

II. Project Delivery Method Options and Answers

A. The Traditional Approach: Design/Bid/Build

In the traditional project, an owner selects an architect or engineer to design plans and specifications. See Figure 1. The design professionals analyze the owner's needs and develop design concepts. They then prepare design development drawings, and then construction drawings. Once the design has been fully completed and the construction drawings finished and reviewed by the owner, the project is advertised for bids. Contractors pick up the bid solicitation materials and review a full set of plans and specifications to prepare a bid proposal. If the contractor's price is acceptable, the owner will sign a contract with the contractor and construction can then begin.

B. When Fast Track Construction Works Best

In contrast, with fast track construction, the contractor is selected early in the process -- long before the plans and specifications are complete, and sometimes before the design has even begun. The contractor assists with design development and submits a price proposal before the drawings are complete. Usually, the contractor provides a guaranteed maximum cost, including the contractor's fee, and perhaps some contingencies and allowances. Construction starts well before the construction drawings are finished. The designers focus first on the site work, and foundation. While the contractor is moving dirt, and constructing the foundation, the designers prepare drawings for the rest of the project. Some of the design may even be design build (more on that later). As construction progresses, the designers struggle to keep ahead of the contractor. If all goes well, the fast tracked project will complete in much less time than the traditional project.

The principal advantage of fast track construction is time. The project starts well before the completion of the design and may even finish shortly after the last drawing is released. If all goes well, a project that is fast tracked may complete before the construction contract is even signed on a traditional project. For those projects where time is real money, fast tracking is an option. If a manufacturing plant is needed yesterday, and construction has not yet begun, fast tracking may be viable. In the 1970's when inflation was out of control, fast tracking helped to avoid some of the price increases.

Fast tracking also allows the contractor an early opportunity to provide design input and value engineering. The relationship between the parties should be less confrontational since the contractor is usually not bound to a fixed lump sum price.

However, fast tracking is not cheap and has considerable risks. New drawings arrive about every day. There may be coordination problems between drawings, or with existing construction. The contractor is not always able to construct exactly what is shown on the drawings due to field or existing conditions. When the contractor makes changes, the changes need to be immediately communicated to and coordinated with the designer.

C. The Inherent Challenges in Multiple Primes

Well into the 1800's, the primary approach to construction was the "master builder" who not only designed the project, but also constructed it. For most of this century, however, construction projects have been managed jointly by the triumvirate of the owner, designer, and general contractor. Under this approach, the contractor and designer typically exercised day to day control, although the owner has at least nominal control, thanks to the power of its purse. (Remember the Golden Rule: He who has the gold makes the rules.) This traditional approach involved a single prime contractor

who contracted directly with the owner. The general contractor then signed subcontracts with key trade contractors (electrical, mechanical, plumbing, etc.), and acted as the site manager during construction. *See* Figure 1. The general contractor answered for the quality, cost, and timeliness of the work. The general contractor also assumed responsibility for site safety.

The designer traditionally observed the construction to verify general conformance with the plans and specifications and the other contract documents. The designer also visited the site to determine the percentage of completion and to assess the propriety of the contractor's applications for payment.

In a multiple prime arrangement, the owner hires various prime contractors (usually, the trade contractors, electrical, mechanical, plumbing, etc.) to perform and control the different portions of the work. There is no general contractor. Each prime contractor is independently responsible to the owner for the cost, timeliness, and quality of the work under its respective contract. The owner acts as its own general contractor or hires a construction manager to control the project. *See* Figure 2. Under this approach, the various prime contracts must clearly define responsibilities for construction, supervision of the work, site safety, and contract administration, since accountability for the whole of the work is now fragmented among several entities.

If the owner is not a sophisticated and effective manager, retaining multiple primes is an accident waiting to happen. Coordination problems are bound to arise if the work of each trade contractor is not scheduled appropriately. If the trade contractors mobilize only to discover that the project has not progressed sufficiently to accommodate them, or that another trade has had to disturb their work to do their own, there may be significant delay and disruption claims, and massive litigation. For example, in *Maintenance Corp. v. Rutgers*, 90 N.J. 223, 447 A.2d 906 (1982), the owner's contracts with each of several primes stated that time was of the essence. When delays occurred, and complex litigation began, the court held that each prime contractor was an intended beneficiary of the owner's contracts with the other primes and had standing to sue the others for delay damages. The single biggest winners there were the lawyers.

Choosing multiple primes may save a substantial amount of money. Typically, the general contractor marks up the costs of its subcontractors and materials. This markup covers the general contractor's administration costs and some of its risks. Often, in negotiating the subcontract prices (known in the trade as "buying out the subcontracts"), the general contractor will reap considerable savings over its estimated costs. With multiple primes, the owner benefits directly from any savings on subcontract buyout, and avoids the general contractor's markup on subcontracts and materials.

D. Common Setbacks Arising in Design/Build Contracting

While the design build concept is not new, its expansive use is a recent phenomenon. The Texas Education Code, §41.031, now allows schools to make widespread use of design building. Section 41.031 permits schools to avoid competitive bidding for school construction projects by contracting for a design built school. There are several variations of the design build concept, but the two main approaches are the Design Build Team, and Sole Design Builder.

1. Design Build Team

Under the Design Build Team approach, an architect or engineer and a contractor join forces to form a joint venture to design and build a project. The team negotiates with an owner or submits a competitive proposal for both the project's design and construction. An advantage of this approach is the early involvement of the general contractor in the design phase. Having the contractor involved early allows for better coordination with the designer and among the various aspects of the

design. The contractor and designer are motivated to work and play well together since they are team members. This can also be a disadvantage. The designer no longer is principally the owner's agent, and is partners with the contractor. This disadvantage can also be an advantage if the owner makes both designer and contractor responsible for the ultimate project. The owner can then look to the team if anything is amiss, and avoid finger pointing between designer and contractor.

