

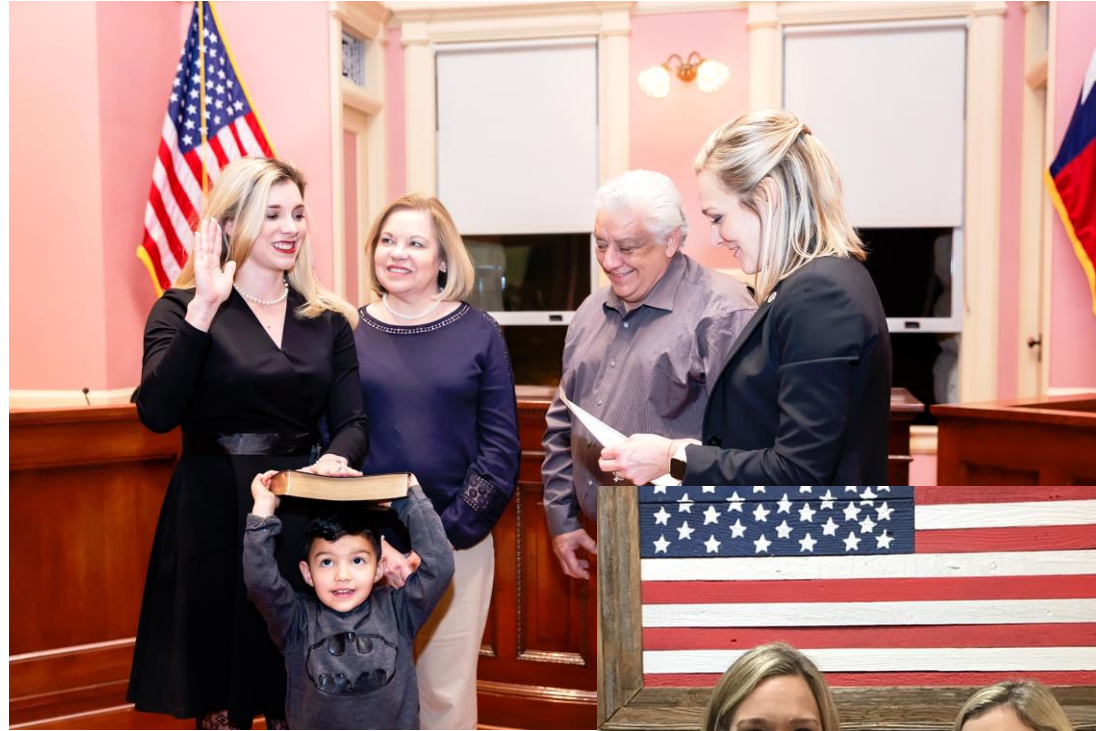
Procurement & Practices for Local Gov't Construction Projects

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THE
CHAPMAN
FIRM





Construction Projects



Photo Credit: Texas Contractor <https://www.acppubs.com/articles/8233-texas-construction-industry-forecast>

Presentation will cover...

- Stages of Construction Projects
- Procurement Laws
 - Types of procurement methods
 - Best Practices for construction procurement
- Key Construction Contract Terms
- Tips for Construction Projects

Planning the Process



DREAM



DESIGN



BUILD

If only it was
that simple...

GOVERNMENTAL ENTITIES

- Legal compliance
 - Bonding laws for funding
 - Procurement laws
 - Prompt Payment laws
 - Regulatory agencies
- Project Perception
 - Members of the Public
 - Elected Officials/Board Member
 - End Users
 - Other Stakeholders

Where to
begin?!?!



Preliminary Considerations

What type of Construction Project is it?

- Vertical (Architect)
 - Buildings
- Horizontal (Engineer)
 - Infrastructure
- New Construction
- Renovation (update)
- Restoration (Historic)
- Specialized
 - Courtroom
 - Fire Station
 - Police Station
 - Dam
 - Public Pool
 - Historic
 - Sports Parks

What is the Size of the Project?

- Multi-million Dollar Capital Project
 - Multi-year process
- Few Hundred Thousand Dollars
 - Months long
- Somewhere in the middle

Other Considerations

- Vertical
 - Will building be occupied during construction?
 - Permitting (special permits THC, TCJS, TAS)
 - Project Manager
 - Any potential abatement issues
 - Asbestos
 - Mold
- Horizontal
 - Acquire property (ROWs/Easements)
 - Utility relocations
 - TCEQ regulations
 - Subsurface Conditions

Stages of Construction Project

Stages of Construction Project

- Pre-Design
 - Programming Phase
 - Funding source
- Pre-Construction
 - Schematic Design
 - Design Development
 - Construction Documents
 - Bidding
- Construction
 - Notice to Proceed through Final Completion (Close-out)

FUNDING

How to finance your project

Funding Methods

- General Fund
- Certificates of Obligation (Local Gov't Code Chapter 271, Subchapter C)
- Bond Funds (Gov't Code Chapter 1251)
- Tax Anticipation Notes (Gov't Code Chapter 1431)
 - *But see, LGC 262.023*
 - If use alternative delivery method under Gov't Code Chapter 2269
 - County may not issue anticipation notes for the payment of the contract in an amount that exceeds the lesser of:
 - 20% of the county's budget for the fiscal year in which the county enters into the contract, or
 - \$10 million.

How much?

- May want to bring on Design Professional (Architect/Engineer) for pre-design services to help establish budget.
- And then plan for contingencies...



Programming

- Space Use Studies
 - Determine square footage
 - Basic needs for space, size lot, parking, etc.
 - Anticipated FF&E
- Stakeholder input
 - Committees
- Account for Growth!
 - Determine how long building will satisfy needs before expansion
 - 20 years, 10 years?

Plan for the unexpected



What could go wrong?

