252.

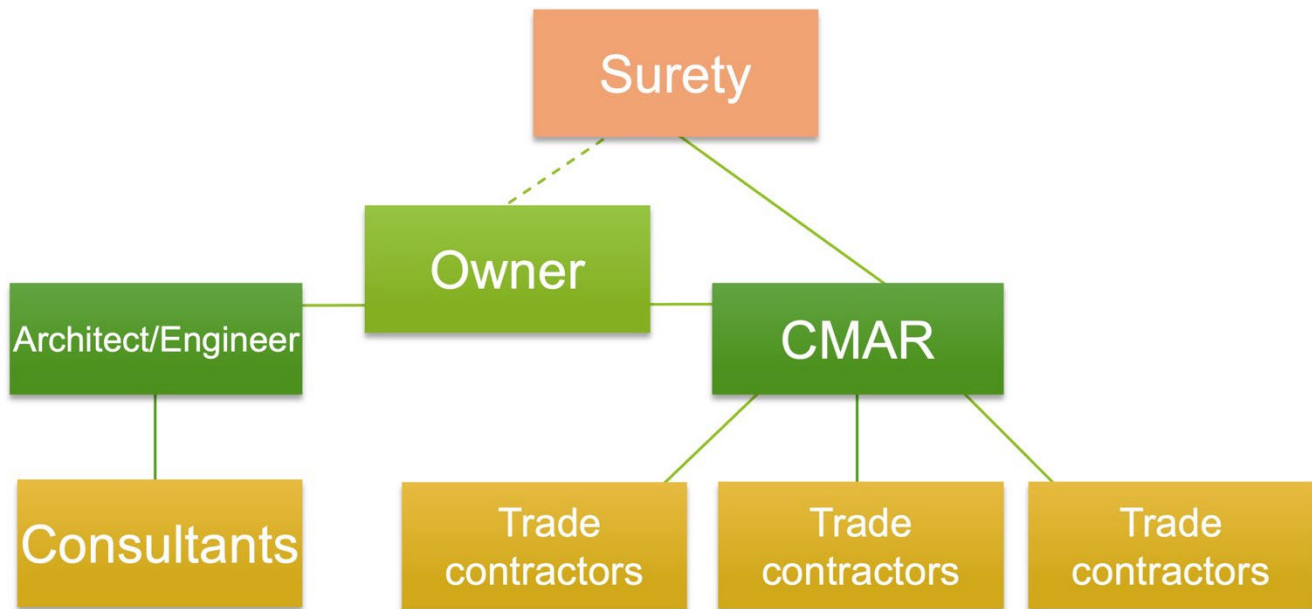


Table 4. Visual depiction of construction manager-at-risk entities.

Two processes are provided for selection of the CMAR—the one-step process or the two-step process.¹⁴⁶ The request issued for CMAR must indicate which process is being used.¹⁴⁷

First, let's go through the one-step process. Under the one-step process, a county prepares and issues a single request for proposals that includes the following:

- a statement that selection process is a one-step process;
- general information on the project site, project scope, schedule;
- selection criteria and the weighted value for each criterion;
- estimated budget;
- the time and place for receipt of the proposals; and
- other information that may assist the county in its selection of the CMAR.¹⁴⁸

In the one-step request for proposal, the county may request the offeror include in its proposal the proposed fees and prices for fulfilling the general conditions.¹⁴⁹ The county receives, publicly opens, and reads aloud the names of the offerors and the fees and

¹⁴⁶ TEX. GOV'T CODE §2269.253.

¹⁴⁷ TEX. GOV'T CODE §2269.253(b)(1).

¹⁴⁸ TEX. GOV'T CODE §2269.253(b),(c).

¹⁴⁹ TEX. GOV'T CODE §2269.253(d).

prices.¹⁵⁰ Not later than the 45th day after the opening, the county must evaluate and rank each proposal submitted based on the published selection criteria and weighted values.¹⁵¹

Now for the two-step process. Step one, the county prepares and issues an initial request for qualifications that includes the following:

- a statement that selection process is a two-step process;
- general information on the project site, project scope, schedule;
- selection criteria and the weighted value for each criterion;
- estimated budget;
- the time and place for receipt of the qualifications; and
- other information that may assist the county in its selection of the CMAR.¹⁵²

During the two-step process, the county may not request fees or prices in step one.¹⁵³ The county receives, publicly opens, and reads aloud the names of the offerors providing qualifications.¹⁵⁴ The county ranks the offerors, solely on the basis of qualifications.¹⁵⁵ Step two, the county may request that five or fewer offerors, based on qualifications, provide additional information in a proposal, including the CMAR's proposed fee and prices for fulfilling the general conditions.¹⁵⁶ The county receives, publicly opens, and reads aloud the names of the offerors and the fees and prices.¹⁵⁷ Not later than the 45th day after the opening, the county must evaluate and rank each proposal submitted based on the published selection criteria and weighted values.¹⁵⁸

For both the one-step and the two-step processes, the county must select the offeror that submits the proposal that offers the best value for the county based on the published selection criteria and on its ranking evaluation.¹⁵⁹ After ranking, the county should first

¹⁵⁰ TEX. GOV'T CODE §2269.253(f).

¹⁵¹ TEX. GOV'T CODE §2269.253(g).

¹⁵² TEX. GOV'T CODE §2269.253(b),(c).

¹⁵³ TEX. GOV'T CODE §2269.253(e).