2. Sole Design Builder

Under this approach, one firm contracts with the owner to be responsible for both the design and construction of the project. That firm then retains design expertise and construction capability suitable for the project. An advantage is a greater turn key approach with one firm responsible for the entire project. Another advantage is the firm's ability to specialize in particular projects, like schools. Building a great number of a particular type of project gains the firm a verifiable track record. The owner can inspect prior projects for imagination, form, and function. A disadvantage is the lack of independent and critical analysis from separate design and construction firms. This disadvantage has less impact if the owner has some expertise and can capably review the design and construction of the project.

3. Design Build Developer

With this approach, the owner contracts with a commercial developer, who usually lacks the credentials of a designer or a contractor. This approach is suitable for the owner who has little or no construction experience, and owns few other projects. The design build developer can supply the expertise to oversee the design and construction of projects for those owners who lack the necessary in-house staff. This way the owner can retain the experience necessary to develop the project properly, from selection of designer and contractor to handling of governmental permits and other matters. This form of design building is often used for build to suit projects.

4. Advantages

The principal advantage of design building is that the owner can hold one party accountable for the design and construction of the entire project. With the traditional approach, responsibility is not always clear. A single point of contact relieves the owner of the need to coordinate the designer with the contractor, a primary cause of construction disputes and cost overruns. Design building may reduce the management time that the owner would ordinarily expend on the project. While the owner must still have a designated construction representative to review the project construction, the representative's time is not consumed with handling the communications and conflicts that arise between the designer and contractor.

Design building should result in a lower overall cost and a faster completion of the construction project. A design builder with the responsibility for all of the project is often willing to charge the owner a lower fee than the combined fee for the architect/engineer and contractor under the traditional approach. The design build approach is better suited for fast track construction. As the design unfolds in a fast track project, communication between the designer and contractor is crucial. With a design builder, communication is facilitated and the design and construction is better coordinated.

The principal pitfall of design building can be the design builder's weakness in anticipating the owner's needs for the project. Intense consultation and communication with the owner before the project design begins is incredibly important. Some design builders will move into an owner's existing projects for a lengthy period to assess and evaluate the efficiency and functionality of the project, consulting with the owner on a daily basis to discover and resolve problems. These consultations should involve the owner's lower management and persons actually performing the

owner's work. Otherwise, the owner may not even mention critical aspects of its operations, figuring that they were obvious. The owner may have developed improvements or have unique situations for which the design builder needs to account. For example, the owner may have handicapped workers who perform certain tasks. The design builder needs to ensure access for the handicapped workers. Time spent observing the owner's operations would have shown this need.

Under the traditional method of construction, the designer owes the owner (the designer's client) a clear duty to exercise professional judgment in a manner that gives the owner the best project for the most reasonable price. The design builder has this same responsibility since it has agreed to design the project. Performing this duty in a successful and impartial manner, however, may be at odds with the design builder's motivation to cheapen the construction, regardless of impact on the owner's needs. If the designer is an employee of the design builder, the design builder is in a position to direct a design decision that in the judgment of the designer does not best serve the owner's interest. There is an inherent conflict between the designer's duty to the owner and to his employer. The design builder should have safeguards to ensure that the designer will act in the owner's best interest, even if the design builder insists on something else. In other words, there must be mechanism in place so that the designer still owes an independent duty to the owner. In entering into a design build contract, the owner must make the parties recognize the potential conflict the designer faces and acknowledge the independent duty the designer owes to the owner, regardless of actual employer.

The design build approach also eliminates the checks and balances present when the designer and contractor are separate. Under the traditional approach, the designer will closely examine a contractor's performance to determine whether it meets specifications and justifies payment. Contractors, on the other hand, may suggest value-engineering proposals if the design is too costly to construct. While the owner may pay more to separate design and construction responsibilities, many owners believe that these controls are worth the price.

Another risk the owner faces is that the owner must rely solely on the design builder for compensation if the project is not successful. Some owners prefer having multiple parties -- architect, engineer, and trade contractors -- potentially liable for damages. Multiple parties tend to create a larger pool of funds, especially if the insurance carriers and bonding companies of the parties are included.

5. Pricing

Often, a design built project will be priced by a guaranteed maximum. With a guaranteed maximum price, the design builder must deliver the project at or under the guaranteed price. The contract should have a savings clause, with the owner benefitting from some or most of the savings. This should entice the design builder to use its experience, imagination, and creativity to benefit both parties.

The design builder may submit a lump sum price, or negotiate a price with the owner. The design builder may be one of several interested in performing the work. The owner may take competitive bids or proposals or negotiate with the bidders before or after the bids or proposals.