- Build in contingencies for:
 - Change Orders
 - Unforeseen conditions
 - Weather
 - Escalation of construction costs
 - FF&E (furniture, fixtures & equipment)
 - Commissioners/Elected Official change their mind (Never!)
 - Things you didn't think of
- Owner's Contingency v. Contractor/CM Contingency

“Available funds”

- Sec. 262.031. CHANGES IN PLANS AND SPECIFICATIONS.
- (a) If it becomes necessary to make changes in plans, specifications, or proposals after a contract is made or if it becomes necessary to increase or decrease the quantity of items purchased, the commissioners court may make the changes. **However, the total contract price may not be increased unless the cost of the change can be paid from available funds.**
- Sec. 252.048 CHANGE ORDERS
- (b) The total contract price may not be increased because of the changes **unless additional money for increased costs is appropriated for that purpose from available funds** or is provided for by the authorization of the issuance of time warrants

Change Orders

- Governing Body can give authority for Change Order for changes less than \$50,000 to:
 - “ administrative official” - LGC Sec. 252.048
 - “ employee” - LGC 262.031
- Change Orders cannot increase Original Contract Price more than **25%**.
- 262 - Change Orders cannot decrease Original Contract Price by 18% or more without consent of Contractor.
- 252 – Change Orders cannot decrease Original Contract Price more than 25% without consent of the Contractor.

A 3D wireframe architectural rendering of a building structure, showing the skeletal framework of walls, floors, and stairs. The rendering is semi-transparent, allowing the underlying structure to be seen through the top layer. The background is a light blue gradient.

Preconstruction

Bring on your design team

Preconstruction Services

- Determine what method of procurement is best
 - Important because you may need to bring on your construction team earlier (Design Build, CMAR)
- Hire Architect or Engineer
- Pre-design
 - Geotechnical
 - Environmental Assessment
 - Surveying
- Design Phases
 - Design Development
 - Schematic Design
 - Construction Documents

Design Phases

- Schematic Design (30%)
 - Preliminary Building Plans, Site plan, Sections & Elevations
 - May have additional geotechnical work
- Design Development (60%)
 - Drawings, plans, sections, elevations, construction details, MEP
- Construction Documents (90%)
 - Final changes to Design
 - 100% Sealed Plans & Specs
 - Construction Documents used for Project

Budget & Schedule

- Every Phase have the Budget & Schedule analysis updated by Architect/Engineer (and Contractor once on board)
- Important to know if you are on target with goals
- Make sure Contract has milestones for A/E to meet for each phase of design

An illustration featuring several stylized people in business attire. A man in the center wears glasses and a suit. To his left, a woman holds a blue sign with 'BID' written on it. To his right, another woman holds a green sign with 'BID'. In the background, a woman holds a red sign with 'BID'. The scene is decorated with starburst symbols. The overall style is flat and colorful.

Procurement Laws

Go-To Provisions for Public Procurement

Government Code

- Chapter 2254 – Architects/Engineers/Land Surveyors
- Chapter 2269 – Public Works for County, Municipality, School District, any other special district or authority, any other political subdivision

Local Government Code

- Chapter 252 – Municipalities
- Chapter 262 – Counties
- Chapter 271 – County, ISD, Hospital Dist., Housing Authority

Exemptions that may apply to Construction

- LGC Sec. 252.022 – 16 items listed
- (1) public calamity to preserve the property of municipality
- (2) Necessary to protect the public health or safety of municipality's residents
- (6) purchase of land or a right-of-way
- (7) sole source

- LGC Sec. 262.003 Sole-Source

- **Exemptions should be RARE!**

CREW

Selecting your team



The background features a collage of architectural blueprints. On the left, a hand is visible holding a wooden T-square against a blueprint. In the center, a roll of blueprints is unrolled, showing detailed technical drawings. The right side shows another roll of blueprints, partially unrolled. The overall color palette is a mix of light blues, greys, and off-whites, with a semi-transparent white overlay for the text.

Architect/Engineer

Architect & Engineer Statutes

- Gov't Code Chapter 2254 – Request for Qualifications
- Gov't Code Chapter 2269 – “on or before the selection of [CONTRACTOR], the government entity shall select or designate an architect or engineer to prepare the construction documents for the project.”
- Tex. Local Gov't Code Sec. 271.904
 - Indemnification must comply with the statute
 - Sets out statutory Standard of Care

Requests for
Qualifications
Gov't Code
Sec. 2254.002

- Applies to:
 - State agency or department
 - District, authority, county, municipality, or other political subdivision of the state
 - Local government corporation or another entity created by or acting on behalf of a political subdivision in the planning and design of a construction project
 - Publicly owned utility



Professional
Services
Sec. 2254.002(2)

- Architect
- Landscape Architect
- Land surveyor
- Professional engineer
- Interior Designer

Selection Process

- Cannot Competitively Bid
- Must make selection and award based on:
 - Demonstrated competence and qualifications to perform services
 - For a fair and reasonable price
- Must select mostly highly qualified provider and then attempt to negotiate with them for a fair and reasonable price.
- If cannot reach agreement:
 - Formally end negotiations with provider;
 - Select next most highly qualified provider;
 - And attempt to negotiate.
- Rinse and Repeat until Contract is entered into.

Practical Steps

- Issue RFQ – do not include cost-based analysis
 - Include proposed contract with required insurance
- Selection Committee should evaluate RFQ responses based on Demonstrated Competence and Qualifications and select most highly qualified
- Begin Negotiation with that Highest Qualified Professional
 - This is when you get the fee schedule and cost proposal!
 - Negotiate contract terms
- Can only negotiate with one at a time. Cannot go back once you formally end negotiations.

Void Contract

- Contract entered into or an arrangement made in violation of Gov't Code 2254, Subchapter A is void against public policy.

