



Texas Association of School Boards

Legal Services

P.O. Box 400 • Austin, Texas 78767-0400 • 512.467.3610 • 800.580.5345 • legal.tasb.org • legal@tasb.org

Serving Texas Schools Since 1949

Architect or Engineer?

Which One Your District Needs Depends on Project's Nature, Cost

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A question we at TASB Legal Services commonly receive (but, frankly, one that is not asked frequently enough) is whether a school district is required to hire an architect or engineer for a particular construction project. The answer to that question depends on the nature and cost of the project, requires looking at several different sources of law, and has little to do with competitive procurement or the construction delivery method the district uses.

What Does an Architect or Engineer Do?

Generally speaking, architects and engineers are responsible for the design and oversight of certain aspects of construction. The Texas Occupations Code governs the practices of architecture and engineering. Chapter 1051 defines what constitutes the practice of architecture and requires one to be registered with the Texas Board of Architectural Examiners (TBAE) in order to hold oneself out as an architect and to engage in the practice of architecture. Chapter 1001, known as the Texas Engineering Practice Act, defines the practice of engineering and requires one to be licensed by the Texas Board of Professional Engineers (TBPE) in order to practice engineering. Both licenses require extensive formal education and passing an examination.

The practice of architecture and the practice of engineering can overlap. For example, some acts of engineering are within the practice of architecture. Consequently, architects can perform some services that are considered to be engineering. But only a limited number of engineers that are identified by the TBAE may legally engage in the practice of architecture. Therefore, a particular construction project may require an architect, an engineer, or both, depending on the nature of the project. The project may, in fact, require multiple engineers if the project involves different engineering disciplines, such as geotechnical, structural, electrical, or mechanical engineering.

When Is an Architect or Engineer Required?

Public works and public buildings frequently require plans prepared by and supervision of an architect or engineer.

Engineers: A school district may not construct a “public work” involving engineering in which the public health, welfare, or safety is involved unless the engineering plans, specifications, and estimates have been prepared by an engineer, and the engineering construction is performed under the direct supervision of an engineer. Tex. Occ. Code § 1001.407. A “public work”

generally includes the construction, alteration, or repair of a building or other structure or improvement paid for in whole or in part from public funds. Because most school district construction involves the public health, welfare, or safety, school district construction projects are often public works.

The Engineering Practice Act provides two exceptions to this rule that are applicable to school districts. No engineer is required if (1) the project involves mechanical or electrical engineering and will cost \$8,000 or less, or (2) the project does not require mechanical or electrical engineering and will cost \$20,000 or less. Tex. Occ. Code § 1001.053. The general rule and exceptions are shown in a helpful flowchart from the TBPE. Texas Board of Professional Engineers, [When is a Professional Engineer required on a project?](#)

Architects: If a school district constructs a public building that will be used for education, assembly, or office occupancy, an architect is required for design and construction observation depending on construction cost at the start of the project and whether the project involves new construction or existing buildings. A school district must hire an architect for construction of a new building if construction costs exceed \$100,000. 22 Tex. Admin. Code § 1.212(a). On the other hand, if the district alters or adds on to an existing building, the district must hire an architect if (1) the project requires removal, relocation, or addition of walls, partitions, or exits, and (2) construction costs exceed \$50,000. 22 Tex. Admin. Code § 1.212. This rule is depicted in a helpful flow chart from the TBAE. Texas Board of Architectural Examiners, [When to Engage an Architect or Approved Engineer for Design and Construction Observation](#) (2016).

How Does a School District Select an Architect or Engineer?

Architects and engineers are providers of professional services and must be selected in accordance with the Professional Services Procurement Act (PSPA) rather than on the basis of competitive bidding or another method of competitive procurement. Tex. Educ. Code § 44.031(f). In procuring architectural or engineering services, a school district must first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications and then attempt to negotiate a contract at a fair and reasonable price. Tex. Gov't Code § 2254.004(a). While the PSPA requires this two-step process, it does not set out a specific procedure to follow to determine a provider's competence and qualifications.

Although not statutorily required, the best practice for completing the first step under the PSPA is to evaluate architects or engineers using a Request for Qualifications (RFQ). An RFQ is used to solicit information from multiple companies in order to generate a pool of prospective service providers. The RFQ should include all the information about the district's project that is necessary for an architect or engineer to submit a statement of their qualifications for performing the job, including the scope of the work. In addition, the RFQ may include information related to the general terms and conditions of the agreement between the district and the architect or engineer, a proposed contract, and a questionnaire. The questionnaire may assign weights to the questions in order to rank respondents based on such criteria as their experience, references, and financial stability.