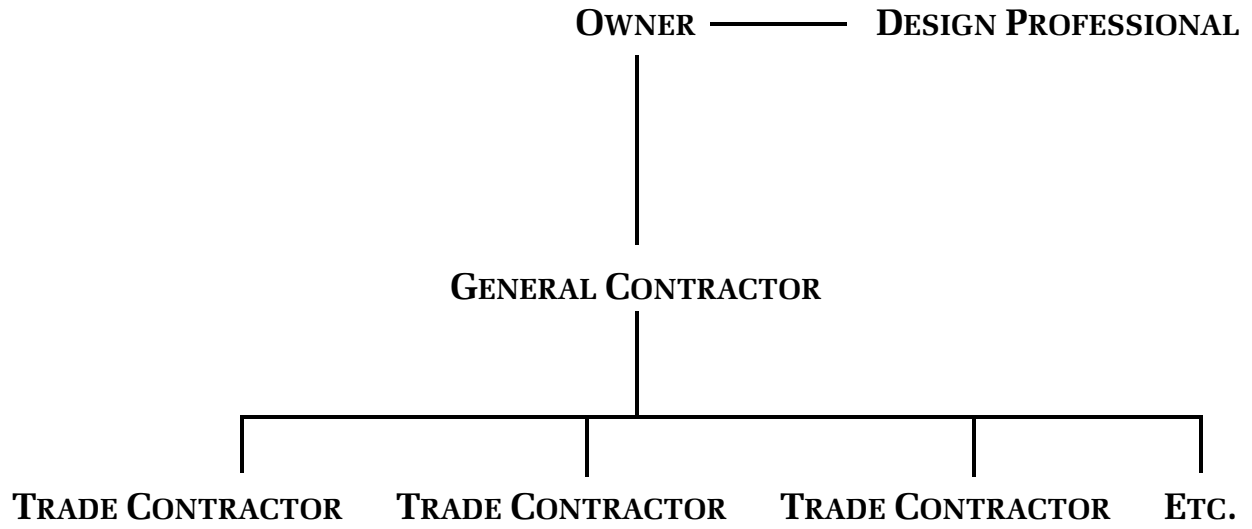


FIGURE 1. TRADITIONAL ORGANIZATIONAL CHART

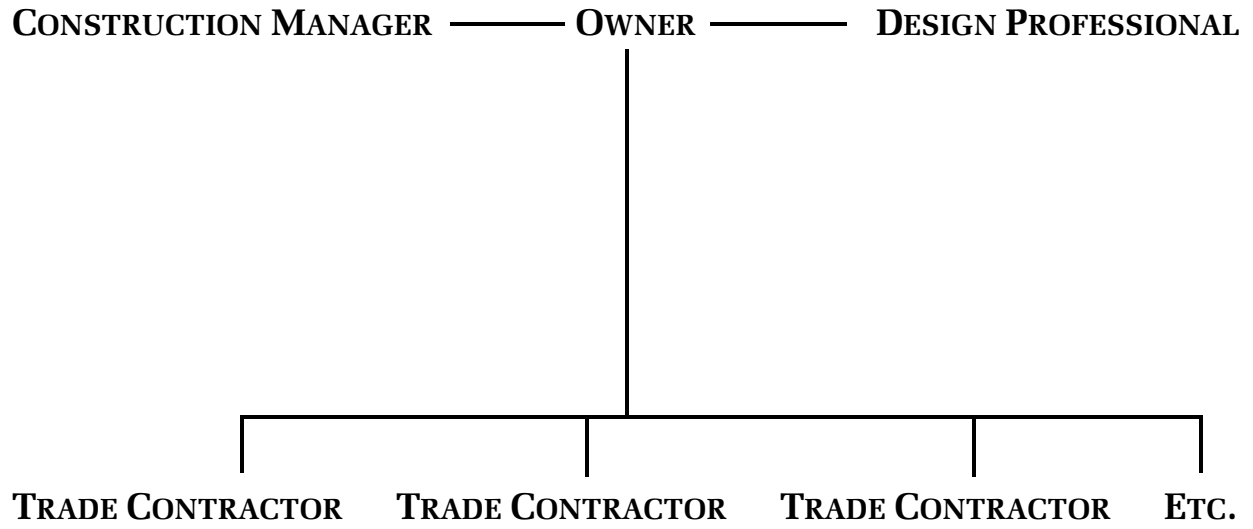


FIGURE 2. CONSTRUCTION MANAGER (SANS GENERAL CONTRACTOR) ORGANIZATIONAL CHART

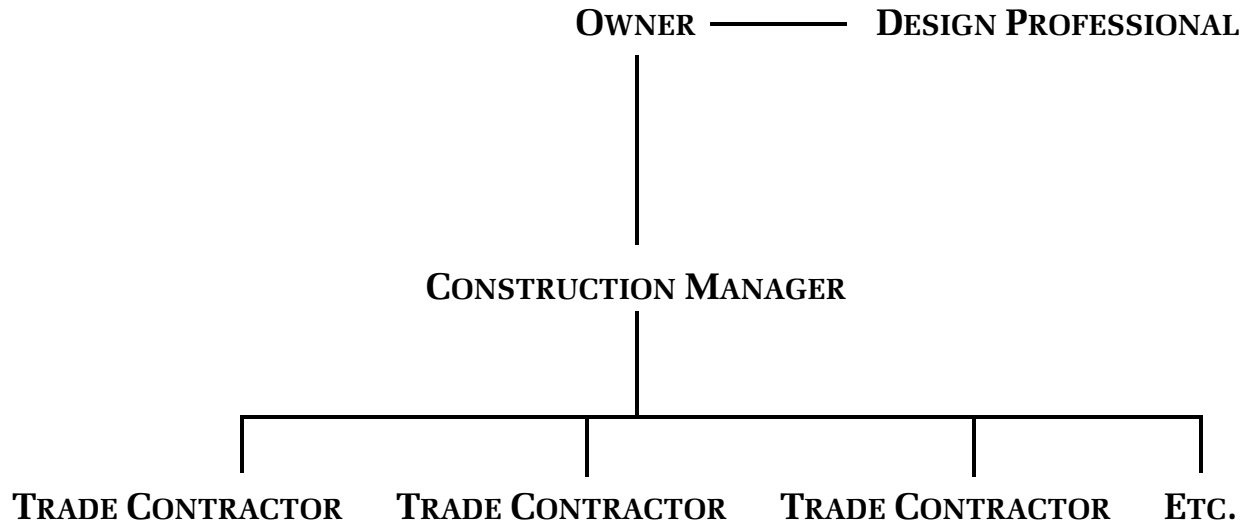
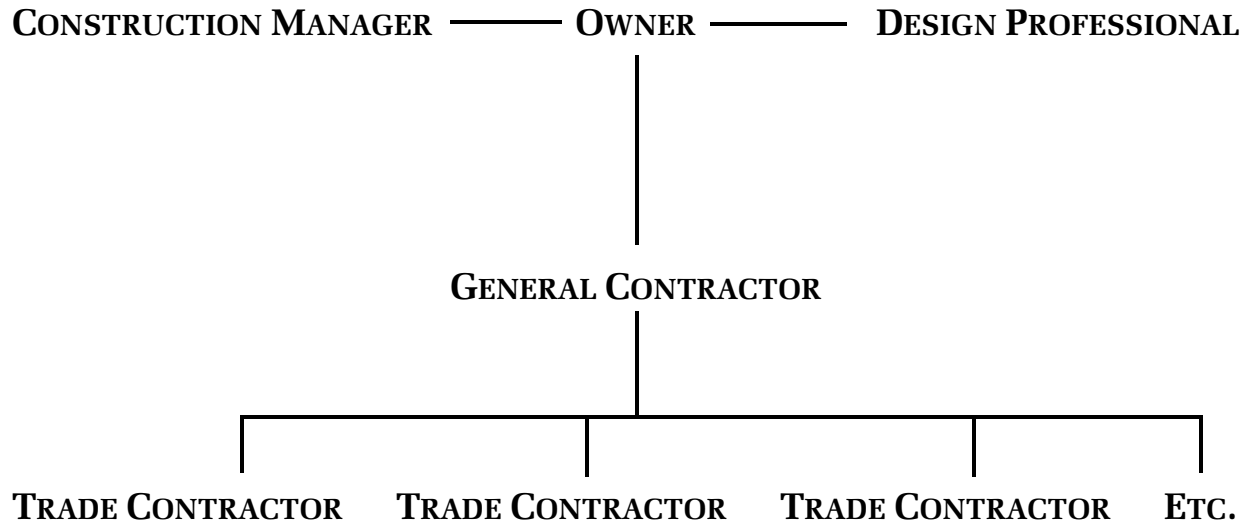