¹⁵⁴ TEX. GOV'T CODE §2269.253(f).

¹⁵⁵ TEX. GOV'T CODE §2269.253(e).

¹⁵⁶ *Id.*

¹⁵⁷ TEX. GOV'T CODE §2269.253(f).

¹⁵⁸ TEX. GOV'T CODE §2269.253(g).

¹⁵⁹ TEX. GOV'T CODE §2269.254(a).

attempt to negotiate a contract with the selected offeror.¹⁶⁰ If the county is unable to negotiate a satisfactory contract with the selected offeror, the county must, formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection rankings until a contract is reached or all negotiations with all rank offerors end.¹⁶¹ Once negotiations end with an offeror, the county cannot go back to the previous offeror. The county may at any time reject all offers.¹⁶²

Within seven days of the contract being awarded, the county must make the rankings public.¹⁶³

CMAR contracts often include preconstruction phase pricing, and then once the construction documents are near completion, a guaranteed maximum price (GMP) is reached between the county and the CMAR for the construction services. This is referred to as the GMP Amendment and amends the contract to add the GMP cost. After the GMP Amendment, the CMAR must publicly advertise to receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the construction work.¹⁶⁴ Minor work may be included in the CMAR's general conditions.¹⁶⁵ The CMAR may also seek to self-perform portions of the work.¹⁶⁶ In such a case, the CMAR must submit its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors, and the county must determine the CMAR's bid or proposal provides the best value for the county.¹⁶⁷

.....
If a trade contractor or subcontractor defaults in performance of its work or fails to execute the subcontract after selection, the CMAR may, without advertising, fulfill the contract requirements through self-performance or select a replacement trade contractor or subcontractor. TEX. GOV'T CODE §2269.257.
.....

¹⁶⁰ TEX. GOV'T CODE §2269.254(b).

¹⁶¹ TEX. GOV'T CODE §2269.254(c).

¹⁶² TEX. LOC. GOV'T CODE §271.027(a); TEX. GOV'T CODE §2269.106.

¹⁶³ TEX. GOV'T CODE §2269.254(d).

¹⁶⁴ TEX. GOV'T CODE §2269.255(a).

¹⁶⁵ *Id.*

¹⁶⁶ TEX. GOV'T CODE §2269.255(b).

¹⁶⁷ *Id.*

The CMAR must review all trade contractor and subcontractor bids or proposals in a confidential manner that does not disclose the contents during the selection process to a person not employed by the CMAR, architect, engineer, or county.¹⁶⁸ All bids or proposals must be made available to the county on request and then to the public after the later of the award of the contract or seven days after the date of final selection of the bids or proposals.¹⁶⁹

The CMAR should review, evaluate, and recommend to the county each bid or proposal from a trade contractor or subcontractor, but the county may require another bid or proposal to be accepted.¹⁷⁰ If there is a change in price, time or GMP cost for additional costs or risk incurred by the CMAR by selection of another trade contractor or subcontractor, then the county must compensate the CMAR for the additional costs or risk.¹⁷¹

4. Subchapter G - Design-Build for Buildings

“Design-build” is defined as a project delivery method by which a county contracts with a single entity to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility.¹⁷² Essentially, in the design-build method, the architect or engineer and the general contractor are one entity, and only one contract with a design-build firm is entered for both design and construction services.¹⁷³ A design-build firm must be a sole proprietorship, partnership, corporation, or other legal entity or team that includes an architect or engineer and a construction contractor.¹⁷⁴ Subchapter G of chapter 2269, Texas Government Code, applies only to buildings or associated structures, including electric utility structures, and does not apply to civil works projects.¹⁷⁵

¹⁶⁸ TEX. GOV'T CODE §2269.256(a).

¹⁶⁹ *Id.*

¹⁷⁰ TEX. GOV'T CODE §2269.256(b)

¹⁷¹ *Id.*

¹⁷² TEX. GOV'T CODE §2269.301.

¹⁷³ TEX. GOV'T CODE §2269.303.

¹⁷⁴ TEX. GOV'T CODE §2269.304.

¹⁷⁵ TEX. GOV'T CODE §2269.302. This subchapter 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. *Id.*

