

BUILDING SUCCESS STORIES:

A SURVEY OF CONSTRUCTION DELIVERY METHODS



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by
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Introduction

Texas public school districts are political subdivisions subject to federal and state constitutions and statutes, regulations of the Texas Education Agency, and local Board policy. Standard contracts promulgated by the American Institute of Architects (“AIA”) are developed primarily for commercial, not public projects. Thus, the mere execution of a standard, unmodified AIA Agreement on a public project more than likely constitutes a violation of many laws by the governmental entity. Section IV of this paper is intended to introduce the reader to some of the essential modifications to AIA documents necessary for compliance with current law. Prior to a detailed discussion of construction contracts, a summary of statutory procedures governing construction delivery methods is provided.

House Bill 628 became effective September 1, 2011 and brought several changes regarding the statutes that govern construction projects of Texas public school districts. The most major change was the change in location of the governing statutes regarding available contract methods from the Education Code to the Government Code. The allowable methods for a school district’s construction contracts are now found in Chapter 2269 of the Government Code. Allowable construction-contract methods include:

- (1) Competitive bidding;
- (2) Competitive sealed proposals;
- (3) Construction manage-agent;
- (4) Design-build;
- (5) Construction manager-at-risk; and
- (6) Job-order contracting.

Considering that the Construction Management-At-Risk (“CMAR”) delivery method is now the most common delivery method utilized in major school construction, this paper will also offer examples and practical suggestions for trustees and administrators considering CMAR construction contracts. Applicable statutes, sample requests for competitive sealed proposals and sample selection criteria are attached below.

I. Contracts for Facilities—Construction Manager-At-Risk: Texas Government Code, Chapter 2269: Subchapter F

Texas public school districts may use the CMAR method for the construction, rehabilitation, alteration, or repair of a facility. In using the CMAR method and in entering into

a contract for the services of a CMAR, a district must follow the procedures prescribed by Texas Government Code §§ 2269.251-258. A CMAR may be a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the school district regarding construction during and after the design of the facility. TEX. GOV'T CODE § 2269.251. A CMAR may be compensated either through a fixed contract amount or a guaranteed maximum price.

Engineer or Architect to Be Selected Before or Concurrently with CMAR. Before or concurrently with selecting a CMAR, the district is required to select or designate an Engineer or Architect who shall prepare the construction documents for the project. TEX. GOV'T CODE § 2269.252.¹ If the Engineer or Architect is not a full-time employee of the district, the district must select the Engineer or Architect on the basis of demonstrated competence and qualifications as provided by Texas Government Code § 2254.004.² *Id.* The district's Engineer, Architect, or construction manager-agent for a project may not serve, alone or in combination with another, as the CMAR unless the Engineer or Architect is hired to serve as the CMAR under a separate or concurrent procurement conducted in accordance with Subchapter F of Chapter 2269, Texas Government Code. Section 2269.252 does not prohibit the district's Engineer or Architect from providing customary construction phase services under the Engineer's or Architect's original professional service agreement in accordance with applicable licensing laws. TEX. GOV'T CODE § 2269.252(b).

Inspection and Testing Contracts. The district shall provide or contract for, independently of the CMAR, the construction materials, engineering, inspection, testing, and inspection services, as well as the verification testing services necessary for acceptance of the facility by the district. TEX. GOV'T CODE § 2269.058.³

One-step or Two-step Selection Process. The district must select a CMAR in either a

¹ The selected Engineer or Architect is required to prepare the construction documents for the project and has full responsibility for complying with Chapter 1001 or 1051, Occupations Code, as applicable. TEX. GOV'T CODE § 2269.057 (as amended by House Bill 628, 82nd Texas Legislature).

² § 2254.004. Contract for Professional Services of Architect, Engineer, or Surveyor.

- (a) In procuring Architectural, Engineering, or land surveying services, a governmental entity shall:
 - (1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and
 - (2) then attempt to negotiate with that provider a contract at a fair and reasonable price.
- (b) If a satisfactory contract cannot be negotiated with the most highly qualified provider of Architectural, Engineering, or land surveying services, the entity shall:
 - (1) formally end negotiations with that provider;
 - (2) select the next most highly qualified provider; and
 - (3) attempt to negotiate a contract with that provider at a fair and reasonable price.
- (c) The entity shall continue the process described in Subsection (b) to select and negotiate with providers until a contract is entered into. TEX. GOV'T CODE § 2254.004.

³ The district shall select those services for which it contracts in accordance with Section 2254.004, Government Code. TEX. GOV'T CODE § 2269.058(b).

one-step or two-step process. TEX. GOV'T CODE § 2269.253(a). The district must prepare a request for proposals, in the case of a one-step process, or a request for qualifications, in the case of a two-step process, that includes general information on the project site, project scope, schedule, selection criteria and the weighted value for each criterion,⁴ estimated budget, and the time and place for receipt of proposals or qualifications, as applicable, a statement as to whether the selection process is a one-step or two-step process, and other information that may assist the district in its selection of a CMAR. *Id.* at § 2269.253(b). The district must also state the selection criteria in the request for proposals or qualifications. *Id.* at § 2269.253(c).

If a one-step process is used, the district may request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions. TEX. GOV'T CODE § 2269.253(d). If a two-step process is used, the district may not request fees or prices in step one. *Id.* at § 2269.253(e). In step two, the district may request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the CMAR's proposed fee and its price for fulfilling the general conditions. *Id.*

Criteria to Consider. In determining the award of a contract under Chapter 2269, the District *must* consider and apply: (1) any existing laws, including any criteria, related to historically underutilized businesses; and (2) laws, rules, or applicable municipal charters, including laws applicable to local governments, related to the use of women, minority, small, or disadvantaged businesses. TEX. GOV'T. CODE § 2269.055(b).

In determining the award of a contract under Chapter 2269, the District *may* consider:

- (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 governmental entity to comply with rules relating to historically underutilized businesses;
- (5) the offeror's safety record;
- (6) the offeror's proposed personnel;
- (7) whether the offeror's financial capability is appropriate to the size and scope of the project; and
- (8) any other relevant factor specifically listed in the request for bids, proposals, or qualifications.

TEX. GOV'T CODE § 2269.055(a). Based on the eighth criterion, the district can and should consider factors listed in § 2269.055(a), as well as any additional factors the district sees fit, but must list the factors specifically desired for use in the selection process.

⁴ TEX. GOV'T CODE § 2269.056: The board of trustees of a school district that is considering a construction contract using a method of delivery authorized by Chapter 2269 other than competitive bidding must, before advertising, determine which method provides the best value for the district. The district **shall** base its selection among offerors on applicable criteria listed for the particular method used. The district **shall** publish in the request for proposals or qualifications the criteria that will be used to evaluate the offerors, and the applicable weighted value for each criterion. The district **shall** document the basis of its selection and **shall** make the evaluations public not later than the seventh day after the date the contract is awarded. TEX. GOV'T. CODE § 2269.056.

Public Disclosure of Offerors, Fees, and Prices. At each step, the district must receive, publicly open, and read aloud the names of the offerors. TEX. GOV'T CODE § 2269.253(f). At the appropriate step, the district must also read aloud the fees and prices as the proposal is opened. *Id.* Within 45 days after the date of opening the proposals, the district must evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals. *Id.* at § 2269.253(g).

CMAR Must Be Selected Based Upon Best Value for the District. The district must select the offeror who submits the proposal that offers the *best value* for the district based on published selection criteria and on its ranking evaluation. TEX. GOV'T CODE § 2269.254(a). The district must first attempt to negotiate a contract with the first selected offeror. *Id.* at § 2269.254(b). If the district is unable to negotiate a satisfactory contract with the selected offeror, the district must, formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. *Id.* at § 2269.254(c). Within 7 days of awarding the contract, the district must make public the rankings determined above regarding each proposal submitted. *Id.* at § 2269.254(d).