FIGURE 3. CONSTRUCTION MANAGER AT RISK ORGANIZATIONAL CHART



**FIGURE 4. GENERAL CONTRACTOR - CONSTRUCTION
MANAGER ORGANIZATIONAL CHART**

D. Common Setbacks Arising in Design/Build Contracting

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E. Which Projects Are Most Suitable for CM/GC and Other Hybrid Approaches

The presence of a construction manager fundamentally changes the allocation of control on a project. The role of a construction manager is a relatively recent development, and allows great variability. Generally, the construction manager assumes most (but not all) of the job site management and administrative duties that would otherwise be performed by either the designer or a general contractor. These duties include conducting thorough site inspections as the work progresses, issuing or initiating certificates for payment, monitoring compliance with the

construction schedule and revising the schedule when needed, participating in the change order process, monitoring compliance with environmental and safety laws and regulations, arranging for inspections by public officials, and coordinating the work of multiple primes and/or specialty trades.

A construction manager's official duties are defined by its agreement with the owner. However, because the construction manager's contract language has not been well tested by the courts, there is no telling what "official" duties may be imposed if the contract is not clear.

In *Gibson v. Heiman*, 261 Ark. 236, 547 S.W.2d 111 (1977), the Arkansas Supreme Court was faced with a construction management contract which it found to be ambiguous because it did not list or define the construction manager's duties. The court ruled that the manager must be viewed as the owner's representative during construction -- a duty typically reserved for the design professional. Because the court concluded that the construction manager had not fully performed its contractual duty to represent the owner's interests, it held that the manager could not recover the balance due under the contract.

The benefits of hiring a construction manager include better overall coordination of the work and greater attention to cost and schedule control. However, the presence of a construction manager does not always simplify project management. Published form construction management contracts still envision a design professional with some role in the project during construction, and the owner still having at least some nominal control. Although the use of a construction manager may improve coordination, it also increases the potential for fragmented control by adding another "controlling" participant.

The construction manager's scope of duties may vary considerably. The construction manager may or may not guarantee the cost of construction. With a construction cost guarantee, the construction manager usually issues a guaranteed maximum cost similar to that submitted by a general contractor. If the construction manager has guaranteed the cost, the construction manager is considered to be "at risk" for the construction cost. With the construction manager at risk, it will often contract as the owner's agent with the various trade contractors. *See* Figure 3. This arrangement provides the construction manager with control sufficient to accept the risk of the guaranteed cost. In return, the owner saves the markup of the general contractor on the subcontractors and materials.

For greater control over project scheduling and coordination, the owner may retain a general contractor as well as a construction manager. *See* Figure 4. With this arrangement, the general contractor retains subcontractors and oversees the purchases of materials, as usual. The construction manager acts as the owner's agent during the project. The construction manager coordinates the scheduling and monitors the change order, and payment application process. The construction manager enforces the contract terms, and acts as an arbiter of the contract documents. The general contractor reports to the construction manager in the general course of the project.

F. Overcoming Obstacles When Implementing Best Value Procurements

John Ruskin, a 19th century art critic and social commentator, once said, "It's unwise to pay too much, but it's also unwise to pay too little. When you pay too much, you lose a little money, that is all. When you pay too little, you sometimes lose everything because the thing you bought was incapable of doing the thing it was bought to do."

Ruskin's comments have proved true for more than 100 years, and help public procurement professionals stretch taxpayer dollars.

The best value for a product or service may not be delivered by the lowest bidder. Cost is

one of several factors to consider when using the best value procurement process.

In its broadest sense, best value may be defined as the outcome of any acquisition that ensures customer needs are met in the most effective, timely, and economical manner. Finding the best value should be the ultimate goal of every acquisition.

1. Federal Construction Contracting

Best value procurement was introduced to the federal acquisition system through legislative and regulatory initiatives. The Clinger-Cohen Act of 1996 enacted design-build procurement for the federal government. The Act describes the two-phase selection procedure and the concept of "efficient competition." The Act defines "efficient competition" as a balance between the need "to obtain full and open competition" and "the need to efficiently fulfill the Government's requirements." The statute codifies the design-build construction method popular in the private sector. The Federal Acquisition Regulation (FAR) implements the Clinger-Cohen Act and the two-phase design-build process for federal procurement.

However, the statutes and regulations provide only a procedure to use best value procurement; they do not require an agency to use best value procurement. The two-phase procedures "are generally appropriate for unusual or complex projects for which technical competence and demonstrated past performance are critical." If the government agency determines the two-phase design-build procedure is appropriate for its project, it must create a "scope of work" statement that "defines the project and states the Government's requirements."