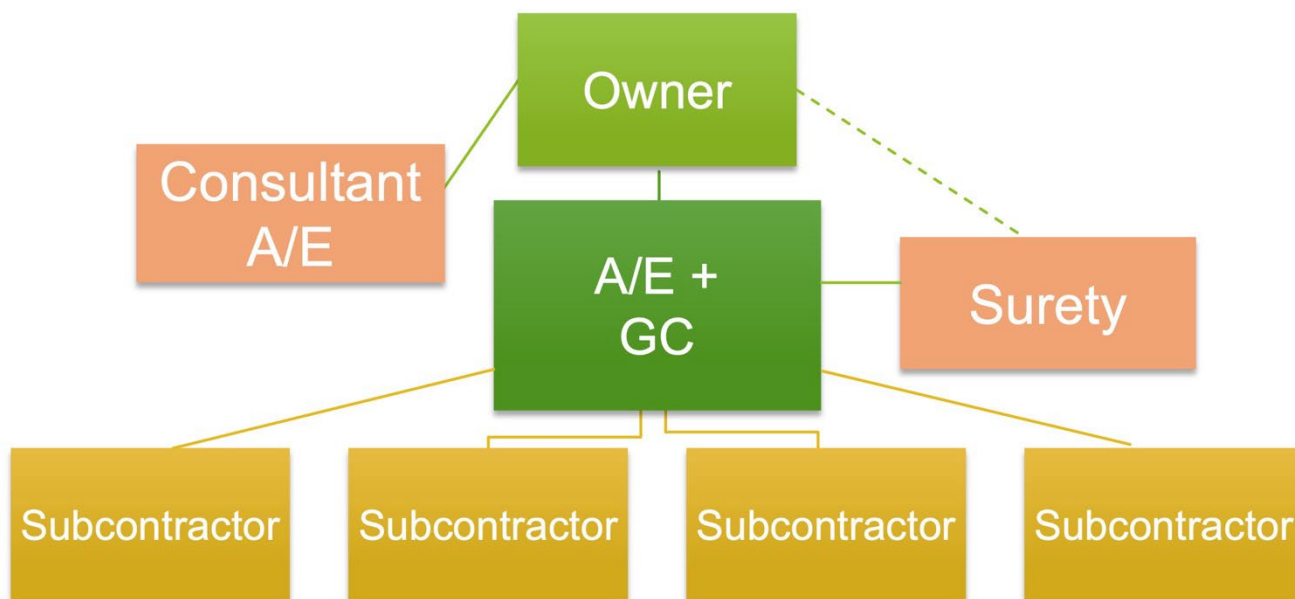


Table 5. Visual depiction of design-build entities.

When using the design-build method, a county must have an architect or engineer, independent of the design-build firm, for the duration of the project.¹⁷⁶ After selection of the design-build firm, the firm's architects and engineers must submit all design elements for review and determination of scope compliance to the county's independent architect or engineer before or concurrently with construction.¹⁷⁷ Upon completion of the project, the firm must supply a set of as-built construction documents to the county, noting any changes made during construction.¹⁷⁸

To procure a design-build firm, the county must prepare and issue a request for qualifications, including the following information:

- General information on the project site,
- project scope,
- budget,
- special systems,
- selection criteria and weighted value for each criterion, and

¹⁷⁶ TEX. GOV'T CODE §2269.305.

¹⁷⁷ TEX. GOV'T CODE §2269.309.

¹⁷⁸ TEX. GOV'T CODE §2269.310.

- other information that may assist potential design-build firms in submitting proposals for the project.¹⁷⁹

The county must also prepare a design criteria package, providing sufficient information, including criteria for selection, to permit a design-build firm to prepare a response to the county's request for qualifications and provide any additional information requested.¹⁸⁰ The design criteria package must specify criteria the county considers necessary to describe the project and may include, as appropriate:

- the legal description of the site,
- survey information concerning the site,
- interior space requirements,
- special material requirements,
- material quality standards,
- conceptual criteria for the project,
- special equipment requirements,
- cost or budget estimates,
- time schedules,
- quality assurance and quality control requirements,
- site development requirements,
- applicable codes and ordinances,
- provisions for utilities,
- parking requirements, and
- any other requirement.¹⁸¹

The county may not require design-build firms to submit architectural or engineering designs as part of a proposal or response to a request for qualifications.¹⁸²

Upon receipt of the responses, the county must evaluate each firm's experience, technical competence, and capability to perform, the past performance of the firm and members of the firm, and other appropriate factors submitted by the firm in response to the request

¹⁷⁹ TEX. GOV'T CODE §2269.306(a).

¹⁸⁰ TEX. GOV'T CODE §2269.306(b)

¹⁸¹ TEX. GOV'T CODE §2269.306(c).

¹⁸² TEX. GOV'T CODE §2269.306(d).

for qualifications.¹⁸³ Cost-related or price-related factors are not permitted.¹⁸⁴ Each firm must certify in its response that each architect or engineer that is a member of the firm was selected based on demonstrated competence and qualifications.¹⁸⁵

After evaluation of the responses, the county may qualify a maximum of five firms to submit proposals that contain additional information, and if the county chooses, to interview those firms for final selection.¹⁸⁶ The county must then evaluate the additional information on the basis of the selection criteria stated in the request for qualifications and the results of any interview.¹⁸⁷ The additional information may include:

- information regarding demonstrated competence and qualifications,
- considerations of safety and long-term durability of the project,
- the feasibility of implementing the project as proposed,
- the ability of the firm to meet schedules, and
- costing methodology.¹⁸⁸

Costing methodology is not a price or bid for overall design or construction.¹⁸⁹ It includes the firm's policies on subcontractor markup, definition of general conditions, range of cost for general conditions, policies on retainage, discount for prompt payment, and expected staffing for administrative duties.¹⁹⁰ After receipt of the additional information and interviews, if any, the county shall rank each proposal submitted on the basis of the criteria set for in the request for qualifications, and select the design-build firm that submits the proposal offering the best value for the county based on the published selection criteria and its ranking evaluations.¹⁹¹

The county must first attempt to negotiate a contract with the selected firm.¹⁹² If the county is unable to negotiate a satisfactory contract, the county must, formally and in

¹⁸³ TEX. GOV'T CODE §2269.307(a).

¹⁸⁴ *Id.*

¹⁸⁵ TEX. GOV'T CODE §2269.307(b).

¹⁸⁶ TEX. GOV'T CODE §2269.307(c).

¹⁸⁷ TEX. GOV'T CODE §2269.307(d).

