

◆ The Construction Report ◆

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Legal Methods for School Construction in Texas

Chapter 44 of the Texas Education Code lists the only options available for a school district to construct, rehab, alter, or repair a "facility." The Education Code defines "facility" very broadly and includes real property, structures, and improved and unimproved land. The term does not include highways, roads, streets, bridges, utilities, water supply or treatment projects, and other civil engineering construction.

Education Code §44.031 applies to all school district construction contracts over \$25,000. The Code permits the following methods: (1) design/build contract; (2) construction manager-agent; (3) construction manager at risk; (4) competitive sealed proposals; (5) competitive bidding; and (6) job order.

No matter the method, to select a vendor, a school may consider purchase price; vendor reputation; vendor's quality; suitability of vendor's proposed goods or services; vendor's past relationship with the district; use of historically underutilized businesses; total

A school employee's violation of §44.031 is a Class B Misdemeanor.

long-term costs; and any other relevant factor. The district's board of trustees may adopt rules to govern the construction acquisition. Whatever the method selected, the district must advertise for bids or proposals. Notice of time and place for bids or proposals must be published once a week for at least two weeks before the deadline.

Exceptions: If school property is destroyed, severely damaged, or has major operational or structural failure, and the district's board of trustees deter-

mine that delay posed by section 44.031's methods would prevent or substantially impair holding of classes or other essential school activities, the school may contract for replacement or repair using a method other than those required by this section.

The Education Code does not apply to the selection or retention of professional services (architects, attorneys or fiscal agents). To retain professional services, a school must comply with Texas Government Code Chapter 2254.



A school may purchase an item available from only one source, including an item where competition is precluded due to patent, copyright, secret process or monopoly; film, manuscript or book; utility service (electricity, gas or water); or captive replacement part or component for equipment.

The board of trustees may delegate authority to a designated person, representative, or committee. In procuring construction services, a district shall provide notice of any delegation and its limits. Should the district fail to do so, any ranking, selection or evaluation by the designee is advisory only.

A school officer, employee or agent commits an offense if with crimi-

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Lawyer Quips and Quotes

George and Lenny decided to cross North America in a hot air balloon. However, neither were experienced balloonists, and Lenny's mind quickly drifted from navigation to thoughts of how certain clouds looked like cuddly little bunny rabbits. Realizing that they were lost, George declared, "Lenny -- we are going to have to lose some altitude so we can figure out where we are."

George let some hot air out of the balloon, which slowly descended below the clouds, but he still couldn't tell where they were. Far below, they could see a man on the ground. George lowered the balloon, to ask the man their location.

When they were low enough, George called down to the man, "Hey, can you tell us where we are?" The man on the ground yelled back, "You're in a balloon, about 100 feet up in the air."

George called down to the man, "You must be a lawyer." "Gee, George," Lenny replied, "How can you tell?" George answered, "Because the advice he gave us is 100% accurate, and is completely useless."

The man called back up to the balloon, "You must be a client." George yelled back, "Why do you say that?"

"Well," the man replied, "you don't know where you are, or where you are going. You got into your predicament through a lack of planning, and could have avoided it by asking for help before you acted. You expect me to provide an instant remedy. The fact is you are in the exact same position you were in before we met, but now it is somehow my fault."

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"Opportunity is missed by most because it is dressed in overalls and looks like work." -- Thomas Alva Edison

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nal negligence he or she violates §44.031. The offense is a Class B misdemeanor involving moral turpitude.

A school officer or employee commits an offense if he or she knowingly violates §44.031, other than by conduct prohibited in §44.031(b) or (c). The offense is a Class C misdemeanor. Final conviction of a person other than a school trustee for an offense under §44.031(b) or (c) causes an immediate removal from office or employment. A trustee convicted of an offense has committed official misconduct for purposes of Local Government Code Chapter 87, and is subject to removal under that Chapter and Section 24, Article V of the Texas Constitution.

A court may enjoin the performance of a contract which violates §44.031. A county attorney, district attorney, criminal district attorney, citizen of the school's county or any interested party may sue for an injunction. The prevailing party is entitled to reasonable attorney's fees.

Any school board considering construction of a "facility" must before advertising for bids or proposals determine which method provides the best value for the school. The district shall base its selection on criteria authorized under §44.031(b). The district shall publish in its request for bids, proposals

A court may enjoin the performance of a contract that violates §44.031.

or qualifications the criteria to be used to evaluate offerors and relative weights given to the listed criteria. The district is required to document the basis of its selection, and shall make evaluations public not later than the 7th day after the contract award date.