Trade Contractors Selected Pursuant to TEX. GOV'T CODE § 2269.255(a) and TEX. EDUC. CODE § 44.031(g). After entering into a contract with a school district, a CMAR must publicly advertise and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. TEX. GOV'T CODE § 2269.255(a). The Government Code requires advertising and notice to be conducted “in a manner prescribed by law.” TEX. GOV'T CODE § 2269.052. The specifically required notice procedure for public school districts remains in § 44.031(g) of the Education Code. A CMAR may seek to perform portions of the work itself if the CMAR submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors, and if the district determines that the CMAR's bid or proposal provides the best value for the district. TEX. GOV'T CODE § 2269.255(b).

The CMAR and the district or its representative must review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the CMAR, Engineer, Architect, or district. TEX. GOV'T CODE § 2269.256(a). All bids or proposals must be made public after the contract is awarded or within 7 days after the date of final selection of bids or proposals, whichever is later. *Id.*

District Must Pay Difference to Disregard a CMAR's Recommendation. If a CMAR reviews, evaluates, and recommends to the district a bid or proposal from a trade contractor but the district requires another bid or proposal be accepted, the district must compensate the CMAR for any change in price, time, additional cost, or risk that the CMAR incurred as a result of a district's requirement that the other bid or proposal be accepted. TEX. GOV'T CODE § 2269.256(b).

One Exception to Public Advertisement—Trade Contractor Default. If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected, the CMAR may itself fulfill, without advertising, the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements. TEX. GOV'T CODE § 2269.257.

Payment and Performance Bonds. A CMAR must provide payment and performance bonds for the amount of the contract price as if it were a contractor pursuant to Texas Government Code §2253.021.⁵ 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 district must each be in an amount equal to the project budget, as specified in the request for qualifications. TEX. GOV'T CODE § 2269.258(a). The CMAR must deliver the bonds not later than the 10th day after the date the CMAR executes the contract, unless the CMAR furnishes a bid bond or other financial security acceptable to the district to ensure that the CMAR will furnish the required performance and payment bonds when a guaranteed maximum price is established. *Id.* at § 2269.258(b). These costs pass through to the Owner.

Insurance. A CMAR should be required to provide a comprehensive liability insurance policy insuring the amount of the entire project. These costs are passed through to the Owner. A CMAR should also be required to provide at least a one-year warranty for the entire project.

II. Comparison to Other Construction Delivery Methods

A. Construction Manager Agent:

A construction manager agent (hereinafter “CMA”) is selected in the same manner as an

⁵ § 2253.021. Performance and Payment Bonds Required

- (a) A governmental entity that makes a public work contract with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity:
 - (1) a performance bond if the contract is in excess of \$100,000; and
 - (2) a payment bond if the contract is in excess of \$25,000.
- (b) The performance bond is:
 - (1) solely for the protection of the state or governmental entity awarding the public work contract;
 - (2) in the amount of the contract; and
 - (3) conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.
- (c) The payment bond is:
 - (1) solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material; and
 - (2) in the amount of the contract.
- (d) A bond required by this section must be executed by a corporate surety in accordance with Section 1, Chapter 87, Acts of the 56th Legislature, Regular Session, 1959 (Article 7.19-1, Vernon's Texas Insurance Code).
- (e) A bond executed for a public work contract with the state or a department, board, or agency of the state must be payable to the state and its form must be approved by the attorney general. A bond executed for a public work contract with another governmental entity must be payable to and its form must be approved by the awarding governmental entity. TEX. GOV'T CODE §2253.021.

Architect or Engineer, on the basis of demonstrated competence and qualifications⁶ as set forth in Texas Government Code § 2254.004 (See footnote 3 above). TEX. GOV'T CODE § 2269.207. A CMA is paid hourly or on a fixed percentage basis. A CMA assists the Owner in preparing bid packages and advertizing for bids. A CMA acts as the Owner's fiduciary. TEX. GOV'T CODE § 2269.204. Depending on the contract between a CMA and a school district, a CMA would likely be responsible for scheduling and organizing work by the various trades, supervising the means and methods of construction and advising the Owner concerning substitutions, acceptance or rejection of work, and any other services specified in the contract. TEX. GOV'T CODE § 2269.201-.202. The Owner must competitively select and enter into multiple contracts directly with each individual construction trade. TEX. EDUC. CODE §44.037(e). The CMA approach is distinguished from the CMAR method in that there is only one contract between an Owner and a CMAR. The CMAR is then responsible for completing the general conditions of the contract within a specified time period.

Consider the following observations about the CMA method:

- **Payment and Performance Bonds.** A CMA may not provide or be required to provide performance and payment bonds. TEX. GOV'T CODE § 2269.203. As a consequence, each separate trade must provide a payment bond for a contract in excess of \$25,000.00 and a performance bond for a contract in excess of \$100,000.00. TEX. GOV'T CODE §2253.021. Potential gaps in bond coverage may occur on small projects for construction contracts that do not exceed \$25,000.00, there is typically no payment and performance bond. Additionally, available qualified tradesmen may not be able to obtain bonds necessary to submit competitive bids in some geographic areas under the CMA approach.
- **Insurance.** Although a school district Owner may be able to purchase a Builder's Risk policy for the entire job, a CMA typically does not insure the amount of the entire project. The CMA is only required to maintain professional liability or error and omissions insurance in the amount of at least \$1 million for each occurrence. TEX. GOV'T CODE § 2269.208.
- **Warranty.** Warranties are the responsibility of each trade contractor. Consequently, a CMA may lack the necessary leverage with trade contractors to get a specific trade to return to a job and timely perform warranty work.⁷
- **Best value for the District.** A CMA project produces savings through lower insurance and bond costs. A CMA typically has less home-office overhead to

⁶ While the Construction Management Association of America is in the process of developing certification procedures for CMAs, there are currently no licensing requirements as with Architects and Engineers.

⁷ This is particularly true on smaller projects.

pass through to an Owner. Some CMAs are also compensated on a percentage of savings enjoyed by the Owner.

- **Contract Administration Burden.** A reputable CMA firm will possess significant experience in contract administration services. Some CMA firms may not be sufficiently competent to manage the competitive bidding and contract administration paper work necessary in larger projects even though the party acting as CMA may be a very competent and experienced general contractor or tradesman. A CMA's lack of contract administration experience can result in additional services by the Architects, which can absorb savings afforded by the CMA method.
- **Worker's Compensation Insurance.** A reputable CMA firm will be capable of presenting evidence of worker's compensation insurance coverage for all of its employees. Some CMA firms do not possess worker's compensation insurance for their jobsite superintendents and seek either to have the district employ the jobsite superintendent and carry this employee on their own worker's compensation policy or the CMA hires the jobsite superintendent as an independent contractor and burdens this individual with the responsibility of obtaining his own worker's compensation insurance.
- **Use of Architect of Engineer.** A school district must select an Architect or Engineer, in addition to a CMA, to prepare the construction documents for the project. TEX. GOV'T CODE § 2269.205.
- **General or Trade Contractors Also Required.** A school district must hire a general contractor or trade contractors, in addition to the CMA, to serve as the prime contractor for their specific portion of the work. The general contractor or trade contractors must provide performance and payment bonds. TEX. GOV'T CODE § 2269.206.

B. General Contractor:

The general contractor (hereinafter "GC") construction delivery method is the oldest delivery method for public projects in Texas. Today, the GC and CMAR delivery methods enjoy several important similarities. For example, both GC and CMAR methods enable public school districts to bond and insure the entire project, as a district contracts directly with its GC or CMAR. Warranties extended by a GC or CMAR are typically very similar. Some GCs even perform as CMARs on certain projects. However, GCs and CMARs are selected by different procedures. In particular, a GC submits one competitive bid for the entire project (which includes its own profit) in response to a published invitation to bid under Texas Government

Code, Subchapter C, §2269.101 *et seq.*⁸ In contrast, a CMAR is selected by either a one or two-step process as set forth in TEX. GOV'T CODE § 2269.253 and as discussed above. The District may either request proposals which include the CMAR's fee and estimated price for completing the project (one-step) or may pre-qualify the CMARs to be considered and then later request CMAR's fee and maximum price for completing the project from five or fewer CMARs (two-step). TEX. GOV'T CODE § 2269.253.

