

CONSTRUCTION AND THE LAW IN TEXAS

Alternative Delivery Methods: Construction Manager-At-Risk

This month's column is focused on the Construction Manager-At-Risk (CMAR) alternative delivery method. Alternative delivery methods are the new normal for many types of procurement, and CMAR is one of the most popular methods in Texas. The CMAR alternative delivery method involves the procurement of two separate services: an architect or engineer, who provides design and construction phase services; and a construction manager at risk, who serves as the general contractor and provides consultation during and after the design and construction, rehabilitation, alteration, or repair of the real property. In this column, I will describe the CMAR procurement process outlined in chapter 2269 of the government code and discuss some of the ambiguity surrounding the selection process.

CMAR selection can occur through a one-step or two-step process. Both processes require prospective contractors to prepare responses to detailed requests, which can take days or even weeks to prepare. The initial work required to prepare a response to a CMAR request will be time consuming. But, once contractors have prepared one response, future responses will become more refined and take less time to prepare.

Before a contractor responds to a CMAR advertisement, it should first look at the request to determine if the owner is utilizing a one-step or two-step process. The

owner will prepare a request for proposals ("RFP") if it is using a one-step process, and will prepare a request for qualifications ("RFQ") if it is using a two-step process. Both the RFP and RFQ must include the following information: general information regarding the project site and scope, schedule, selection criteria and weighted value for each criterion, any other information that would help the owner select the CMAR, a statement indicating if the process is one-step or two-step, the estimated budget, and time and place for receipt of the RFP or RFQ. An RFP will also request proposed fees and costs for general conditions. Owners are prohibited from requesting any pricing information in an RFQ.

Contractors should pay special attention to the details included in the RFP or RFQ. One reason the CMAR delivery method is popular because the owner can establish specific criteria upon which it will judge each potential CMAR. This freedom essentially creates tailor-made requirements for each project. Although contractors may balk at the subjectivity provided to owners, they should use the criteria as a playbook to advertise their company in a way that highlights elements most valued by the owner.

An owner must select the architect or engineer before or at the same time it selects a CMAR. Recent changes in the law prohibit the architect, engineer, or any entity related to the architect or engineer

from serving alone or in combination with another person as the CMAR. A contractor should ensure it is not a "related entity" as defined in the statute before it prepares a response to an RFP or RFQ.

Once the deadline to submit responses to the RFP or RFQ have passed, the owner must publicly open and read aloud the names of the offerors and, in the case of an RFP, the fees and prices included therein. Under the one-step method, within 45 days after the proposals are opened, the owner must evaluate and rank each proposal using the criteria set forth in the RFP.

If the owner is utilizing the two-step method, the selection process is not complete. The owner will evaluate and rank each response using the criteria set forth in the RFQ and select up to five contractors to provide additional information, including proposed fees and general conditions. The statute does not require the owner to make its rankings after step one public, and also does not specify when or how the owner should identify the contractors selected for the next step. This cloud of uncertainty creates frustration for many contractors. It is advised that owners inform all contractors of the top 5 rankings, so everyone knows whether they were selected to move onto the next step. Once step two is complete, the owner has 45 days to evaluate and rank each contractor based on the criteria from the RFQ and step two.

In both processes, the owner must attempt to negotiate a contract with the highest-ranked offeror. If the negotiations are unsuccessful, the owner must formally end negotiations in writing and begin negotiations with the next ranked offeror until a contract is reached or negotiations with all ranked offerors end. The owner must make the rankings from the final step of each process public within seven days after the CMAR contract is awarded. The statute does not specify where the owner should publicly post this information. Generally, it is advised that owners post the rankings on their website.

Once the CMAR is selected, it will publicly advertise for and receive bids or proposals from subcontractors for the performance of all major scopes of the work. The statute does not define what constitutes a major or minor scope of work, so this will require a judgment call from the CMAR. The CMAR will then review the bids or proposals without disclosing the contents



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to the public, and make selection recommendations to the owner. On the later of seven days from final selection or the date the subcontract is awarded, the CMAR must make all bids or proposals public. Again, the statute does not state how such information should be made public. The CMAR can self-perform portions of the work if it follows the bid process and the owner determines the CMAR will provide the best value on the project.

Responding to RFPs and RFQs can be time consuming, but I hope this column makes the process a little less intimidating. Contractors who take the time to become comfortable with the CMAR selection process and refine their written response materials will produce improved responses to RFPs and RFQs and, ultimately, remain competitive in the Texas construction market. 🍷