In *RGV Vending v. Weslaco ISD*, 995 S.W.2d 897 (Tex.App. – Corpus Christi 1999), RGV sued Weslaco ISD complaining that the school used criteria other than those listed in §44.031(b) to evaluate bidders. The trial court dismissed the claim. On appeal, the appellate court reversed, and held that the school improperly used criteria not set out in §44.031(b).

Design-build contract (§44.036).

To undertake this method, the district must develop a "design criteria package" which includes the selection criteria, and provides sufficient information to permit a design-build firm to respond to the school's request for qualifications and any additional information requested. The design criteria package may include cost or budget estimates, time schedules, and quality assurance and quality control provisions. The school will sign a single design-build contract with a design-build firm for the design and construction of the facility. The design-build firm can be a partnership, corporation or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas. The school has to designate an engineer or architect independent of the design-build firm to act as the school's representative for the duration of the project.

The school evaluates the statements of qualifications and selects the design-build firm in two phases. In phase one, the school prepares a request for qualifications and evaluates the responses. The school evaluates each offeror's experience, technical competence and capability to perform, past performance of offeror's team and members of the team, and other appropriate factors submitted by the teams or firms in response to the request for qualifications. Cost-related or price-related evaluation factors are not permitted. The school can qualify a maximum of five offerors to submit additional information for a final selection interview.

In phase two, the school must evaluate the information submitted by the offerors based on listed selection criteria and the results of any interview. The school may request additional information regarding demonstrated competence and qualifications, considerations of safety and long-term durability, project feasibility, offeror's ability to meet the schedule, and costing methodology, or other factors as appropriate. The school may not require offerors to submit detailed engineering or architectural designs as part of the proposal. The school then ranks each proposal based on the listed criteria. The school is required to select the design-build

The Editor's Corner

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firm that submits the best value based on published selection criteria and on its ranking evaluations. The school then attempts to negotiate an acceptable contract with the highest ranked offeror. If unable, the school is required formally and in writing to end negotiations with that offeror, and proceed to negotiate seriatim with the next ranked offeror until reaching a contract or all negotiations end.

Construction Manager - Agent (§44.037). A construction manager-agent ("CM Agent") represents the school in a fiduciary capacity, and can provide administrative personnel, equipment necessary to perform duties, on site management, and other specified services. Before or concurrently with selecting the CM Agent, the school must select or designate an engineer or architect to prepare construction documents. The school must select the CM Agent based on demonstrated competence and qualifications similar to the selection process for engineers or architects under §2254.004 of the Government Code. Using the CM Agent, the school procures the general contractor or trade contractor to be a prime contractor for a specific portion of the work.

Construction Manager at Risk (§44.038). Before or currently with selecting a construction manager at risk ("CMAR"), the school must select or designate an engineer or architect to prepare construction documents. The school selects the CMAR using a one-step or two-step process. The school prepares a request for proposals (one step process) or a

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request for qualifications (two step process) that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, time and place for proposals or qualifications, whether the selection process is one-step or two-step, and other pertinent selection information. In a one step process, the school may request as part of the offeror's proposal proposed fees and prices for fulfilling general conditions. With a two-step process, the school may not request fees or prices in step one. In step two, the school may request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information including proposed fee and price for fulfilling the general conditions.

At each step, the school shall receive, publicly open, and read aloud the names of the offerors. At the appropriate step, the school shall also read aloud the fees and prices, if any, stated as each proposal is opened. Within 45 days after the date of proposal opening, the school must evaluate and rank each proposal in relation to the criteria listed in the request for proposals. The school must select the offeror offering the best value based on published selection criteria, and on its ranking evaluation. The school must first attempt to negotiate a satisfactory contract with the highest ranked offeror. If unable, the school must formally and in writing end negotiations with that offeror, and proceed to negotiate seriatim with the next ranked offeror until a contract is reached or all negotiations end.

With contract in hand, the CMAR must publicly advertise and receive bids or proposals from trade contractors to perform all major elements of work, other than minor work which may be included in the general conditions. The CMAR and the school must review all of the trade contractor bids or proposals without publicly disclosing the contents until after contract award or within 7 days after the date of final bid or proposal selection, whichever is later.

The CMAR may seek to perform work itself. The CMAR must submit its bid or proposal for those portions of the work just as all other trade contractors, and the school must determine that the bid or proposal provides the best value.

If a selected trade contractor defaults

or fails to execute a contract after selection, the CMAR may, without advertising, itself perform work or select a replacement trade contractor to perform the work.