When using a competitive-bidding method authorized under Subchapter C, Chapter 2269, of the Texas Government Code, the school district is not required to formally find that this method provides the best value for the district, as it must when considering the other authorized methods under Chapter 2269. Of course, in determining the award of a contract under this Chapter, as with all methods this Chapter lists, the school district may consider the criteria listed in Section 2269.055 described above. Once awarded a competitive-bidding contract, a GC proceeds with much autonomy.

A GC contracts directly with its own subcontractors and suppliers with no input from the Owner. No other competitive bid is required. By contrast, a CMAR must publicly advertise and seek competitive bids from each trade contractor in accordance with TEX. EDUC. CODE § 44.031(g). However, unlike the GC, the CMAR may perform portions of the work only if it submits its own competitive bids for portions of the work along with the other trades and the District determines that this proposal "provides the best value for the district." TEX. GOV'T CODE § 2269.255(b).

A GC assumes responsibility for completing the project within its bid price. A CMAR assumes responsibility for performing its work within its guaranteed maximum price. However, if a CMAR reviews, evaluates, and recommends to the district a bid or proposal from a trade contractor but the district requires another bid or proposal be accepted, the district must compensate the CMAR for any change in price, time, additional cost, or risk that the CMAR incurred as a result of a district's requirement that the other bid or proposal be accepted. TEX. GOV'T CODE § 2269.256(b). Both a GC and a CMAR are entitled to additional compensation for additional costs outside of the contract.

- **Engineer or Architect.** As with a CMAR, a school district is required by statute to select or designate an Engineer or Architect to prepare construction documents for the project. TEX. GOV'T CODE § 2269.102.⁹
- **Payment and Performance Bonds.** A GC and CMAR are both required to provide a payment and performance bond for the amount of the entire

⁸ Subchapter B, Chapter 271, of the Local Government Code provides other laws for competitive bidding. However, only §§ 271.026, 271.027(a), and 271.0275 from this subchapter apply to a competitive bidding process conducted under Chapter 2269 of the Government Code. TEX. GOV'T CODE § 2269.106

⁹ The selected or designated Engineer or Architect has full responsibility for complying with Chapter 1001 and Chapter 1051, Occupations Code, as applicable. TEX. GOV'T CODE § 2269.057.

project.

- **Insurance.** Both a GC and a CMAR should be required to provide a comprehensive liability insurance policy insuring the amount of the entire project. A GC and CMAR may also be required to provide a Builder's Risk policy. These costs are passed through to the Owner.
- **Warranty.** Both a GC and a CMAR should provide at least a one-year warranty for the entire project. A GC or CMAR may have an ongoing relationship with specific trades and control greater leverage to enforce timely warranty repairs.
- **Best value for the District.** A general contractor is in business to make a profit; not to produce savings for the Owner. A GC communicates directly with the Owner's Architect; not the Owner. A CMAR involves the Owner and the Architect in budget decisions and consults directly with the Owner concerning cost savings and other construction issues. Reputable CMARs typically meet with the Owner and its Architect on at least a monthly basis.
- **Contract Administration.** A GC submits a bid and Applications for Payment. Its books are closed to the Owner. A CMAR keeps relatively open books and keeps the Owner advised of construction costs, savings, etc.
- **Worker's Compensation Insurance.** A reputable GC and CMAR will both be capable of presenting evidence of worker's compensation insurance coverage for all employees prior to the commencement of construction.

C. Design-Build Contracts:

As previously discussed, the Texas Education Code §44.031(a) authorizes public school districts to enter into contracts through methods provided by Chapter 2269 of the Government Code, which includes the design-build method. A Design-Build Firm ("DBF") provides this construction services delivery method. Subchapter G, Chapter 2269 of the Government Code governs the design-build method. Section 2269.301 defines a "design-build" as a single contract with a DBF for the design and construction of a facility. TEX. GOV'T CODE § 2269.301. A DBF may 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. A school district may use the design-build method for the construction, rehabilitation, alteration, or repair of a facility. TEX. GOV'T CODE § 2269.303. In using that method and in entering into a contract for the services of a DBF, the contracting school district and the DBF shall follow the procedures provided by Subchapter G. *Id.*

- **Independent A/E Required.** In addition to selecting a DBF firm, the district must also designate an Engineer or Architect independent of the DBF to act as its representative for the duration of the work on the facility. TEX. GOV'T

CODE § 2269.305. If this Engineer or Architect is not a full-time employee of the district, any Engineer or Architect designated must be selected on the basis of demonstrated competence and qualifications as set forth in Texas Government Code §2254.004. TEX. GOV'T CODE § 2269.057(b).

- **Selecting a DBF.** Initially, the district must prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria, and other information that may assist potential DBFs in submitting proposals for the project. TEX. GOV'T CODE § 2269.306(a). The district may not, however, require offerors to submit Architectural or Engineering designs as part of a proposal or a response to a request for qualifications. The district must also prepare the design criteria package that includes more detailed information on the project. TEX. GOV'T CODE § 2269.306(b). The design criteria package is required to include sufficient information to permit a DBF to prepare a response to the district's request for qualifications; the package also includes a list of the criteria for selection as proposed in § 2269.055 and discussed above. TEX. GOV'T CODE § 2269.306(c). The design criteria package may, but is not required to include other information and/or requirements that the district feels pertinent. A sample list of such other information can be found in § 2269.306(c) of the Government Code.

In phase one, after the district prepares a request for qualifications, it must then evaluate each responding DBF's experience, technical competence, and capability to perform; the past performance of the DBF's team and members of the team; and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted. TEX. GOV'T CODE § 2269.307(a). Each DBF must certify to the district that each Engineer or Architect that is a member of its team was selected based on demonstrated competence and qualifications as provided by Texas Government Code §2254.004. TEX. GOV'T CODE § 2269.307(b). The district may qualify no more than five responding DBFs to submit additional information and, if the district chooses, to interview for final selection. TEX. GOV'T CODE § 2269.307(c).

In phase two, the district must evaluate the additional information submitted by the offerors on the basis of the selection criteria stated in the request for qualifications and the results of any interview. TEX. GOV'T CODE § 2269.307(d). The district may request additional information regarding demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the offeror to meet schedules, costing methodology, or other factors as appropriate. TEX. GOV'T CODE § 2269.307(e).

A new change to the law includes the definition of "costing methodology,"

which means an offeror's policies on subcontractor markup, definition of general conditions, range of cost for general conditions, policies on retainage, policies on contingencies, discount for prompt payment, and expected staffing for administrative duties. *Id.* Again, the district may not require offerors to submit detailed Engineering or Architectural designs as part of the proposal. TEX. GOV'T CODE § 2269.306(d). Proposals must be ranked on the basis of the criteria set forth in the request for qualifications and the DBF that offers the best value for the district must be selected on the basis of the published selection criteria and on its ranking evaluations. TEX. GOV'T CODE § 2269.308(a).

After the design-build firms have been ranked, the district should attempt to negotiate a contract with the selected DBF. TEX. GOV'T CODE § 2269.308(b). If the district is unable to negotiate a satisfactory contract with the selected DBF, the district shall, formally and in writing, end negotiations with that DBF and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. TEX. GOV'T CODE § 2269.308(c).

- **Review by Independent A/E.** Following selection of a DBF, that firm's Engineers or Architects must complete the design and submit all design elements for review and determination of scope compliance to the district or district's Engineer or Architect before or concurrently with construction. TEX. GOV'T CODE § 2269.309.
- **A/E Must Comply with Law.** An Engineer or Architect on a DBF project is responsible for compliance with the Engineering or Architectural design requirements and all other applicable requirements of Chapter 1051 or 1001 of the Occupations Code, as applicable. TEX. GOV'T. CODE § 2269.057(a).
- **Independent Tests and Inspection.** As with other delivery methods, a district must provide or contract for, independently of the DBF firm, inspection services, testing of construction materials Engineering, and verification testing services necessary for acceptance of the facility by the district. TEX. GOV'T CODE § 2269.058.
- **Set of Construction Documents.** The DBF shall supply a set of construction documents for the project to the district at the conclusion of construction. The document must note any changes made during construction. TEX. GOV'T CODE § 2269.310.
- **Payment and Performance Bonds.** A payment or performance bond is not required for, and may not provide coverage for, the portion of a design-build contract that includes design services only. If a fixed contract amount or guaranteed maximum price has not been determined at the time a design-

build contract is awarded, the penal sums of the performance and payment bonds delivered to the district must each be in an amount equal to the project budget, as specified in the design-criteria package. The DBF must deliver the bonds not later than the 10th day after the date the DBF executes the contract unless the DBF furnishes a bid bond or other financial security acceptable to the district to ensure that the DBF will furnish the required performance and payment bonds before construction begins. TEX. GOV'T CODE § 2269.311.