A. Two-Phase Procedure

In Phase 1, the government narrows the field of potential bidders to a short list of no more than five of the best qualified design-build contractors without looking at price. During Phase 2, the government selects the design-build contractor who provides the "best value" based on all appropriate factors, including price.

(1) Phase 1

After the agency determines that design-build procedures are appropriate and creates the scope of work statement, it issues a solicitation. The solicitation incorporates the scope of work statement along with the evaluation factors the agency will consider. These factors include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members), other appropriate factors (excluding cost or price-related factors, which are not permitted in Phase 1). Importantly, Phase 1 does not include detailed design or pricing information. Nor do the regulations limit the discussions the government may have with offerors during the selection of the short list.

The explicit exclusion of cost or price data from Phase 1 sets the design-build procedure apart from the traditional competitive process. By excluding cost or price data, the design-build method permits agencies to focus on other important aspects of bid proposals. The offeror is able to focus on the design quality and technical requirements of a complex project without regard to price. During this phase, the government may evaluate the proposals without fear that the competitors simply are trying to under-bid each other regardless of the impact on the project. Furthermore, the offeror benefits from the reduced proposal preparation expenses because it does not have to produce a detailed cost analysis unless it is selected to enter Phase 2.

The FAR defines past performance information as:

relevant information for future source selection purposes, regarding a contractor's

action under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

See 48 CFR §42.1501. The FAR definition is subjective and permits the government agency to exercise broad discretion. Thus, the government has wide latitude in establishing a contractor's performance rating. The burden is on the government agency to maintain information on contractor past performance and prepare a past performance evaluation report for each competing contractor. 48 CFR §§42.1500 to 42.1503. However, contractors are permitted to "submit comments, rebutting statements, or additional information" relating to the evaluation. 48 CFR §42.1503. In the event of a disagreement, discrepancies are resolved "at a level above the contracting officer." 48 CFR §42.1503. Ultimately, the contracting agency retains the final decision regarding content of the past performance evaluation. *Id.* Finally, the solicitations must describe the approach for evaluating past performance information, including how the agency will evaluate offers when no past performance information is available. 48 CFR §15.305 (a) (2) (iv). General Accounting Office decisions indicate that when there is a lack of past performance information, "the offeror may not be evaluated favorably or unfavorably on past performance."

Phase 1 narrows the field of offerors based primarily on technical competence and past performance. The result is a short list of contractors best qualified to compete in Phase 2. 10 USC §2305a (c) (2). Generally, this short list is limited to five contractors. 10 USC §§2305a (c) (4) to 2305a (d). The list may include more than five contractors only if the greater number of competitors is in "the Government's interest and is consistent with the purposes and objectives of two-phase design-build contracting." 48 CFR §36.303-1 (a) (4). This short list will thus include only those competitors likely to provide "best value" to the government.

(2) Phase 2

After the agency creates the short list, the competitors must comply with the solicitation requirements for Phase 2. The solicitation may be issued concurrently with the Phase 1 solicitation or after creation of the short list. 48 CFR §36.303. The Phase 2 solicitation "shall require submission of technical and price proposals, which shall be evaluated separately, in accordance with Part 15." 48 CFR §36.303-2 (b). The agency must indicate in the solicitation all factors to be considered and their relative importance. 48 CFR §15.304; 10 USC §2305 (a) (2) (A) (i); 41 USC §253a (b) (1) (A). After the 1997 revisions to FAR Part 15, the government has significant discretion and flexibility during the two-phase process. The regulations require that competitors "shall be treated fairly and impartially but need not be treated the same." 48 CFR §1.102-2 (c) (3). One recent analysis of the current FAR regulations for Phase 2 noted "[t]he rewrite encourages presolicitation conferences, one-on-one meetings, and even draft requests for proposals concerning future contracting opportunities." FAR §15.201 (c); FAR §15.201 (f).

FAR Part 15 also permits the government to negotiate with competitors to achieve "best value." 48 CFR §15.306 (d). FAR §15.306 (d) defines negotiation or bargaining as "persuasion, alteration of assumptions and positions, give and take, and may apply to price, schedule, technical

requirements, type of contract, or other terms of a proposed contract." *Id.* The government may also:

[N]egotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

48 CFR §15.306 (d) (3). Finally, each offeror has the opportunity to revise its proposal during the negotiations and to submit a "final proposal revision." 48 CFR §15.307 (b). However, the regulations prohibit conduct that favors one offeror over another, that reveals an offeror's technical solution, or that reveals an offeror's price without that offeror's permission. 48 CFR §15.306 (e). These regulations give government agencies "considerable discretion" in the procurement process.

During Phase 2, the evaluating agency may consider cost information. 48 CFR §15.305 (a) (4). The best value procurement method permits the agency to "conduct a price/technical trade-off analysis of an offeror's technical proposal and prices in order to determine which proposal is most advantageous to the government" and, thus, "make an award to a higher priced offeror that has submitted a technically superior offer." 48 CFR §15.101-1; 48 CFR §15.305 (a) (4).

The criteria for evaluation is critical for implementing a best value procurement, and requires forethought and planning.

EVALUATION CRITERIA SCORE SHEET (ASSIGN NUMERICAL VALUE)

Evaluation Criteria	Vendor 1	Vendor 2	Vendor 3	Vendor 4
-Technical/Management				
1. Technical & Organizational Approach				
2. Qualification of Personnel				
3. Resource Commitment				
4. Past Performance				
-Overall Proposal Rating				
-Overall Cost to Agency				
-Best Value Solicitation				
-Weighing The Options				

According to the U.S. Army Materiel Command's *Army Source Selection Guide*, the general rule is: the higher the technical or performance risk, the greater the emphasis on non-cost factors. To that end, civilian procurements of professional services and construction and information technology (IT) contracts, which tend to be complex, may be handled through the best value process. Best value procurement is also appropriate for the purchase of goods such as HVAC equipment, office furniture and equipment, and copiers.