Indemnification Local Gov't Code Sec. 271.904

- Indemnification provision must comply with Local Gov't Code Sec. 271.904 or it is void and unenforceable
- A/E can only
 - indemnify or hold harmless to the extent damage is caused by or results from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by A/E or the A/E's agent, consultant under contract, or another entity over which the A/E exercises control.
- A/E cannot "Defend" but can provide for reimbursement of attorney's fees in proportion to A/E liability

Statutory Standard of Care

Sec. 271.904(d)

- (d) A contract for engineering or architectural services to which a governmental agency is a party must require a licensed engineer or registered architect to perform services:
 - **(1) with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license; and**
 - **(2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect.**
- (e) In a contract for engineering or architectural services to which a governmental agency is a party, a provision establishing a different standard of care than a standard described by Subsection (d) is void and unenforceable. If a contract contains a void and unenforceable provision, the standard of care described by Subsection (d) applies.

Other Professionals

Project Manager

PROS

- Someone dedicated to project full time
- Able to review multitude of paperwork (e.g., pay apps, change orders)
- Enforcement of Contract Terms

CONS

- Less Control over day-to-day
- May not know the procedures for your entity
- May not have government entity's interests at heart
- Costs Lots of Money

Considerations for Hiring a Project Manager

- Do you want a turn-key project manager?
- Do you want to maintain some control or oversight over the project?
 - If so, must limit the scope of project manager in contract.
- What authority do they have?
 - Change Directives?
 - Emergency decisions?
- Who is managing the project manager ?

Testing & Inspections Sec. 2269.058

- (a) **Independently** of the contractor, CMAR, or design-build firm, the **governmental entity shall provide or contract for the construction materials engineering, testing, and inspection services and the verification testing services necessary for acceptance of the facility by the governmental entity.**
- (b) The governmental entity shall select the services for which it contracts under this section in accordance with Sec. 2254.004.

Contractor & Subs

Contractors

- General Contractor
- Subcontractors
- Suppliers (provide materials)
- Sub-Subcontractors
 - 3rd Tier subs & below



Threshold

- **Over \$50,000** must be competitively procured.
- **No Component, Separate, or Sequential Purchases!**
 - If you would normally buy it in one purchase, cannot change that to avoid competitive procurement.
 - This is a crime! (252.062, 262.034)



Tex. Atty. Gen.
Op. GA-0247
GA-0383

- Violations of the procurement laws does not automatically void the contract, but the contract is voidable. Taxpayer can sue to enjoin performance or void the contract.
- Gov't Body does not have authority to ratify to make the contract valid.
- Auditor should not approve claim for payment on the illegal contract. Local Gov't. Code Sec. 113.065.

Methods of Procurement

Gov't Code Chapter 2269

Government Procurement

| FOURTH EDITION |

Paul Emanuelli

- Design, Bid, Build
- CM Agent
- Construction Manager-at-Risk (CMAR)
- Design Build Team
- Job Order Contracts

Criteria to Consider 2269.055

May Consider:

1. price;
2. offeror's experience and reputation;
3. quality of goods or services;
4. the impact on governmental entity's ability to comply with HUB rules;
5. safety record;
6. proposed personnel;
7. Whether 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.

Shall:

1. consider and apply any existing laws related to historically underutilized businesses; and
2. consider and apply any existing laws, rules, or applicable municipal charters related to the use of women, minority, small, or disadvantaged businesses.

New Law Eff. Sept. 1, 2021

- Offerors can request evaluations.
- Transparency: I recommend including bid tab or score sheet with award letter.

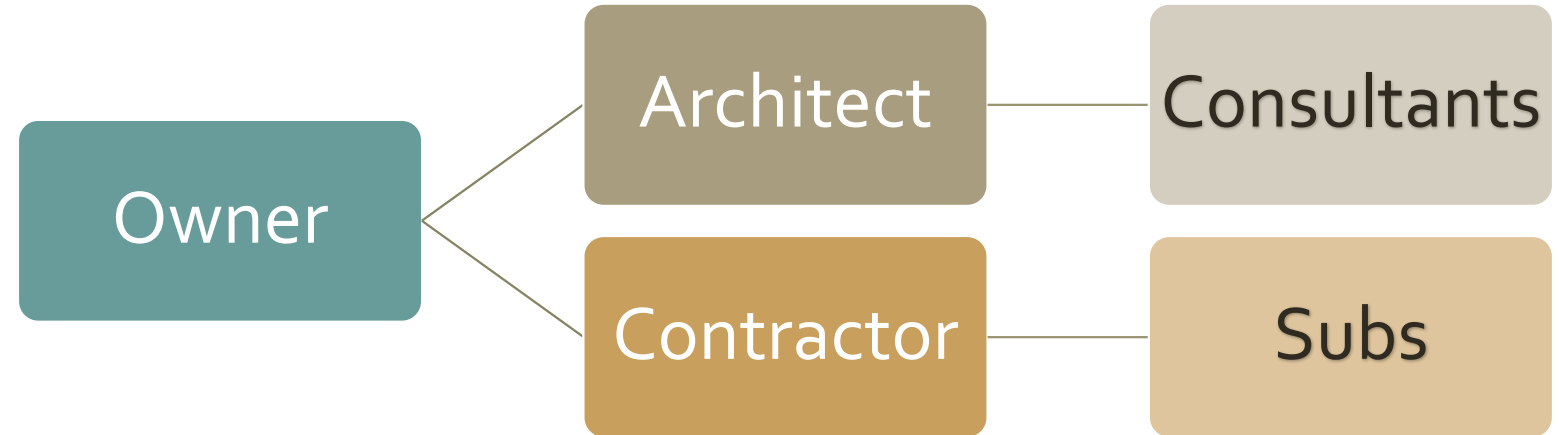
SECTION 2. Subchapter B, Chapter 2269, Government Code, is amended by adding Section 2269.060 to read as follows:

Sec. 2269.060. DOCUMENTS RELATED TO EVALUATION AND RANKING.