- **Insurance.** A DBF should be required to provide a comprehensive liability insurance policy insuring the amount of the entire project. These costs are passed through to the Owner.
- **Warranty.** A DBF should be required to provide comprehensive one-year warranty for the entire project.
- **Contract Administration.** A DBF submits a proposal and Applications for Payment. Its books are closed to the Owner. A CMAR keeps relatively open books and keeps the Owner advised of construction costs, savings, etc.
- **Worker's Compensation Insurance.** A DBF and CMAR will both be capable of presenting evidence of worker's compensation insurance coverage for all employees prior to the commencement of construction.

The design-build method, like the construction management-at-risk method, continues to receive much attention in public construction across Texas. Both methods centralize responsibility for construction under a single contract and afford a bonded, guaranteed maximum price and a comprehensive warranty. However, because the design-build method also requires a school district to designate an Engineer or Architect independent of the DBF to act as its representative for the duration of the work on the facility, a design-build delivery method generally will be less economically feasible in most circumstances.

III. Suggestions Relating To Selection and Contracting Procedures

A. Statutory Selection Procedures

Under Chapter 2269, an initial step a public school must take is to have the district's board of trustees ("the board") select the procurement process or method of delivery of construction services that will provide the "best value" to the district, unless a district is considering competitive bidding. TEX. GOV'T CODE § 2269.056 (a). If a district only considers using the competitive bidding method, then this initial "best value" determination is not required but is still recommended for uniformity. *Id.* Specific board action is necessary to

select a procurement process.¹⁰ At this meeting, the board should select one of the options permitted by TEX. GOV'T CODE, Chapter 2269¹¹ and designate it as the method that will provide the "best value" for the District. TEX. EDUC. CODE § 44.031(a)(5). In the event that the board elects to proceed with the CMAR construction delivery method, it should take action to adopt "a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager" as the method that will provide the "best value" for the district.¹²

After approving a delivery method, the primary objective then becomes selecting the best CMAR for the project at a fair and reasonable fee. The Texas Education Code requires that, for projects exceeding \$50,000, school districts must adhere to specific purchasing methods. TEX. EDUC. CODE §44.031(a). Most CMARs are selected using fairly standard requests for competitive sealed proposals.¹³ This method requires that a district publish notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened, and that the notice be published in the county in which the district's central administrative office is located. TEX. EDUC. CODE §44.031(g). Notice must be published once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. *Id.* In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately. *Id.* The typical CMAR request for proposal will seek a summary of corporate information, personnel information, construction systems approach and references. A cautious school district will also visit the CMAR's office and referenced projects. In determining the selection criteria to be used to evaluate a CMAR, the district may base its decision on the criteria authorized to be used under § 2269.055 of the Texas Government Code. Subsection 2269.055(a) allow school districts to select a CMAR on the basis of price, demonstrated experience, past performance, reputation, quality of the CMAR's goods or services, safety record, proposed personnel, whether the CMAR's financial capability is appropriate to the size and scope of the project; and any other appropriate factors that demonstrate the capability of the CMAR. Subsection 2269.055(b) requires a district to consider and apply any existing law related to historically underutilized businesses and he use of

¹⁰ Sample agenda language:

"Consider methods of delivery of construction services for the new _____ facility."

¹¹

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) construction manager-agent;
- (4) design-build;
- (5) construction manager at risk;
- (6) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager; or
- (7) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility.

¹² Sample motion language:

"I move that _____ ISD select *construction management* *Bat-risk* as the method of delivery of construction services which offers the best value to _____ ISD for the construction of the new _____ facility."

¹³ Samples are provided. However, it may be necessary to further tailor the enclosed sample one-step request for competitive sealed proposals for a construction manager *Bat-risk* project to a specific project.

women, minority, small, or disadvantaged businesses. However, in evaluating CMAR applicants, school districts are advised to also include of the factors set forth in Texas Education Code §44.031(b), to the extent they do not overlap. Specific board action should be taken to select a CMAR.¹⁴

B. Practical Suggestions for the Public School District Owner

The American Institute of Architects (AIA) and the Association of General Contractors (AGC) both have standard forms of agreement¹⁵ that are commonly used in CMAR projects. Consider the following suggestions in negotiations.

- **Include Agreements with RFQs and RFPS.** When requests for qualifications (“RFQ”) (for Architects) or requests for proposals (“RFP”) (for constructors) are published, the District’s modified AIA Agreements should be included so that the responding parties will understand what will be contractually required on the project. Including a standard AIA document or a reference to standard AIA documents may present hurdles in negotiations if not provided as a part of the original RFQ or RFP.
- **Including Waiver Language.** Consider including waiver language in the RFP or invitation to bid that requires responders to agree to waive any cause of action against the district, Architect, or Engineers, or their employees arising from the administration, evaluation, or recommendation of any proposal or bid. *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.* 995 S.W.2d 192 (Tex. App.—San Antonio 1999, pet. denied) (low bidder’s lawsuit against Architect for defamation and other causes of action precluded by bidder’s agreement to waive all causes of action).

IV. Basic but Essential Modifications to AIA Contracts

Assuming that the preceding statutory requirements have been met, it is time to prepare a contract. As a practical matter, public school districts should always allow their legal counsel to develop construction contracts early. This practice will insure that the correct family and consistent editions of AIA documents are utilized. On a typical CMAR project, a public school district Owner should insist upon AIA Document A133-2009 Owner-CMAR Agreement, the A201 General Conditions of the Contract, and a modified AIA B102 Owner-Architect Agreement.¹⁶ This section is intended to address some of the contract issues that

¹⁴ Sample motion language:

“I move that _____ ISD select _____ [Company] as its construction manager-at-risk for the construction of the new _____ facility.”

¹⁵ AIA A121 / CMc and AGC 565 respectively.

¹⁶ The American Institute of Architects recommends modifications to the B102, 2007 Edition in order to coordinate this instrument with the A133, 2009 Edition and the A201, 2007 Edition. (See Instruction Sheet for AIA Document 133).

public school districts should always address:

A. AIA Document B102 Owner - Architect Agreement

The Owner-Architect Agreement should contain the standards of professional performance required of Architects on public school construction projects. Standard AIA Documents fail to address the following issues that uniquely impact public school construction:

- **Accessibility.** A public building that is constructed or substantially renovated, modified, or altered after January 1, 1997, through the use of public funds, must be accessible to and functional for persons with disabilities. 42 U.S.C. § 12181, *et seq.*; 28 C.F.R. § 36.101 *et seq.* The Texas Department of Licensing and Regulation is responsible for the enforcement of these standards.
- **New Facilities v. Renovation.** Board Policy CS (LEGAL) dictates that “[a]ll new facilities and major space renovations approved by the board after January 1, 2004, shall meet the facility standards established by the Commissioner as set out in Texas Administrative Code Title 19, Chapter 61.1036. Other renovations associated with repair or replacement of architectural interior or exterior finishes, fixtures, equipment, electrical, plumbing, and mechanical systems are not subject to space or educational adequacy requirements, but must meet construction quality standards. TEX. EDUC. CODE § 46.008; 19 TEX. ADMIN. CODE § 61.1036. After January 1, 2004, a “major space renovation” means renovations to all or part of the facility’s instructional space where the scope of the work in the affected part of the facility involves substantial renovations to the extent that most existing interior walls and fixtures are demolished and then subsequently rebuilt in a different configuration or function. 19 TEX. ADMIN. CODE § 61.1036(a)(10).
- **Architect Standards.** The Architect should be required to represent to the Owner that it has executed the Contract Documents using the best professional judgment and reasonable care consistent with the practice of Architecture in the State of Texas. New certification requirements require the Owner to notify the Architect that he or she must certify that the construction documents conform to the standards applicable to school construction. TEX. EDUC. CODE § 46.008; 19 TEX. ADMIN. CODE § 61.1036.
- **Architect Inspections.** The Architect should be responsible for regular inspections during the course of the project and his or her professional Engineers should also be required to visit the project at regular intervals.
- **Architect Review of Other Professionals.** The Architect should be required by contract to review and evaluate work of other design professionals.

