

Texas Board of Professional Engineers
Policy Advisory Regarding Procurement of Engineering Services by General Construction
Contractors for Governmental Public Works Projects

August 20, 2009

Definitions:

Project Professional Engineer – Engineer(s) or engineering firms retained by a governmental entity to perform engineering services for a specific public works project.

General Construction Contractor – Private entity retained by a governmental entity to construct a public works project designed by the Project Professional Engineer.

Other Professional Engineers – Engineer(s) or engineering firms which may be retained by the General Construction Contractor or his subcontractors or vendors to fulfill engineering requirements of the project during the construction phase.

Background: The Dallas – Ft. Worth International Airport Board (DFWIAB) has requested clarification on the Texas Board of Professional Engineers' (Board) interpretation of the Professional Services Procurement Act (PSPA) requirements contained in the Texas Engineering Practice Act (Act). In the course of complex public works projects, the need often arises for Other Professional Engineers to be engaged to perform tasks unforeseen by the Project Professional Engineers or tasks not authorized to be performed by the Project Professional Engineers since they would involve dictating the General Construction Contractor's means and methods of construction. Examples of such engineering tasks include but are not limited to:

- 1) Trench safety plans.
- 2) Traffic control plans.
- 3) Temporary construction structures (crane foundations, for example).

Applicable Board Rules from the Act:

§137.53 Engineer Standards of Compliance with Professional Services Procurement Act

(a) A licensed engineer shall not submit or request, orally or in writing, a competitive bid to perform professional engineering services for a governmental entity unless specifically authorized by state law and shall report to the board any requests from governmental entities and/or their representatives that request a bid or cost and/or pricing information or any other information from which pricing or cost can be derived prior to selection based on demonstrated competence and qualifications to perform the services.

(b) For the purposes of this section, competitive bidding to perform engineering services includes, but is not limited to, the submission of 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.

(c) This section does not prohibit competitive bidding in the private sector.

Source Note: The provisions of this §137.53 amended to be effective June 4, 2007.

§137.79 Standards for Compliance with Professional Services Procurement Act

When procuring professional engineering services, a governmental entity and/or its representative(s) shall comply with the requirements of Subchapter A, Chapter 2254, Texas Government Code and shall select and award on the basis of demonstrated competence and qualifications to perform the services for a fair and reasonable price and shall not select services or award contracts on the basis of competitive bidding.

Source Note: The provisions of this §137.79 amended to be effective December 21, 2008.

Analysis of Board Rules, Texas Administrative Code, Title 22, Part 6, Chapter 137: A reading of Board Rule 137.53 reveals that no language exists specific to the selection of Other Professional Engineers that may be required during the construction phase of the project and that would be selected by a General Construction Contractor. Rule 137.53 is specific, however, in that all professional engineers must not divulge cost information prior to being selected solely on their qualifications. The rule also requires licensed professional engineers to report to the Board any instance where a governmental entity and/or their representative requests cost information prior to the qualification based selection phase. The board would interpret a General Construction Contractor to be a representative of the governmental entity. Similarly, Board Rule 137.79 requires that governmental entities or their representatives use qualification based selection processes.

Process: If professional engineering services are required during the course of the project, the public entity or the General Construction Contractor must use qualification based selection to procure all engineering services regardless of when the services are required. The following language is used by the DFWIAB in their contract documents to communicate this requirement to their contractors and representatives:

Ancillary/ Integral Professional Services: In selecting an architect, engineer or land surveyor, etc., to provide professional services, if any, that are required by the specifications, bidder shall not do so on the basis of competitive bids but shall make such selection on the basis of demonstrated competence and qualifications to perform the services in the manner provided by Section 2254.004 of the Texas Government Code and so shall certify to the Board (DFWIAB) with its bid.

The above contract language covers instances where a General Construction Contractor's means and methods would trigger the requirement for Other Professional Engineering services that were not performed by the Project Professional Engineers. Examples include traffic control plans for contractor controlled disruptions of normal traffic, or instances where Other Professional Engineering services would be sought to build a temporary crane foundation. The General Construction Contractor would use a qualification based selection process to select Other Professional Engineers and would certify in writing to the governmental entity that the QBS process was followed and no pricing or costing data was used in the process.

Limitations: The QBS process performed by General Construction Contractors described in this policy advisory is intended only for those limited instances where:

- 1) Engineering decisions or designs performed by the governmental entity's Project Professional Engineer would interfere with the contractor's means and methods of construction or
- 2) Unforeseen construction issues necessitate the services of Other Professional Engineers in the course of the project.