

# Overview of Construction In Texas Public Schools

June 7, 2017

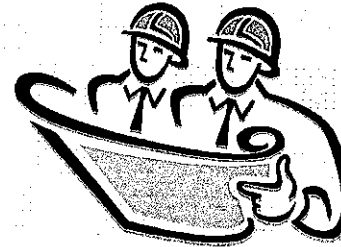
## Comfort Independent School District Board Training

Presented by: Ann Mewhinney

**WG** | WALSH GALLEGOS  
TREVINO RUSSO & KYLE P.C.

# FACILITY DESIGN REQUIREMENTS

- ▀ Architects & Engineers
- ▀ Architects
- ▀ Engineers
- ▀ Architect or Engineer



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# LEGAL REQUIREMENTS

TEX. OCC. CODE ANN. §1051.703(a)

- ▶ The school district needs an architect for:
  - ▶ A new building having construction costs exceeding \$100,000
  - ▶ An alteration or addition to an existing building having construction costs exceeding \$50,000



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# PRE-BOND PLANNING

- Use of an Architectural Firm
  - WHY?
    - to help determine what project(s) will be included in the bond election
    - to help determine the estimated costs for such project(s)
- Amount of a bond election
  - in addition to construction cost, the budget should include:
    - costs of design
    - other purchases outside the construction contract such as furniture, fixtures and equipment ("FF&E") and technology if not included in the construction contract.
    - may also include the cost of land acquisition and land development (bringing utilities and streets to the land).
- Special language for Agreement with Architect



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## BOND ELECTION -- DO'S AND DON'TS

- Board Member as a Private Citizen or an Elected Official
  - Question 1: Outside the context of a board meeting, may a sitting board member make comments regarding the Board's position related to school district bond election?
  - Question 2: May a sitting board member or an employee campaign for or against a bond referendum?
  - Question 3: May proponents and opponents of a bond proposition, including any sitting board member or District employee, distribute bond campaign materials at school facilities?
  - Question 4: Can the District provide any information to the public regarding the bond proposition?



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# DESIGN STANDARDS

TEX. EDUC. CODE ANN. §46.008 and  
19 Texas Administrative Code (TAC) §61.1036.

- ▶ All school facilities are required to meet certain design standards.
  - ▶ Building Codes
  - ▶ Independent Testing
  - ▶ Use of District Resources for Certain Purposes



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# PROCUREMENT OF PROFESSIONAL SERVICES

- Professional Services Procurement Act
  - TWO STEP PROCESS
    - Demonstrated Competence and Qualifications
    - Fair and Reasonable Price
- The decision to contract with an Architect or Engineer should be made by the Board of Trustees
- Formalities?
- Agreements



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# AGREEMENTS

- **Agreements drafted by the American Institute of Architects (“AIA”)**

- **Modify!!!**

- To meet the **school district’s** expectations of the duties of the architect or engineer.
- Make sure the school district’s expectations for the design schedule, the number of visits to the jobsite during construction, and markup on additional services are included.
- Add provisions requiring mediation as a condition precedent to litigation, establishing venue in the county of the school district, and certification of the project as required by the TEA.
- Modify provisions for Architect’s insurance and standard of care.
- Select “litigation” (not arbitration) as the method of dispute resolution.
- Delete any limitation of liability provisions.
- Consider adding geotechnical reports and surveys to the architect’s responsibility.



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# PROJECT DESIGN SCHEDULE

- Design is typically divided into three phases: Schematic Design, Design Development, and Construction Documents.
- At the end of each phase, the Architect should prepare a budget for the work and the school district should review and approve the design documents and budget. Completion of each phase also triggers the District's obligation to pay.
- Typically, after the Construction Documents are complete, the project will be advertised for competitive bids, competitive sealed proposals, or the Construction Manager will submit a guaranteed maximum price.



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## OTHER CONSULTANTS

- Independent Materials Testing
- Geotechnical Engineers and Surveyors
  - Architect or District
  - Limitation of Liability
- Project or Program Managers
  - Outside consultants or in-house
  - Procurement



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## OTHER CONSIDERATIONS

- Title IX: new constructions and renovations should provide equal opportunity to all students, and should especially be of equal quality (materials, structure, efficiency, etc.).
- Electioneering Prohibited:
  - prohibited from using District funds or other resources to electioneer for or against any measure in an election, including a District bond election. TEX. EDUC. CODE §11.169, TEX. ELEC. CODE §255.003, Policy BBBB (LEGAL).



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## PROCUREMENT OF CONSTRUCTION SERVICES

- Selection of method of procurement of construction services
  - the Board must select the method of procurement of construction services that provides the best value to the district before advertising.
- Authorized methods of procurement of construction services
  - Eight Methods
- What method provides the best value for the school district?



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# METHODS OF PROCUREMENT

TEX. GOVT CODE Chapter 2269

- Competitive Bidding
- Competitive Sealed Proposals
- Construction Manager-Agent
- Construction Manager-At-Risk
- Design Build
- Job Order Contracts
- Energy Savings Performance Contracts
- Interlocal Contract



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## SELECTION OF METHOD OF PROCUREMENT OF CONSTRUCTION SERVICES

- Board of Trustees adopt rules and procedures
  - The school district's "rules" are included in the district's policy manual at section CH and the CV series; however these policies usually will not give much direction on which method to choose.
- Select method before advertising
- Emergency Exceptions
- Best Value for the District
  - Two most common: CSP and CMAR
  - Do NOT use Competitive Bidding



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## PROCUREMENT PROCEDURES FOR CONSTRUCTION SERVICES (CONT.)