- **Consider Architect Re-Inspection Requirement.** Consider requiring the Architect to conduct a re-inspection of the project approximately eleven (11) months after the date of Substantial Completion and, upon warranty deficiencies uncovered during said inspection, be responsible for reviewing the correction of said deficiencies.
- **Establish Which Building Code Applies.** In districts located within incorporated cities, a building code will be, in most instances, adopted and enforced by the local municipality. When a district or its proposed facility falls outside of a local jurisdiction with building code enforcement authority, a good practice is to adopt a building code within the Contract Documents. When a school building is constructed using New Instructional Facilities Allotment (NIFA) funds, 19 Texas Administrative Code § 61.1036(f)(2) requires that “[a] school district located in an area that has not adopted local building codes shall adopt and use the building code and related fire, plumbing, mechanical, fuel gas, and energy conservation codes from the latest edition of the family of International Codes as published by the ICC; and the National Electric Code as published by the NFPA. As an alternative, a school district may adopt the building code and related fire, plumbing, mechanical, fuel gas, and energy conservation codes as adopted by a nearby municipality or county.”¹⁷
- **Criminal History Report.** The Architect must be required to obtain a national criminal history report for the Architect and any employee, agent, or sub-contractor of the Architect that will have direct contact with students to comply with § 22.0834 of the Texas Education Code.

B. AIA Document A201 General Conditions of the Contract for Construction

- **Arbitration.** The 2007 AIA documents no longer require “arbitration” of claims and disputes. The 2007 AIA documents now contain a check box that

¹⁷ Additionally, Title 19 of the Texas Administrative Code § 61.1036(f)(2) requires:

A qualified, independent third party, not employed by the design Architect or Engineer, shall review the plans and specifications for compliance with the requirements of the adopted building code. The plan review shall examine compliance conditions for emergency egress, fire protection, structural integrity, life safety, plumbing, energy conservation, and mechanical and electrical design. The review shall be conducted prior to the commencement of construction and must be conducted by a certified building code consultant or a third party Architect or Engineer. A certified building code consultant is a person who is certified by either the ICC, ICBO, SBCCI, or BOCAI. Associated fees shall be the responsibility of the school district. The reviewer shall prepare a summary list of any conditions not in conformance with the provisions of the adopted building code and is required to send a copy to the school district, design Architect, or Engineer. The design Architect or Engineer shall revise the plans and specifications as necessary and certify code compliance to the district. The reviewer, in his or her reasonable judgment, may allow a limited number of variances from the codes if such variances do not negatively affect the quality or safety of the facility. Any disputes shall be a matter for contract resolution.

allows the parties to choose the method of binding dispute resolution—litigation or arbitration. In the event that no selection is made, the default method of binding dispute resolution is litigation. In 1997, the AIA revised its forms in order to require nonbinding mediation as a condition precedent to arbitration or litigation; this requirement remains in the 2007 AIA documents. The 2007 changes no longer require school districts to expressly delete arbitration from their contracts; however, arbitration should still never be the selected dispute resolution process. School districts enjoy a significant advantage if their construction contracts ultimately permit disputes to be resolved in their local district courts. Local district judges are elected officials and juries are likely to be, at least partially, composed of school district patrons and taxpayers. By contrast, arbitration is a binding method of dispute resolution that is governed by the American Arbitration Association (“AAA”). AAA arbitrators are comprised of Architects, Engineers, contractors, and their lawyers. No Owner representative will be available as an AAA arbitrator. State and federal courts strongly favor arbitration in the event of an ambiguity in the contract. Therefore, it is critical to clearly delete any reference to arbitration in every document that constitutes a part of the Contract Documents (e.g. the Owner-Architect, Owner-Contractor, and General Conditions). *See New Concept Constr., Inc. v. Kirbyville Cons. Indep. Sch. Dist.*, 119 S.W.3d 468 (Tex. App.—Beaumont 2003, pet. denied).

- **Alternative Dispute Resolution.** Alternative Dispute Resolution (“ADR”) is sometimes confused with arbitration. ADR or mediation is a nonbinding process. This process usually involves a disclosure of documents and salient facts and a day-long meeting. At this meeting, a third party mediator will hear the arguments of each party and subsequently separate the parties into separate rooms. The mediator then exercises shuttle diplomacy, acquainting each party with what the mediator believes are the strengths and weaknesses in that party’s position in an effort to draw the parties into a mutually acceptable resolution. The rules of mediation require that all communications made in this settlement process be confidential and not available for use in subsequent litigation if mediation is unsuccessful.
- **Insurance.** Board Policy CV (EXHIBIT) has been adopted by most school districts throughout Texas. This instrument essentially sets forth the worker’s compensation insurance requirements for contractors or others involved in the construction of school facilities as mandated by Texas Labor Code § 406.096. *See also* 28 TEX. ADMIN. CODE § 110.110. Policy CV (EXHIBIT) requires that the district use the language set out in policy for bid specifications and contracts for building or construction, without any additional words or changes, except those required to accommodate the specific document in which they are contained or to impose stricter standards of documentation.

- **Payment and Performance Bonds.** Governmental entities must require contractors to provide a payment bond for a contract in excess of \$25,000.00 and a performance bond for a contract in excess of \$100,000.00. TEX. GOV'T CODE § 2253.021. These bonds must be issued by sureties authorized and admitted to write surety bonds within the State of Texas. Other requirements are set out in Article 7.19-1 of the Texas Insurance Code. If a valid payment bond is not obtained by the contractor, the governmental entity is subject to the same liability that the surety would otherwise have had. In other words, the school district stands in the shoes of the contractor with regard to the obligation to pay subcontractors and suppliers. To confirm the status of corporate sureties, you may contact the following Website: <http://www.fms.treas.gov/c570/index.html>.
- **Other Insurance.** Always require that the contractor obtain sufficient automobile liability insurance on a project because the Texas Tort Claims Act waives immunity to public school districts for injuries and property damage arising from the use or operation of a motor vehicle. TEX. CIV. PRAC. & REM. CODE § 101.001 *et seq.* Consult with the district's insurance professionals in order to determine whether the district should further require the constructor to provide builder's risk insurance, project-management protective liability insurance, and name the district and others as additional insureds on the contractor's insurance. The recommendations for which insurance products are required has changed and existing contracts should be updated accordingly.
- **Indemnity.** Texas Constitution, Article III, §§ 51 and 52 and Article XI, § 3 precludes governmental entities from making gifts of public funds or lending a public body's credit for private purposes. Accordingly, school districts are likewise precluded from indemnifying third parties for damages for which a school district could not otherwise be held liable. This is particularly the case considering that the Texas Tort Claims Act makes public school districts immune from tort liability except when injuries or damages are the result of the operation or use of a motor vehicle. TEX. CIV. PRAC. & REM. CODE § 101.051. Because public school districts cannot be liable for such injuries, entering into such an indemnity provision places school districts in violation of Texas Constitution, Article III, §§ 51 and 52 and Article XI, § 3. Thus, the provisions of the AIA Documents that require indemnification must be substantially modified or deleted in their entirety.
- **Indemnifying the District.** Texas has adopted the "express negligence" rule, which renders unenforceable indemnity clauses that do not expressly and unambiguously state that they are intended to indemnify the indemnitee from his own negligence. The AIA Owner indemnification clauses do not meet this standard and should be revised accordingly.

- **Interest on Late Payments by the District.** Texas Government Code § 2251.027 precludes a political subdivision from requiring a vendor or subcontractor to waive their right to interest on late payments as a condition of the contract. The interest rate due is one-percent (1%) each month on the balance of the late payments until July 1, 2004. Subsequent to that date, the rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. The rate in effect on September 1 is equal to one-percent (1%) plus the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday. TEX. GOV'T CODE § 2251.025.¹⁸ The net effect of this change in the law appears to reduce the overall interest rate. However, the computation of the interest rate becomes vastly more complicated. It is not uncommon to see interest omitted entirely or set at a lesser rate. Since any rate other than the statutory rate violates § 2251.027, Owners should insert either an appropriate interest rate or language that the interest rate on any overdue payments will be calculated in accordance with the rate provided in Chapter 2251 of the Texas Government Code.