(a) An offeror who submits a bid, proposal, or response to a request for qualifications for a construction contract under this chapter may, after the contract is awarded, make a request in writing to the governmental entity to provide documents related to the evaluation of the offeror's submission.

(b) Not later than the 30th day after the date a request is made under Subsection (a), the governmental entity shall deliver to the offeror the documents relating to the evaluation of the submission including, if applicable, its ranking of the submission.

Design, Bid, Build



Considerations:

- Competitive Bidding v. Competitive Sealed Proposals

Gov't Code
Chapter 226g
Subchapter C -
Competitive
Bidding

- "Competitive bidding" is a procurement method by which a governmental entity contracts with a contractor for the construction, alteration, rehabilitation, or repair of a facility by **awarding the contract to the lowest responsible bidder.**
- NOTE: this is different language than in 252 & 262, which adds "best value" language

Steps for Competitive Bidding

- Step 1: Architect/Engineer to develop plans & specs
- Step 2: Request for Competitive Bids
 - Advertise for Bids
 - Estimated budget
 - Project scope
 - Estimated project completion date
 - Other information required for bid
- Step 3: Receive, publicly open, and read aloud names of offers & bids.
- Step 4: Award Contract to lowest responsible bidder
- Step 5: Not later than 7 days after contract award, the governmental entity shall document the basis of its selection and shall make the evaluations public.

What if you
don't want
Competitive
Bidding?



Best Value
Sec.
2269.056(a)

- The governing body of a governmental entity that considers a construction contract using a method authorized by this chapter other than competitive bidding must, **before advertising, determine which method provides the best value for the governmental entity.**
- Agenda item to have governing body make determination that CSP or CMAR or Design Build provides best value!
- This can be part of the authorization for procurement.

Subchapter D - Competitive Sealed Proposals

- "Competitive sealed proposals" is a procurement method by which a governmental entity
 - requests proposals,
 - ranks the offerors,
 - negotiates as prescribed, and
 - then contracts with a general contractor for the construction, rehabilitation, alteration, or repair of a facility.

CSP procedures

- Step 1: Architect/Engineer Plans
- Step 2: Governing body determines CSP provides the best value in an agenda item (can be part of the approval to issue CSP).
- Step 3: Requests sealed proposals
 - Include construction documents – plans, specs, contract, insurance requirements, bond forms
 - Set out Selection Criteria
 - Weighted value for each criterion
 - Estimated Construction Budget
 - Project Scope
 - Estimated Project Completion Date
 - and other relevant factors.

More Steps...

- Step 4: Publicly opened and read aloud the names of the proposers and any monetary component.
- Step 5: Within 45 days of opening, evaluate and rank each proposal and select "**best value**" based on the selection criteria and ranking.
- Step 6: Negotiate contract with the first ranked proposer.
- If negotiations are not successful, terminate negotiations with that proposer and moves to the next-ranked proposer until a contract or all proposers are rejected.

Positives of using CSP

- Can negotiate time, scope and price modifications!
- Evaluation scoring based on more than cost.
- Proposals typically provide more in-depth information than a bid form.



Note New Law Eff. Sept. 1, 2021

- Civil Works – Cost must be **50%** weighted value.
- If governing body determines lower weighted value is in “public interest,” then not less than **36.9%**.

(c) Except as provided by Subsection (d), for civil works projects, the weighted value assigned to price must be at least 50 percent of the total weighted value of all selection criteria.

(d) If the governing body of a governmental entity determines that assigning a lower weighted value to price is in the public interest, the governmental entity may assign to price a weighted value of not less than 36.9 percent of the total weighted value of all selection criteria.

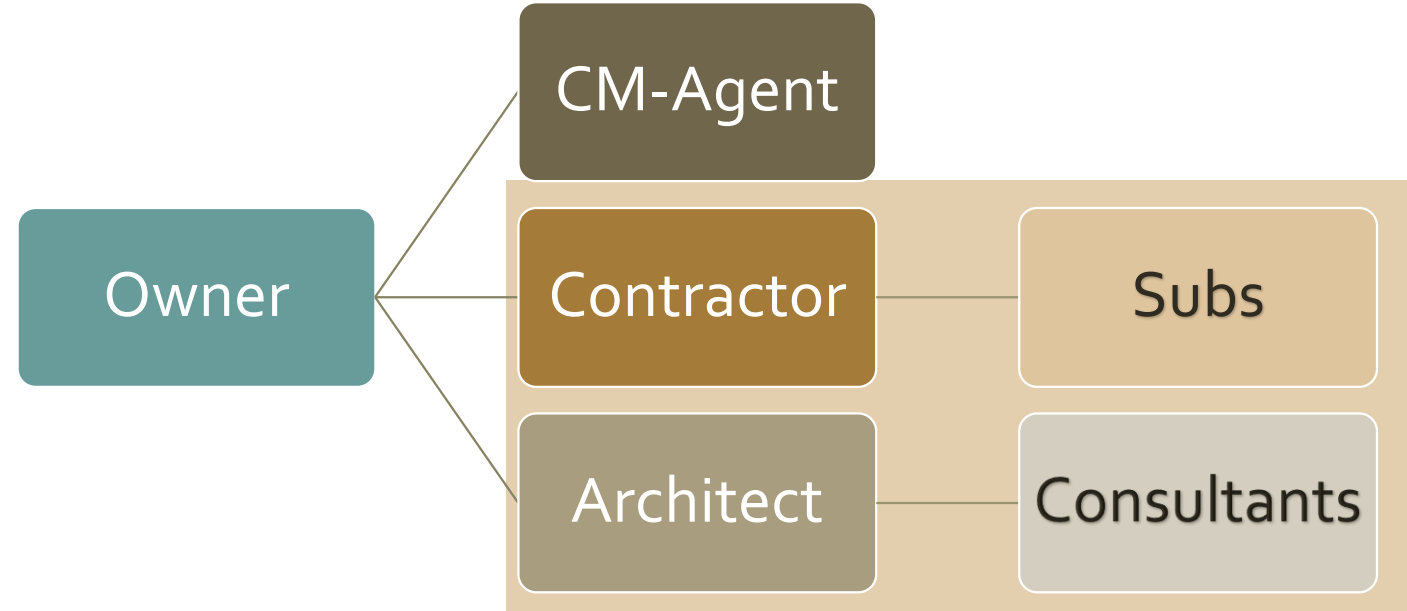
Civil Works basically horizontal projects