¹⁸⁸ TEX. GOV'T CODE §2269.307(e).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ TEX. GOV'T CODE §§2269.307(f); 2269.308(a).

¹⁹² TEX. GOV'T CODE §2269.308(b).

writing, end all negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked firms end.¹⁹³ Once negotiations end with a firm, the county cannot go back to negotiate with the previous firm. The county may at any time reject all proposals.¹⁹⁴

Within seven days of the contract being awarded, the county must make the rankings public.¹⁹⁵

5. Subchapter H – Design-Build for Certain Civil Works Projects

Subchapter H of chapter 2269, Texas Government Code, applies to design-build procurement for civil works projects and is limited to counties with a population of more than 100,000 within its geographic boundaries.¹⁹⁶ Civil works projects include roads, streets, bridges, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm drainage and flood control projects, or transit projects; types of projects or facilities related to these and associated with civil engineering construction; and buildings or structures that are incidental to projects or facilities described above and that are primarily civil engineering construction projects.¹⁹⁷ “Design-build firm” is defined as a partnership, corporation, or other legal entity or team that includes an engineer and a construction contractor qualified to engage in civil works construction in Texas.¹⁹⁸

¹⁹³ TEX. GOV'T CODE §2269.308(c).

¹⁹⁴ TEX. LOC. GOV'T CODE §271.027(a); TEX. GOV'T CODE §2269.106.

¹⁹⁵ TEX. GOV'T CODE §2269.308(d).

¹⁹⁶ TEX. GOV'T CODE §§2269.352; 2269.353.

¹⁹⁷ TEX. GOV'T CODE §2269.351(1).

¹⁹⁸ TEX. GOV'T CODE §2269.351(2).

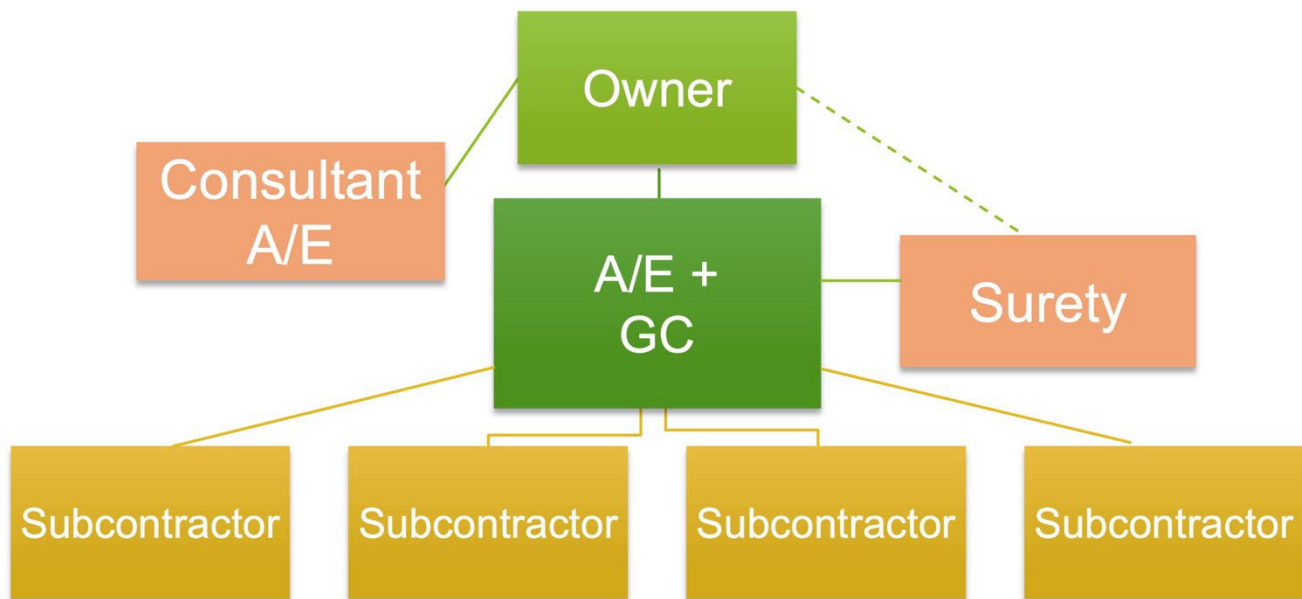


Table 6. Visual depiction of design-build entities.

Contracts entered into under this subchapter must be for a single integrated project and cannot be for aggregated projects at multiple locations.¹⁹⁹ Counties should use the following criteria to determine whether design-build is the appropriate method for a civil works project:

- The extent to which the county can adequately define the project requirements;
- The time constraints for delivery of the project;
- The ability to ensure that a competitive procurement can be held; and
- The capability of the entity to manage and over the project, including availability of experience personnel or outside consultants familiar with the design-build method.²⁰⁰

A county is also limited on the number of civil works projects that design-build can be used for in a fiscal year:

- A county with a population of 500,000 or more within its geographic boundary may enter into a design-build contract for not more than six civil works projects in any fiscal year²⁰¹;

¹⁹⁹ TEX. GOV'T CODE §2269.353(b).

²⁰⁰ TEX. GOV'T CODE §2269.353(c).

²⁰¹ TEX. GOV'T CODE §2269.354(a)(1).

- A county with a population of 100,000 but less than 500,000 may enter into a design-build contract for not more than four civil works projects in any fiscal year²⁰².