- **Prevailing Wage / Pay Rates.** Texas Government Code, Chapter 2258, Subchapter B requires workers on public projects be paid prevailing wage rates as determined by either surveys conducted by the public body or the United States Department of Labor. These wage rates should be specified within invitations to bids and the Contract Documents. The governmental entity should also specify within the Contract Documents the penalties for violations of the wage laws.¹⁹ If federal funds are used, the governmental

¹⁸ **Texas Government Code §2251.025. Interest on Overdue Payment**

- (a) A payment begins to accrue interest on the date the payment becomes overdue.
- (b) The rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. The rate in effect on September 1 is equal to the sum of:
 - (1) one percent; and
 - (2) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday.
- (b) Interest on an overdue payment stops accruing on the date the governmental entity or vendor mails or electronically transmits the payment. In this subsection, "governmental entity" does not include a state agency.
- (c) This subsection applies only if the comptroller is not responsible for issuing a warrant or initiating an electronic funds transfer to pay the principal amount owed by a state agency to a vendor. The accrual of interest on an overdue payment to the vendor:
 - (1) stops on the date the agency mails or electronically transmits the payment; and
 - (2) is not suspended during any period that a payment law prohibits the agency from paying the vendor.
- (d) This subsection applies only if the comptroller is responsible for issuing a warrant or initiating an electronic funds transfer to pay the principal amount owed by a state agency to a vendor. Interest on an overdue payment to the vendor:
 - (1) stops accruing on its distribution date; and
 - (2) does not stop accruing during any period that a payment law prohibits the comptroller from issuing the warrant or initiating the transfer.

¹⁹ \$60.00 per day for each worker employed for each calendar day or part of the calendar day that the worker is paid less than the applicable wage rate. TEX. GOV'T CODE § 2258.023(b).

entity must also comply with the Davis-Bacon Act. 40 U.S.C. §§ 3141-48.

- **Sales Tax.** Texas public school districts are tax exempt. Standard AIA Documents do not contemplate the tax exemptions that a school district is entitled to for goods and services used in the construction of school facilities pursuant to the Tax Code. TEX. TAX CODE §§ 151.301, .309, .311. In fact, standard AIA Documents require that a contractor be reimbursed for taxes paid on goods or services used on the project. Again, such provisions must be modified in order to clarify that the project is tax exempt and make the contractor responsible for any sales taxes incurred.
- **Retention (Retainage).** Texas Government Code § 2252.032 mandates that if more than five-percent (5%) is retained by the Owner, the governmental entity is required to deposit the retainage in an interest-bearing account for the benefit of the contractor. However, this provision does not restrict a CMAR to also holding five-percent (5%).
- **Liquidated Damages.** AIA Document A201-2007 Edition, v 4.3.10.1, includes a no damages for delay clause. If the district desires liquidated damages, this provision must be modified. Liquidated damages impose economic incentives for the contractor to complete the project during the time period contemplated by the Contract Documents. The amount of liquidated damages must be reasonably related to the actual damages that would be caused by delay. However, the recovery of liquidated damages is by no means certain. The Texas Supreme Court has fashioned a two-part test for the enforceability of liquidated damages provisions. In the Court's view, a liquidated damages provision is enforceable if: (1) the harm caused by the breach was incapable or difficult of estimation when the contract was made; and (2) the amount of liquidated damages was a reasonable forecast of just compensation. *Stewart v. Basey*, 245 S.W.2d 484, 485-86 (Tex. 1952). In the context of public construction, appellate courts have reached different conclusions when addressing unexcused delays in completion. *Commercial Union Ins. v. La Villa Sch. Dist.*, 779 S.W.2d 102, 107 (Tex. App.—Corpus Christi 1989, no writ) (holding that delay damages clause assessing damages of \$100.00 per day were unenforceable because it was too difficult to ascertain damages under the circumstances); *Loggins Constr. Co. v. Stephen F. Austin St. Univ.*, 543 S.W.2d 682, 685-86 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (holding that \$250.00 per day for delayed usage of a football stadium was a reasonable penalty).
- **Testing.** AIA Document A201-2007 Edition, v 13.5 requires the contractor to arrange for and bear the cost of testing. However, the Texas Government Code mandates that the school district independently satisfy this obligation when using a general contractor, design-build firm, or a construction manager-at-risk. TEX. GOV'T CODE § 2269.058. Therefore, this provision must

be modified in order to comply with applicable law.

- **Equal Employment Opportunity.** Public school districts typically require, by policy, that contractors not discriminate on the basis of race, religion, sex, or national origin. In any event, the inclusion of such a provision is generally a sound practice.
- **Termination for Convenience.** Termination for Convenience (or without cause) is an important protection for public Owners. Without this provision, the Owner will have a difficult struggle to terminate its contractual relationship with the contractor and may be forced to pay the contractor substantial damages. Care should be given to modifications that permit the Owner to terminate the construction contract without cause in the event that circumstances dictate.
- **Contractor Certification.** Title 19 of the Texas Administrative Code, in § 61.1036(c)(3)(D) requires that the contractor certify that the facility has been constructed in accordance with the Contract Documents. It is recommended that the AIA documents be modified so that this requirement is included within the Contract Documents.
- **Alcohol-Free, Tobacco-Free, and Drug-Free Zones.** In accordance with Texas Education Code §§ 38.006-38.007, Texas Health & Safety Code § 481.134, and board policy, school districts are alcohol-free, tobacco-free, and drug-free zones. Accordingly, contractors must be made aware of these statutory and policy requirements and, by modification to the Contract Documents, should be held responsible for enforcing compliance among their own employees, subcontractors, and suppliers.
- **Mechanic's Liens.** Standard AIA documents contain numerous references to mechanic's liens on the project by subcontractors. However, public projects cannot be encumbered by mechanic's liens. Protection against nonpayment is extended to subcontractors and suppliers by the required statutory payment bond. TEX. GOV'T CODE § 2253.021. Thus, references to mechanic's liens should be deleted.
- **Trenching and Shoring.** Texas Government Code § 2166.303 and Texas Health & Safety Code § 756.021-.023 mandate proper engineering for trenching and safety procedures used by contractors. Because "trenching" and "shoring" are "means and methods" decisions by the contractor, the contractor should be required to provide for the design and execution of these procedures in compliance with applicable law.
- **Criminal History Review.** Texas Education Code §§ 22.081-.087 mandate that certain employees and independent contractors of the school district

submit to criminal history checks if they are going to be working in a place where students are regularly present. Specifically, § 22.0834 requires that anyone employed by an entity that contracts with a school district submit to the checks. Thus all employees of the contractor, sub contractors, sub-sub contractors, or agents thereof must be required to submit criminal history reviews to the school district before beginning work on school property where students are present.

C. AIA Document A133-2009 Standard form of Agreement Between Owner and Construction Manager Where the Construction Manager Is Also the Constructor

- **Establish How Contingency Funds Will Be Used.** Paragraph 2.2.3 of the AIA Document A133-2009 requires the CMAR to establish a contingency fund. Because the guaranteed maximum price is frequently provided prior to the completion of the Contract Documents (drawings and specifications), a contingency is commonly included to address unanticipated construction issues. Before agreeing to proposed contingency language, the Owner should understand: (1) how contingency funds are to be used; (2) what party received unused contingency funds; and (3) when contingency funds may be accessed.
- **Determine When the CMAR Should Provide P&P Bonds.** After a CMAR has been selected, a school district must carefully consider when it should require the CMAR to bond the project. School districts are well-advised to allow sufficient time for the CMAR to establish a guaranteed maximum price before requiring the CMAR to bond the project. Allowing payment and performance bonds to be acquired based upon a guaranteed maximum price affords greater security than allowing the bonded amount to be based upon a projected budget. This procedure also provides stricter compliance with Texas Government Code § 2253.021, which requires that the bond be “in the amount of the contract.” TEX. GOV'T CODE § 2253.021(b)(2).
- **Competitive Bids from Subcontractors / Suppliers.** §2.3.2.1 and §2.3.2.2 address the procedures the CMAR must use in soliciting competitive bids or sealed proposals from subcontractors and suppliers. Texas Government Code §§ 2269.255-258 impose requirements that are distinguished from the standard language of the AIA documents. Thus, modifications are necessary in order to comply with applicable law. Section 2265.255 is silent as to whether the CMAR must advertise its solicitations for competitive bids or sealed proposals from subcontractors and suppliers in the same manner as a public school district. Until this question is resolved by the legislature or appellate court, the better practice is to require the CMAR to advertise these invitations for bids or RFPs in the same manner required as a school district.