- (1) "Civil works project" means:
- (A) roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, wharves, docks, airport runways and taxiways, storm drainage and flood control projects, or transit projects;
- (B) types of projects or facilities related to those described by Paragraph (A) and associated with civil engineering construction; and
- (C) buildings or structures that are incidental to projects or facilities that are described by Paragraphs (A) and (B) and that are primarily civil engineering construction projects.

Subchapter E - Construction Manager-Agent

Considerations:

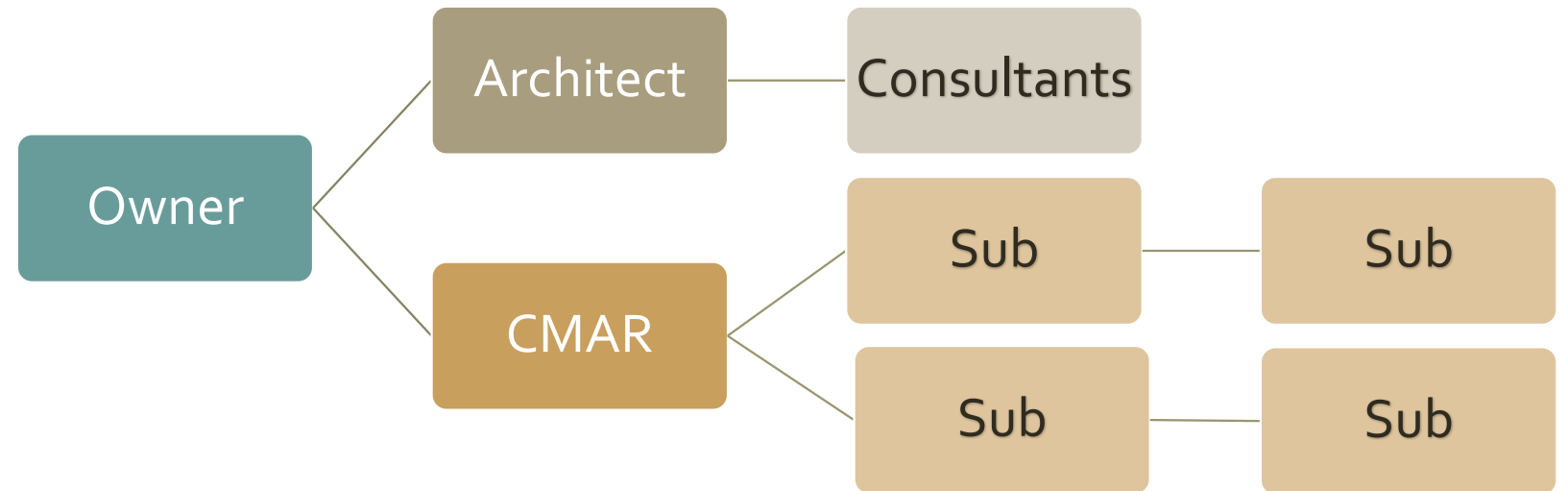
- Turn-Key approach
- CM-Agent oversees project and all contracts



Governmental entity contracts with a CM-agent to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors.

CM-agent **serves as the agent for the governmental entity** by providing construction administration and management services.

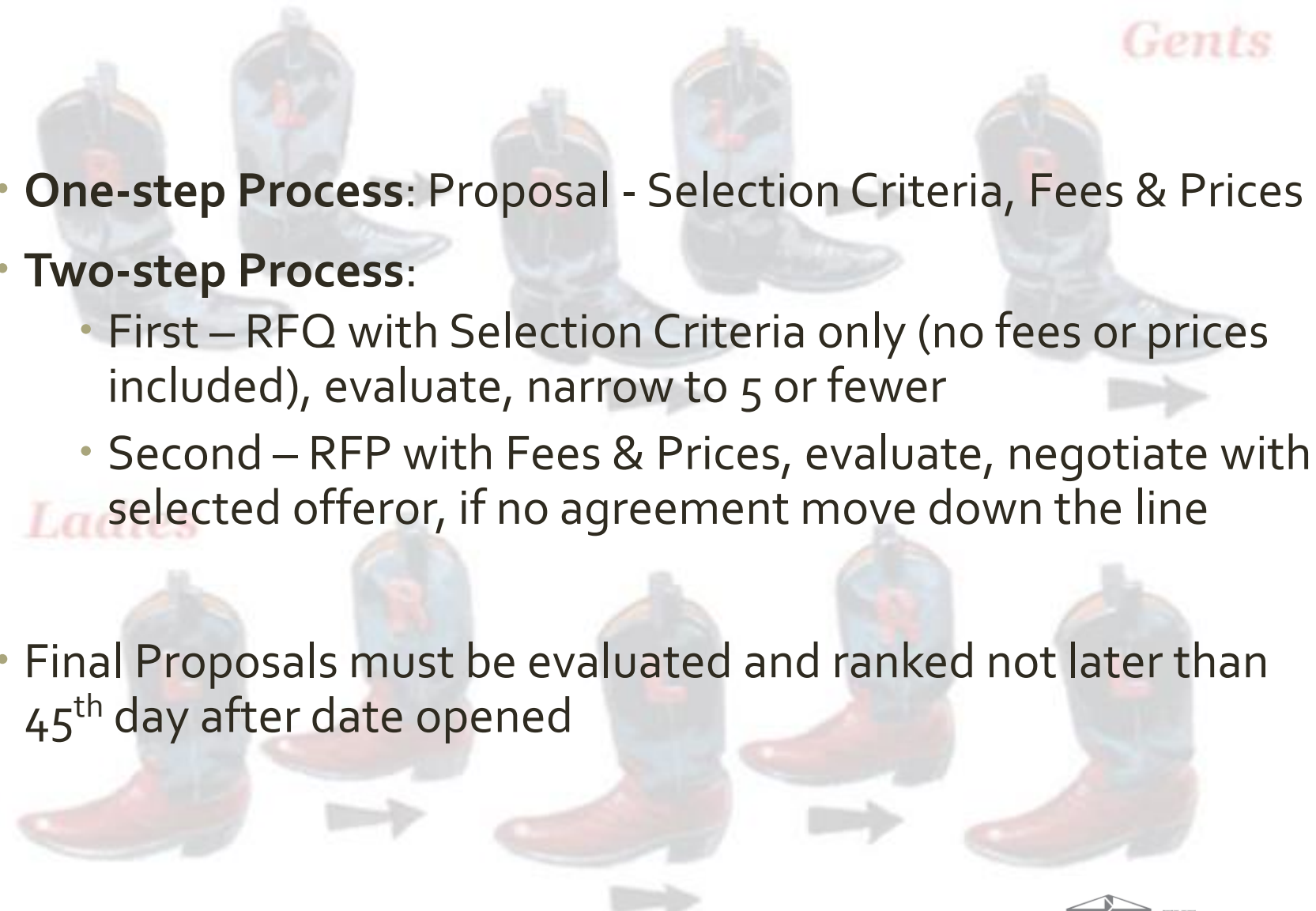
Subchapter F - Construction Manager-at- Risk



