

THE FOWLER LAW FIRM PC



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THE FOWLER LAW FIRM NEWSLETTER

The Seven Deadly Sins of Public Procurement... Bonus Sins That Can Easily Be Avoided!

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Submitted by Laura S. Fowler JD, Attorney at Law with The Fowler Law Firm PC

Dear Readers:

Wait... there's more!

If you are a purchasing director dealing either with Texas Education Code Section 44.031, available at <http://tlo2.tlc.state.tx.us/statutes/docs/ED/content/htm/ed.002.00.000044.00.htm#44.031.00>, (for public school and junior college districts) or the Texas Local Government Code Section 271.113, available at <http://tlo2.tlc.state.tx.us/statutes/docs/LG/content/htm/lg.008.00.000271.00.htm#271.113.00> (which is most cities, counties and special purpose districts) for public works construction and many other high dollar purchases, there are delivery or selection methods that can help or hinder you a great deal. Each seems to have at least one *Achilles Heel* afflicting it. Your author states this anecdotally, having represented political subdivisions throughout Texas for many years. There is no empirical data suggesting that any one delivery method is any better or more risk free than another, but the following mistakes do tend to crop up often and are quite *expensive* to correct.

COMPETITIVE BIDDING (hard bid): There is *no* authorized negotiation of the bid price of this delivery method with the exception of the specified alternatives. This lends itself to change orders in extreme numbers. Call around and find out who has the reputation as “*the change order king*” before you use this method!

COMPETITIVE SEALED PROPOSAL (negotiated proposal): While there is more latitude to discuss options after the proposal is submitted, the law requires an estimated construction budget to be posted any response by the builder is required. Guess what happens?

JOB ORDER CONTRACTING: Still alive and well despite several efforts by various Texas legislators to kill it, job order contracting is great *if and only if* the contractor really has experience doing this kind of work. A new builder who last year was a general contractor has no business launching into this very unique delivery method. Check references very carefully and make sure the builder has an excellent reputation *specifically* in job order contracting.

CONSTRUCTION MANAGER AT RISK: CM at Risk, as it is usually referred to, is a tremendously flexible system, as it is used by most political systems. However, it is *horribly* one-sided to favor the contractor. Why? Typically, the political subdivision and its architect let the builder wait so long to submit bids that all that is really occurring is a contract that is **cost plus a fee**. In other words, the builder invites all the bids, totals them up, puts his percent and general conditions cost on top of that and then presents a Guaranteed Maximum Cost figure for final acceptance. That takes little skill in cost estimating. True cost estimating and value engineering is a large part of what construction managers market as their unique skill that makes them different than other types of builders and entitled to sizable fees.

So what do you do? Demand that the contractor generate the Guaranteed Maximum Price *well before* the date the bid and proposal review begins. In other words, forcing the Construction Manager to bear more of the risk and uncertainty is the only way you will really get a value engineered building.

INTERLOCAL AGREEMENT: Most of the time this method is called 'Co-op' purchasing. When done correctly it is an easy and even wonderful way to purchase with assurance. However, there are a few things you need to be sure about before you use a co-op. They are:

1. Is the co-op really configured as a co-op or is it something somebody cobbled together? You can only find this out by doing some serious due diligence. Every co-op has a different twist. Your author has discovered on her clients' behalf many that are wonderfully compliant and some that are *just plain unlawful!*
2. Ask what the co-op staff is doing to do due diligence on the vendors it lists. This is a lot more than just putting some firm or company on the list because somebody liked them or had one good experience in his political subdivision.
3. Ask other co-op members (generally fellow political subdivisions) what experience they had with the co-op staff helping them if a co-op vendor failed to perform. Some co-ops are great about this and some don't do anything.
4. Ask yourself what you are really going to get from a co-op that you can't get yourself. If your answer is supported by negative responses to the first three questions above, your answer will be pretty obvious. Co-op purchasing is not always the best choice.

DESIGN BUILD: Definitely not for everyone, design build is another delivery method where the track record of the design build firm should be carefully reviewed and references checked. Some design firm that just got *married* to some builder is not a design build firm; it is a marketing ploy! Design build teams of design professionals and builders who have worked together for a long time can and do save money and build buildings faster in certain situations. But firms that have just forged a union to go after your business are an unholy form of matrimony.

