

# CONSTRUCTION AND THE LAW IN TEXAS

## Alternative Delivery Methods: Competitive Sealed Proposal

This is the third column in a multi-part series regarding alternative delivery methods. If you have read the previous monthly columns, you know that alternative delivery methods are becoming the new normal for many types of procurement in the heavy construction industry. As a result, contractors must develop an understanding of the framework governing each alternative delivery method to remain relevant and competitive in the Texas construction industry.

My last column outlined the legal framework for alternative project delivery and generally discussed the impact chapter 2269 of the government code has on every alternative delivery method. In this month's column, I will address one specific delivery method: the competitive sealed proposal. This method can be used for the construction, rehabilitation, alteration, or repair of any improvement to real property. After reading this column, contractors will have an understanding of the competitive sealed proposal process and the criteria an owner may consider during the selection process. With this knowledge, contractors can develop practices and procedures that make their company attractive to owners in the Texas construction market and feel empowered to consider bidding a project governed by the competitive sealed proposal method.

Chapter 2269 of the government code governs the competitive sealed proposal method. Under this chapter, a public owner

must follow four steps to select a contractor: (1) request proposals; (2) evaluate and rank each offeror; (3) negotiate with the selected offeror; and, (4) contract with the selected offeror. This process is fairly similar to the traditional design/bid/build model, with the addition of an evaluation matrix and more freedom to negotiate.

In comparison to the traditional design-bid-build model, the competitive sealed proposal method allows owners to utilize more selection factors than those included in the lowest responsible bidder or best value standards. In fact, chapter 2269 explicitly allows owners to include "any other relevant factor" in their list of criteria for bidders. Public owners enjoy the freedom to include additional criteria because it allows for increased subjectivity based on the specific wants and needs of the owner and the project. Using the competitive sealed proposal method, owners can select contractors based on a holistic view of the company rather than a fixed set of criteria that may not encompass the specific requirements of the project. As a result, owners can protect themselves from unsophisticated contractors who may, in the past, have been selected based on price and safety record alone. A robust understanding of the competitive sealed process will enable contractors to understand the priorities of each owner, and, in response, adapt business practices and draft proposals that sell their company in the best light possible. I will detail each step of the com-

petitive sealed process below.

First, the owner must prepare a request for competitive sealed proposals. The request for proposals must include the construction documents (prepared by an architect or engineer hired by the owner), selection criteria and the weighted value for each, an estimated budget and project completion date, project scope, and any other information that a contractor may need to respond to the request. Contractors should pay close attention to the content of the request for competitive sealed proposals, as it contains invaluable information. Not only will this information allow contractors to determine if they are interested and qualified for the project, it will also highlight the qualifications and experience that will be most valued by the owner and, therefore, indicate what information is essential to include in the proposal.

Once the deadline to submit proposals has passed, the owner must publicly open every proposal and read aloud the names of the offerors and any monetary proposals made by each contractor. Within 45 days after the proposals have been opened, the owner must evaluate and rank the offerors based on the selection criteria and weighted value contained in the request for proposal.

Chapter 2269 allows owners to consider any factor it chooses to include in the request for proposals. As a result, each request for proposals will likely contain varying criteria that will impact the emphasis contractors place on particular qualifications and experience. In the past, an estimating department played the biggest role in preparing bids but now, based on the selection criteria listed in the request, the specific project team and reputation of the company as a whole may be as equally important as the price. Furthermore, the owner's ability to rank contractors based on the contractor's proposed personnel should increase the value contractors place on business development with potential owners. Be aware of the ethical obligations found in chapter 176 of the Texas local government code, which requires certain disclosures by public officials and any person who enters or seeks to enter into a contract with a public owner.

Ultimately, the owner will select the highest ranked contractor and begin contract negotiations. During these negotiations, the owner may discuss options for scope or



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time modifications, and any associated price change. If negotiations are unsuccessful, the owner must formally end negotiations and move down the list to the next contractor. Once the owner successfully negotiates with a contractor, it will enter into a contract and conclude the bidding process.

Although the competitive sealed proposal process may seem daunting and unfair to contractors who have modeled their business on the traditional bidding process, it is imperative that contractors adapt to the changing construction market. By understanding the selection steps of the competitive sealed proposal process and using that knowledge to highlight relevant qualifications and experience, contractors will reap benefits in the developing alternative project delivery landscape. 🏗️