Considerations for using CMAR

- CMAR **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 governmental entity regarding construction during and after the design of the facility. **The contracted price may be a guaranteed maximum price.**
- Brings Construction Manager on Project sooner
- Risk for cost overages should shift to the CMAR
 - GMP is a cap on contract price
- Potential to save money –Value Engineering
 - Cost savings returned to Owner
 - Sometimes 80/20 or 70/30 split as incentive

CMAR Procedures

- 
- Gents*
- **One-step Process:** Proposal - Selection Criteria, Fees & Prices
 - **Two-step Process:**
 - First – RFQ with Selection Criteria only (no fees or prices included), evaluate, narrow to 5 or fewer
 - Second – RFP with Fees & Prices, evaluate, negotiate with selected offeror, if no agreement move down the line
 - Final Proposals must be evaluated and ranked not later than 45th day after date opened
- Ladies*

Construction Manager-at- Risk

- Step 2: Requests sealed proposals from chosen 5 or fewer
 - Include Construction Documents – plans, specs, contract, insurance requirements, bond forms
 - Set out Selection Criteria
 - Weighted value for each criterion
 - Estimated Construction Budget
 - Project Scope
 - Estimated Project Completion Date
 - and other relevant factors.
- Step 3: Publicly opened and read aloud the names of the proposers and any monetary component.
- Step 4: Within 45 days of opening, evaluate and rank each proposal and select “**best value**” based on the selection criteria and ranking.
- Step 5: Negotiate contract with the first ranked proposer.
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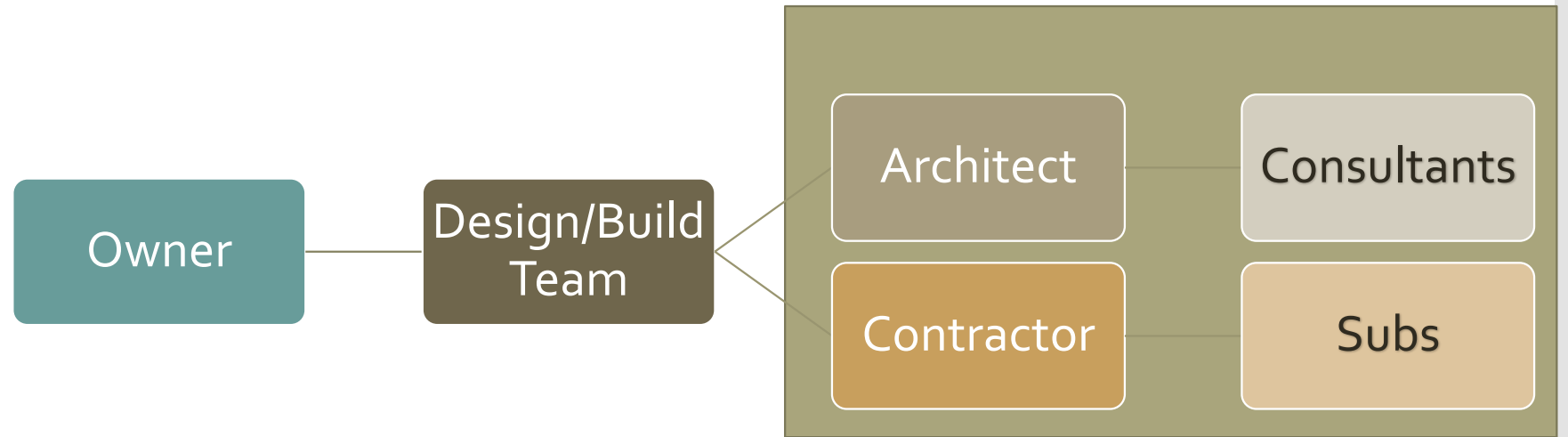
CMAR Criteria

- Pricing and Delivery Proposal
- Pre-Construction Phase Services and Project Execution Plan
- Construction Phase Services and Project Execution Plan
 - Key Personnel – Organization chart
- Estimating and Cost Control Measures
- Project Planning and Scheduling
- Quality Control and Commissioning Program
- Job Site Safety Program
- Warranty and Service Support Program

Interview Points

- The CMAR team is important!
- Want to interview the narrowed list of 5 or fewer.
- Include weighted value to score for interview in Proposal criteria. (Typically 10-15%)
- Can request that certain key personnel are present for interview

Subchapter G - Design-Build



Governmental entity contracts with a **single entity** to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility.