2. Measuring What's Relevant

There are a number of source selection factors to consider when using the best value procurement method. (See inset below.) The user should be wary of using too many. Whatever factors are selected should be based on requirements and should relate directly to the goods and services being procured. If too many evaluation criteria are employed, the process will dilute consideration of those that are truly important.

Life Cycle Costing (LCC) can be an effective tool to measure the value of offers. LCC goes beyond the total acquisition cost. It also measures total operation and maintenance costs minus any residual value remaining after the useful life of the product is expended. The Total Cost of Ownership is another important factor. For example, this factor considers the initial price of the purchase, the cost of maintenance over a specified number of years, and the cost of consumables. The vendors' performance history is also an important factor in evaluating a best value contract. The private sector has long looked to contractors' current and past performance as a major criterion in selecting suppliers. However, any time that subjectivity is allowed into an evaluation process, the door is open for reasonable minds to differ on the outcome.

The public sector has traditionally relied more on detailed technical and management proposals to compare offers. This practice often allowed vendors who could write outstanding proposals to win contracts, even though competing offerors had significantly better performance records and, therefore, offered a higher probability of meeting contract requirements.

The Office of Federal Procurement Policy ("OFPP") encourages agencies to make contractors' performance records a key consideration in awarding negotiated acquisitions, reasoning that the result would be increased competition and higher quality service by vendors.

3. Assessing the Advantages

Using best value procurement can encourage and increase small, women-owned, and minority business participation and subcontracting opportunities. In addition, best value procurements can take advantage of the experience and independent judgment of evaluators and offer greater flexibility to compare technical and cost factors subjectively. Best value procurements do, however, require time and resources to complete and may be difficult to evaluate. As with other selection processes, best value procurement has advantages and disadvantages, and is simply a tool to accomplish a procurement.

A best value procurement process cannot be objectively measured and increases the potential for additional protest.

4. Calibrating for Control

The make up of the evaluation team depends on the nature of the purchasing requirement. At a minimum, the team should include end users, technical experts, contract administrators, procurement professionals, and, if necessary, legal counsel. Before conducting a best value procurement, it may be helpful to have a presolicitation dialogue to ensure a mutual understanding of the agency's needs and vendors' capabilities. Such a meeting could help reduce miscommunication and protest. The team should develop a means of evaluating the merits of bid proposals so that their relative strengths and short comings can be compared.

RATING	DESCRIPTION
Exceptional	Bid exceeds requirements and demonstrates an exceptional understanding of goals and objectives of the acquisition. One or more major strengths exist. No

significant weaknesses exist.

Acceptable Bid demonstrates an acceptable understanding of goals and objectives of the acquisition. There may be both strengths and weaknesses, but the strengths outweigh the weaknesses.

Marginal Bid demonstrates a fair understanding of the goals and objectives of the acquisition. Weaknesses outbalance any strengths that exist. Weaknesses will be difficult to correct.

Unacceptable Bid fails to meet an understanding of the goals and objectives of the acquisition. The proposal has one or more significant weaknesses that will be very difficult or impossible to correct.

Once a need has been identified, an agency must decide on a rating method. The Virginia DGS uses one of three methods. The numeric rating uses a balanced scorecard, with points generally totaling 100. The color rating method uses red, yellow, and green to rate proposals. The adjectival rating method uses descriptions. Others use a rating system from one to five, with five being the best. The actual system used is not as important as whether the evaluators all understand the system and use the same system. Ratings should reflect how well contractors meet the cost, schedule, and performance requirements of a contract. In addition, the OFPP stresses the importance of including a narrative sentence with each rating, recognizing contractor resourcefulness in over-coming challenges that arise in the context of contract performance. Price, while not the only factor weighed in a best value contract, is still important.

Vendors have had mixed reactions to best value contracts. Some feel uncertainty about the prospects of future contracts because of the subjectivity involved and the fact that the lowest price does not guarantee contract award. Others appreciate the process more because they feel that it levels the playing field concerning product and service quality while not making price the determining factor. Communication with disappointed vendors after the an award may help alleviate vendor concerns. A debriefing session with the unsuccessful bidders can even help improve the response to future requests for proposal.

Best value procurement is not a new concept. Rather, it is a practice that is being used more now than in the past. In 1989, for example, the U.S. Navy began employing a methodology for "greatest value source selection" of firm-fixed price supplies in which cost and past performance were the only award factors. The name has changed over time. Some request for proposal processes are simply best value procurements. Typically, a request for proposal process can equate to the best value procurement process when consideration is given to factors other than cost. Legislative changes have allowed the process to take place. As state laws have been changed to permit more best value procurements, the process has gained more acceptance.

Typical best value source selection factors

Life cycle costing/Total cost of ownership

Quality of goods or

- services
- User friendliness
- Proposed technical performance
- Financial stability of vendor
- Timeliness
- Cost of necessary training
- Qualifications of individuals proposed for a project
- Realistic risk assessment of the proposed solution
- Availability and cost of technical support
- Environmental impact
- Past performance
- Cost/price

G. Special Concerns for Public Works Projects

1. No implied duty of contractual good faith

There is no implied duty of good faith in performing a contract in Texas. The Texas Supreme Court so held in *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983), where it refused to hold that “in every contract there is an implied covenant that neither party will do anything which injures the right of the other party to receive benefits of the agreement.”

The case *City of San Antonio v. Forgy*, 769 S.W.2d 293 (Tex.App. -- San Antonio 1989, writ denied), illustrates the problem with no duty of good faith. There, a metal casing around a water well ruptured, and the contractor had to drill a second well at considerable expense. During discovery in the ensuing suit, the contractor found out that the City’s engineer knew before hand that the casing was undersized and was likely to rupture. Despite the City’s prior knowledge that the casing would fail, the court refused to impose a duty of good faith on the City in its dealings with the contractor.