Competitive Sealed Proposals (§44.039). The school must select or designate an engineer or architect to prepare construction documents. The school must prepare a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other pertinent information. The school must publicly open and read aloud the names of the offerors and any required prices. Within 45 days after the opening, the school must evaluate and rank each proposal in relation to the published selection criteria.

The school must select the offeror offering the best value based on published selection criteria, and on its ranking evaluation. The school must first attempt to negotiate a satisfactory contract with the selected offeror. If unable, the school must formally and in writing end negotiations with that of-



feror and then negotiate seriatim with the next ranked offeror until a contract is reached or all proposals are rejected. In determining best value, the school is not restricted to considering price, and may consider any other factor stated in the selection criteria.

Competitive Bidding (§44.040). The school must advertise for bids based on construction documents prepared by design professionals. Bids may be opened only by the school at a public meeting. A bid that has been opened may not be changed to correct a bid price error. The school must provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications. The school must receive bids in a fair and confidential manner.

The school must award to the bidder offering the best value according to the selection criteria.

Job Order Contracts (§44.041). A school may award a job order contract for minor construction, repair, rehab, or alteration of a facility if the work is recurring but delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of pre-described and pre-priced tasks. The school may establish contractual unit prices by specifying one or more published construction unit price books and applicable divisions or line items; or by providing a list of work items and requiring offerors to bid or propose one or more coefficients or multipliers to be applied to price book or work items in a price proposal. The school must advertise for, receive, and publicly open sealed proposals. The base term of a job order contract is for a period with any listed renewal option. If the school fails to advertise the renewal, the base term may not exceed two years and is not renewable without further advertisement and solicitation of proposals.

The school is required to retain a design professional if the job order contract requires engineering or architectural services.

Preferences. The school may give preference to agricultural products produced, processed or grown in Texas if the cost and quality are equal. If not produced, processed or grown in Texas, the school may give preference for agricultural products produced, processed or grown in US states over foreign products if the cost and quality are equal. A school may likewise give preference to Texas vegetation for landscaping.

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Three time heavyweight champion Muhammad Ali opened the New York Stock Exchange for the final trading session of the century Friday, December 31, 1999, with an admonition for traders:

"If it goes up then you will have been blessed by my presence. If it goes down, I had nothing to do with it"

Henry Aaron and Joe Namath had previously opened trading under the NYSE's Bridging the Millennium program.

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Who are you going to call? CM Agent or CM at Risk— A question of accountability

Chapter 44 of the Texas Education Code allows a school to choose between a construction manager - agent ("CM Agent") and a construction manager at risk ("CMAR"). Although the names of the two "managers" seem similar, the choice comes down to accountability. Simply put, a CM Agent owes a fiduciary duty to the school under Education Code §44.037(b); a CMAR does not. A CM Agent is accountable for the school's best interest; a CMAR is not. This means that a school can rely on a CM Agent to provide full disclosure. A CMAR has no such duty.

Education Code §44.037(b) provides in pertinent part: "A construction manager-agent represents the district in a fiduciary capacity." A fiduciary has the burden of showing that his dealings with his client were fair and with full

disclosure. *Russell v. Campbell*, 725 S.W.2d 739, 745 (Tex.App. - Houston [14th Dist.] 1987).

A fiduciary has a duty to his client to disclose material facts. For example, in *McClung v. Johnson*, 620 S.W.2d 644, 647 (Tex.Civ.App.--Dallas 1981, writ ref'd n.r.e.), the court held that an



attorney was a fiduciary with a duty to disclose, and that breach of the duty was tantamount to concealment. That court held that the failure to disclose suspended the statute of limitations for so long as the duty existed, and that the duty to disclose only ceased when the relationship ended.

The Texas Supreme Court has held

that "By entering into fiduciary relations, the parties consent as a matter of law to have their conduct measured by the standards of the finer loyalties exacted by courts of equity." *Courseview, Inc. v. Phillips Petroleum Co.*, 312 S.W.2d 197, 205 (Tex. 1957).

The CM Agent's fee is amicably negotiated. In contrast, a CMAR's fee and prices for fulfilling general conditions may be competitively bid. Compensation too low may motivate a CMAR to seek out and pursue change orders or claims to increase its revenue. If a CMAR recommends a particular trade contractor, but the school chooses another, the school is required to compensate the CMAR by a change in price, time or guaranteed maximum cost for any additional cost and risk that the CMAR may incur. If a trade contractor selected by the school defaults, the CMAR may without advertising perform the work itself or select a replacement, perhaps at school expense.

With no fiduciary duty, a CMAR's attitude can be markedly contentious.

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