Considerations for Design- Build

- Vertical Construction Only (2269.302)
 - (note: can be used for electrical utility structure)
- Need to decide on Design-Build at the very beginning of your project!
 - Design A/E and Construction Contractor are a team – “Design-Build Firm.” (2269.304)
 - Single Contract for Design-Build Firm (2269.303)
 - Includes terms for design & construction
- Must hire independent A/E (not design A/E) to serve as Independent Representative for entire project. (2269.305)

Request for Qualifications

RFQ must include:

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

Design Criteria Package 2269.306(c)

- Design Criteria Package must include:
- criteria for selection,
- Information to prepare a response to RFQ and to provide any additional information requested.
- criteria the governmental entity considers necessary to describe the project and
- may include:
 - the legal description of the site,
 - survey information concerning the site,
 - interior space requirements,
 - special material requirements,
 - material quality standards,
 - conceptual criteria for the project,
 - special equipment requirements,
 - cost or budget estimates,
 - time schedules,
 - quality assurance and quality control requirements,
 - site development requirements,
 - applicable codes and ordinances,
 - provisions for utilities,
 - parking requirements, and
 - any other requirement.

Evaluation DB Firms

- Evaluation based on
 - Experience
 - Technical competence
 - Capability to perform
 - Past performance of firm
 - Past performance of member of the firm
 - Other factors in RFQ
- Cost and Price-related evaluation is not permitted!
- Certification by firm of demonstrated competence & qualifications for each A/E member

Selection & Ranking

- Select 5 or fewer to submit proposals and for interview
- Evaluate proposals on basis of selection criteria state in RFQ & interview results
- 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, or costing methodology.
- Rank based on Criteria in RFQ!

Costing Methodology

- "Costing methodology" 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.
- **The term does not include a guaranteed maximum price or bid for overall design or construction.**

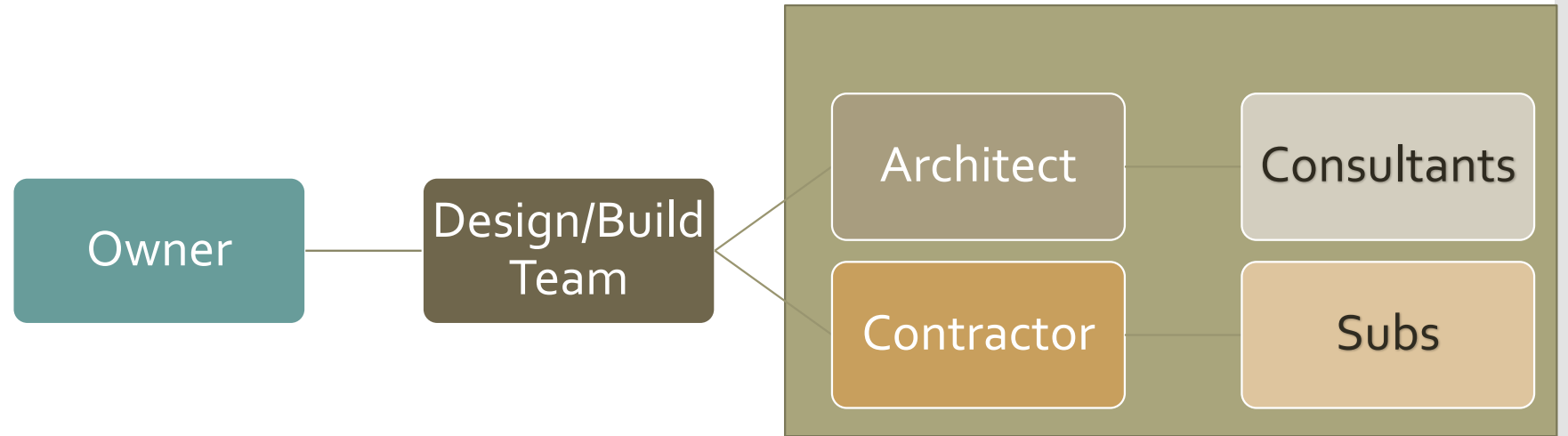
Contract Negotiation

- Attempt to negotiate with top ranked firm
- If unable to negotiate contract, formally and in writing, end all negotiations, proceed to next firm in order of selection ranking.
- Rinse and repeat until contract is reached.

Design-Build Performance & Payment Bonds Sec. 2269.311

- Not required and may not provide coverage for the design portion of the design-build contract.
- If a fixed contract amount or GMP has not been determined at the time contract is awarded, the penal sums of the performance and payment bonds delivered must each be in an amount equal to the construction budget, as specified in the design criteria package.
- The DB firm shall deliver the bonds 10 days after DB firm executes the contract
 - Unless bid bond or other financial security acceptable to ensure that DB firm will furnish the required performance and payment bonds before construction begins.

Subchapter H - Design-Build for Civil Works Projects



Population of more than 100,000.
or Board of Trustees under Trans. Code Chp. 54

Limitations

- Only for single project (2269.353)
- Cannot be for aggregated projects at multiple locations
- Also, limit on number of projects per year (2269.354)

Job Order Contracts

- Often referred to as IDIQ (Indefinite Quantities)
- Issue CSP for Job Order Contract
- Only for vertical construction (2269.402)
- Can be awarded to one or more job order contractors

CONTRACT

This is where you turn when things go wrong

“The Dude
Abides”



Abide by your contract!

