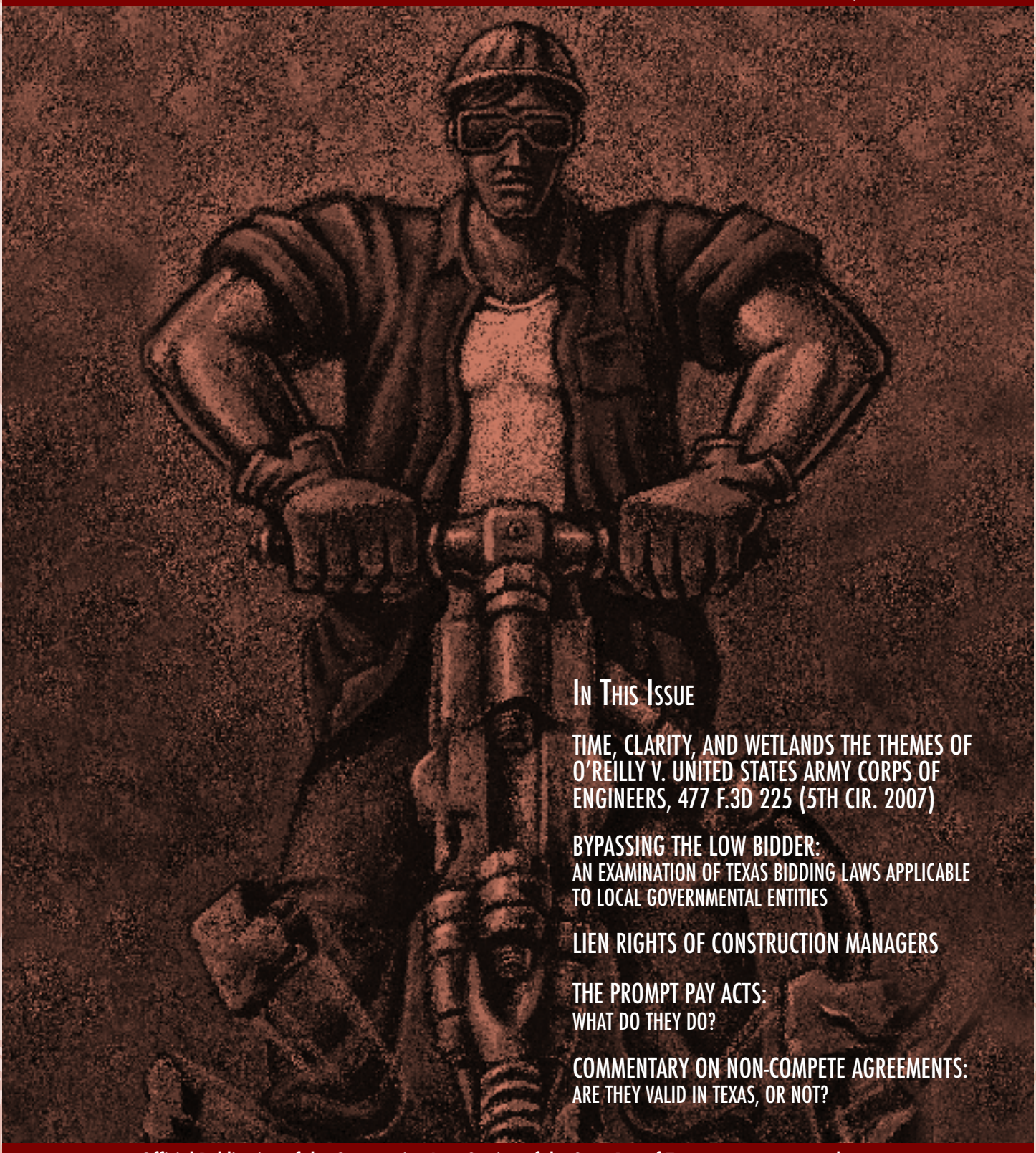
Construction Law Journal

Summer 2007 Volume 5, Number 1



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WHAT DO THEY DO?

COMMENTARY ON NON-COMPETE AGREEMENTS:
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CONSTRUCTION LAW JOURNAL

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Anyone interested in submitting an article should contact the Editor, Gregory Cokinos at Cokinos, Bosien & Young, 1221 Lamar, 16th Floor Houston, Texas 77010 or 713/535-5500. Manuscripts for publications must be typed double-spaced with footnotes. Articles should be submitted electronically in either WordPerfect or Word format.

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The Construction Law Section of the State Bar of Texas sponsors two continuing legal education programs each year. The Annual Advanced program is held each year in early March. The program continues to draw the top construction law practitioners and construction industry leaders throughout the state and is the best networking opportunity for our Section members.