CONSTRUCTION MANAGER AS AGENT: If your political subdivision understands just how much more exposure it has if it does this kind of construction *and* has true in-house professionals like registered architects or professional licensed engineers or a very serious experienced builder, you probably have the right team to oversee this form of construction. That being said, this is not a delivery method for a small political subdivision with a few key administrators wearing many hats.

FOUNDATION OR CHARITABLE ENDEAVOR OR PRIVATE EDUCATIONAL INSTITUTION OR CHARTER SCHOOL: All of these institutions have building needs. Many political subdivisions have a charitable function housed within their facilities. Yet they are utterly different and have no requirement to competitively bid, save whatever the private or foundation by laws require. Nevertheless, it is easy and dangerous to start co-mingling the funds, personnel and vendor contributions of these two. Treat them as if they are entirely separate and you will be fine. Otherwise, you are in tremendous danger!

In your every purchasing adventure, I wish you the very best.

*Did you find these materials helpful and practical? Then don't miss the opportunity to enjoy the all new and up to date 2008 edition of *Protect Your Great Ideas and Assets* currently being adopted for use by many universities and by practicing administrators in a variety of institutions in Texas. Proceeds from the sales support scholarships to deserving students. You may order the current book by visiting www.thefowlerlawfirm.com/howitworks.html and the complete information system by visiting www.thefowlerlawfirm.com/program1.html. To learn more about THE FOWLER LAW FIRM FOUNDATION and its scholarships, please visit www.thefowlerlawfirm.com/foundation.html.*

You can hear Mrs. Fowler speak on this and other related topics at the following conferences throughout Texas this summer:

Texas Association of Community College Business Officers' 2008 Conference on June 11, 2008 at the Waco Convention Center in Waco, Texas. Mrs. Fowler will be presenting from 3 PM to 5 PM in McLennan 1 on common concerns related to purchasing. For more information, please visit <http://www.taccbo.org/>.

TASBO's Alamo Area Association of School Business Officials' 12th Annual Summer Conference on June 13, 2008 at Tivy High School in Kerville, Texas. Mrs. Fowler will be presenting from 11 AM to 12 PM in Room A108 on the topic *How a Texas School District Business Official Avoids Getting Sued, Indicted or Fired... in One Easy Lesson*". For more information, please visit <http://65.205.109.51/PDFs/May06.pdf>.

Texas Council of Women School Executives' Summer Conference on June 21, 2008 at the Renaissance Austin Hotel in Austin, Texas. Mrs. Fowler will be presenting from 10:45 AM to 12 PM on *Personnel Law Points that Everyone Can Follow*. For more information, please visit <http://www.tcwse.org/conference/summer/2008/summer08.html>.

San Antonio Texas Community College Human Resources Professionals on June 23, 2008.

National Association of Purchasing Managers' Momentum 2008 on June 25, 26 and 27, 2008 at the Bahia Mar Resort in South Padre Island, Texas. Mrs. Fowler will be presenting on June 25 from 1:05 to 1:30 PM in Class W1a on *Tough Talk about Municipalities, Counties and Other Political Subdivisions – Construction Procurement* in and from 2 to 2:30 PM in Class W2a on *Purchasing People: Labeling People, a Few Words of Caution*. She will be presenting on June 26 from 8-9 AM in Classroom C on *Insurance Purchasing Requirements*. For more information, please visit <http://www.napmrgv.org/momentum/momentum.htm>.

Laura Fowler and THE FOWLER LAW FIRM P.C. are so grateful to so many of you who have helped to make our firm a success. The Fowler Law Firm P.C. is a full service law firm whose attorneys have many years of experience in the handling of education institution issues, both public and private, non-profit associations, real estate, family law, probate and estate, business formation and taxation and all aspects of copyright, trademarks and patents. We never charge a client a fee or incur any expense until the client understands and agrees. In addition, we often counsel with your clients and friends and give them the information they need at no charge when we cannot truly be of service. For more information or to refer a matter to us please contact us at **(512) 441-1411** or visit our website at www.thefowlerlawfirm.com.

To read the on-line version of this article, please visit www.thefowlerlawfirm.com/newsletter/schools/061108.htm.

This information is provided by Laura S. Fowler JD, and J. Nevin Shaffer JD, Attorneys at Law with The Fowler Law Firm PC. It is not intended as a substitute for careful review by legal counsel of your choosing. We would be most honored to assist you in your every real legal need.

Contact Laura Fowler at fowler@thefowlerlawfirm.com or call (512) 441-1411.

As with any legal issues, please consult your attorney with questions.