- Know and follow the terms of your construction contracts!
- Deadlines
- Notice Dates
- Change Order provisions (change in times or cost)

Contract is
your road map
for project



Change Orders

- Make sure contract sets out clear procedure for:
 - How Change Orders are processed
 - Who can ask for them and for what types of issues
 - Cost v. Time
 - When notice of change must be given
 - What to do if cannot agree (Change directive)
 - Documents required to be submitted with Change Order

Change Orders

- Governing Body can give authority for Change Order for changes less than \$50,000 to:
 - “ administrative official” - LGC Sec. 252.048
 - “ employee” - LGC 262.031
- Change Orders cannot increase Original Contract Price more than **25%**.
- 262 - Change Orders cannot decrease Original Contract Price by 18% or more without consent of Contractor.
- 252 – Change Orders cannot decrease Original Contract Price more than 25% without consent of the Contractor.

Change Orders LGC 271.060

- Total contract price may not be increased by a C/O unless provision has been made for the payment of the added cost by the current funds or bond funds, or combo.
- Contract with original contract price of \geq \$1M may not be increased by more than 25%.
- If C/O increases contract amount to \geq \$1M, subsequent C/Os may not increase the revised contract amount by more than 25%.
- Governing Body may grant authority to employee for C/O for increase or decrease of \leq \$50,000.

Liquidated Damages



- To be or not to be....a penalty, that is the question
- Factors to consider:
 - (1) the harm caused by the breach is incapable or difficult of estimation; and (2) the amount of liquidated damages is a reasonable forecast of just compensation
 - *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991).
- Consider what your actual damages may be for each Project!

Waiver and Release Provisions

- Make sure waivers and release of liens are provided and required in Contract:
 - Should be attached to each pay application
 - Helps ensure subs are being paid timely

CONSTRUCTION BONDS

PERFORMANCE
BOND

PAYMENT
BOND



Bonds

- Bid Bond – in case selected bidder backs out
 - For Counties required on construction of public works or contracts >\$100,000
 - 5% of total contract price (LGC Sec. 262.032)
- Payment Bond – ensures subs and suppliers paid
 - Required if contract >\$25,000/\$50,000
 - In full amount of the contract price (Gov't. Code 2253)
- Performance Bond – ensures completion of project
 - Required if contract > \$100,000
 - In full amount of the contract price (Gov't. Code 2253)

Indemnity

- **CITIES & COUNTIES CANNOT INDEMNIFY**
 - Tex. Const. Article XI, Sec. 5 & 7
- Reminder: A/E special provisions – make sure complies with Tex. Local Gov't Code Sec. 271.904





- Check your limits provide adequate protection
- Know the differences
 - A/E – Professional Liability important
 - Contractor – General Commercial Liability important
 - Umbrella and excess policies
- Make sure Gov't Entity is listed as additional insured
- Require policies to be provided, not just COI
- For larger projects, may want project specific policy

Venue



- Venue: “Exclusive Venue shall lie in a state court of competent jurisdiction in [YOUR COUNTY], Texas.”
- TCPRC Sec. 15.015 – Counties
 - “An action against a county shall be brought in that county.”
- LGC 262.007(a) – Architect/Engineer/Construction claims
 - “A suit on the contract brought by a county shall be brought in the name of the county. A suit on the contract brought against a county shall identify the county by name and must be brought in a state court in that county.”

Prevailing Wage Rates Gov't Code Chapter 2258

- Statutorily Required!!!
- Need to include prevailing wage rates in your bid and contract. (2258.022(d))
- Most entities use Davis-Bacon Act
- Recommend including certified payrolls and audit provisions in contract.
- Criminal Offense: “An officer, agent, or representative of the state or of a political subdivision of the state commits an offense if the person wilfully violates or does not comply with a provision of this chapter.” (2258.028)

Prompt Pay
Act
Gov't Code
Chapter 2251

- Make sure your contract says that the Prompt Payment Act controls for Time of Payment and Interest!!
- Check your terms for payment to make sure they do not conflict
- Also, require Contractor to make payments to subs/suppliers in compliance with Prompt Pay Act

Texas Public
Information
Act
Gov't Code
Chapter 552

- Must be included in Contract:
- “The requirements of Subchapter J, Chapter 552, Government Code, may apply to this (include "bid" or "contract" as applicable) and the contractor or vendor agrees that the contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter.”
(552.372(b))

Retainage
Gov't Code
Chapter 2252
Subchapter B

- Retainage – Recommend 5%
- If over 5%, retainage must be held in an interest bearing account and interest paid upon completion of the contract.
- HB 692 – revised law – effective September 1, 2021
 - Set different tiers of retainage allowed by contract amounts
 - If more than \$10M, may have contractors request to have retainage in interest bearing account. Only upon agreement (2252.032(c)).
 - May want to add to contract, that Contractor not allowed to withhold greater percentage of retainage from subs (2252.032(d))



COMMUNICATION

WHO, WHAT, WHEN, HOW & WHY

Project Updates

- Require & attend OAC meetings at least monthly
 - A/E and Contractor present to status updates on project
- Many vendors will also provide monthly electronic updates for officials
 - May need to synthesize info (can be confusing and overwhelming)
- Don't just get the happy news – need to know good & bad



Schedules

- Require monthly updated schedules with each pay application that details the critical path
- Additional time should only be allowed when it affect the critical path
- Keep track of project float – float should belong to the project



PROGRESS, UPDATES AND OTHER INFO ABOUT THE NEW COMAL COUNTY JAIL



Brick by Brick by 60,000 Bricks

JUNE 18, 2019 PAUL ANTHONY LEAVE A COMMENT

Progress on the jail keeps going, but most of it is happening inside the wall these days, as crews install...

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Transparency with the Public & End Users

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or timelapse
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SENSERA 

Get your
Officials on
Board



Nov. 29, 2017

Groundbreaking
for new jail





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Thank you

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A Balanced Approach.