Under TBAE rules, an architect cannot respond to an RFQ with information that specifies the fee charged by an architect, including information from which a fee may be extrapolated or indirectly determined. 22 Tex. Admin. Code § 1.147. Only after the district has ranked the companies that respond to the RFQ may it attempt to negotiate a fair and reasonable price for the services. In fact, TBAE rules state that architects may disclose their fee, including information found in a fee schedule, only after the school district has completed step one under the PSPA by selecting the architect based on demonstrated competence and qualifications. 22 Tex. Admin. Code § 1.147.

Similarly, TBPE rules prohibit engineers from submitting, orally or in writing, any monetary cost information in the initial step of selecting qualified engineers. Cost information or other information from which cost can be derived must not be submitted until the second step of negotiating a contract at a fair and reasonable cost. 22 Tex. Admin. Code § 137.53. Engineers are further required to report to the TBPE any requests from governmental entities that occur prior to selection based on demonstrated competence and qualifications for (1) a bid or cost and/or pricing information, or (2) any other information from which pricing or cost can be derived. 22 Tex. Admin. Code § 137.53(a).

School districts are well-advised not to skip the first step under the PSPA by prematurely requesting costs and fee information from architects and engineers. Districts that do so may find themselves in hot water with the Texas Education Agency. The agency's Division of Financial Compliance has authority to investigate a school district's selection process and direct the district to take remedial action if a violation is found.

What about Competitive Procurement?

We have not mentioned competitive procurement for the construction contract because the rules regarding when and how you must engage an architect or engineer apply regardless of how the district procures its construction contract or what construction delivery method the district uses. However, a discussion of whether a district's construction project requires an architect or engineer would not be complete without reviewing the basics of construction procurement generally and a school district's obligation to seek the professional services of an architect or engineer specifically. The general rule for school district purchasing is that, unless an exception applies, all school district contracts for the purchase of goods and services, including construction services, valued at \$50,000 or more in the aggregate for each 12-month period must be made by one of a list of permitted methods that the district determines will provide the best value for the district. The list of permissible construction delivery methods is found in Chapter 2269 of the Texas Government Code. Tex. Educ. Code § 44.031(a).

Choosing a Construction Services Contracting Method

Districts may only procure construction services using a method in Texas Government Code chapter 2269 or an interlocal contract, depending on which method will provide the best value to the district. Tex. Educ. Code § 44.031(a). Most districts delegate the best value determination to the Superintendent. See TASB Policy CV(LOCAL). The Superintendent must recommend a method to the board, which then makes the final decision on what method to use.

A best value determination is not required if the district uses the competitive bidding procurement method. If the district does not use competitive bidding, it must compare the other available contracting methods and select the method that provides the best value for the district. Tex. Gov't Code § 2269.056(a). The term "best value" is not defined in the context of choosing a contracting method, but we know that it means more than simply the lowest price. When comparing contracting methods, price is certainly a major factor to consider, but the district might also assign value to other criteria such as the speed of delivery and completion of the project, or whether the use of district resources or personnel will be required.

The Texas attorney general has stated that a school district "should establish, by rule, its own procedure and criteria to determine the purchasing method that will provide the best value in a particular instance." Tex. Att'y Gen. Op. No. JC-37, at 4 (1999). The TASB model policies at sections CH and CV, which pertain to procurement, do not provide procedures and criteria for determining best value. Therefore, to assist in this determination, the district should strongly consider establishing rules in administrative regulations or purchasing procedures.

It is important to note that, according to Section 2269.056, the board must determine best value unless it has delegated that authority to an individual or committee. See Tex. Gov't Code §§ 2269.053(a) ("The governing body of a governmental entity may delegate its authority under this chapter regarding an action authorized or required by this chapter to a designated representative, committee, or other person."); .056(a) ("The governing body of a governmental entity that considers a construction contract using a method authorized by this chapter . . . must . . . determine which method provides the best value for the governmental entity.") If the board delegates such authority, it must provide notice of that delegation, the limits of the delegation, and the name or title of each person to whom authority is delegated. Tex. Gov't Code § 2269.053(b). "The governmental entity shall provide notice of the delegation, the limits of the delegation, and the name or title of each person designated under Subsection (a) by rule or in the request for bids, proposals, or qualifications or in an addendum to the request."

Chapter 2269

The contracting methods provided by Chapter 2269 include competitive bidding, competitive sealed proposals, construction manager-agent, construction manager-at-risk, design-build, and job order contracts.

Chapter 2269 reiterates the general rule that an architect or engineer required by that chapter must comply with Texas Occupations Code chapter 1051 or 1001, as applicable, and, if not a full-time employee of the district, must be selected on the basis of demonstrated competence and qualifications as provided by the PSPA. Tex. Gov't Code § 2269.057. Further, the statutes related to each construction delivery method address whether and to what extent an architect or engineer is required for that particular method.

Competitive Bidding and Competitive Sealed Proposals: A school district that uses competitive bidding or competitive sealed proposals must have an architect or engineer prepare the construction documents required for the project. Tex. Gov't Code §§ 2269.102, .152.