2. Sovereign Immunity

The State of Texas retains sovereign immunity. As a result, sovereign or governmental immunity protects the State, its agencies, and its officials from lawsuits for damages, absent the Legislature's consent through statute or legislative resolution. *Tex. Natural Resources Conservation Comm'n v. It-Davy*, 74 S.W.3d 849, 853-54 (Tex.2002); *Fed. Sign v. Texas Southern University*,

951 S.W.2d 401, 405 (Tex.1997); *City of Texarkana v. Cities of New Boston*, 141 S.W.3d 778, 781 (Tex.App.-Texarkana 2004, no pet.). Governmental immunity encompasses both immunity from liability and immunity from suit. *It-Davy*, 74 S.W.3d at 853.

Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit. *Federal Sign*, 951 S.W.2d at 405. When the State contracts, the State waives immunity from liability. *Id.* However, immunity from suit still bars a suit against the State unless the State expressly consents to the suit. *City of Texarkana*, 141 S.W.3d at 785.

3. Differing Site Conditions

Differing site conditions are essentially conditions which differ in some degree from that which the parties expected. One way of managing differing site conditions is to include a differing site conditions clause in the contract. Differing site conditions clauses seek to allocate equitably an unknown risk between the owner and the contractor. In theory, this equitable apportionment should minimize costs to the owner because it allows the contractor to remove this contingency from its bid. The owner avoids overpayment on the majority of projects and is required to pay for differing site conditions only when they occur.

Despite the theory supporting inclusion, there are good reasons not to include a differing site conditions clause in the contract. Those owners who do not often build may not generate the experience sufficient to realize the cost savings of contractor's removal of the differing site conditions risk. An owner who rarely engages in construction may be more concerned with the potential for a catastrophic cost overrun than the incrementally higher construction cost that the differing site conditions clause may cause. Second, some owners, particularly public owners, have limited funds for the construction of a project. Substantially increasing the project budget to accommodate a changed condition may be impractical. Third, placing the risk on the contractor provides the contractor with an incentive to minimize the financial effect of the discovered condition. If the contract has a differing site conditions clause, the contractor may see the changed condition as an opportunity to recoup other losses on the project at the owner's expense. Finally, in a competitive market, empirical evidence indicates that contractors do not quantify the risk of differing site conditions and may undervalue the risk. Under these conditions, elimination of the differing site conditions clause benefits the owner at little or no cost.

Federal Government contracts contain a standard provision relating to differing site conditions, which takes precedence over any contrary language in the contract. These standard provisions are often included in federally funded work for states and local governments. The federal provision recognizes two types of differing site conditions. A Type I claim provides for an equitable adjustment if the conditions encountered differ materially from those indicated in the contract. Although the representation of the conditions need not be explicit, the contract documents must provide sufficient grounds to justify a bidder's expectation of latent conditions materially different from those actually encountered.

When the contract documents do not contain affirmative misrepresentations as to anticipated conditions, a contractor's right to a contract adjustment may nonetheless arise from unusual physical conditions differing materially from those ordinarily encountered in work of the character provided in the contract. These claims are generally referred to as Type II claims.

The federal differing site conditions clause is listed in the Code of Federal Regulations, 48 C.F.R. §52.236-2 (1991), as follows:

(a) The Contractor shall promptly, and before such conditions are disturbed, give a

written notice to the Contracting Officer of: (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the written notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or of the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed unless the Contractor has given the written notice required; provided, however, the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

The 1987 edition of the American Institute of Architects (AIA) Document A201, General Conditions for the Contract for Construction, contains a differing site conditions clause similar to the federal model.

Having a differing site conditions clause in the contract does not exempt the contractor from inspecting the site. Courts have found an implied obligation that a contractor make at least a minimal inspection of the site to familiarize itself with the property. Most contracts today include an express "site inspection clause" obligating the contractor to inspect and familiarize itself with the conditions at the site. The AIA A201 General Conditions has such an inspection provision, and directs the contractor to verify field conditions and measurements before commencing construction.

When the contract has a site inspection clause, and the contractor unreasonably fails to inspect the site, the contractor may be foreclosed from invoking the terms of the differing site conditions clause. If, however, the contractor makes a reasonable inspection of the site, yet fails to discover the differing site condition, the two clauses may conflict.

The courts have resolved the conflict by applying a standard of reasonableness. The contractor is obligated to discover conditions apparent through a reasonable investigation. The contractor is not obligated to discover hidden conditions, which do not surface through a reasonable investigation. The contractor is also not required to perform burdensome, extensive, or detailed tests or analyses. If the investigation is constrained by weather conditions, site conditions, or time in the contracting process, the contractor will be only required to perform an investigation that is reasonable under the circumstances.

A disclaimer or reliance clause may limit the effectiveness of a differing site conditions clause. These clauses typically state that information received from the project owner is provided solely for informational purposes and that the owner does not warrant the accuracy or sufficiency

of the information provided. The objective of the provision is to render unreasonable any reliance by the contractor on owner-provided information which characterizes the condition of the property.

Courts have reached a variety of results on the effect of disclaimer provisions. Some courts have held that a disclaimer effectively precluded a contractor from arguing that reliance on the owner-provided information was reasonable. See, *J.E. Brenneman Co. v. Commonwealth Department of Transportation*, 56 Pa. 210, 424 A.2d 592 (1981); *Zurn Engineers v. State of California*, 69 Cal.App.3d 798, 138 Cal.Rptr. 478, cert. denied, 434 U.S. 985 (1977). In order to be effective, such clauses should provide that the information was not warranted and that the contractor has not relied on the information. These provisions are most effective when combined with a site inspection clause.

In *Brown-McKee, Inc. v. Western Beep, Inc.*, 538 S.W.2d 840 (Tex.Civ.App. -- Amarillo 1976, writ ref'd n.r.e.), the contractor had no notice of a hard rock formation immediately below the ground surface. However, the contractor's claim for a differing site condition was denied due to a broad disclaimer of subsurface conditions in the contract. The court held that with that clause, the contractor would have to prove deception or bad faith on the part of the owner or show that the owner had withheld material information that it had a duty to disclose.