When using the design-build method for civil works projects, a county must designate an engineer, independent of the design-build firm, to act as its representative for the procurement process and for the duration of the project.²⁰³ The county must also provide or contract for independent of the design-build firm, for inspection services, construction materials engineering testing, and verification testing services.²⁰⁴ After selection of the design-build firm, the firm's engineers must submit all design elements for review and determination of scope compliance to the county before or concurrently with construction.²⁰⁵ Upon completion of the project, the firm must supply a record set of construction documents to the county.²⁰⁶

To procure a design-build firm under this subchapter, the county must prepare and issue a request for qualifications, including the following information:

- information on the civil works project site,
- project scope,
- project budget,
- project schedule,
- selection criteria and weighted value for each criterion, and
- other information that may assist potential design-build firms in submitting proposals for the project.²⁰⁷

The county must also prepare a design criteria package that may include:

- budget or cost estimates,
- information on the site,
- performance criteria,
- special material requirements,

²⁰² TEX. GOV'T CODE §2269.354(a)(3).

²⁰³ TEX. GOV'T CODE §2269.355.

²⁰⁴ TEX. GOV'T CODE §2269.356.

²⁰⁵ TEX. GOV'T CODE §2269.365.

²⁰⁶ TEX. GOV'T CODE §2269.366.

²⁰⁷ TEX. GOV'T CODE §2269.357(a).

- initial design calculations,
- known utilities,
- capacity requirements,
- quality assurance and quality control requirements,
- the type, size, and location of structures, and
- notice of any ordinances, rules, or goals adopted by the county relating to awarding contracts to historically underutilized businesses.²⁰⁸

Upon receipt of the responses, the county must evaluate each firm's experience, technical competence, and capability to perform, the past performance of the firm and members of the firm, and other appropriate factors submitted by the firm in response to the request for qualifications.²⁰⁹ Cost-related or price-related factors are not permitted.²¹⁰ Each firm must certify in its response that each designated engineer that is a member of the team was selected based on demonstrated competence and qualifications.²¹¹ The county must then qualify offerors to submit additional information, and may choose to interview for final selection.²¹²

The county may then request proposals from the selected firms. A response to a request for detailed proposal must be submitted on or before the earlier of the time for submission requested by the county or 180 days after the date the county makes a public request for the proposals from selected firms. The request for proposals must include the following:

- a design criteria package,
- if the project site is identified, a geotechnical baseline report or other information that provides the design-build firm minimum geotechnical design parameters to submit a proposal,
- detailed instructions for preparing the technical proposal and the items to be included, including a description of the form and level of completeness of drawings expected, and
- the relative weighting of the technical and price proposals and the formula by which the proposals will be evaluated and ranked.

²⁰⁸ TEX. GOV'T CODE §2269.358.

²⁰⁹ TEX. GOV'T CODE §2269.359(a).

²¹⁰ *Id.*

²¹¹ TEX. GOV'T CODE §2269.359(b).

²¹² TEX. GOV'T CODE §2269.359(c).

Each proposal must include a sealed technical proposal and a separate sealed cost proposal. The technical proposal must address the project approach, anticipated problems, proposed solutions, ability to meet schedules, conceptual engineering design²¹³, and other information requested by the county. The county may require the design-build firm to identify companies that will fill key roles, including project management, lead design firm, quality control and quality assurance management, and other key task leaders.

The county must first open, evaluate, and score each responsive technical proposal submitted based on the selection criteria and assign points based on the weighting. The county may reject, as nonresponsive, proposals that make a significant change to the composition of its firm as initially submitted. After scoring the technical proposals, the county shall subsequently open, evaluate, and score the cost proposals from firms that submitted a responsive technical proposal and assign points based on the weighting. The county shall select the design-build firm in accordance with the formula provided in the request for proposals.

The county must first attempt to negotiate a contract with the highest-ranked design-build firm.²¹⁴ If the county is unable to negotiate a satisfactory contract, the county must, formally and in writing, end all negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked firms end.²¹⁵ Once negotiations end with a firm, the county

²¹³ Unless a stipend under the statute is paid, the design-build firm retains all rights to work product submitted in a proposal. The county may not release or disclose to any person, including the successful offeror, the work product contained in an unsuccessful proposal. The county must return all copies of the proposal and other information submitted to an unsuccessful offeror. The county may not use any unique or nonordinary design element, technique, method, or process contained in the unsuccessful proposal that was not also contained in the successful proposal at the time of the original submittal, unless the entity acquires a license from the unsuccessful offeror. If this violated, then the contract for the project is void. Additionally, the county is liable to an unsuccessful offeror, or any member of the design-build team or its assignee, for one-half of the cost savings associated with the unauthorized use of the work product of the unsuccessful offeror, and well as subject to injunctive, declaratory relief, or damages. TEX. GOV'T CODE §2269.364.

²¹⁴ TEX. GOV'T CODE §2269.362.