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FROM YOUR SECTION CHAIR

David D. Peden
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This has been a great year for the Construction Law Section of the State Bar of Texas. At our annual convention earlier this year, we marked the 20th anniversary of providing quality construction law continuing legal education to the State Bar. Next year, the Section itself will celebrate its 20th anniversary. After the first CLE event in 1987, the need to form a section was apparent. It was formed the next year. The Section has grown tremendously, and we look forward to continued growth. We now have over two thousand dues paying members. We do more than just provide CLE at a fun and informative convention each spring, we have also started the Basics Course, which is presented each fall. We publish this Journal, with tireless editorial leadership provided by Gregory Cokinos. We have granted scholarships at several Texas universities. We have made donations to appropriate charities and organizations. We are always looking for better ways to provide CLE. And, we have a useful website, with searchable seminar papers. Now I look forward to the new leadership taking over in the summer, and doing even more.

Our legal environment is about to change. Much has been said about arbitration. Many, if not most, construction disputes are resolved by arbitration because of standard form contracts that contain mandatory arbitration clauses. But later this year, the American Institute of Architects is expected to publish updated forms. These forms will likely still have arbitration in them, but only if it is elected. Arbitration will no longer be mandatory. Litigation will be the default dispute resolution mechanism. This may mean more bench and jury trials, so be prepared to knock the rust off of your trial skills.

The articles within are intended to educate, and to promote dialogue among our members. The other members of the Editorial Board and I hope that you enjoy them. If you have an idea for an article, please get in touch with any member of the Editorial Board. This will be the last message from this Chair. A new Chair will be elected at the State Bar Convention in June. It has been a privilege and an honor to be of service to our wonderful legal community. Keep up your good work.

David Peden, Chair
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COMMENTS
FROM YOUR EDITOR

By Gregory M. Cokinos
Cokinos, Bosien & Young

The Construction Law Journal continues to enjoy the benefits of having a great group of authors contributing their insight to important aspects of construction law. This issue of the Construction Law Journal offers articles addressing five aspects of construction law.

In his article "Time, Clarity and Wetlands" Stanley P. Santire discusses how the recent case of *O'Reilly v. United States Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007) impacts permitting when wetlands issues exist.

The article by Richard L. Reed, "Bypassing the Low Bidder: An Examination of Texas Bidding Law Applicable to Local Governmental Entities" provides government owners and other interested parties with a road map to help them comply with the requirements of the Texas bidding laws when deciding whether to bypass a lower-priced bidder on a public works project.

In "Lien Rights of Construction Managers," architect and recent law school graduate, Kerri Ranney, with the guidance of Rick Reed, discusses whether a construction manager who does not actually perform construction work on a project has furnished "labor" within the meaning of the lien statute, entitling the construction manager to perfect a valid lien to secure payment for its construction related services.

In the article "The Prompt Pay Acts: What Do They Do?" Ben L. Aderholt and Nick R. Westbrook discuss whether a contractor can, in addition to its principal claim, recover prejudgment interest, prompt pay interest, or both.

Finally, an informative commentary by C. Dean Herms, Jr. addresses Non-Compete Agreements and their validity in Texas, providing the construction practitioner with needed information when this issue arises.

Notably, among the many new laws from this past legislative session, the Texas legislature passed S.B. 324, concerning the enforceability of contingent payment clauses. The impact of this legislation will be considerable and an article addressing this new legislation will be included in a future edition of the *Journal*. In the meantime, construction practitioners are encouraged to read the legislation and any articles addressing the subject.

As always, we welcome suggestions for topics on future articles and ask that you please direct any suggestions, comments or questions to the Editor at the following address:

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BY STANLEY P. SANTIRE[1]

TIME, CLARITY, AND WETLANDS THE THEMES OF O'REILLY V. UNITED STATES ARMY CORPS OF ENGINEERS, 477 F.3D 225 (5TH CIR. 2007)

Time and clarity are major challenges in any construction project. These challenges can be particularly daunting when a developer needs a permit to dredge and fill wetlands. In the recent case of *O'Reilly v. United States Army Corps of Engineers*,[2] the Fifth Circuit stressed lack of articulation and the result was an enormous loss of time translating into a loss of money for a developer. Clarity is an obvious theme in the case, while the element of time is pervasive. The opinion is also an unusually clear discussion of the NEPA[3] process. If only for this reason, it is interesting reading for any lawyer or developer pursuing a permit for a project affecting wetlands.

Facts of the Story

The story began long before the Fifth Circuit handed down the *O'Reilly* decision on January 24, 2007. It all started in St. Tammany Parish, Louisiana. According to the official St. Tammany Parish web site:

> "The ecology of St. Tammany Parish is a diverse and complex structure creating a sensitive bio network that must be protected. Much like the rain forests of South America, the forests, wildlife, marshes, and wetlands are interdependent for survival and preservation of the natural balance."[4]

Notice the reference to wetlands; these posed an environmental dilemma for the developer. The Parish is on the north side of Lake Pontchartrain and connected to New Orleans by the Lake Pontchartrain Bridge. As a consequence, it was prime real estate for New Orleans. A property owner planned to create a residential development. Over half the property consisted of wetlands. Filling and dredging required a permit from the U.S. Army Corps of Engineers ("Corps").