- Preparation of Request for Proposals, Request for Competitive Sealed Proposals, or Requests for Qualifications
- Criteria and Weight of Criteria
- Publication of Notice
- Selection or Ranking of Contractors, Construction Managers-at-Risk or Design/Build Firms
- Negotiation and Execution of Construction Contracts



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# FORMS OF CONTRACTS

- Agreements drafted by the American Institute of Architects (“AIA”) which are drafted by committees made up primarily of representatives of architects and contractors.
- They protect architects first, contractors second, and owners last.
- They are not specific to Texas, to school districts, or to the specific requirements of the Texas Education Code and Texas Government Code Chapter 2269.
- Many provisions do not reflect the expectations of school district construction project owners.
- Documents can be modified and Districts should modify the contracts and attach the modifications to procurement documents.



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## STATUTORY REQUIREMENTS IN CONSTRUCTION CONTRACTS

- Performance Bond –
  - Protects District in event of default of contractor
  - Required when contract is in excess of \$100,000
- Payment Bond –
  - Protects District from payment claims from subcontractors and material suppliers
  - Required when contract is in excess of \$25,000
- Prevailing Wages
- Workers' Compensation Insurance
- Retainage
- Other Requirements



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## OTHER REQUIREMENTS

- Trench Safety
- Prohibition of Alcohol, Tobacco, Controlled Substances and Firearms
- National Pollutant Discharge Eliminations System Regulations
- Criminal History Record Information Review
- Felony Conviction Notice



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## OTHER CONTRACT PROVISIONS

- Contingency
- Change Orders
- Liquidated Damages
- Warranties
- Schedule
- Disclaimer of Design Warranty



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## OTHER CONTRACT PROVISIONS (CONT.)

- Notice of Claims
- No-damage-for-delay
- Indemnity
- Dispute Resolution Provision



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# DISPUTE RESOLUTION

- Delay Claims: Substantial Completion and Final Completion
- Contractor Default and Construction Defects
- Design Defects
- Litigation



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## CONTRACT TERMS TO ADDRESS WITH YOUR ATTORNEY

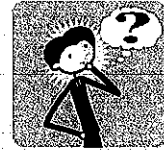
- Indemnity Language
- Attorney's Fees
- Termination Language
- Scope and Project Terms
- Required Terms (Criminal History Background Check)
- Choice of State Law and Venue



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# WHAT TO DO



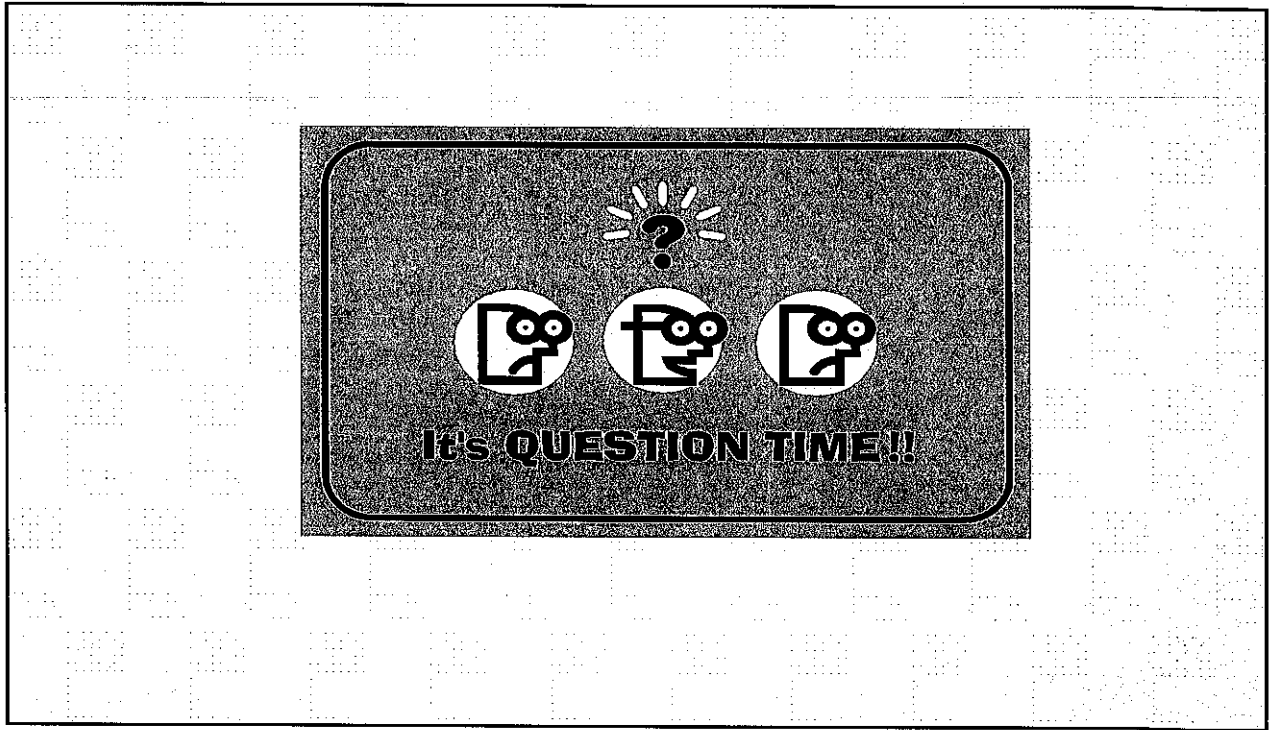
- Know and follow the statutes
- Use good business practices
- Manage the Design
- Manage the Project




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**Ann Mewhinney**  
Austin Office  
P.O. Box 2156  
Austin, Texas 78768  
Phone: 512-454-6864  
Fax: 512-467-9318  
Email: [amewhinney@wabsa.com](mailto:amewhinney@wabsa.com)  
Web: [www.WalshGallegos.com](http://www.WalshGallegos.com)



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