Construction Manager-Agent and Construction Manager-at-Risk: For projects using a construction manager-agent or construction manager-at-risk, a school district must select or designate an architect or engineer to prepare the construction documents for the project before the selection of the construction manager. Tex. Gov't Code §§ 2269.205(a), .252(a). For construction manager-agent, the architect or engineer may not also serve as the construction manager unless hired to serve in that capacity under a separate selection process. Tex. Gov't Code § 2269.205(b). For construction manager-at-risk, the architect or engineer, or an entity related to the architect or engineer, may not serve, alone or in combination with another person, as the construction manager-at-risk. Tex. Gov't Code § 2269.252(b).

Design-Build: A design-build firm is a company that includes an architect or engineer as well as a construction contractor. Tex. Gov't Code § 2269.304. If the district hires a design-build firm, the district must still have its own architect or engineer, independent of the design-build firm, to act as the district's representative for the duration of the project. Tex. Gov't Code § 2269.305. After selection of the design-build firm, that firm's architects or engineers must submit all design elements for review and determination of scope compliance to the district's architect or engineer before or concurrently with construction. Tex. Gov't Code § 2269.309.

Job Order Contracts: A job order contract is a procurement method used for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, type, and quantities of work required are indefinite. Tex. Gov't Code § 2269.401. Essentially, job order contracting is a way to get numerous, commonly encountered construction-related projects done more quickly and easily. If a job order contract requires architectural or engineering services, the district must have an architect or engineer prepare the construction documents for the project. Tex. Gov't Code § 2269.408(a). However, the district is not required to have its own architect or engineer if a job order contract is for a relocatable educational facility subject to and approved under Texas Occupations Code chapter 1202, as long as the contractor employs the services of an architect or engineer who approves the documents for the project. Tex. Gov't Code § 2269.408(b). "Relocatable educational facility" means a portable, modular building capable of being relocated that is used primarily as an educational facility for K-12 public education, regardless of whether the facility is built at the installation site. Tex. Occ. Code § 1202.004.

This exception does not mean that relocatable educational facilities can be installed using job order contracting. Relocatable educational facilities are commonly installed by design-build companies. Instead, this exception applies when a previously installed facility requires maintenance, repair, or alteration. Relocatable educational facilities purchased or leased on or after January 1, 2010, must comply with all provisions applicable to industrialized buildings under Texas Occupations Code chapter 1202, which include standards related to building codes, design review, and inspections. Tex. Occ. Code § 1202.004(b).

Interlocal Contracts

It is not uncommon to find items such as roofing systems, HVAC units, gym floors, and modular buildings for sale by a purchasing cooperative (which is a type of interlocal contract). Certainly, these are construction-related items if the installation of these items involves construction, rehabilitation, alteration, or repair of a facility.

While an interlocal contract is not a method listed under Chapter 2269, it is permitted under Texas Education Code section 44.031(a)(4), which generally authorizes using interlocal contracts for procurement.

The Interlocal Cooperation Act addresses when local governments, including school districts, can purchase construction-related goods and services through purchasing cooperatives. A local government is prohibited from entering into a contract to purchase construction-related goods or services through a purchasing cooperative in an amount greater than \$50,000 unless a person designated by the local government certifies in writing that: (1) the project for which the construction-related goods or services are being procured does not require the preparation of plans and specifications under the Texas Engineering Practice Act or the TBAE, or (2) required plans and specifications have been prepared. Tex. Gov't Code § 791.011(j).

The provision does not state who the “person designated” by the district should be and whether a particular purchase requires architectural or engineering plans and specifications. Also, keep in mind that purchases through a co-op in an amount less than \$50,000, and therefore not subject to this provision, may still require an engineer. For example, if the district purchases an HVAC unit from a co-op, alteration of a building involving public health, welfare, or safety is involved and proper installation of the unit will likely involve mechanical and electrical engineering. Therefore, if the purchase of the HVAC system exceeds \$8,000, the district must hire an engineer to prepare the plans and specifications and to supervise installation of the unit.

Because of the complexity of these issues, a school district should consult with its legal counsel if it is considering procuring construction-related items through an interlocal contract. Of course, a district should always consult legal counsel before signing any construction-related

contract, regardless of the method of procurement, and should modify a contractor's standard contract (as well as architect's and engineer's contracts) in order to ensure that the contract complies with Texas laws and school district needs.

Conclusion

Laws related to construction procurement and the practice of architecture and engineering can be confusing even for those who deal with the issues regularly. When a school district is considering a construction-related project, it must consider not only how to get the best value for the district but also whether the services of an architect or engineer are required for the project.

Because construction-related contracts, including contracts for the professional services of architects and engineers, often involve large amounts of money, fierce competition, and the potential for expensive litigation, it is very important for school district officials to be good stewards of the district's resources by planning ahead and seeking advice early in the process to ensure they are complying with the myriad laws and rules that govern construction procurement.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/architect-or-engineer.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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