²¹⁵ *Id.*

cannot go back to negotiate with the previous firm. The county may at any time reject all proposals.²¹⁶

6. Subchapter I – Job Order Contracts

Job order contracting is often referred to as “IDIQ” standing for indefinite delivery, indefinite quantity. It is statutorily defined as a procurement method used for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, type, and quantities of work required are indefinite.²¹⁷ Subchapter I of chapter 2269, Texas Government Code, applies only to a facility that is a building, the design and construction of which is governed by accepted building codes, or a structure or land, whether improved or unimproved, that is associated with a building.²¹⁸

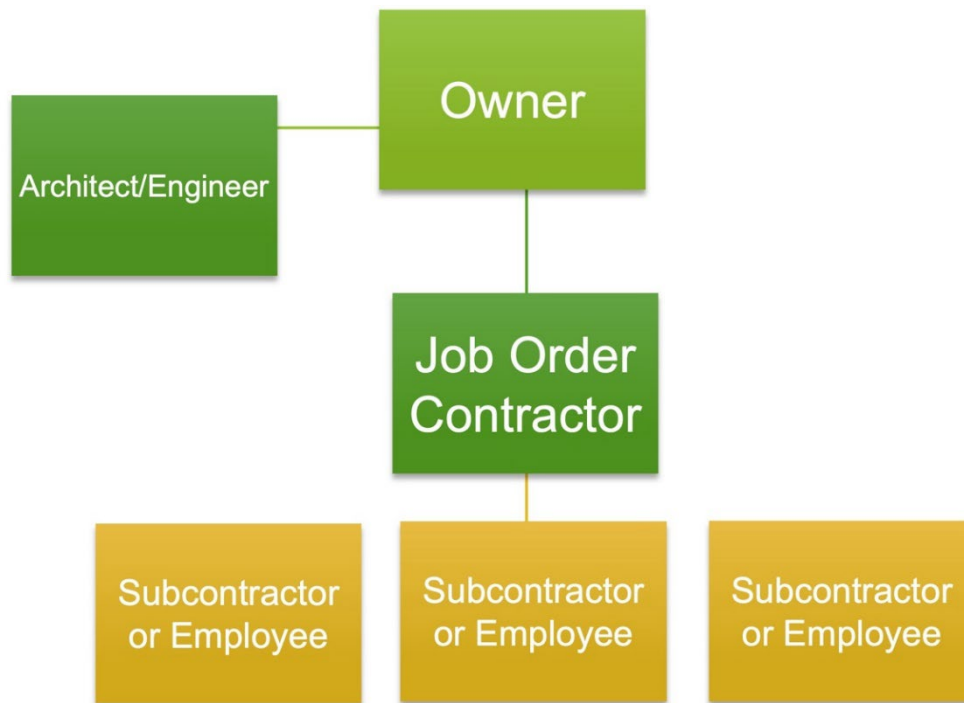


Table 7. Visual depiction of job order contract entities.

²¹⁶ TEX. LOC. GOV'T CODE §271.027(a); TEX. GOV'T CODE §2269.106.

²¹⁷ TEX. GOV'T CODE §2269.401.

²¹⁸ TEX. GOV'T CODE §2269.402. This subchapter does not apply to a highway, road, street, bridge, 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. *Id.*

To award a job order contract, the work must be of a recurring nature but the delivery times are indefinite, and indefinite quantities and orders must be awarded substantially on the basis of pre-described and pre-priced tasks.²¹⁹ The county must establish a maximum aggregate price when it advertises the proposal.²²⁰ The commissioners court must approve each job, task, or purchase order that exceeds \$500,000.²²¹ Job order contracts may be awarded to one or more contractors in connection with each solicitation of proposals.²²²

A county may utilize unit pricing for a job order contract by either specifying one or more published construction unit price books and the applicable divisions or line items, or providing a list of work items and requiring the offerors to propose one or more coefficients or multipliers to be applied to the price book or pre-priced work items as the price proposal.²²³

A county may also use the competitive sealed proposal method set forth in Subchapter D for job order contracts.²²⁴ Under this method, the county may require offerors to submit information in addition to rates, including experience, past performance, and proposed personnel and methodology.²²⁵

The base term for a job order contract may not exceed two years.²²⁶ The county may renew the job order contract annually for not more than three additional years.²²⁷

²¹⁹ TEX. GOV'T CODE §2269.403(a).

²²⁰ TEX. GOV'T CODE §2269.403(b).

²²¹ TEX. GOV'T CODE §2269.403(c).

²²² TEX. GOV'T CODE §2269.406.

²²³ TEX. GOV'T CODE §2269.404.

²²⁴ TEX. GOV'T CODE §2269.405(a).

²²⁵ TEX. GOV'T CODE §2269.405(c).

²²⁶ TEX. GOV'T CODE §2269.409.

²²⁷ *Id.*

Subchapter J – Enforcement

Any contract entered into in violation of chapter 2269 is voidable as against public policy.²²⁸ Chapter 2269 may be enforced through declaratory or injunctive relief filed not later than the 15th calendar day after the date on which the contract is awarded.²²⁹

c. Public Work Performance and Payment Bonds

For public work contracts, a county must require the contractor before beginning the work, to execute to the county a performance bond in the amount of 100% of the contract price if the contract exceeds \$100,000 and a payment bond in the amount of 100% of the contract price if the contract exceeds \$25,000.²³⁰ A performance bond is solely for the protection of the county and conditioned on faithful performance of the work in accordance with the plans, specifications, and contract documents.²³¹ A payment bond is solely for the protection and use of subcontractors and suppliers who have a direct contractual relationship to the prime contractor or a subcontractor to supply public work or material.²³² The bonds must meet the requirements of chapter 2253 of the Texas Government Code.²³³

For projects utilizing the construction manager-at-risk and design-build procurement methods (discussed further in section 3 of this handbook), if a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, the penal sums of the performance and payment bonds delivered to the county must be each in an amount equal to the construction budget as specified in the request for proposals for qualifications.²³⁴ However, the design portion of a design-build contract should not be included in the payment or performance bonds. The construction manager or design builder must deliver the bonds not later than the 10th day after the date of the construction manager or design builder executes the contract unless the entity has furnished a bid bond or other financial security acceptable to the county to ensure the

²²⁸ TEX. GOV'T CODE §2269.451.