- **Defining the Compensation to the CMAR.** Carefully evaluate Contract Documents in order to determine what costs are acceptable to the Owner on a given project. For example, consider amending the standard AIA document so that the public Owner avoids paying a multiplier on personnel costs as per §4.1.3. Likewise, consider the following suggestions for Articles 5-8 of AIA Document A133-2009:
 - **§5.1.6 Liquidated damages.** Evaluate whether to include liquidated damages provisions.
 - **§6.3 Subcontract Costs.** The CMAR may submit bids and perform portions of the work with its own crews. In evaluating whether this bid affords the best value to the district, consider whether it includes profit and overhead of the CMAR as would the typical bid submitted by a subcontractor. Because the CMAR's overall fee is generally based on a percentage of the work, the CMAR may be making a profit on his own profit. This may or may not be acceptable to the Owner.
 - **§6.6.2 Sales Tax.** Clarify that the subject of the contract is a public project and delete any obligation of the public Owner to pay sales tax.
 - **§6.6.4 Fees of Testing Laboratories.** Modifications should be made to assure compliance with Chapter 44 of the Texas Education Code.
 - **§6.6.8 Litigations Costs.** Consider making these costs the responsibility of the CMAR. This is an issue subject to negotiation.
 - **§6.6.9 Personnel Relocation.** Consider making these costs the responsibility of the CMAR. This is an issue subject to negotiation.
 - **§6.9.1 Cash Discounts.** Consider whether cash discounts should favor the Owner or the CMAR. Returning cash discounts to the CMAR with no reduction in the cost of the work may encourage cost savings. This is an issue for negotiation.
 - **§6.11 Record Retention.** Standard AIA forms require the contractor to retain records for a period of three years following final payment. The statute of limitations for a breach of contract action is four years, and it begins to run from the date of the breach. TEX. CIV. PRAC. & REM. CODE § 16.004; *Goose Creek Consol. Indep. Sch. Dist.v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486 (Tex. App.—Texarkana 2002, pet. denied). A statute of repose precludes litigation ten years following the date of completion. *Sowers v. M. W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). Therefore, consider extending the period of time required for retention of

documents.

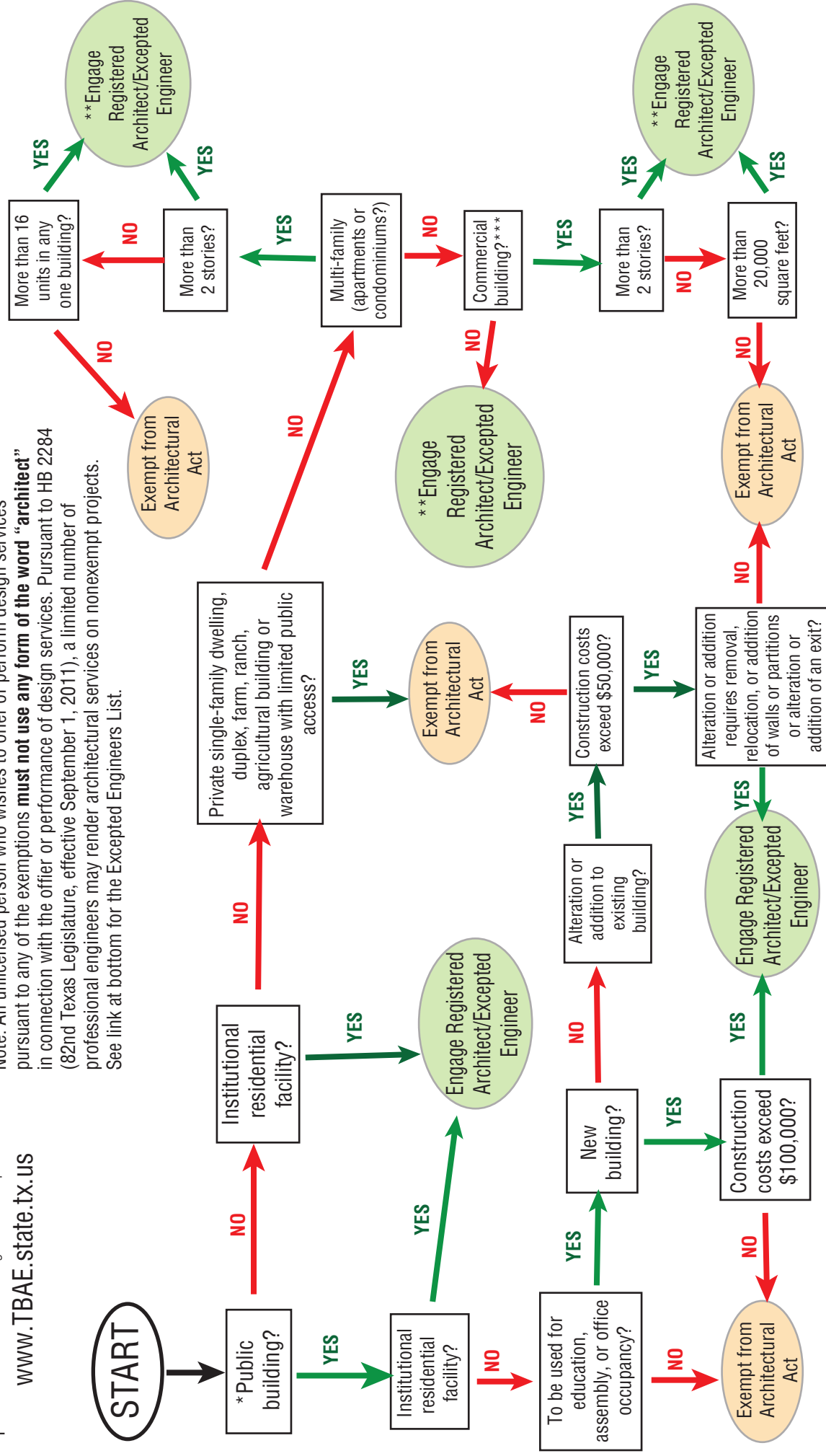
- **§7.2.4 Sharing of Savings.** Solicit input from the Architect and develop a plan toward shared savings, if applicable.
- **Article 8 Insurance.** Delete and modify. Consultation with the district insurance provider is encouraged because the recommendations as to which insurance products are necessary have recently changed.

Conclusion

The comparison of delivery methods, summary of procedural steps, practical advice, and sample forms offered herein are intended to provide useful tools to public school districts considering Construction Management-at-Risk or other construction service delivery methods. Remember that AIA standard agreements require significant modification for public construction projects. Specific standard AIA documents are required to work together depending upon the particular construction delivery method selected by a school district. Consequently, prior to the preparation of construction documents, school administrators are encouraged to consult with legal counsel concerning the preparation of Owner-Architect Agreements, Owner-CMAR Agreements and the General Conditions of the Contract.

When to Engage an Architect or Excepted Engineer for Design and Construction Observation

Note: An unlicensed person who wishes to offer or perform design services pursuant to any of the exemptions **must not use any form of the word "architect"** in connection with the offer or performance of design services. Pursuant to HB 2284 (82nd Texas Legislature, effective September 1, 2011), a limited number of professional engineers may render architectural services on nonexempt projects. See link at bottom for the Excepted Engineers List.



* "Public Building" means any building that is owned by a State agency, a political subdivision of the State, or any other public entity in Texas.

** If a project involves only the alteration of an existing building and the alteration does not involve a substantial structural or exitway change to the building, the project is exempt from the architectural act.