In *Millgard Corp. V. McKee/Mays*, 49 F.3d 1070 (5th Cir. 1995), the contract disclaimed a particular soil borings report. Although the contract also contained a differing site conditions provision, the court held that the subcontractor could not rely on the soil borings report to support its claim since the report had been specifically disclaimed.

Other courts have held that disclaimer clauses do not preclude reliance on information received from the owner. The situations in which courts have allowed contractors to rely on information received from the owner despite a disclaimer clause may be grouped in three categories. First, cases hold that reliance was permissible because the contractor performed a reasonable investigation that confirmed or supported the information received from the owner. Second, cases hold that reliance was justified because the owner intended that the contractor rely on the information in preparing a bid. Third, cases hold that reliance was justified because the circumstances did not allow sufficient time for the contractor to conduct an adequate independent investigation. The cumulative effect of these limitations is that a contractor may rely on information received from the owner except when relatively simple inquiries might have revealed contrary conditions.

4. Indemnity

If the owner requires indemnity for its own negligent acts, the owner cannot subtly demand it. Indemnity for one's own negligence must be expressly stated in the contract. In *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), the Texas Supreme Court announced the express negligence doctrine to avoid confusion in the interpretation and enforcement of indemnity provisions. Unless the owner writes the indemnity provision in clear black and white language, the contractor will not have to indemnify the owner for the owner's own negligence.

The standard AIA language like ¶3.18 in the A201 General Conditions will not satisfy the express negligence doctrine, since it does not mention the owner's negligence.

In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989), the Texas Supreme Court upheld the following language as satisfying the express negligence doctrine: Contractor [PPI] agrees to hold harmless and unconditionally indemnify COMPANY [ARCO] against and for all liability, cost, expenses, claims and damages which

[ARCO] may at any time suffer or sustain or become liable for any reason of any accidents, damages or injuries either to the persons or property or both, of [PPI], or of the workmen of either party, or of any other parties, or to the property of [ARCO], in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [ARCO], its officers, agents or employees.

In *Dresser Industries v. Page Petroleum Co.*, 853 S.W.2d 505 (Tex. 1993), the Supreme Court stressed that an indemnity agreement must be conspicuous enough to provide “fair notice” of its term. To provide “fair notice,” an indemnity provision must be apparent to a reasonable person. A notation on the face of the contract which draws attention to the provision, such as all capital letters or contrasting type or color is sufficient.

In *Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994), the court held that if an indemnity provision does not initially satisfy the express negligence doctrine, an indemnitor has no duty to indemnify another for their attorney’s fees even if the other were later found not to be negligent.

The Texas Civil Practice & Remedies Code §130.002 invalidates a provision which attempts to have a contractor indemnify an architect or engineer for liability and damage for personal injury, property damage, and expenses arising from the design professional’s negligence in preparing plans or specifications or in contract administration.

If the owner has required the contractor to indemnify the owner for the owner’s own negligence, the contractor should secure sufficient liability insurance to cover the risk. If the contractor cannot obtain such insurance, the contractor should seriously consider qualifying its bid or not bidding at all. A Texas court has held that an agreement to cover a party’s negligence also covers the party’s gross negligence, which could result in punitive damage award in millions of dollars.

5. No Damages for Delay

Ordinarily, Owner is responsible for delays the owner causes to the contractor. For example, the owner may be responsible for obtaining rights of way on a project. If the owner does not obtain the rights of way in a timely manner and delays the work, the owner can be liable for the contractor’s extra costs.

In *Anderson Development Corp. v. Coastal States Gathering Co.*, 543 S.W.2d 402 (Tex.Civ.App. -- Houston [14th Dist.] 1976, writ ref’d n.r.e.), the owner was to obtain the rights of way for the work. The parties had planned to do the work in the dry summer months. Because the owner failed to obtain the rights of way before the summer, the contractor had to perform the work in the fall in between rain storms. As a result, the work was performed sporadically as weather permitted and cost significantly more. The contractor did not complete work until three months after the scheduled completion date. The contractor successfully sued to recover its extra costs.

In *Board of Regents of the University of Texas v. S&G Construction Co.*, 529 S.W.2d 90 (Tex.Civ.App. -- Austin 1975, writ ref’d n.r.e.), the owner failed to provide proper plans and specifications. The work was delayed while the job was redesigned on a daily basis. The contractor incurred almost \$900,000 in extra costs as a result of the massive number of changes. The contractor successfully sued to recover the extra money. The court reasoned that the owner had caused the delays and increased the costs, and should pay for them.

With a no damages for delay clause, however, the owner can disclaim responsibility for the contractor’s extra costs arising from delays on project. Texas courts have upheld the no damages

for delay disclaimer.

In *City of Houston v. RF Ball Construction Co.*, 570 S.W.2d 75 (Tex.Civ.App. -- Houston [14th Dist.] 1978, writ ref'd n.r.e.), the contractor received several hundred change orders and almost 900 design clarifications radically altering the plans and specifications for the project. The large number of changes was later held not to be within the contemplation of the parties when the project began. As a result of all the changes, the contractor incurred \$3 million in extra cost not including the direct costs of performing all the extra work. The contractor sued to recover the indirect costs of delay, disruption, general hindrance, and inefficiency.

However, the contract contained a variation of the no damages for delay clause, which precluded recovery for extra indirect costs for changes and modifications to the contract.

There are exceptions to enforcement of the no damages for delay clause. In general, the no damages for delay clause will not be enforced if the delays that occurred were not contemplated when the contract was signed. The contractor's delay claim will not be barred if the delays were caused by the owner's active interference, bad faith, or intentional misconduct. If the owner abandons the contract, the owner can be liable for delay damages regardless of the no damages for delay clause. Finally, if the owner materially misrepresents site conditions or conceals material site conditions information, the owner may be liable for delays the contractor sustains.