²²⁹ TEX. GOV'T CODE §2269.452.

²³⁰ TEX. GOV'T CODE §2253.021.

²³¹ TEX. GOV'T CODE §2253.021(b).

²³² TEX. GOV'T CODE §2253.021(c).

²³³ TEX. GOV'T CODE §2253.

²³⁴ TEX. GOV'T CODE §§2269.258, 2269.311.

entity will furnish the required performance and payment bonds when a guaranteed maximum price is established or before construction begins.

4. CONTRACTUAL STATUTES

When procuring contracts, counties should be aware of certain statutes that apply to county contracts. The following statutory provisions are applicable to county contracts, and are included for reference, but are beyond the scope of this handbook.

- i. Gov't Code Sec. 552.372 – Bids and Contracts
 - a. A request for bids or proposals and the contract must include the following statement: "The requirements of Subchapter J, Chapter 552, Government Code, may apply to this (include "bid" or "contract" as applicable) and the contractor or vendor agrees that the contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter."
- ii. Gov't Code 2251 – Payment for Goods and Services
- iii. Gov't Code Ch. 2252 Subchapter A – Nonresident Bidders
- iv. Gov't Code Ch. 2252 Subchapter B – Retained Public Works Contract Payments
- v. Gov't Code Ch. 2252 Subchapter E – Public Contracts with Disadvantaged or Historically Underutilized Businesses
- vi. Gov't Code Ch. 2252 Subchapter F – Prohibition on Certain Companies (Foreign Terrorist Organizations)
- vii. Gov't Code Ch. 2252 Subchapter Z – Miscellaneous Provisions
 - a. Sec. 2252.904 – Attorney's Fees
 - b. Sec. 2252.908 - Disclosure of Interested Parties
 - c. Sec. 252.910 - Voidable Contract Provision: Experience Modifier
 - i. A contract solicitation may not require a person to have a specified experience modifier in order to submit a response to the contract solicitation.
- viii. Gov't Code Ch. 2258 – Prevailing Wage Rates
 - a. Sec. 2258.002(d) - Note that the request for bids or proposals for public work contracts must include the prevailing wage rates.
- ix. Gov't Code Chs. 2270-2276 – These chapters contain mandatory contractual provisions.

5. ALTERNATIVES TO COMPETITIVE BIDDING

a. Interlocal Cooperation Act

Chapter 791 of the Government Code authorizes counties to contract with each other, other local governmental entities, or federally recognized Indian tribes within the State for the cooperative provision of governmental services. Section 791.011(d) spells out what terms an Interlocal Agreement must contain, including a provision stating that payments for the performance of functions under an interlocal agreement must be made from current revenues available to the paying party. A county that purchases goods and services under the Interlocal Cooperation Act satisfies the requirement of the county to seek competitive bids for the purchase of the goods and services.²³⁵

b. Cooperative Purchasing Program

Chapter 271, Local Government Code, Subchapter F authorizes counties to participate in a cooperative purchasing program with another local governmental entity of this state or another state or with a local cooperative organization of this state or another state. A county that purchases goods or services under this subchapter is deemed to satisfy state law requiring competitive bidding.²³⁶ A county should make efforts to confirm the components of a cooperative purchase and ensure competitive processes are used when possible. See the sample “Cooperative Purchasing Form” (Exhibit A).

c. TASB BuyBoard

The Buy Board, or Local Government Purchasing Cooperative, is an administrative agency created under the Interlocal Cooperation Act and administered by the Texas Association of School Boards (TASB). The Buy Board, a well-known purchasing cooperative, may be used as an alternative to competitive bidding. For more information, visit buyboard.com.

d. State of Texas Multiple Award Contracts under Comptroller Schedules

Non-IT goods and services can be ordered directly from a vendor online through the Texas SmartBuy Membership Program, administered and maintained by the

²³⁵ TEX. GOV'T CODE §791.025(c).

²³⁶ TEX. LOCAL GOV'T CODE §271.102(c).

Comptroller. Purchases from Texas Smart Buy are deemed to satisfy competitive bid requirements.²³⁷ For more information, visit txsmartbuy.com.

e. Texas Department of Information Resources

Certain IT products and services can be ordered from the Texas Department of Information Resources (DIR). Purchases from DIR's cooperative and shared contracts are deemed to satisfy competitive bid requirements.²³⁸ For more information, visit dir.texas.gov.

f. Federal Supply Schedule Sources

A county may purchase goods or services available under federal supply schedules of the United States General Services Administration (GSA). Purchases from GSA supply schedules are deemed to satisfy competitive bid requirements.²³⁹ For more information, visit gsa.gov.

g. Public-Private Partnerships

A county may utilize public-private partnerships for qualifying projects under Government Code chapter 2267.²⁴⁰ The Texas Legislature passed chapter 2267 to encourage investment and provide flexibility for local governments contracting with private entities on a broad array of infrastructure projects.²⁴¹ Before a county may employ chapter 2267 provisions, the commissioners court must first approve a resolution electing to participate under the chapter's scope.²⁴² It must also adopt reasonable guidelines that, among other specific requirements, encourage competition and guide the county's selection of projects before the county may request or consider a proposal for a qualifying project.²⁴³ Other requirements, including the specific procurement procedures for public-private partnerships, are outlined in chapter 2267.²⁴⁴

²³⁷ TEX. GOV'T CODE §2155.504.