*** "Commercial building" means an enclosed structure primarily used for the purchase, sale, or exchange of commodities or services.

TBAE “Architect Required Flowchart” Notes:

(For the latest information and complete details, see Tex. Occ. Code Ann. Ch. 1051 and the Rules and Regulations of the Board at www.tbae.state.tx.us.)

Clarification of certain types of privately owned buildings

RULE 1.211 PRIVATELY OWNED BUILDINGS (excerpt from Rule 1.211) For the purposes of Section 1051.606 of the Texas Occupations Code:

“**multifamily dwelling**” means a building containing more than two separate units intended to be used for human habitation where the units are not separated by open space but instead are separated only by walls or partitions.

“**commercial building**” means an enclosed structure primarily used for the purchase, sale, or exchange of commodities or services.

“**warehouse that has limited public access**” means a building primarily used for the storage of equipment, merchandise, or commodities where:

- (1) only employees, delivery persons, and other specifically authorized people are routinely expected to enter the building; and
- (2) persons who enter the building are expected to occupy the building only on a limited basis.

Clarification of terms regarding publicly owned buildings

Public Entity--A state, a county, a city, a county, a district, a department or agency of state or local government which has official or quasi-official status, an agency established by state or local government though not a department thereof but subject to some governmental control, or any other political subdivision or public corporation.

RULE 1.212 PUBLICLY OWNED BUILDINGS (excerpt from Rule 1.212 regarding intended uses)

education: the use of a building at any time for instructional purposes;

assembly: the use of a building for the gathering together of persons for purposes such as civic, social, or religious functions or for recreation, food or drink consumption, or awaiting transportation; or

office occupancy: the use of a building for business, professional, or service transactions or activities.

Alterations: Determining if “substantial” structural or “substantial” exitway change.

RULE 1.213 EXEMPTION FOR ALTERATIONS TO EXISTING BUILDINGS

(a) For purposes of Section 1051.606 of the Texas Occupations Code, a **structural change is “substantial”** if the engineering plans and specifications for the structural change must be prepared by a licensed engineer pursuant to Chapter 1001 of the Texas Occupations Code.

(b) For purposes of Section 1051.606 of the Texas Occupations Code, an **exitway change is “substantial”** if the change will affect a path of egress intended to be used by more than fifty (50) persons.

Clarification of requirements regarding institutional residential facilities

RULE 1.214 INSTITUTIONAL RESIDENTIAL FACILITIES (excerpt from Rule 1.214)

(b) For purposes of this section, “**institutional residential facility**” means a building intended for occupancy on a 24 hour basis by persons who are receiving custodial care from the proprietor or operator of the building.

Architect required for construction observation on projects requiring an architect for plans and specs

RULE 1.217 CONSTRUCTION OBSERVATION

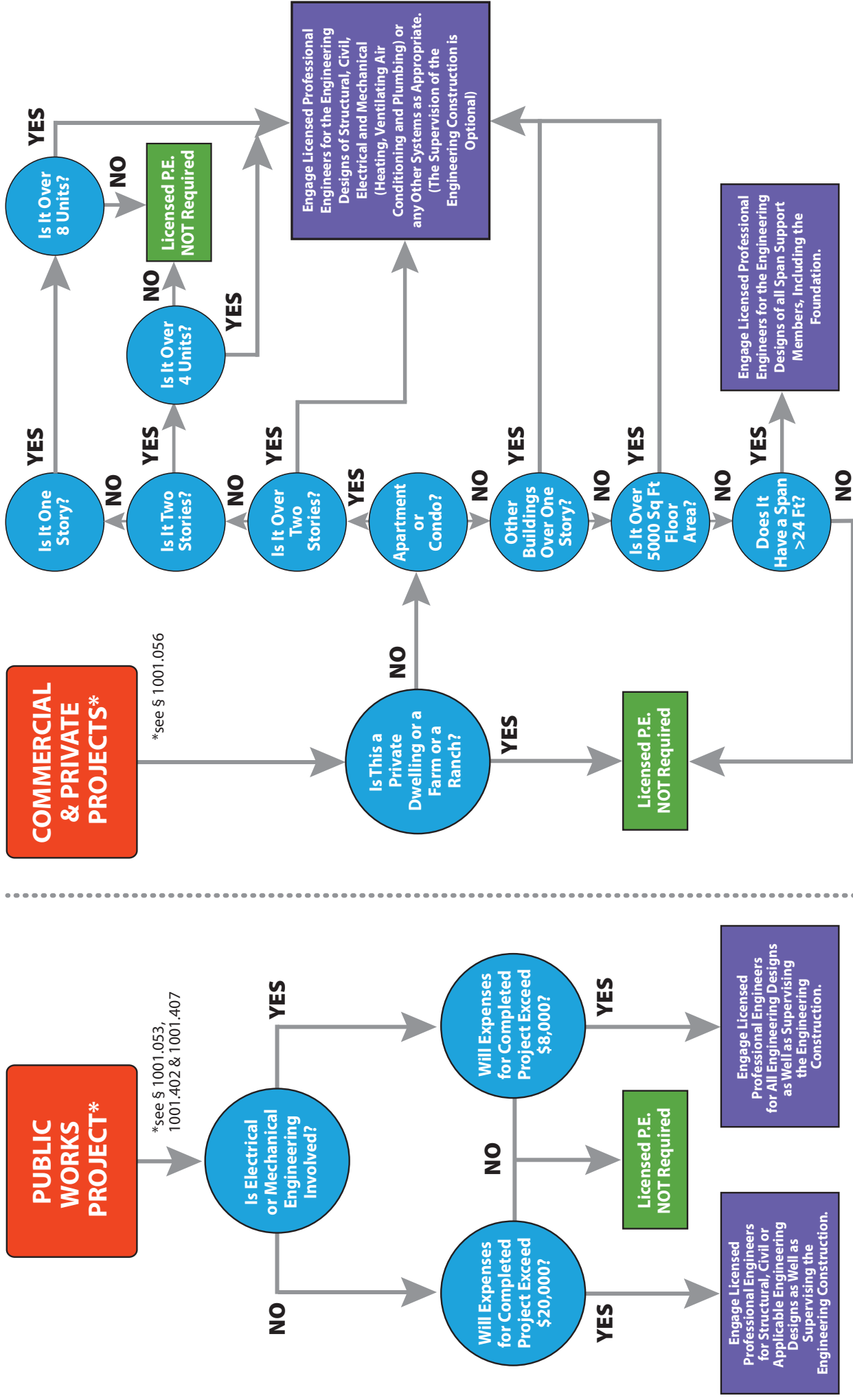
if, pursuant to Section 1.211, Section 1.212, or Section 1.214, an Architect must prepare or supervise and control the preparation of the architectural plans and specifications for a new building or the alteration of or an addition to an existing building, construction observation for the project shall also be conducted by an Architect or by a person working under the Supervision and Control of an Architect. For purposes of this Subchapter, “**construction observation**” means the administration of the portion of the construction contract described and documented in the architectural plans and specifications, including the following:

- (1) reviewing each shop drawing, sample, and other submittal by a contractor or consultant;
- (2) preparing or reviewing each change to an architectural plan or specification;
- (3) visiting the construction site at intervals appropriate to the stage of construction to:
 - (A) become generally familiar with and keep the client generally informed about the progress and quality of the portion of the construction completed;
 - (B) make a reasonable effort to identify defects and deficiencies in the construction;
 - (C) determine generally whether the construction is being performed in a manner indicating that the project, when fully completed, will be in accordance with the architectural plans and specifications; and
- (4) in addition to any responsibilities under Section 1.216, notifying the client in writing of any substantial deviation from the architectural plans and specifications that may prevent the building from being occupied or utilized for its intended use.

When is a Professional Engineer required on a project?



Texas Board of Professional Engineers
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This flowchart is intended for guidance purposes only and the Texas Engineering Practice Act and Rules govern final interpretation. Local codes and ordinances may be more restrictive as long as not in conflict with the Texas Engineering Practice Act and Rules.

Visit <http://engineers.texas.gov/downloads.htm> for a copy of the Texas Engineering Practice Act and Board Rules and download this diagram.



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