In 1999, the initial permit application covered 147 acres, including 91.94 acres of wetlands. About a year later, the owner amended the permit application to encompass only one segment of the original project. The amended application covered 81.58 acres including 39.54 acres of wetlands. In December 2003, the Corps issued a §404 permit allowing the dredging and filling according to the amended application. A lawsuit was filed to enjoin the permit.[5] In a six page, unpublished opinion the District Court granted the injunction. The District Court decision was appealed and on January 24, 2007 the Fifth Circuit addressed the case in a thirty-five page published opinion.[6]

The Circuit Court opinion is a model of clarity. This is particularly ironic in that its primary thrust was to address the lack of clarity in the permit drafted by the Corps. The fact that the Circuit Court opinion was published and the District Court decision was not, plus the much more extensive length of the Fifth Circuit opinion, could mean nothing in itself. On the other hand, it could mean that the Fifth Circuit was sending a message to the Corps. Hurricane Katrina hit the subject area in August 2005, a point in time after the District Court decision and before that of the Fifth Circuit.[7] An extensive body of analysis lays much of the damage from Katrina on the shoulders of the Corps.[8]

Regardless of such speculation, possible subplots, and the impact of Katrina, the result of this decision for the *O'Reilly* case is that seven years after the developer

[1] Stanley P. Santire is a principal in the Santire Law Firm. He received his Doctor of Jurisprudence from the University of Texas School of Law. A member of the State Bar of Texas Construction Law Section and the Labor and Employment Law Section, he serves as co-editor of the Newsletter published by the Labor and Employment Law Section. This article was reviewed by Allen D. Cummings, board certified in Oil, Gas, & Mineral Law by the Board of Specialization of the State Bar of Texas, former Chair of the State Bar of Texas Oil, Gas and Energy Resources Law Section and listed as one of The Best Lawyers in America in energy. It was also reviewed by Dr. H. Nugent Myrick, former faculty member of Rice University, Harvard University and the University of Houston and an advisor to government, industry, and service companies on water pollution and environmental impact statements.

[2] Loretto O'Reilly, Jr. et al. v. United States Army Corps of Engineers, 477 F.3d 225 (5th Cir. 2007).

[3] National Environmental Policy Act of 1969.

[4] http://www.stpgov.org/about_sttammany/about.html.

[5] Loretto O'Reilly, Jr. v. United States Army Corps of Engineers, No. Civ.A. 04-940, 2004 WL 1794531 (E.D. La. 2004).

[6] *Loretto O'Reilly, Jr.*, , 477 F.3d at 225.

[7] http://news.bbc.co.uk/2/shared/spl/hi/guides/456900/456984/html/default.stm.

[8] Joby Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws* Washington Post, Oct. 24, 2005; *see also* Bill Walsh, *Corps Chief to 'Design Failure'*, Time Picayune, April 6, 2006.

BY RICHARD L. REED[1]

BYPASSING THE LOW BIDDER: AN EXAMINATION OF TEXAS BIDDING LAWS APPLICABLE TO LOCAL GOVERNMENTAL ENTITIES

Introduction

When a municipality, county, or other local governmental entity (which shall be collectively referred to in this article as a "Government Owner") solicits a proposal for a public works construction project, each bidder's decision to submit a bid is the culmination of a lot of effort, with no guarantee of success. In the end, win or lose, each contractor risks significant investment of time, money, and resources to submit its proposal. Typically, losing bidders do not recover their lost investment, unless special provision is made for a stipend toward the costs of developing their unsuccessful proposals.

Bidders must independently evaluate many issues. The most obvious considerations, among others, are: the contractor's own depth of experience for the particular project, the project's scope and complexity, the cost and availability of competent labor, materials and specialized equipment, the risk that costs will escalate, the risk of severe weather or other complications that may delay completion of the work, the risk that the Government Owner's geotechnical data or other design information may be inaccurate, the risk of peculiar site conditions that could affect the work, and the contractual risks to be assumed.

However, equally as important as the above factors, each bidder must evaluate the chance that the contract might be awarded to a competing bidder. This fosters competition at its very essence. It is what yields the lowest price for the Government Owner.

The purpose of the competitive bidding laws is to stimulate fair competition, prevent favoritism, and secure the best price for the job from a responsible bidder. *See Texas Highway Comm'n v. Texas Ass'n of Steel Importers*, 372 S.W.2d 525, 527 (Tex.1963) (quoting *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ)). Early in the history of Texas' competitive bidding laws, the Texas Supreme Court explained that the requirement to make the award of a public contract to the "lowest and best" or "lowest responsible" bidder is merely incidental to the main purpose of protecting the public interests of securing the best work and materials at the lowest practicable price. *See Vilbig Bros. v. City of Dallas*, 91 S.W.2d 336, 340 (Tex.1936) (quoting with approval *Hobart v. Detroit*, 17 Mich. 246 (1868)).

A bidder who submits the lowest price most certainly will have an elevated expectation of being awarded the project. Yet, the Government Owner may be justified in rejecting the lowest priced bid. Doing so, however, can raise significant doubt over whether the decision to overlook the lowest priced bidder was politically motivated or otherwise unfair. Bypassing the lowest priced bidder is permissible only if the Government Owner does so in strict accordance with the law. Indeed, public employees and their agents found to have violated competitive bidding law by improperly rejecting the lowest priced bid may be subject to serious criminal sanctions. Failing to award the contract to the lowest priced bidder obviously ends up costing taxpayers more, but any hint of political favoritism can also adversely affect the Government Owner's reputation for fairness, and diminish competition in the delivery of quality work at reasonable cost to the taxpayers. This is undoubtedly contrary to the public interest.

Clearly, the lowest price is not necessarily the best choice. A Government Owner must be able to select a contractor that is not only economical, but is sufficiently qualified to perform the work. Several alternative delivery methods now provide Government Owners alternatives methods for procuring their project needs. All of these methods prescribe the means to ensure an even playing field for all the bidders. Basically, this means that all interested parties are to be openly informed of the selection criteria in advance. Such openness promotes confidence that all bidders will be treated fairly in the system of public procurement for construction projects.

This article is intended to provide a road map to help Government Owners and other interested parties comply with the various requirements of the Texas bidding laws when deciding to bypass a lower-priced bidder on a public works project.

[1] Rick Reed is a lawyer and a Director with the law firm of *Coats|Rose, Yale, Ryman & Lee, P.C.* The firm concentrates its practice in construction law and real estate. Rick is in charge of the firm's San Antonio office. Before joining Coats|Rose, Rick was Assistant General Counsel to Zachry Construction Corporation, and represented Zachry for over 25 years. See www.coatsrose.com for more information about Rick and his firm. ©2007–All Rights Reserved by Richard L. Reed, Coats|Rose P.C.

The author would like to recognize the assistance of Kerri Ranney and Jim Muska, students of the South Texas College of Law, in the preparation of this article. Ms. Ranney, a practicing architect, is now a law graduate of South Texas.

Overview of Relevant Texas Bidding Laws

Texas bidding laws evaluated in this article are: the Texas Local Government Code, Chapter 262 (for Counties), also known as the *County Purchasing Act*; the Texas Local Government Code, Chapter 252 (for Municipalities), which this article will refer to as the *Municipal Purchasing Statute*; and Texas Local Government Code, Chapter 271, Subchapters H and J (for Municipalities, Counties, and certain other local governmental entities, including School Districts, conservation and reclamation districts, hospital organizations, and other political subdivision of the State of Texas), also known as the Public Property Finance Act, and which this article will refer to as the *Alternative Delivery Methods Statute*. These are the bidding laws most commonly applicable to the local governmental bid solicitations for public works contracts. (Other statutes applicable to particular state and federal projects are beyond the scope of this article.)

TRADITIONAL COMPETITIVE BIDDING

Government Owners have long used competitive bidding, the time-honored process for choosing a contractor for a public works project. This is the standard process for sealed bids that favors selection of the lowest-priced bidder, assuming the bidder is qualified to perform the work. It is the method most familiar to local Government Owners who have used it for years. To ensure bidders are evaluated equally, the bidders must be afforded the opportunity to bid on the same items on equal terms and have their bids judged according to the same standards as set forth in the specifications that must be published for all the bidders to see in advance.[2]

The Government Owner must take this requirement very seriously. It would be improper, and a violation of the statute, for the Government Owner to use *any* standard of evaluation not included in the request for proposals. By way of example, if a Government Owner merely asks for proposals under a competitive bid solicitation to indicate the length of time required to complete the project, without specifying a date certain by which the bidder must guarantee that the work will be completed, it would be improper to disqualify a lower priced bidder who proposed to complete the work with a longer duration than a higher priced bidder. Similarly, if a request for proposals merely asks for the resumes of the contractor's superintendent without specifying a minimum level of years of experience as a qualification criterion, it would be improper to disqualify a lower priced bidder whose superintendent is less experienced than the higher priced bidder's superintendent.

The meaning of the key terms "lowest and best bid" and "lowest responsible bidder" (as those terms are used in the County Purchasing Act[3] and in the Alternative Delivery Method Statute[4]), has been the subject of litigation in Texas courts. Texas courts interpret these phrases to mean that, for purposes of competitive bidding, the lowest price *is* the best as long as the bidder is "responsible." *See Labrado v. County of El Paso*, 132 S.W.3d 581, 598 (Tex. App.—El Paso 2004, no pet.), *Collins v. County of El Paso*, 954 S.W.2d 137, 151 (Tex.App.—El Paso 1997, pet. denied), and *Sterrett*, 240 S.W.2d at 520. Thus, as these terms are interpreted, it would be a violation of law to bypass the lowest priced bidder unless the bidder is found in a hearing not to be responsible.[5]

This does not mean the Government Owner is forced to accept a bid that happens to be the "lowest" (and therefore "best") even if that bidder is incompetent or proposes to use incompetent managers, or proposes to take such a ridiculously long time to complete that the bidder is obviously incompetent. However, the issue of a low bidder's incompetence goes to the "responsibility" of the low bidder. Significantly, the Local Government Code provides that a County's award to a bidder who is not the "lowest dollar bidder" requires the County to allow the low bidder to appear and present evidence of its "responsibility."[6] It stands to reason that, using traditional competitive bidding, the Government Owner must find that the lowest bidder is not a "responsible" bidder, as that

[2] *See* Tex. Loc. Gov't Code Ann. § 252.021(a)(1) and (3) (Vernon 2005); and § 252.042 (as to Cities – "*Requests for proposals made under Section 252.021 must solicit quotations and must specify the relative importance of price and other evaluation factors.*"), and § 262.0225 and § 262.023(a)(3) (Vernon 2005) (as to Counties – "*In the procedure for competitive bidding under this subchapter, the commissioners court of the county shall provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications.*"). All local Government Owners, including cities and counties are expressly permitted to avail themselves of the alternative bidding processes (including competitive bidding) under the Alternative Delivery Statute, Loc. Gov't Code, Chapter 271, Subchapter H. Subchapter H is located at Tex. Loc. Gov't Code Ann. § 271.111 (Vernon 2005), and the requirement for publishing all evaluation criteria is found at § 271.0245 ("*. . . the governing body of the governmental entity shall provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications.*"), and at § 271.114(b), requiring publication of all other evaluative criteria for bids taken under any of the alternative delivery methods other than competitive bidding ("*The governmental entity shall publish in the request for bids, proposals, or qualifications all the criteria that will be used to evaluate the offerors and the relative weights given to the criteria.*").

[3] Tex. Local Gov't Code Ann. § 262.027(a).

[4] Tex. Local Gov't Code Ann. § 271.027(b).

[5] The hearing process is discussed *infra*.

[6] Tex. Loc. Gov't Code Ann. § 262.027(c). The requirement for an opportunity to present evidence of responsibility also applies to a municipal procurement under the Alternative Delivery Methods Statute, as discussed at Footnote 29, *infra*.

term has been interpreted by the courts, before it awards a contract to the next highest bidder who is "responsible."

The meaning of the term "responsible" was directly considered in the *Labrado* case in 2004.[7] The County of El Paso sought bids for services to maintain the County's buses. One of the criteria in the bid package stated bidders must demonstrate that they would operate a well-equipped maintenance garage. This was a very specific requirement, and very clearly spelled out in the bid specifications. All the bidders knew it up front. The lowest price bidder, Tony Labrado, protested the County's decision to bypass his bid for the higher bid of another. The Court found the County of El Paso acted properly under § 262.027(a) in bypassing Mr. Labrado's bid because he had failed to meet a material bid specification – he did not show in his bid that he had a maintenance garage, and at the hearing before the Commissioners Court to examine his "responsibility," he could not show that he had such a garage. The Court specifically held:

> "The term 'lowest responsible bidder' involves compliance with statutory requirements relating to competitive bidding." *Niles v. Harris County Fresh Water Supply Dist. No. 1A*, 336 S.W.2d 637, 638 (Tex. Civ. App.—Waco 1960, writ ref'd). The term "competitive bidding" contemplates that each bidder will bid on the same material terms and will receive fair and equal treatment. *Collins*, 954 S.W.2d at 151; *Sterrett*, 240 S.W. 2d at 520 (Tex. Civ. App.–Dallas 1951, no writ). [FN 6: Effective September 1, 2001, the County Purchasing Act expressly requires commissioners courts to 'provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications.'] Therefore, to be "responsible," a bidder must comply with the material specifications of the requests for bids.[8]

Interpreting the Texas Supreme Court's holding in *Vilbig Bros.*, *supra*, the State's Attorney General has found that "the 'lowest and best bid' and 'lowest responsible bidder' standards are essentially synonymous."[9] This is particularly evident from the statute's requirement to draw lots to choose between two responsible bidders if both happen to submit "the lowest and best bid."[10] There obviously can be no subjective difference between the bids of two responsible bidders who have each offered the lowest and (therefore) best price.

In conclusion, using the traditional competitive bidding method, the Government Owner *must* reject all of the bids and restart the solicitation process, and may *not* award the contract to a higher priced bidder *unless* the Government Owner determines (and presumably makes a specific *finding* based on the evidence presented) that the lowest bidder failed to meet the specifications in the request for proposals, or is incompetent to perform the work.[11]

ALTERNATIVE DELIVERY METHODS

For certain facilities,[12] the Alternative Delivery Method

[7] *Labrado*, 132 S.W.3d at 598.

[8] *Id.* at 597-98 (emphasis added).

[9] *See* Tex. Atty. Gen. Op. DM-113 (1992).

[10] Tex. Loc. Gov't Code Ann. § 262.027(b).

[11] *See* Tex. Loc. Gov't Code Ann. § 252.043 (as to Cities – "*. . . the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality.*") While municipalities may consider factors other than price, as set forth in § 252.043(b), to determine "best value," the contract must, under § 252.043(d), be awarded to the lowest responsible bidder for civil or structural (building) projects. The only exception is for procurement through the "competitive sealed proposal procedure" that requires the city to engage an independent engineer to evaluate published criteria under § 271.116. *Id.* And *see* Tex. Loc. Gov't Code § 262.027 (as to Counties – subject to limited exceptions, "*the court shall: (1) award the contract to the responsible bidder who submits the lowest and best bid; or (2) reject all bids and publish a new notice.*"). And *see* Tex. Loc. Gov't Code Ann. § 271.027, for competitive bidding under the Alternative Delivery Statute: "*(a) The governmental entity is entitled to reject any and all bids. (b) The contract must be awarded to the lowest responsible bidder, ...*").

[12] Tex. Loc. Gov't Code Ann. § 271.111(7). The term "facility" generally included buildings, and not civil construction projects or buildings associated with such projects, until recent enactment of HB 1886 by the 2007 Texas Legislature. Now, special provision is made for "Civil Works Projects" through a new Subchapter J, recently enacted by the 2007 Texas Legislature. Tex. Loc. Gov't Code Ann. § 271.181. This applies only to governmental entities with a population of 500,000 or more until September 1, 2009, and will apply to those with a population of 100,000 or more after that date. Tex. Loc. Gov't Code Ann. § 271.182. Civil Works Projects, for purposes of Subchapter J, include:

> (A) roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water distribution and wastewater conveyance facilities, desalination projects, 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.

Id. A Government Owner can only use one design-build procurement process for each "single integrated project," and cannot use it to contract for civil works projects at multiple locations, *see* Tex. Loc. Gov't Code Ann. § 271.185(b).

Statute, Subchapters H[13] and J,[14] enable certain Government Owners[15] to use any one of several alternative procurement methods that base selection of the contractor on the evaluation of criteria other than price.[16] These alternative delivery methods include solicitation for competitive sealed proposals,[17] a construction manager-agent,[18] a construction manager-at-risk,[19] design-build contracts,[20] and job order contracts.[21]

As with competitive bidding, the bidders must still be given "the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications."[22] Competitive bidding under Subchapters H and J of the Alternative Delivery Method Statute may also include the evaluative criteria other than price, and using such criteria select the "bidder offering the best value to the governmental entity according to the selection criteria that were established by the governmental entity."[23]

The Government Owner must specifically determine the method that provides the best value before advertis-

[13] Tex. Loc. Gov't Code Ann. § 271.113.

[14] Recent enactment of H.B. 1886 by the 2007 Texas Legislature resulted in the addition of Subchapter J, effective September 1, 2007, which made the design-build delivery method available for a limited number of civil works projects by certain governmental entities. This is discussed further in other footnotes, *infra*. *See* Tex. Loc. Gov't Code Ann. § 271.186 as to the number of design-build projects various governmental entities are permitted in any year.

[15] Tex. Loc. Gov't Code Ann. § 271.111(10). The term "Governmental entity" is defined to mean "a municipality, county, river authority, or defense base development authority established under Chapter 378 as added by Chapter 1221, Acts of the 76th Legislature, Regular Session, 1999." Recent enactment of H.B. 1886 by the 2007 Texas Legislature resulted in the addition of hospital districts, water districts, authorities created under Section 59, Article XVI, Texas Constitution, including conservation and reclamation districts. However, for purposes of Civil Works Projects under new Subchapter J, a "local governmental entity" entitled to use the design-build method for such projects does not include "a regional tollway authority created under Chapter 366, Transportation Code, a regional mobility authority created under Chapter 370, Transportation Code, or a water district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, with a population of less than 50,000." Tex. Loc. Gov't Code Ann. § 271.181(6).

[16] Tex. Loc. Gov't Code Ann. § 271.113(b). The factors other than price that may be considered are: reputation, quality, the extent to which the governmental entity's needs are met, the contractor's past relationship with the governmental entity, the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses, the total long-term cost to the governmental entity, and "any other relevant factor specifically listed in the request for bids or proposals." *Id*.

See also Tex. Loc. Gov't Code Ann. § 271.185(c) and (d). As a result of the recent enactment of H.B. 1886 by the 2007 Texas Legislature, the design-build method of procuring a civil works project requires a formal finding that this method is appropriate for the project based on the following specific criteria:

> (1) the extent to which the entity can adequately define the project requirements;
>
> (2) the time constraints for the delivery of the project;
>
> (3) the ability to ensure that a competitive procurement can be held; and
>
> (4) the capability of the entity to manage and oversee the project, including the availability of experienced personnel or outside consultants who are familiar with the design-build method of project delivery.

[17] Tex. Loc. Gov't Code Ann. § 271.116. Recent enactment of H.B. 1886 by the 2007 Texas Legislature added a requirement that the Government Owner engage an independent architect or engineer for competitive sealed proposal procurements, just as is required under the design build method. *See* Footnote 20, *infra*.

[18] Tex. Loc. Gov't Code Ann. § 271.117. A construction manager-agent may be required to provide administrative personnel, equipment, and on-site management of the Government Owner's prime contractor. The prime contractor must be separately procured. *See* Tex. Loc. Gov't Code Ann., § 271.117(e).

[19] Tex. Loc. Gov't Code Ann. § 271.118. The construction manager-at-risk "assumes the risk for construction . . . 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." *Id.* § 271.118(e).

[20] Loc. Gov't Code Ann. §271.119. The term "design build contract" is defined as "a single contract with a design-build firm for the design and construction of a facility." *Id.* § 271.111(3). Under § 271.119(b), the Government Owner must designate a separate engineer as its representative to oversee the design-builder. If not a full time employee of the Government Owner, the independent engineer must be selected by separate procurement "on the basis of demonstrated competence and qualifications as provided by Section 2254.004, Government Code." Design-build proposals are considered in two phases. *See* § 271.119(d). Offerors are first evaluated on the basis of experience, competency, ability to perform, and past performance of the proposed team, without consideration of cost-related factors. *Id.* § 271.119(d)(1). Note that bidders may be ranked on "other appropriate factors submitted . . . in response to the request for qualifications. . . ." *Id.* At the second phase, short-listed bidders are re-evaluated based on all selection criteria set forth in the Request for Qualifications, including costing methodology, and an interview. *See* § 271.119(d)(1)-(2). This two-phased approach is also required under new Subchapter J for the design-build procurement of civil works projects, pursuant to HB 1886. *Id.* § 271.191.

[21] Tex. Loc. Gov't Code Ann. § 271.120 ("A governmental entity may award job order contracts for the minor construction, repair, rehabilitation, or alteration of a facility if the work is of a recurring nature but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of predescribed and prepriced tasks.")

[22] Tex. Loc. Gov't Code Ann. § 271.0065 and § 271.114(b) ("The governmental entity shall publish in the request for bids, proposals, or qualifications all the criteria that will be used to evaluate the offerors and the relative weights given to the criteria.")

[23] Tex. Loc. Gov't Code Ann. § 271.115(c).

[24] Tex. Loc. Gov't Code Ann. § 271.114(a).

ing for bids.[24] This is significant because a Government Owner would violate the law if it advertises for bids using traditional competitive bidding, and then switches midstream to an evaluation using alternative delivery statute criteria that were never published pursuant to a procurement methodology that was never announced. Independent architects and engineers who advise Government Owners must be careful not to improperly influence a traditional competitive bidding procurement decision with advice based on a ranking evaluation using unpublished alternative delivery criteria.

Two of the alternative delivery methods provide for two-step evaluations and ranking of bidders based on published criteria,[25] but regardless of the method used, the Government Owner must select the bidder that offers the "best value" based on a ranking evaluation according to published selection criteria.[26]

As noted above with respect to traditional competitive bidding, when the Government Owner concludes that the lowest bidder is not the best value, specific steps must be taken to select a higher bidder. While the Municipal Purchasing Statute allows an award to be based on either best value or the lowest responsible bid,[27] most public works contracts awarded by any means other than a competitive sealed proposal solicitation must still be based on the lowest responsible bid (i.e. price).[28] Additionally, the Alternative Delivery Methods Statute still requires that bypassing the lower bidder under such circumstances requires that the lowest responsible bidder be entitled to present evidence of its responsibility to the relevant governing body.[29] The Local Government Code expressly states that, with respect to all alternative delivery methods:

> The contract must be awarded to the lowest responsible bidder, but the contract may not be awarded to a bidder who is not the lowest bidder unless before the award each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body of the governmental entity or the designated representative of the governing body and present evidence concerning the bidder's responsibility.[30]

CONSEQUENCES OF ILLEGALLY BYPASSING A LOW BIDDER

There are severe consequences for a failure to comply with statutory requirements for bypassing a low bidder. These include costly litigation to enjoin the public works project, the declaration of an improperly awarded contract as void, and even imposing criminal penalties and disqualifying persons from holding public office. If a Government Owner illegally bypasses a low bidder, "[a]ny property tax paying citizen of the county may enjoin performance of the contract."[31] Also, a contract between a Government Owner and a bidder selected in violation of the law may be void or rendered void, and payment may be disallowed for services performed under a void contract.[32]

Individual government employees and government representatives or agents who intentionally or knowingly violate the Texas bidding laws are subject to prosecution for a Class C misdemeanor,[33] and upon conviction may be removed and/or disqualified from holding government office or employment, or contracting to render services to a Government Owner, for up to four (4) years following a conviction.[34]

[25] Tex. Loc. Gov't Code Ann. § 271.118(e) (as to construction manager-at-risk), and § 271.119(d) (as to design-build).

[26] Tex. Loc. Gov't Code Ann. § 271.113(a); *see also* § 271.115(c) (as to competitive bidding), and § 271.116(f) (as to competitive sealed proposal procurements); § 271.118(g) & (h) (as to construction manager-at-risk), § 271.119(d)(2) (as to design-build).

[27] Tex. Loc. Gov't Code Ann. § 252.043(c).

[28] Tex. Loc. Gov't Code Ann. § 252.043(d); *See also* Footnote 3, *supra*. Note also that, while a home rule municipality may by charter adopt a manner of letting contracts in conflict with, and controlling over the Municipal Purchasing Act (*see* Tex. Loc. Gov't Code Ann. § 252.001), no such exception is made in the Alternative Delivery Method Statute, so it should be presumed that any attempt by a home rule municipality to invoke the use of the non-price criteria recognized by § 271.113(b) must be done in accordance with the Alternative Delivery Method Statute's requirements for advance determination of the best value process for the project, advance publication of the selection criteria, and selection based on best value.

[29] Tex. Loc. Gov't Code Ann. § 271.027(b).

[30] Tex. Loc. Gov't Code Ann. § 271.027(b).

[31] Tex. Loc. Gov't Code Ann. § 262.033 (as to Counties); § 252.061 (as to Cities); and § 271.112(f) as to the alternative delivery methods under Subchapter H. (No provision for injunctive relief was included in new Subchapter J added in 2007 by H.B. 1886, with respect to design-build procurements for civil works projects.)

[32] Tex. Loc. Gov't Code Ann. § 252.061 (as to Cities); § 271.112(f) (as to governmental entities, including counties, under Subchapter H, although no provision for voiding an illegal contract was included in new Subchapter J added in 2007 by H.B. 1886, with respect to design-build procurements for civil works projects.)

[33] Tex. Loc. Gov't Code Ann. § 252.062 (as to Cities); § 262.034(c) (as to Counties); and § 271.029(c) (as to Subchapter H of the Alternative Delivery Methods Statute.Also, a Class B Misdemeanor applies to certain other violations under Subchapter H. No provision for criminal penalties was included in new Subchapter J added in 2007 by H.B. 1886, with respect to design-build procurements for civil works projects).

[34] Tex. Loc. Gov't Code Ann. § 252.063 (as to Cities); § 262.035 (as to Counties); and § 271.030 (as to governmental entities under Subchapter H of the Alternative Delivery Methods Statute - No provision for disqualification from holding office was included in Subchapter J added in 2007 by H.B. 1886, with respect to design-build procurements for civil works projects.)

RECENT UNSUCCESSFUL ATTEMPTS DURING THE 2007 LEGISLATIVE SESSION TO MODIFY TEXAS BIDDING LAWS

House Bill 447 passed in the 2007 legislative session with only one dissenting vote in each house, but was ultimately vetoed by Governor Rick Perry.[35] House Bill 447 would have consolidated alternate project procurement methods for most governmental entities into a single chapter of the Government Code, and redefined some of the regulations. Governor Perry vetoed the bill on the grounds that it would discourage competition in the public sector, limit how the government may contract for design and construction services, and result in increased costs and project delays for taxpayers.

House Bill 237, which also did not become law, would have provided for a published list of criteria a public school district would be required to choose from when entering into a purchasing contract. The bill proposed to strike the word "may" and insert "shall" when listing the criteria a school district could refer to in evaluating proposals.[36]

CONCLUSION

Clearly, Government Owners must carefully follow a complex set of rules for procurement of construction projects. Using the alternative delivery methods other than traditional competitive bidding, a Governmental Owner must clearly determine and publish the procurement method chosen for a particular project and, if applicable, the evaluation or ranking criteria that will be used in determining the best contractor for the project. If the Government Owner believes the low bidder is not the best value or the lowest responsible bidder for the project, there are procedures in place for bypassing the low bidder and selecting a different contractor who will provide the best value. In all cases, the low bidder has a right to be informed of the proposed decision to award to a higher priced bidder, and to be given the opportunity to present evidence to the Government Owner of the low bidder's responsibility. The Government Owner must find the low bidder was not responsible, by virtue of incompetence or failure to meet the specifications and criteria published with the request for proposal. Failing to do so may result in a finding that the contract is void, and expose the Government Owner to an injunction by a taxpaying citizen with standing. Government officials and their agents who disregard the law can face criminal sanctions, removal and disqualification from office, and civil liability.

[35] Tex. H.B. 447, 80th Leg., R.S. (2007).

[36] Tex. H.B. 237, 80th Leg., R.S. (2007).