²³⁸ TEX. GOV'T CODE §2054.0565.

²³⁹ TEX. LOCAL GOV'T CODE §271.103.

²⁴⁰ TEX. GOV'T CODE §2267.001.

²⁴¹ TEX. GOV'T CODE §§2267.001-002.

²⁴² TEX. GOV'T CODE §2267.001.

²⁴³ TEX. GOV'T CODE §2267.052.

²⁴⁴ TEX. GOV'T CODE §§2267.001-066.

6. RECOMMENDED PRACTICES

Counties must follow federal, state, and local laws for procurement. However, it is also important for counties to adopt policies and follow best practices, especially in instances where no clear legal guidance exists. Utilizing basic principles and practices help to ensure legal compliance and a fair procurement process.

In general, public procurement should provide open and fair competition resulting in selection of the best value and quality for the expenditure of public funds.²⁴⁵ These fundamental tenets of openness, impartiality, and competition define the essence of Texas public procurement. Some recommended practices to ensure open, fair competition include the following:

- **Adopt written policies and procedures.**²⁴⁶ Establishment of written policies addressing all areas of procurement, including those not expressly required by law, is essential. A county should consider adopting written policies and procedures related to ethics, conflicts of interest, payment, evaluations, and approval processes. Federal funding often requires counties have documented procurement procedures consistent with state and local requirements.²⁴⁷
- **Identify the funding source prior to procurement process.** Prior to issuing a request for procurement, a county should confirm the source of funds or potential funds allocated to pay for the goods or services. The procurement process must comply with all the applicable funding requirements. Federal funds or individual grants may have different or additional requirements. Failure to comply with funding requirements during the procurement process may limit a county's eligibility for funding or ability to subsequently change the source of funding for that contract.
- **Maintain documentation.** A county should maintain documentation of the entire procurement process including advertisements, notices, evaluation documents, approvals, and final contracts. In addition, a county should maintain documentation of the basis for determinations for each particular procurement. For example, if a vendor is disqualified, the basis for that decision should be

²⁴⁵ *Sterrett v. Bell*, 240 S.W.2d 516 (Tex. Civ. App. – Dallas 1951, no writ history).

²⁴⁶ TEX. LOC. GOV'T CODE §262.011(o) (authorizing county purchasing agent to adopt rules and procedures to implement duties).

²⁴⁷ 2 C.F.R. §200.318(a)

retained in the procurement file. Even in the case of emergency purchasing, it is important to memorialize the steps and decisions made to ensure fair and open competition.

- **Create standard procurement documents.** A county should create form procurement documents to be used for bids, proposals, or qualifications. Procurement documents should include uniform elements to be contained in most formal procurements, such as notice requirements, criteria and weighted values, evaluation procedure, applicable ethics policies, forms and certifications, and unique local or federal requirements (such as MWBE/HUB program). It is also recommended to include a form vendor contract with general terms and conditions.

CLOSING

While this publication cannot cover all situations, its intent is to provide Texas counties with a roadmap to start each public procurement on the right legal path. By following the statutory authorities and implementing these recommended practices, your county will be able to traverse the winding roads of public procurement.

EXHIBIT A

Cooperative Purchasing Form	
Cooperative: [Name]	
Cooperative Contract No.: [Member]	
Cooperative Contract Dates: [Confirm currently valid]	
Cooperative Contract Scope: [Confirm includes requested goods/services]	
Coop Purchaser: Insert Name and contact info of coop purchaser	
Evaluation	
Vendor 1: Name and Contact Info	
Pricing: Insert price quote based on confirmed coop bid pricing.	
Evaluation: Review additional criteria and insert valuation notes.	
Vendor 2: Name and Contact Info	
Pricing:	
Evaluation:	
Vendor 3: Name and Contact Info	
Pricing:	
Evaluation:	
Were you able to obtain three (3) quotes? (Circle One) YES NO If no, explain what efforts were made to obtain three (3) quotes.	
Did you confirm the price and scope of the quotes with Coop? (Circle One) YES NO	
Is this for construction-related goods or services? (Circle One) YES NO If yes, do you certify that the goods/services do not require architecture/engineering plans or that such plans have been prepared? (Circle One) YES NO	
Purchaser Name:	
Authorized Signature:	Date:

EXHIBIT B

Sole Source Justification Form	
Purchase Item: [Name and Company] [Include name, manufacturer, and model number of item being purchased or the services to be purchased]	
Description of requested items or services and their purpose(s):	
Reason(s) for requesting a sole source purchase: <ul style="list-style-type: none">○ Covered by patents, copyrights, secret processes.○ Monopoly○ Creative works such as films, manuscripts, or books○ Electric power, gas, water, and other utilities○ Captive replacement parts○ If other, please explain.	
Explain why product or service is the only item that can satisfy requirements:	
Identify other sources reviewed and reason they are unacceptable:	
I certify that the above statements are true and correct, and that no other material fact or consideration offered or given has influenced this recommendation for a sole-source or proprietary purchase.	
Purchaser Name:	
Authorized Signature:	Date: