

**GMA
Research
Report
February 2011**



Public Works Construction Projects



3rd Edition

A Georgia Municipal
Association Publication



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FOREWORD

The Georgia Municipal Association is pleased to provide the third edition of **Public Works Construction Projects** to our members. This edition contains information on House Bill 1079, which passed in the 2000 Session of the Georgia General Assembly, House Bill 513, which passed in the 2001 Session, and Senate Bill 146, which passed in the 2007 Session.

HB 1079 established uniform bidding requirements for local government public works construction projects. The legislation was developed by the Public Construction Law Task Force, which consisted of officials from the Georgia Municipal Association (GMA), the Association County Commissioners of Georgia (ACCG), the Associated General Contractors – Georgia Chapter (AGC), and the Georgia Utility Contractors Association (GUCA). The Task Force worked for almost two years developing these requirements.

HB 513 made several technical corrections to the requirements of HB 1079. Additionally, the legislation provided bidders and offerors on public works construction projects the same protections from unfair competitive practices as provided to bidders and offerors on road construction projects in the current open records law.

SB 146 made changes to the requirements for bid advertisements. Most notable, it clarified the requirements for online advertisements and required that the advertisement list the status of needed permits and easements or rights of way.

This guide has been prepared to explain the regulations of the Georgia Local Government Public Works Construction Law and assist city officials in their efforts to procure contracts for public works construction projects in accordance with state law.

Jim Higdon
Executive Director

The primary author of the 2000 and 2001 editions of this publication was Perry Hiott, GMA Director of Research & Redevelopment Services. The 3rd edition has been prepared by Susan Moore, GMA General Counsel, with assistance from Jeff Jeter, GMA Legal Intern.

ACKNOWLEDGMENTS

The requirements that ultimately became the Georgia Local Government Public Works Construction Law were developed over a period of several years, and many individuals and organizations were involved with this project. The Georgia Municipal Association would like to recognize those individuals for their efforts.

We extend special thanks to Rep. Tom Shanahan, who introduced HB 1079 in the 1999 Session of the General Assembly and guided it through the House of Representatives during the 2000 Session. Rep. Shanahan also introduced HB 513 during the 2001 Session. We also extend thanks to Sen. Billy Ray, who carried HB 1079 in the Senate during the 2000 Session and HB 513 during the 2001 Session.

We would also like to thank the GMA members of the Public Construction Law Task Force for their dedication and hard work on this project:

Hal Averitt	Mayor	Statesboro
Dick Bolin	City Manager	Newnan
Tom Hall	City Manager	LaGrange
Cardee Kilpatrick	Commissioner	Athens-Clarke County
Bill Lewis	City Manager	Toccoa
Danny Mabry	City Manager	Carrollton
Walter Smith	City Manager	Monticello
Jerolyn Webb-Ferrari	Assistant City Attorney	Atlanta
Felicia Strong-Whitaker	Procurement Director	Atlanta

Appreciation is given to Susan Moore, GMA General Counsel, for her efforts in drafting major portions of the legislative proposal that ultimately became HB 1079. Other GMA staff members involved with this project during the past three years include Perry Hiott and Bill Thornton, along with former GMA staff members Mary Ann Draut and the late Ed Sumner.

We would like to thank the individuals who served on the Public Construction Law Task Force on behalf of other organizations, as well as the individuals that provided staff support to the Task Force: Vikki McReynolds, Georgia Utility Contractors Association; Kelly Pridgen, Association County Commissioners of Georgia; and Mark Woodall, Associated General Contractors – Georgia Chapter.

Finally, special thanks is given to the firms and organizations that provided materials and information that were used to prepare this guidebook: Alston & Bird LLP; Association County Commissioners of Georgia (ACCG); Associated General Contractors – Georgia Chapter; Stevenson and Palmer Engineers; the Brookwood Group; Holder Construction Company; and the American Consulting Engineers Council of Georgia (ACEC).

CHAPTER ONE INTRODUCTION

House Bill 1079

HB 1079, which passed in the 2000 Session of the Georgia General Assembly, was the result of a two-year effort by the Public Construction Law Task Force to develop uniform requirements for local government public works construction projects. The legislation requires contracts for such projects be awarded in an open and competitive manner. Additionally, HB 1079 authorizes the use of current construction industry practices in order to provide increased flexibility to local governments that are constructing public facilities.

The origin of HB 1079 can be traced to SB 229, which was introduced in the 1997 Session of the General Assembly. This legislation proposed to restrict the use of local government personnel working on their own projects, and it would have subjected local government projects to state-established uniform bid requirements that were developed without input from local governments. The construction industry supported this legislation because the lack of uniformity among cities, counties, school boards, and authorities made it difficult for contractors to have knowledge of the specific bidding requirements of the various local governments. Additionally, the construction industry sought to address such practices as:

- The use of large change orders which greatly exceed original project costs and which alter the scope of the original projects;
- The use of force account labor (self-performance) to construct large public facilities; and
- The use of “emergency” situations to bypass local advertising and competitive bid requirements.

In 1997, the Public Construction Law Task Force was formed to determine the feasibility of developing a uniform public construction bid law. The Task Force consisted of representatives from GMA, ACCG, the Associated General Contractors (AGC), and the Georgia Utility Contractor’s Association (GUCA). Representatives from the Georgia School Boards Association (GSBA) and the American Consulting Engineers Council of Georgia (ACEC) also participated in meetings of the Task Force. As a result of good faith demonstrated by the Task Force to address the construction industry’s concerns, AGC and GUCA did not pursue passage of SB 229 during the 1998 Session.

During the summer of 1998, the Task Force tentatively agreed to proceed with the development of uniform procurement procedures for public works construction projects. In March of 1999, after more than one year of work, the Task Force completed its proposed uniform procurement requirements. The proposal was presented to Rep. Tom Shanahan, who introduced the legislation as HB 1079

during the last week of the 1999 Session. The Task Force continued to develop HB 1079 between the 1999 and 2000 Sessions. During the 2000 Session, Rep. Shanahan introduced a substitute version of HB 1079, which contained the final recommendations of the Task Force. Both the House and the Senate approved the revised legislation during the 2000 Session, and Governor Roy Barnes signed HB 1079 into law on April 20, 2000. The legislation, which became Act # 663, took effect on that date.

HB 1079: Summary

- Passed in the 2000 Session of the General Assembly.
- Signed into law by Governor Barnes on April 20, 2000. (Act # 663.)
- Effective date: April 20, 2000.

Under HB 1079, local governments in Georgia are now required to obtain bids or proposals for public works construction projects costing \$100,000.00 or more. HB 1079 required some cities in Georgia to significantly modify their procedures for procuring public works construction contracts. Additionally, as the legislation took effect on April 20, 2000, it is important for city officials to fully understand what the law now requires and allows.

HB 1079: Key Provisions

- The legislation establishes requirements for procurement of local government public works construction contracts.
- The legislation does not apply to public works construction projects that can be performed at a cost of less than \$100,000.
- The legislation does not restrict cities from using in-house personnel on municipal public works construction projects.
- The legislation does not restrict cities from using inmate labor on public works construction projects.
- The legislation authorizes cities to adopt a pre-qualification process for prospective bidders.

House Bill 513

HB 513, which was passed in the 2001 Session of the General Assembly, makes various technical corrections to the requirements of HB 1079. Such corrections include restatements of requirements that were inadvertently deleted by HB 1079, correcting cross-references in the Georgia Code, and renumbering various sections and article numbers in the Georgia Code.

HB 513: Summary

- Passed in the 2001 Session of the General Assembly.
- Signed into law by Governor Barnes on April 27, 2001. (Act # 261.)
- Effective Date: July 1, 2001.

Section 1 of HB 513 contains bonding requirements for State of Georgia agencies. Prior to the passage of HB 1079, portions of the payment and performance bond requirements for State of Georgia agencies were included in Title 36 of the Georgia Code, which contains provisions for local governments. These provisions were unintentionally deleted by HB 1079. HB 513 re-establishes bid, payment, and performance bond requirements for State of Georgia public works construction projects and makes such requirements consistent with the requirements for local governments.

Sections 2 through 11 of HB 513 contain many technical corrections and cross-references.

Section 12 of HB 513 establishes a title for Chapter 91 of Title 36 of the Georgia Code: "Georgia Local Government Public Works Construction Law." This section also renumbers various article numbers and code sections, updates cross-references, and clarifies existing language.

Section 13 of HB 513 amends the Georgia Open Records Act. The new provisions provide bidders and offerors on public works construction projects with the same protections from unfair competitive practices previously provided only to bidders and offerors on road construction projects in the previous open records law.

HB 513: Key Provisions

- The legislation identifies Chapter 91 of O.C.G.A. Title 36 as the “Georgia Local Government Public Works Construction Law.”
- The legislation restores certain bonding requirements for state public works construction projects that were deleted by last year’s legislation.
- The legislation makes bonding requirements for state public works construction projects consistent with local government bonding requirements.
- The legislation exempts hospital authorities from the law’s requirements, under certain conditions.
- The legislation exempts pending, rejected, or deferred bid proposals from the Open Records Law until such time as the final award is made, terminated, or abandoned. This provision only applies to DOT projects and public works construction projects.

Senate Bill 146

SB 146, which was passed in 2007, adds definitions and expands on the procedure for advertising of bids. It clarifies the procedure for online bid advertising, requires that bid advertisements list the status of required permits and easements or rights of way, and emphasizes that bid advertisements contain sufficient details that a potential contractor will know the extent and character of the work to be done.

SB 146: Summary

- Passed in the 2007 Session of the General Assembly.
- Signed into law by Governor Perdue on May 29, 2007. (Act # 342.)
- Effective Date: July 1, 2007.

Section 1 of SB 146 adds definitions for “base bids” and “alternate bids,” terms that are used in section 2.

Section 2 of SB 146 expands the requirements for bid advertisements. It outlines the procedure for online bid posting. This section requires that bid advertisements state whether the bid will be awarded based on the base bid or the base bid plus selected alternatives, and requires that advertisements list the status of all federal, state, or local permits and the status of all required easements or rights of way. All bids must contain

a level of detail appropriate to the project and present the specifications in a way that will enable the public to know the extent and character of the law.

SB 146: Key Provisions

- The legislation allows contracts to be advertised solely on the Internet so long as it is posted continually for four weeks.
- The legislation requires that the bid advertisement state whether the bid will be awarded based on the base bid alone or the base bid plus selected alternatives.
- The legislation requires that the bid advertisement list the status of all required federal, state, and local permits as well as required easements or rights of way.
- The legislation required that the bid advertisement describe the project in a level of detail appropriate to the project and in a manner that a member of the public will be able to know the extent and character of the work to be done.

CHAPTER TWO DEFINITIONS AND EXEMPTIONS

This chapter describes the various definitions and exemptions contained in the Georgia Local Government Public Works Construction Law. Most of the definitions contained in the legislation were developed by the Public Construction Law Task Force, based upon language used in the American Bar Association's (ABA) Model Procurement Code, American Institute of Architects (AIA) documents, other Georgia statutes, and laws from other states.

A. WHAT IS PUBLIC WORKS CONSTRUCTION?

Public works construction includes most governmental construction projects costing more than \$100,000, except road projects, which are addressed in another section of the Georgia Code. However, the term does not include routine operation, repair, and maintenance of buildings and property.

The Georgia Local Government Public Works Construction Law defines **public works construction** as follows:

***Public works construction** means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property other than those projects covered by Chapter 4 of Title 32. Such term does not include the routine operation, routine repair, or maintenance of existing structures, buildings, or real property. (O.C.G.A. § 36-91-2 (12)).*

1. Our city plans to add a small addition to our city hall building. Is this considered public works construction? Would the requirements of the Public Works Construction Law apply?

Answer: Yes, an addition to a city hall building is considered public works construction as defined by the Public Works Construction Law. The requirements of this law would apply unless the project qualifies for one of the law's stated exemptions.

2. Our city plans to re-paint the exterior walls on our city hall building. Is this considered public works construction? Would the requirements of the Public Works Construction Law apply?

Answer: No, the routine operation, repair, or maintenance of an existing structure or building is not included in the definition of public works construction. The requirements of this law would not apply.

B. DEFINITIONS. (O.G.G.A. § 36-91-2)

In addition to defining public works construction, the Georgia Local Government Public Works Construction Law defines numerous terms that are used throughout the legislation. These terms are defined below:

- **Governing authority** means the official or group of officials responsible for governance of a governmental entity. Examples of a governing authority include a city council, a county board of commissioners, or a county school board.
- **Governmental entity** means a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission but shall not include any authority, board, department, or commission of the state, or a public transportation agency as defined by Chapter 9 of Title 32.

Is our city's Water Board a governmental entity, and is it subject to the requirements of the Georgia Local Government Public Works Construction Law?

Answer: Yes, if the Board is a local government authority, it is a governmental entity and subject to the requirements of the Public Works Construction Law, regardless of how it was created (such as through an ordinance of the city, local legislation of the Georgia General Assembly, or a local constitutional amendment). However, an exception now exists for hospital authorities, under certain conditions.

Is our county's hospital authority a governmental entity, and is it subject to the requirements of this law?

Answer: Yes, a hospital authority is a governmental entity. However, a hospital authority may not be subject to the requirements of the Georgia Local Government Public Works Construction Law. HB 513 excludes hospital authorities, under certain conditions, from the requirements of this law. (Please refer to pages 14 -15 of this publication or O.C.G.A. § 36-91-22 (i).)

- **Change order** means an alteration, addition, or deduction from the original scope of work as defined by the contract documents to address changes or unforeseen conditions necessary for project completion.

- **Base bid or base proposal** means the amount of money stated in the bid or proposal as the sum for which the bidder or proposer offers to perform the work.
- **Alternate bid** means the amount stated in the bid or proposal to be added to or deducted from the base bid or base proposal if the corresponding change in project scope or alternate materials or methods of construction is accepted.
- **Competitive sealed bidding** means a method of soliciting public works construction contracts whereby the award is based upon the lowest responsive, responsible bid in conformance with the provisions of subsection (b) of Code Section 36-91-21.
- **Competitive sealed proposals** means a method of soliciting public works contracts whereby the award is based upon criteria identified in a request for proposals in conformance with the provisions of subsection (c) of Code Section 36-91-21.
- **Emergency** means any situation resulting in imminent danger to the public health or safety or the loss of an essential governmental service.
- **Responsible bidder or responsible offeror** means a person or entity that has the capability in all respects to perform fully and reliably the contract requirements.
- **Responsive bidder or responsive offeror** means a person or entity that has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.
- **Bid bond** means a bond with good and sufficient surety or sureties for the faithful acceptance of the contract payable to, in favor of, and for the protection of the governmental entity for which the contract is to be awarded.
- **Payment bond** means a bond with good and sufficient surety or sureties payable to the governmental entity for which the work is to be done and intended for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the public works construction contract.
- **Performance bond** means a bond with good and sufficient surety or sureties for the faithful performance of the contract and to indemnify the governmental entity for any damages occasioned by a failure to perform the same within the prescribed time. Such bond shall be payable to, in favor of, and for the protection of the governmental entity for which the work is to be done.

- **Scope of project** means the work required by the original contract documents and any subsequent change orders required or appropriate to accomplish the intent of the project as described in the bid documents.
- **Scope of work** means the work that is required by the contract documents.
- **Sole source** means those procurements made pursuant to a written determination by a governing authority that there is only one source for the required supply, service, or construction item.

C. EXEMPTIONS. (O.C.G.A. § 36-91-22)

The requirements of the **Georgia Local Government Public Works Construction Law** do not apply to the following public works construction projects:

- **Public Works Contracts Costing Less Than \$100,000.** Public works construction projects that can be performed at a cost of less than \$100,000 are not subject to the requirements of the Public Works Construction Law. However, local governments are specifically prohibited from intentionally subdividing a contract for a project costing \$100,000 or more in order to evade the requirements of this law.

Since the requirements of the Public Works Construction Law are designed to promote open competition and reduce project costs, some local governments may desire to use the procedures required by this law on smaller projects. Other local governments may already have in place local ordinances or charter provisions requiring a competitive award of construction contracts for projects under \$100,000. Local governments can adopt competitive award procedures for public works construction projects of less than \$100,000, but they are not required to do so. For public works construction projects of \$100,000 or more, any local requirements that conflict with the provisions of the Public Works Construction Law are superceded.

- **Inmate Labor.** Any governmental entity having a correctional institution may use inmate labor to perform public works construction projects. Additionally, any governmental entity may contract with a governmental entity having a correctional institution for the use of inmate labor from such institution and use the inmates in the performance of any public works construction project. In such cases, the requirements of the Public Works Construction Law do not apply.

Can a city award a contract for one or more portions of a public works construction project and use inmate labor to perform the remaining portions of the project?

Answer: Yes. Under the Public Works Construction Law, local governments are specifically authorized to utilize inmate labor for public works construction projects. O.C.G.A. § 36-91-22(b). However, if the local government contracts with a private firm to perform a portion of the project, the provisions of this law will apply to any contract estimated to exceed \$100,000. O.C.G.A. § 36-91-22 (g).

Example: A city plans to construct an addition to its city hall and use inmate labor for all aspects of the construction except electrical, heating and air conditioning, and plumbing. The city plans to serve as its own general contractor and contract with trade contractors for the electrical, heating/air conditioning, and plumbing services. If any of the city's contracts with the private trade contractors is estimated to cost more than \$100,000, the city must comply with the Public Works Construction Law's requirements for advertising the contract opportunity and awarding the contract.

Please note, however, that local governments are prohibited from intentionally subdividing a contract costing \$100,000 or more in order to evade the requirements of the law. O.C.G.A. § 36-91-22(a).

- **Federal or State Labor.** The Georgia Local Government Public Works Construction Law does not apply when the labor used or to be used in a public works construction project is furnished at no expense by the state or federal government. In this instance, the governing authority shall have the power and authority to purchase material for such public works construction project and use the labor furnished free to the governmental entity.
- **Federal Grants.** The Georgia Local Government Public Works Construction Law contains an exemption for public works construction contracts involving the expenditure of federal assistance or funds, the receipt of which is conditioned upon compliance with the federal laws or regulations regarding the procedures for awarding public works construction contracts. A governmental entity must comply with the federal requirements and is not required to comply with the provisions of the Public Works Construction Law that differ from the federal requirements. O.C.G.A. § 36-91-22(d). Additionally, the governmental entity must provide notice that the federal procedures exist for the award of such contracts in the advertisement required by subsection (b) of Code Section 36-91-20. The availability and location of

such federal requirements must be provided to any person requesting such information.

One example of a project involving the use of federal grants is a public facility (water/sewer facility, community health facility, etc.) that is funded with Community Development Block Grant (CDBG) funds provided by the U.S. Department of Housing and Urban Development (HUD).

- **Emergencies and Natural Disasters.** The Georgia Local Government Public Works Construction Law does not apply to public works construction projects necessitated by an emergency; provided, however, that the nature of the emergency must be described in the minutes of the governing authority's meeting. (While cities must only describe the nature of the emergency in its minutes, any contract let by a *county* due to an emergency must be ratified by the board of commissioners, as soon as practicable. O.C.G.A. §36-91-22(e). Also, the nature of the emergency must be described in the meeting minutes.)

This exemption is designed to protect the public from interruption of local government services during true emergencies and natural disasters.

What acts are considered "emergencies" to the extent that the requirements of the Georgia Local Government Public Works Construction Law would not apply?

Answer: O.C.G.A. Section 36-91-2(5) defines **emergency** as "any situation resulting in imminent danger to the public health or safety or the loss of an essential government service." While this definition is intentionally broad, it applies to such natural disasters as earthquakes, fires, floods, and hurricanes, as well as any other emergencies that result in the legitimate disruption of an essential government service. For example, had the Y2K problem caused the disruption of an essential municipal service (water, sewer, electricity, etc.) on January 1, 2000, such disruption probably would have been considered an emergency. However, problems that cause mere inconveniences to municipal operations would not be considered emergencies as defined by the law.

- **Road Construction.** The Georgia Local Government Public Works Construction Law does not apply to construction projects subject to the requirements of Chapter 4 of Title 32.
- **Self-Performance.** The Georgia Local Government Public Works Construction Law does not apply to public works construction projects or any portion of a public works construction project self-performed by a governmental entity. However, if the governmental entity contracts with a private person or entity for a portion of such

project, the provisions of this law shall apply to any such contract estimated to exceed \$100,000.00.

Can a city award a contract for one or more portions of a public works construction project and self-perform the remaining portions of the project?

Answer: Yes. Under the Local Government Public Works Construction Law, local governments are specifically authorized to utilize in-house personnel for public works construction projects. However, if the local government contracts with a private firm to perform a portion of the project, the provisions of this law will apply to any contract estimated to exceed \$100,000. O.C.G.A. § 36-91-22 (g).

Example: A city plans to construct an addition to its city hall and use in-house labor (self-perform) for all aspects of the construction except electrical, heating and air conditioning, and plumbing. The city plans to serve as its own general contractor and contract with trade contractors for the electrical, heating/air conditioning, and plumbing services. If any of the city's contracts with the private trade contractors is estimated to cost more than \$100,000, the city must comply with the law's requirements for advertising the contract opportunity and awarding the contract.

Please note, however, that local governments are prohibited from intentionally subdividing a contract costing \$100,000 or more in order to evade the requirements of the Public Works Construction Law. O.C.G.A. § 36-91-22(a).

- **Sole Source.** The legislation does not apply to sole source public works construction contracts. If there is only one legitimate provider of a service, product, or construction item, the local government is not required to adhere to the advertising and competitive procurement requirements of the Local Government Public Works Construction Law. However, the local government must make a written determination that there is only one source of the service, product, or construction item. O.C.G.A. §§ 36-91-2(15), 36-91-22 (h).
- **Hospital Authorities.** HB 513 (passed in the 2001 Session) exempts hospital authorities from the requirements of the Georgia Local Government Public Works Construction Law. However, a public works construction contract entered into by a hospital authority must comply with the requirements of this law if, in connection with such contract, the hospital authority either:
 - 1) Incurs indebtedness and secures such indebtedness by pledging amounts to be received by such authority from one or more counties or municipalities through an intergovernmental contract entered into in accordance with Code Section 31-7-85; or

- 2) Receives funds from the state or one or more counties or municipalities for the purpose of financing a public works construction project, which moneys are not for reimbursement of health services provided.
- **Professional Services.** In addition to the projects specifically exempted from the Local Government Public Works Construction Law's requirements under O.C.G.A. § 36-91-22, contracts for professional services that do not contain a construction element are not subject to the law's requirements. Examples include contracts for professional design services (architectural or engineering) or management services (project/program manager). However, any contract where the other party is "at risk" (meaning financially liable) for construction and provides labor or building materials is subject to the requirements of the Public Works Construction Law, and such contract must be awarded by either competitive sealed bids or competitive sealed proposals.

CHAPTER THREE

PROCUREMENT OF PUBLIC WORKS CONSTRUCTION CONTRACTS

City officials must consider many factors when planning public works construction projects, including:

- Should the city solicit bids or proposals?
- Should pre-qualification be required?
- Should pre-bid conferences be required?

The requirements of the Georgia Local Government Public Works Construction Law affect many of these considerations. This chapter discusses the procurement process in sequence - from selection of the desired construction delivery method to approval of contracts.

1. Construction Project Delivery Methods. (O.C.G.A. § 36-91-20(c))

One of the key provisions of the Georgia Local Government Public Works Construction Law is the allowance of alternative construction delivery methods for public works construction projects. Any construction delivery method may be utilized, provided that all public works construction contracts that place the bidder or offeror at risk for construction and require the provision of labor or building materials in the execution of the contract must be awarded on the basis of competitive sealed bidding or competitive sealed proposals.

Several construction delivery methods are briefly described below. These methods are conceptual, and variations of each method may exist. More detailed descriptions of these methods are contained in Chapter Four of this report.

- 1) **Traditional Model (Design-Bid-Build).** In this model, the owner hires design professionals (i.e., architects and/or engineers) to design the project. After completion of the design phase, the owner solicits bids for the construction portion of the project. The owner typically awards the contract to the bidder who submits the lowest responsive, responsible bid. The selected contractor then retains necessary trade contractors.
- 2) **Design-Build.** In this model, the owner hires a single firm who provides all design and construction services. Several different firms (design professionals and trade contractors) may provide the actual services, yet the owner has only one contract with the entity responsible for both types of services.
- 3) **Construction Management (CM) At-Risk.** In this model, the construction manager assumes financial risks and liabilities placing the manager "at risk."

This model eliminates the duplication of services caused by employing both a construction manager and general contractor. The model also allows the owner to avoid entering into contracts with numerous trade contractors.

2. Construction Management Methods

Unlike the project delivery methods listed above, which are based on the assignment of “delivery” risk for design and construction, the following methods are referred to as “management” methods. These methods can be used in conjunction with any of the project delivery methods listed above.

- a. **Program/Project Management.** In this method, the owner employs a project manager to act on the owner’s behalf during all phases of the project. The primary distinction between the project manager and the construction manager depends upon the scope of the project being performed. Typically, the project manager will likely fill the role of the owner’s staff in situations where the owner does not have adequate or experienced personnel.
- b. **Agency Construction Management.** In this method, the owner hires a construction manager who will serve as a professional adviser and who will manage and coordinate the activities of the design and construction teams. However, the general contractor and the design team still have contracts directly with the owner. The selected construction manager has little liability or responsibility and serves only in an advisory role. Therefore, the construction manager is at no financial risk.

3. Competitive Processes. (O.C.G.A. § 36-91-21)

Local governments must utilize one of two competitive processes when soliciting public works construction contracts that are subject to the requirements of the Georgia Local Government Public Works Construction Law. The two competitive processes are **competitive sealed bids** and **competitive sealed proposals**. These processes are described below:

- a. **Competitive Sealed Bids.** Under this method, the city issues an Invitation to Bid, which contains the necessary requirements for contract award. Prospective bidders are instructed to submit bids in accordance with these requirements. The invitation to bid must list whether the city will award the contract based on the base bid alone or based on the base bid plus selected alternatives. The city must select the bid from the responsible and responsive bidder who submits the lowest price and meets all of the requirements included in the bid invitation.

When using competitive sealed bids, qualifications of the contractor are not selection criteria. However, prequalification of contractors is allowed under the Local Government Public Works Construction Law, and the

prequalification process can be used to determine which contractors are eligible to compete for a particular project. For additional information on prequalification, please refer to Section 7 of this chapter.

- b. **Competitive Sealed Proposals.** Under this method, the city issues a Request for Proposal (RFP), which contains pertinent information regarding the project. The RFP contains a description of the project and the factors that will be used to evaluate submitted proposals. The RFP may or may not require a final price or fee to be included with the proposal. Price may be one of the factors considered by the city when making their final decision, but it will not be the only factor. All submitted proposals are evaluated in accordance with the criteria provided in the RFP and the city must make its final selection based on such criteria.

There are two types of Competitive Sealed Proposals:

1. **Competitive Cost Sealed Proposals** include pricing of the total construction cost (TCC), including the construction cost of work, as a selection criterion. Qualifications are also typically weighted selection criteria.
2. **Competitive Qualifications Sealed Proposals** do not include construction cost of work as selection criteria, but often do include contractor's fee and/or general conditions as weighted selection criteria. Qualifications are also typically weighted selection criteria.

More detailed descriptions of these processes are provided below in Section 5, Solicitation of Bids and Proposals.

4. Advertising Requirements. (O.C.G.A. § 36-91-20(b))

A key element of the Georgia Local Government Public Works Construction Law is the establishment of minimum requirements for advertising public works construction opportunities. Previously, cities advertised such opportunities in accordance with their respective charters, local ordinances, or established policies. Some cities chose to advertise in the county legal organ, while others chose to place ads in other newspapers (weekly papers or large papers having regional or statewide circulation). Additionally, several cities posted their construction opportunities on their own Internet Web sites, while other cities simply posted a notice at their city hall. (Meanwhile, counties were previously required to post a notice of the construction opportunity on the courthouse door and to advertise the opportunity once per week for four weeks in the legal organ of the county.) Again, the lack of uniformity made it difficult for contractors to learn of local government construction opportunities. As a result, mandatory advertising in the county legal organ was desired by the construction industry.

The advertising requirements contained in this law, which were developed by the Public Construction Law Task Force, provide both uniformity and flexibility by allowing local governments to advertise their construction opportunities in either the county legal organ or on an Internet website. Additionally, local governments must advertise the contract opportunity by posting a notice in the governing authority's office. Local governments may, in their discretion, advertise in other sources and with more frequency than the minimum requirements listed below, depending on their needs.

The law's advertising requirements are listed below:

- A governmental entity must publicly advertise a contract opportunity for public works construction projects.
 - The contract opportunity notice must be posted conspicuously in the governing authority's office; and
 - The contract opportunity must be advertised in either the legal organ of the county or by electronic means on an Internet website of the governmental entity or one identified by the governmental entity.
- Contract opportunities advertised in the legal organ must be advertised at least 2 times:
 - The first ad must be at least 4 weeks prior to bid/proposal opening date.
 - The second ad must follow at least 2 weeks after the first ad.
- Contract opportunities advertised solely on the Internet must be posted continuously for at least four weeks before bids or proposals are opened.
- Plans and specifications must be available on the first day of the advertisement, and they must be open to inspection by the public.
- The advertisement must include such details/specifications so as to enable the public to know the extent and character of the work to be done.
- All notices must advise potential bidders/offerors of any mandatory prequalification requirements, any pre-bid conferences, and/or any federal requirements.

Internet Advertising Options

The Georgia Local Government Public Works Construction Law requires that contract opportunities for public works construction projects must be posted in the governing authority's office and advertised in either the legal organ of the county or on an Internet Web site of the governmental entity or one identified by the governmental entity.

All cities, especially those that do not have their own Internet Web sites, may advertise public works construction opportunities on Georgia Local Government Access, an Internet website developed by the Georgia Municipal Association (GMA) and the Association County Commissioners of Georgia (ACCG). This service is provided free to local governments. Additionally, there is no charge to the contractors who access this website. The website address is listed below:

www.glga.org

1. *Our city prefers to advertise bid and proposal opportunities in a newspaper that has general circulation in our metropolitan area instead of using the legal organ for the county in which our city is located. How can we do this and comply with the requirements of the Georgia Local Government Public Works Construction Law?*

Answer: This law requires that local governments advertise bid and proposal opportunities for public works construction projects in either the legal organ of the county or on an Internet website of the governmental entity or an Internet website identified by the governmental entity. O.C.G.A. § 36-91-20 (b).

However, the law does not prohibit a local government from advertising bid and proposal opportunities in other newspapers, provided that the advertisement is also published in the county's legal organ or on an Internet website.

A possible solution to this situation would be for the city to post the bid/proposal announcement on an Internet website (to meet the requirements of the Local Government Public Works Construction Law), along with the publication of an advertisement in a newspaper having general circulation.

5. Availability of Project Documents. (O.C.G.A. § 36-91-20(b))

As stated above, project plans and specifications must be available to potential bidders/offerors and the general public on the first day of advertisement. O.C.G.A. § 36-91-20(b). The amount of detail contained in the project documents is dependent upon the competitive process used (competitive sealed bids or competitive sealed proposals) and the construction delivery method used.

6. Solicitation of Bids and Proposals

The Georgia Local Government Public Works Construction Law's requirements for soliciting bids or proposals are provided below:

a. Competitive Sealed Bids. (O.C.G.A. § 36-91-21(b))

Under the competitive sealed bid method, the following requirements must be met:

- The governmental entity must publicly advertise an invitation for bids;
- The advertisement must state whether the government entity will award the project based on the base bid or the base bid plus selected alternatives
- Bidders must submit sealed bids based on the criteria set forth in such invitation;
- The governmental entity must open the bids publicly and evaluate such bids without discussions with the bidders; and
- The contract must be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.
 - See Chapter Two, Section B., Definitions, for definitions of responsible and responsive bidder or offeror.
 - If the bid from the lowest responsible and responsive bidder exceeds the funds budgeted for the public works construction contract, the governmental entity may negotiate with such apparent low bidder to obtain a contract price within the budgeted amount. Such negotiations may include changes in the scope of work and other bid requirements.

Additional information can be found in Section 16, Negotiation of Bids or Proposals.

b. Competitive Sealed Proposals. (O.C.G.A. § 36-91-21(c))

Under the competitive sealed proposal method, the local government must:

- Publicly advertise a request for proposals, which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project, as well as the relative importance of the evaluation factors;

What is “conceptual program information?”

Answer: Depending on the construction delivery method selected, “conceptual program information” could be a written description of the proposed project, schematic drawings, or completed design drawings.

- Open all proposals received at the time and place designated in the request for proposals so as to avoid disclosure of contents to competing offerors during the process of negotiations; and
- Make an award to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the governmental entity, taking into consideration the evaluation factors set forth in the request for proposals. The evaluation factors must be the basis on which the award decision is made. The contract file must indicate the basis on which the award is made.

Are there different types of competitive sealed proposals?

Answer: Yes, there are two types of competitive sealed proposals: 1) competitive **cost** sealed proposals; and 2) competitive **qualifications** sealed proposals. Competitive cost proposals include total construction cost (including the construction cost of work) as a selection criterion. Competitive qualifications proposals do not include construction cost of work as a selection criterion.

Offerors submitting proposals may be afforded an opportunity for discussion, negotiation, and revision of proposals. Discussions, negotiations, and revisions are allowed after submission of proposals and prior to award for the purpose of obtaining best and final offers. In accordance with the request for proposals, all responsible offerors found by the governmental entity to have submitted proposals reasonably susceptible of being selected for award must be given an opportunity to participate in such discussions, negotiations, and revisions. During the process of discussion, negotiation, and revision, the governmental entity must not disclose the contents of proposals to competing offerors. Doing so will void the city's agreement with the contractor.

Additional information can be found in Section 16., Negotiation of Bids or Proposals.

How can a city not disclose the contents of proposals to competing offerors (or anyone else)? Aren't such proposals public records and subject to the Georgia Open Records Act?

Answer: HB 513 amended the Georgia Open Records Act to prohibit bids and proposals on both road construction and public works construction projects from being reviewed by competing bidders and offerors until the contract is awarded, the bids or proposals are rejected, or the project is discontinued. O.C.G.A. § 50-18-72(6)(B).

The new requirements provide bidders and offerors on public works construction projects with the same protections from unfair competitive practices as provided only to bidders and offers on road construction projects in the previous open records law.

If competing bidders and offerors have access to the information contained in their competitors' bids and proposals before the contract is awarded, they may gain an unfair advantage. However, once a contract is awarded, all bids and proposals are rejected, or the project is discontinued, then the danger of this unfair advantage ceases and all of the information may be accessed.

7. Prequalification. (O.C.G.A. § 36-91-20(f))

Another key provision contained in the legislation is the authorization for local governments to adopt, in their discretion, a process for mandatory **prequalification** of

prospective bidders or offerors. A prequalification process allows a city to establish minimum criteria which potential bidders or offerors must meet in order to become eligible to submit a bid or proposal on a public works construction project.

While local governments are not required to use a pre-qualification process, those who choose to do so must adhere to the following requirements:

- Criteria for prequalification must be reasonably related to the project or the quality of work. Examples of such criteria include past relevant experience with similar projects or required licenses.

The criteria for prequalification should not be designed to eliminate all prospective bidders/offerors but one.

- The minimum criteria for prequalification must be available to any prospective bidder or offeror requesting such information.
- The process must include a method of notifying prospective bidders or offerors of the minimum criteria for prequalification. Under O.C.G.A. § 36-91-20(b), all required notices of advertisement must advise potential bidders/offerors of the mandatory pre-qualification process. The city's prequalification criteria should be included in the invitation to bid or request for proposal documents. Additionally, a copy of the city's prequalification criteria should be available at city hall.
- The prequalification process must include a procedure for a disqualified bidder to respond to his or her disqualification to a representative of the governmental entity; provided, however, that such procedure should not be construed to require the governmental entity to provide a formal appeal procedure. O.C.G.A. § 36-91-20(f)(4).

What kind of appeal procedure must be established for the prequalification process?

Answer: While this language does not require a formal process for appeals, it provides an opportunity for a disqualified bidder or offeror to discuss the reasons for his/her disqualification and to clear his/her good name. Additionally, the disqualified bidder or offeror may desire to find out how he or she can become "prequalified" in the future. The process can be as simple as a brief meeting with the city manager or purchasing agent. However, a city may, in its discretion, implement a more formal appeal procedure, such as a full hearing before the mayor and council.

8. Pre-Bid Conferences. (O.C.G.A. § 36-91-20(b)(7))

Some cities may desire to hold pre-bid conferences with prospective bidders or offerors. Pre-bid conferences allow the city to answer questions from the potential bidders/offerors in an open forum concerning various technical aspects of the city's invitation to bid or request for proposals.

Pre-bid conferences also provide an opportunity to identify and discuss any potential problems contained in the bid or proposal documents. If necessary, the city can then prepare an addendum to the project specifications. See Issuance of Addenda, below.

If a bidder/offeror's attendance at a pre-bid conference is mandatory, this requirement must be stated in the city's advertisement. O.C.G.A. § 36-91-20 (b)(7).

9. Issuance of Addenda. (O.C.G.A. § 36-91-20(d))

What happens if the city needs to modify its plans and specifications for a project after the bid invitation or RFP has been advertised? What if technical questions concerning the bid/proposal documents arise, and the city seeks to notify bidders or offerors of the answer? In these instances, the city may desire to issue an addendum. The addendum needs to be in writing and made available to all prospective bidders/offerors.

Any addendum that modifies plans and specifications should not be issued within a period of 72 hours prior to the advertised time for the opening of bids or proposals (excluding Saturdays, Sundays, and legal holidays). However, if the necessity arises to issue such an addendum within the 72 hour period, then the opening of bids or proposals shall be extended at least 72 hours (excluding Saturdays, Sundays, and legal holidays) from the date of the original bid or proposal opening without the need to re-advertise.

Cities that issue an addendum should take appropriate steps to notify all potential bidders or offerors of any changes to the project documents or to the bid/proposal opening date. Such notification can be made through a variety of methods, including newspaper ads, notices posted at city hall and/or on the city's Internet website, and notification by fax or phone call.

Example: A city issued an Invitation to Bid for a public works construction project, with the bid opening scheduled for Friday, October 19, 2001, at 10:00 a.m. However, on Wednesday, October 17, 2001, the city issued an addendum to the bid invitation. Under the requirements of the Georgia Local Government Public Works Construction Law, since the addendum was issued within 72 hours of the scheduled bid opening date, the bid opening date must be extended at least 72 hours (excluding Saturdays, Sundays, and legal holidays) from the date of the original bid opening. Thus, in this case, the bid opening must be extended until Wednesday, October 24, 2000 at 10:00 a.m.

While the city is not required to re-advertise the bid opening in accordance with the provisions of O.C.G.A. § 36-91-20(b), the city should take appropriate steps to notify all potential bidders or offerors of the addendum.

10. Submittal of Bids or Proposals.

- a. **Competitive Sealed Bids.** All bidders must submit sealed bids that have been prepared in accordance with the criteria set forth in the city's bid invitation. O.C.G.A. § 36-91-21(b)(2).
- b. **Competitive Sealed Proposals.** All proposers or offerors must submit proposals in accordance with the criteria contained in the city's request for proposals (RFP).

The Georgia Local Government Public Works Construction Law prohibits any person from preventing, or attempting to prevent, competition with regard to the submission of bids or proposals for public works construction projects. A potential bidder or offeror is prohibited from a) preventing or trying to prevent another bidder or offeror from submitting a bid or proposal; and b) causing or inducing another bidder or offeror to withdraw a bid or proposal for the particular project. O.C.G.A. § 36-91-21(d).

11. Bid Bonds.

The bid bond protects the city in the event that the city awards a contract to the lowest responsive and responsible bidder, but the bidder refuses to enter into a contract with the city for the specified bid amount. O.C.G.A. § 36-91-2(3).

The requirements for bid bonds are specified below:

- The Public Works Construction Law requires all bidders to submit bid bonds for all public works construction contracts with estimated bids or proposals over \$100,000.
- A city may, in its discretion, require a bid bond for projects with estimated bids or proposals of \$100,000 or less. O.C.G.A. § 36-91-50(a).
- The bid bond must be in an amount equal to 5% of the total contract amount.
- In lieu of a bid bond, the city may accept a cashier's check, certified check, or cash deposit in an amount equal to at least 5% of the total contract amount.
- If the contract does not exceed \$300,000, the city may also accept an irrevocable letter of credit in lieu of the bid bond.
- No bid or proposal shall be considered to be complete unless a bid bond has been submitted. O.C.G.A. § 36-91-50(d).
- If a bid bond is required and the contractor fails to provide it, the contract shall be invalid. O.C.G.A. § 36-91-50(d).
- The city must approve the form and solvency of the surety prior to acceptance of the bid or proposal. O.C.G.A. § 36-91-40(a)(2).
 - The city may require that any bond surety that does not have a current certificate of authority to transact business in Georgia from the Georgia Insurance Commissioner must be on the U.S. Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1).
 - The U.S. Treasury Department's Financial Management Service updates its list of approved sureties annually in Circular 570 of the Federal Register. To obtain a current copy of the Treasury Department's list, contact the Surety Bond Branch at 202-874-6850, or visit their Internet website at www.fms.treas.gov/c570.
 - If the surety becomes insolvent, or no longer approved by the Commissioner of Insurance, or there are no longer sufficient sureties on the bond, the city may require the contractor to strengthen the bond or to provide new or additional bonds within ten days. O.C.G.A. § 36-91-40(b).
 - The city may stop all work on the contract until the new or additional bonds are furnished. If the bonds are not provided

within the ten-day period, the city may terminate the contract. Additionally, the city may complete the project as the agent of and at the expense of, the contractor and his or her sureties. O.C.G.A. § 36-91-40(b).

12. Opening of Bids/Proposals.

The Georgia Local Government Public Works Construction Law establishes separate requirements for competitive sealed bids and competitive sealed proposals, as follows:

- a. **Competitive Sealed Bids.** The city must open all bids publicly on the scheduled bid opening date that has been advertised in the city's bid invitation. All bidders, and the general public, may attend the bid opening. O.C.G.A. § 36-91-21(b)(3).
- b. **Competitive Sealed Proposals.** The city must open all proposals on the date scheduled for opening proposals, which was contained in the city's Request for Proposals (RFP) and included in the city's advertisement. However, the city must not disclose the contents of the submitted proposals to the competing offerors. O.C.G.A. § 36-91-21(c)(1)(B).

Utility Contractors. While not required under the Local Government Public Works Construction Law, it is unlawful for a contracting body (the city) to open or consider a bid or proposal for utility contracting unless the bidder/offeror has obtained a utility license or intends to have the utility contracting work performed by another person who has obtained a utility license. The utility contractor license number must be written on the face of the bid or proposal. Additionally, if 50% or more of any project is for utility work, the bidder/offeror must obtain a utility license and the utility license number must be written on the face of the bid/proposal. O.C.G.A. § 43-14-8.2(h).

13. Evaluation of Bids and Proposals.

After the city receives and opens all bids/proposals, the next step is to evaluate each submittal. In doing so, the Local Government Public Works Construction Law requires that cities consider only those responsive and responsible bidders or offerors, as defined below:

- **Responsive bidder or responsive offeror** means a person or entity that has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals. O.C.G.A. § 36-91-2(14).
- **Responsible bidder or responsible offeror** means a person or entity that has the capability in all respects to perform fully and reliably the contract requirements. O.C.G.A. § 36-91-2(13).

What determines whether a bidder/offeror is **responsive**? A responsive bidder/offeror is one that has submitted a bid/proposal that meets all of the requirements that the city established in the invitation to bid or in the RPF. A bidder/offer is either responsive or non-responsive.

What factors should a city consider when determining whether a bidder/offeror is **responsible** to the extent that the bidder/offeror possesses the capability to perform fully and reliably the contract requirements? Examples of possible factors include, but are not limited to, the following:

- The firm's relevant experience (on similar projects).
- The firm's ability to perform (construction) within the specified time period.
- The firm's financial condition.
- The firm's bonding capacity and insurance.
- The firm's safety record.

a. Competitive Sealed Bids. Under the Local Government Public Works Construction Law, cities must evaluate all bids without discussions with the bidders. O.C.G.A. § 36-91-21(b)(3).

b. Competitive Sealed Proposals. Under the Local Government Public Works Construction Law, cities must evaluate all proposals according to the factors specified in the city's Request for Proposals (RFP). The evaluation factors must be the basis on which the award decision is made, and the contract file must contain the basis on which the award is made. O.C.G.A. § 36-91-21(c)(1)(C).

Example: The city has prepared a worksheet to evaluate each submitted proposal according to the factors contained in the RFP. The award is made to the offeror whose proposal received the highest score during the evaluation. The contract file must contain documentation that explains how the award was determined. The city could either maintain, in the contract file, the individual worksheets for each proposal or a composite sheet with the total scores of all proposals.

14. Length of Time that Bids/Proposals Must Remain Open. (O.C.G.A. § 36-91-50)

The Georgia Local Government Public Works Construction Law places a limit on the amount of time that a bidder/offeror must honor his bid or proposal. This requirement was included to address problems that could occur when local governments encounter delays in their contract awards. Such delays could inadvertently exhaust the bonding capacity of many small and medium sized contractors.

- a. **Competitive Sealed Bids.** In the case of competitive sealed bids, a bid may not be revoked or withdrawn until 60 days after the time set by the governmental entity for opening of bids. At the end of this time period, the bid will cease to be valid, unless the bidder provides written notice to the city prior to the scheduled expiration date that the bid will be extended for a time period specified by the city. O.C.G.A. § 36-91-50(b).

Example: The city held a scheduled bid opening on September 1st. However, 60 days later, on October 30th, the city has not yet awarded a contract. Prior to the expiration of the 60-day period, the city contacts the apparent low bidder and requests the bidder to extend the submitted bid for an additional 30-day period. Unless the bidder provides the city with written notice prior to October 30th that the bid will be extended until November 29th (as requested by the city), the bid will cease to be valid.

- b. **Competitive Sealed Proposals.** In the case of competitive sealed proposals, the city must advise offerors in the request for proposals of the number of days that offerors will be required to honor their proposals; provided, however, that if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the governmental entity to be unlikely of being selected for contract award must be released from the proposal. O.C.G.A. § 36-91-50(c).

This provision will require some cities to alter their present practices whereby bidders/offerors must keep their bids/proposals open for a longer period of time (120 days, six months, etc.). The requirement allows those bidders/offerors who are not “in the running” for contract award to pursue other opportunities elsewhere.

Our city received twelve (12) proposals in response to a recent RFP for a public works construction project. The city “short-listed” four (4) firms; however, the city did not award a contract within 60 days of the date that the proposals were opened. Must the city release all of the proposals?

Answer: No. The Local Government Public Works Construction Law requires that the city release any offeror that the city determines is unlikely of being selected for contract award. Accordingly, if the city has not awarded a contract within 60 days from the date the proposals were opened, the city must release only those eight (8) firms that were not included on the city’s short list.

15. Bid Mistakes. (O.C.G.A. § 36-91-52)

In certain instances, a city must allow a bidder/offeror to withdraw his or her bid or proposal after the bid opening without forfeiting the bid bond, provided that the bidder/offeror made an appreciable error in the calculations and if:

- The error in the calculation of the bid can be documented clearly in writing;
- The error can be clearly identified from inspection of the original work papers and materials used in preparation of the bid/proposal;
- The bidder/offeror notifies the city in writing prior to the award of the contract and no later than 48 hours after the opening of bids, excluding Saturdays, Sundays, and legal holidays;
- The bid was submitted in good faith and the mistake was due to a calculation or clerical error, an inadvertent omission, or a typographical error as opposed to an error in judgment; and
- The withdrawal of the bid will not harm the city or other bidders by placing them in a materially worse position than they would have occupied if the bid had never been submitted.

In the event that an apparent successful bidder has withdrawn his or her bid in accordance with the requirements stated above, action on the remaining bids should be considered as though the withdrawn bid had not been received. Additionally, if the bid invitation/RFP process is re-opened, the bidder/offeror who filed a request to withdraw a bid/proposal shall not be allowed to re-submit a bid or proposal for the project. O.C.G.A. § 36-91-52(c).

No bidder/offeror who withdraws a bid/proposal pursuant to these requirements may subcontract with the project's contractor, supply materials or labor, or otherwise benefit (directly or indirectly) from the performance of the contract. O.C.G.A. § 36-91-52(d).

16. Negotiation of Bids or Proposals. (O.C.G.A. § 36-91-21)

May a city enter into negotiations with a bidder or offeror? Yes, under certain conditions. The Georgia Local Government Public Works Construction Law establishes different negotiation requirements for competitive sealed bids and competitive sealed proposals, as provided below:

- a. Competitive Sealed Bids.** Under the Public Works Construction Law, if the bid received from the lowest responsive and responsible bidder exceeds the amount that the city has budgeted for the project, the city may negotiate with

the apparent low bidder to obtain a lower price that falls within the city's budget. Such negotiations may also include changes in the scope of work or in other bid requirements. O.C.G.A. § 36-91-21(b)(4).

Example: A city solicited competitive sealed bids for a new fire station, and the city has \$350,000 in its budget for the construction of this project. All submitted bids exceeded the amount budgeted for the project, while the apparent low bidder submitted a bid totaling \$365,000. Under the Public Works Construction Law, the city may negotiate with the apparent low bidder to obtain a contract price within the city's budgeted amount. Also, the city may modify the project's scope of work and other bid requirements in an effort to obtain a contract price within the budgeted amount.

This provision allows the city to avoid having to reject all bids and re-issue the invitation to bid.

b. Competitive Sealed Proposals. The Georgia Local Government Public Works Construction Law authorizes cities to establish provisions in their Request for Proposals (RFP) for discussions, negotiations, and revisions to proposals. Such activities may occur after the submission of proposals and prior to contract award in order to obtain a best and final offer. In accordance with the city's request for proposals (RFP), all responsible offerors found by the city to have submitted proposals "reasonably susceptible" of being accepted for award must be provided an opportunity to participate in discussions, negotiations, and revisions. (Such offerors are typically referred to as "short-listed" offerors.) O.C.G.A. § 36-91-21(c)(2).

Example: The city receives proposals from ten (10) offerors. The city determines that four (4) of the proposals are "reasonably susceptible" of being accepted for award. Thus, all four (4) of the "short-listed" offerors must be provided an opportunity to participate in discussions, negotiations, and revisions.

During all discussions, negotiations, and revisions, the city is prohibited from disclosing the contents of proposals to other competing offerors. O.C.G.A. § 36-91-21(c)(2).

HB 513, passed in the 2001 Session, amended the Georgia Open Records Law to protect bids and proposals on both road construction and public works construction contracts from being reviewed by competing bidders and offerors until the contract is awarded, the bids or proposals are rejected, or the project is discontinued. O.C.G.A. § 50-18-72(6)(B). This amendment is designed to prevent competing bidders and offerors from gaining an unfair advantage by having access to the information contained in other bids and proposals. However, once a contract is awarded, all bids or proposals are rejected, or the project is discontinued, the danger of unfair advantages ceases and all information contained in such bids or proposals may be accessed.

17. Performance Bonds.

Performance bonds protect the local government in the event that the contractor fails to complete the project within the period of time (120 days, etc.) specified in the contract. O.C.G.A. § 36-91-2(9).

The major requirements for performance bonds are specified below:

- A performance bond is required for an amount equal to the contract amount for all public works construction projects that exceed \$100,000.00 and are subject to the requirements of the Local Government Public Works Construction Law. O.C.G.A. § 36-91-70.
- A city may, in its discretion, require a performance bond for public works construction contracts that are estimated at \$100,000 or less. O.C.G.A. § 36-91-70.
- The performance bond must be in an amount equal to the contract, and it shall be increased as the contract amount increases. O.C.G.A. § 36-91-70.
- If the public works construction contract is less than \$300,000, the local government may accept an irrevocable letter of credit instead of a performance bond. O.C.G.A. § 36-91-71.
- If a performance bond is required and the contractor fails to provide it, the contract is invalid. O.C.G.A. § 36-91-70.
- The affected city may recover any damages resulting from the contractor's breach by filing an action within one year of the completion of the project and acceptance of the work. O.C.G.A. § 36-91-72.
- The city must approve the form and solvency of the surety prior to the execution of the contract. O.C.G.A. § 36-91-40(a)(2).

- The city may require that any bond surety which does not have a current certificate of authority to transact business in Georgia from the Georgia Insurance Commissioner must be on the U.S. Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1).
 - The U.S. Treasury Department's Financial Management Service updates its list of approved sureties annually in Circular 570 of the Federal Register. To obtain a current copy of the Treasury Department's list, contact the Surety Bond Branch at 202-874-6850, or visit their Internet website at www.fms.treas.gov/c570.
- If the surety becomes insolvent, or no longer approved by the Commissioner of Insurance, or there are no longer sufficient sureties on the bond, the city may require the contractor to strengthen the bond or to provide new or additional bonds within ten days. O.C.G.A. § 36-91-40(b).
 - The city may stop all work on the contract until the new or additional bonds are furnished. If the bonds are not provided within the ten-day period, the city may terminate the contract. Additionally, the city may complete the project as the agent of, and at the expense of, the contractor and his or her sureties. O.C.G.A. § 36-91-40(b).

18. Payment Bonds.

Payment bonds protect the subcontractors who work for the local government's contractor by ensuring that the contractor compensates all employees who provide labor and materials on the project. O.C.G.A. § 36-91-2(8).

The major requirements for payment bonds are specified below:

- Payment bonds are required for all public works construction contracts with an estimated contract amount greater than \$100,000.00. O.C.G.A. § 36-91-90.
- A city may, in its discretion, require a payment bond for public works construction contracts that are less than \$100,000.00. O.C.G.A. § 36-91-90.
- The payment bond must be in an amount equal to the contract for the use and protection of all subcontractors, and all persons supplying labor, materials, machinery, and equipment in the conduct of work provided in the contract. O.C.G.A. § 36-91-90.
- In lieu of a payment bond, the city may accept, in its discretion, a cashier's check, certified check, or cash in an amount not less than the total amount payable by the terms of the contract. O.C.G.A. § 36-91-90.

- If a payment bond is required and a contractor fails to provide it, the contract is invalid. O.C.G.A. § 36-91-91.
- The city must approve the form and solvency of the surety prior to the execution of the contract. O.C.G.A. § 36-91-40(a)(2).
 - The city may require that any bond surety which does not have a current certificate of authority to transact business in Georgia from the Georgia Insurance Commissioner must be on the U.S. Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1).
 - The U.S. Treasury Department's Financial Management Service updates its list of approved sureties annually in Circular 570 of the Federal Register. To obtain a current copy of the Treasury Department's list, contact the Surety Bond Branch at 202-874-6850, or visit their Internet website at www.fms.treas.gov/c570.
 - If the surety becomes insolvent, or no longer approved by the Commissioner of Insurance, or there are no longer sufficient sureties on the bond, the city may require the contractor to strengthen the bond or to provide new or additional bonds within ten days. O.C.G.A. § 36-91-40(b).
 - The city may stop all work on the contract until the new or additional bonds are furnished. If the bonds are not provided within the ten-day period, the city may terminate the contract. Additionally, the city may complete the project as the agent of, and at the expense of, the contractor and his or her sureties. O.C.G.A. § 36-91-40(b).
- The city must provide a certified copy of the bond and the construction contract to any person who, according to his/her affidavit, provided labor or materials for the project and has not been paid or has been sued in conjunction with the payment bond. O.C.G.A. § 36-91-94.
 - The city may charge up to \$2.50 for the first page and up to \$0.50 for each additional page. O.C.G.A. § 36-91-94 and 15-6-77(g)(4).

- 1. Why should our city obtain a payment bond from the contractor? Whether or not the contractor pays his/her subcontractors is none of the city's business.**

Answer: If a city fails to require a performance bond, the city may be liable to all subcontractors and other employees who provided labor, skill, tools, machinery, or equipment on the city's project, if such persons are not paid by the contractor. O.C.G.A. § 36-91-91.

- 2. Does the receipt of a payment bond remove the city from liability from claims initiated by subcontractor or employees for payment?**

Answer: Yes. Under O.C.G.A. § 36-91-93(c), if a city obtains a payment bond, a subcontractor, employee, or supplier cannot initiate an action against the city for payment.

19. Approval of Contracts.

- The city may award the contract, or it may reject any and all bids or proposals. O.C.G.A. § 36-91-20(c). Should the city award the contract, the following requirements must be met:
 - All public works construction contracts subject to the requirements of the Georgia Local Government Public Works Construction Law must be in writing, on file, and available for public inspection at a place designated by such governmental entity. O.C.G.A. §§ 36-91-20(a), 50-18-70 *et seq.*
 - Municipalities and consolidated governments must execute and enter into contracts in the manner provided in applicable local legislation or by ordinance. This requirement goes to the formality and procedures by which municipalities and consolidated governments enter into contracts, such as who must sign the contract. (However, all contracts for counties must be in writing and approved by the board of commissioners. O.C.G.A. §§ 36-10-1, 36-91-20(a).)
 - Once again, the Public Works Construction Law establishes separate requirements for competitive sealed bids and competitive sealed proposals:
 - **Competitive Sealed Bids.** The city must award the contract to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. O.C.G.A. § 36-91-21(b)(4).

- **Competitive Sealed Proposals.** The city must determine, in writing, which proposal is most advantageous to the city, based on the evaluation factors contained in the Request for Proposals (RFP). Additionally, the contract file must indicate the basis on which the award is made. O.C.G.A. § 36-91-21(c)(1)(C). Cities should maintain either the individual rating sheets for each proposal or a composite tabulation sheet of each offeror's ratings in order to meet this requirement.

Under the Public Works Construction Law, it is unlawful for any member of a governmental entity that awards a public works construction contract to receive, either directly or indirectly, any pay or profit arising from such contract. Violators will be guilty of a misdemeanor. O.C.G.A. § 36-91-21(f). Additionally, "it is improper and illegal for a member of a municipal council to vote upon any question brought before the council in which he is personally interested." O.C.G.A. § 36-30-6.

Must public works construction contracts be approved by the mayor and city council? Can such contracts be approved by the city manager or purchasing agent?

Answer: O.C.G.A. § 36-91-20 (a), described above, specifies that cities and consolidated governments must enter into public works construction contracts in the manner provided by their charter or by their local ordinances. Thus, the mayor and council would approve such contracts if the city's charter or local ordinance requires such action. Likewise, if the city's charter authorizes the city manager or purchasing agent to award or sign such contracts, this practice would not change under the Public Works Construction Law.

Please note, however, that this requirement does not authorize cities to avoid the remaining requirements of the Public Works Construction Law in the event that their municipal charters and/or local ordinances conflict with the provisions of this legislation. This provision applies solely to the execution of public works construction contracts.

How should the city award a contract that is needed due to an emergency?

Answer: While the requirements of the Public Works Construction Law do not apply to public works construction projects necessitated by an emergency, O.C.G.A. § 36-91-22(e) requires the nature of the emergency to be described in the minutes of the local government. Logically, this should be done in the minutes of the meeting where a contract is awarded or ratified due to an emergency.

20. Contractor's Oath. (O.C.G.A. § 36-91-21(e))

Prior to beginning work on the public works construction project, the contractor must provide a written oath stating that he or she has not attempted to prevent competition with regard to the submittal of the bid/proposal submittal and the procurement of a contract for the project. The city official that is responsible for making payments to the contractor must file the oath. If such oath is false, the contract is void, and the city can attempt to recover any payments made to the contractor.

The law does not state where the oath must be filed, although it is presumed that it should be filed with the local government

21. Contractor's Responsibility to use E-Verify. (O.C.G.A. § 13-10-91(b))

Any contractor or subcontractor entering into a contract with a city or other public employer or a contractor of a public employer for the physical performance of a service in Georgia must register and participate in the federal work authentication program (E-Verify) to verify the employment eligibility of all employees. Before a bid for such service is considered, the bid must include a signed, notarized affidavit from the contractor attesting (1) that the affiant has registered with and is authorized to use E-Verify, (2) the user identification number and date of authorization for the affiant, and (3) that the affiant is using and will continue to use E-Verify throughout the contract period. The affidavit is a public record subject to disclosure once the city has entered into the contract for physical performance of services, provided that all information protected from disclosure by federal or state law is redacted prior to disclosure. The city should keep the affidavit on file for five years from the date of receipt. Upon entering into a contract with a new subcontractor, a contractor or subcontractor must provide the city or other public employer with the identity of any and all subsequent subcontractors. This notice must be provided within five business days of the hire. The notice must include an affidavit attesting to the subcontractor's name, address, user identification number, and the date of authorization to use E-Verify. See Appendix B for a sample affidavit.

Each year, the Labor Commissioner will conduct at least 100 random audits of public employees and contractors. The results will be posted on the www.open.georgia.gov website and on the Department of Labor's website by the end of each calendar year.

Any person who knowingly violates this code section shall be punished under O.C.G.A. § 16-10-20. Any contractor or subcontractor that is found guilty of violating this code section shall be prohibited from bidding on or entering into any public contracts for 12 months following conviction.

Code section 13-10-91(f) purports to protect employers from lawsuit or liability resulting from any act to comply with this requirement.

22. Change Orders. (O.C.G.A. § 36-91-20(e))

Bid and contract documents may contain provisions authorizing the issuance of change orders, without the necessity of additional requests for bids or proposals, within the scope of the project when appropriate or necessary in the performance of the contract. However, change orders may not be used to evade the purposes of the Public Works Construction Law.

Our city is constructing a \$2 million expansion to our wastewater treatment plant. Can we issue a change order for other improvements at the plant without obtaining additional bids or proposals?

Answer: Yes, if the proposed change order is within the scope of the project and is needed for the performance of the contract. The Public Works Construction Law defines scope of project as “the work required by the original contract documents and any subsequent change orders required or appropriate to accomplish the intent of the project as described in the bid documents.” O.C.G.A. § 36-91-2(13).

Example: The city awards a contract to construct a building containing restroom/storage/concession facilities at a city park. The city later issues a change order to the contractor to construct a gymnasium at the same park. In this example, the change order is not within the scope of the project. The city should solicit bids or proposals for the gymnasium project.

23. Progress Payments and Retainage.

Cities, counties, school boards, authorities, and state agencies must comply with the following Georgia Laws for progress payments, retainage, and escrow accounts for public works construction projects:

- a) **Progress payment and retainage.** O.C.G.A. § 13-10-80.
- b) **Georgia Prompt Pay Act.** O.C.G. A. § 13-11-1.
- c) **Retainage.** O.C.G.A. § 13-10-80.
- d) **Escrow Accounts.** O.C.G.A. § 13-10-82.

23. Sales and Use Taxes.

The payment of sales and use taxes on public works construction projects is often a source of confusion to both local government officials and contractors. Most city officials are aware that purchases made by their city are exempt from payment of sales taxes. O.C.G.A. § 48-8-3(1). However, with regard to public works construction projects, in many cases, the contractor is required to pay sales and use taxes on the equipment and materials that they use on municipal projects.

Key points to remember regarding payment of sales and use taxes on public works construction projects are listed below:

- Purchases made by cities are exempt from payment of sales and use taxes. O.C.G.A. § 48-8-3(1).
- Cities may be able to save money by purchasing all materials needed for a public works construction project and self-performing the project.
- In most cases, contractors are required to pay sales and use taxes on the equipment and materials that they use on local government public works construction projects. While the city may purchase the equipment and materials “tax-free,” the contractor is deemed to be the consumer of the products and will be required to pay the sales and use tax. O.C.G.A. § 48-8-63(b). Property owned by the State of Georgia, University System of Georgia, or any county, municipality, or other political subdivision of the state that is not consumed is not subject to this tax. This exception does not apply to property owned by the federal government or property that is incorporated into the project to the extent that it loses its identity as separate personal property. O.C.G.A. § 48-8-64(h).

Exceptions are listed below:

- Contracts to install, repair, or extend a public water, gas, or sewage system. In these construction projects, the city may purchase needed materials tax-free, and the contractor may install them without being obligated to pay the sales and use tax, provided that the materials are installed for “general distribution purposes.” O.C.G.A. § 48-8-3(2). The city must purchase the materials for the exemption to apply.
- The extra penny for a local option sales and use tax (LOST) or a special purpose local option sales tax (SPLOST) does not apply to purchases for contracts when the contractor had submitted the bid before the tax levy. See O.C.G.A. §§ 48-8-94, 48-8-118.
- If the contractor is aware of the requirements of O.C.G.A. § 48-8-63(b), the contractor will likely include the cost of sales and use taxes into the contract amount.

Thus, the city ultimately will not avoid the cost of sales tax by merely purchasing its supplies and materials directly.

If our city purchases materials needed for the construction of a new fire station, who is responsible for payment of sales and use taxes, the city or the contractor?

Answer: The city is exempt from paying sales tax on the materials that it purchases. However, the contractor who uses or installs the material is liable under the provisions of the sales and use tax code, unless the project is a governmental water, sewer, or gas system. The contractor is not liable for taxes on any city equipment he may use that is not used up during construction.
O.C.G.A. §§ 48-8-3 (1) and (2). 48-8-63.

24. Prohibited Practices.

Listed below are several key “prohibited practices” contained in the Local Government Public Works Construction Law.

a. Governmental Entities

- Governmental entities are prohibited from using change orders to circumvent the competitive procurement process.
- Discouraging competition or accepting kickbacks - criminal penalties will be imposed.
- Imposing prequalification criteria that are not reasonably related to the project or the quality of the work to be performed.

b. Contractors

- Rigging bids or otherwise preventing competition. Such practices will void the public works construction contract and require the contractor to return all monies paid to the owner.
- Knowingly entering into a contract awarded in violation of the procurement rules. Such practices will require the contractor to return all monies paid to the owner.

CHAPTER FOUR PROJECT DELIVERY METHODS AND CONSTRUCTION MANAGEMENT

For many years, local governments (as well as private sector owners) relied on the familiar design-bid-build, or traditional, method of construction delivery. However, in recent years, new methods of construction project delivery have been developed to provide owners with a variety of options for project design and construction delivery.

This chapter is designed to briefly highlight some of the basic elements of the most common construction project delivery methods and management methods that are available in today's market. The charts and descriptions provided in this chapter contain conceptual information regarding these methods. Please note that many variations of these methods may exist.

As stated in Chapter 3, the Georgia Local Government Public Works Construction Law allows any construction delivery method to be utilized. However, any public works construction project that places the bidder or offeror at risk for construction and requires labor or building materials in the execution of the contract must be awarded on the basis of competitive sealed bids or competitive sealed proposals. (Note that there are two types of sealed proposals, competitive cost and competitive qualifications.)

Competitive cost sealed proposals include pricing of the total construction cost (TCC), including the construction cost of work, as a selection criterion. Qualifications are also typically weighted selection criteria.

Competitive qualifications sealed proposals do not include construction cost of work as a selection criteria, but often do include contractor's fee and/or general conditions as weighted selection criteria. Qualifications are also typically weighted selection criteria.

The following matrix highlights the typical project delivery systems and the types of solicitations, competitive sealed bids or competitive sealed proposals. Notice that both CM At Risk and Design-Build can be done with either type of competitive sealed proposals (cost or qualifications).

Delivery Method	Competitive Sealed Bid	Competitive Sealed Proposal	
		Competitive Cost (CC)	Competitive Qualifications (CQ)
Design-Bid-Build	X		
CM At Risk		X	X
Design-Build		X	X

Each of the construction project delivery methods described in this chapter contains advantages and disadvantages. Some of these methods may not be suitable for a

particular city, or for a particular public works construction project. For this reason, city officials should carefully consider the particular requirements of the city's project, as well as the advantages and disadvantages of the various construction delivery methods and management methods available to them.

Based on the definition of a "project delivery method", referring to the assignment of "delivery" risk for performance of the design and construction, Agency Construction Management and Program Management are addressed as management methods rather than project delivery methods.

Since any of the management methods can be used in conjunction with any of the project delivery methods, how the project is going to be managed should be considered first, and then the appropriate project delivery method should be chosen.

The city should also consider its own internal capabilities when selecting the appropriate construction delivery method and management approach. For example, if the city has employees who have significant experience in overseeing construction projects, the city may not need to hire a construction manager or a program manager. Likewise, if the city's staff possesses limited, if any, experience in overseeing construction projects, then the city may desire to hire an outside construction manager or program manager to augment their staff.

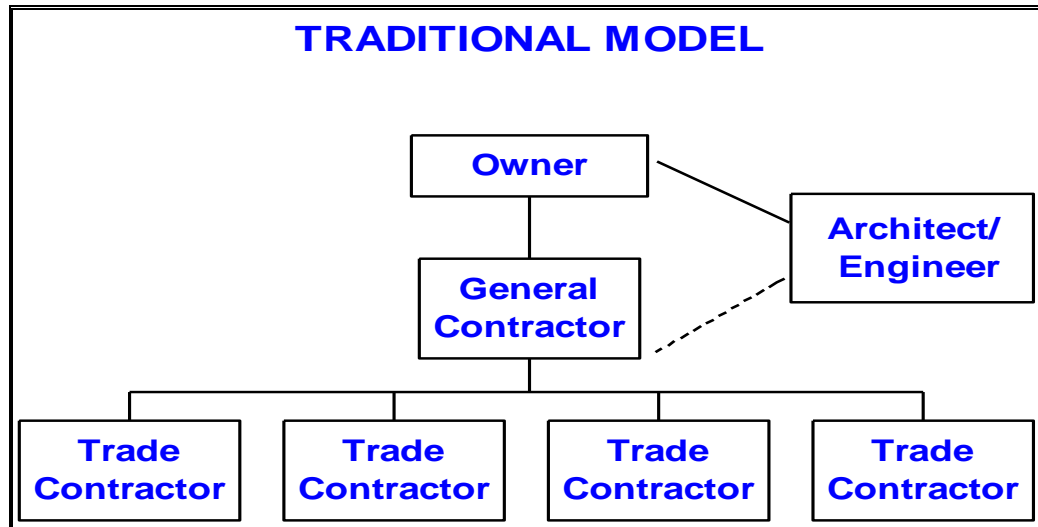
Before selecting a construction project delivery method and management approach, city officials should determine whether or not the city has the in-house resources available to:

- ❑ Manage the design phase of the project.
- ❑ Manage the construction phase of the project.
- ❑ Supervise and inspect construction.

[Note: The models and terms described in this chapter have been adopted with permission from information provided by the following: Alston & Bird, LLP; Associated General Contractors-Georgia Chapter; The Brookwood Group; Holder Construction Company; and the Georgia State Financing and Investment Commission's Guidelines, Selecting the Appropriate Project Delivery Method. GMA thanks these organizations and agencies for their contributions to this publication.]

A. PROJECT DELIVERY METHODS

TRADITIONAL (DESIGN-BID-BUILD)



The **Traditional Model** employs the familiar “design-bid-build” construction delivery method. The owner initially hires design professionals (i.e., architects and/or engineers) to design the project. The design professional can be selected through a qualifications based selection (QBS) procedure, which normally includes such factors as experience, past performance, technical competence, and other factors. The owner then works with the selected designer to develop the project scope and design.

When the design phase has been completed, the owner solicits bids for the construction portion of the project from prospective general contractors. The owner typically awards the contract to the bidder who submits the lowest responsive, responsible bid. The selected general contractor then retains necessary trade contractors.

It is important to note that the design professional and the general contractor maintain an administrative relationship, rather than contractual one.

Under this method, only the contracts for construction are subject to the requirements of the Georgia Local Government Public Works Construction Law.

Advantages:

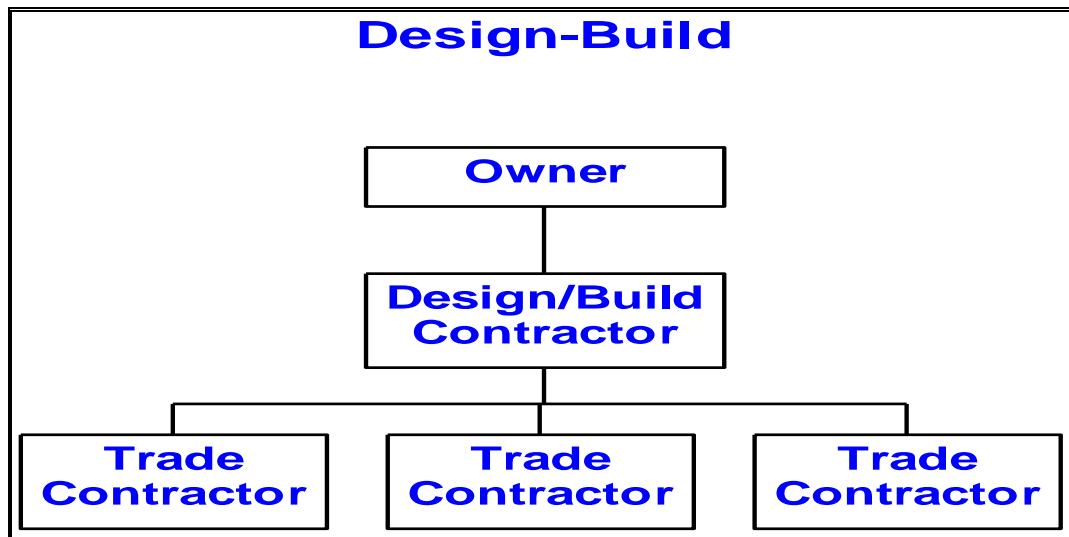
- The owner maintains direct control over the design and construction phases due to the existence of contractual relationships with both parties.
- A complete set of design documents is available prior to commencement of construction.

- Independently operating design and construction teams create a system of checks and balances. This system allows each team to serve as a "watchdog", providing the owner with objective opinions about the other.
- The traditional method is well understood and accepted by all affected groups: the owner, the design professionals, and the construction industry.

Disadvantages:

- The responsibility of coordinating architect and contractor rests on the owner. This requires the owner to have sufficient in-house staff to manage this relationship.
- The contractor is not involved until the design phase is complete. Without contractor participation in the design process the owner may not have valuable contractor input regarding construction issues and cost effectiveness.
- Postponing the selection of a general contractor until both design and bidding processes are complete may greatly increase the length of time necessary to complete the project.
- Neither the general contractor nor the design team has sole responsibility to the owner for problems that arise during construction. Conflicts may develop between the general contractor and the design team, leading to "finger-pointing" and to situations where the owner is unable to get the appropriate party to accept responsibility.

DESIGN-BUILD



The Design-Build method involves a single contract between the owner and a firm who will provide both design and construction services. Several different firms may actually provide the services - for example, the design team (architect/engineer) is typically a subcontractor to the general contractor. However, the owner has only one contract with the entity responsible for both types of services.

The American Institute of Architects (AIA) and the Associated General Contractors of America (AGC) recommend that public agencies adopt general criteria to be used when determining what projects will be delivered using the Design-Build method. AIA and AGC recommend that public agencies consider the following criteria when determining when to use the Design-Build method:

1. Time constraints for the delivery of the project;
2. The capability and experience of potential teams with the Design-Build process;
3. The suitability of the project for use of the Design-Build process; and
4. The capability of the public owner to manage the project, including personnel to oversee the project who are familiar with the Design-Build process.

Advantages:

- There is integration between the design and construction functions. The contractor's "construction knowledge" can be integrated into the design process. Also, a designer who fully understands the problems and methods of construction can produce a more cost-effective design.
- There is single source of responsibility for design and construction problems. The owner may hold the single contractor responsible for problems, eliminating "finger pointing" among several parties.

- Design-Build is well suited for schedule-driven projects, virtually eliminating the lengthy bid process and allowing contractor participation before design completion.
- At some point early in the design phase, the owner may negotiate a guaranteed maximum price for the finished project. This may be attractive to governmental entities with fixed budgets.

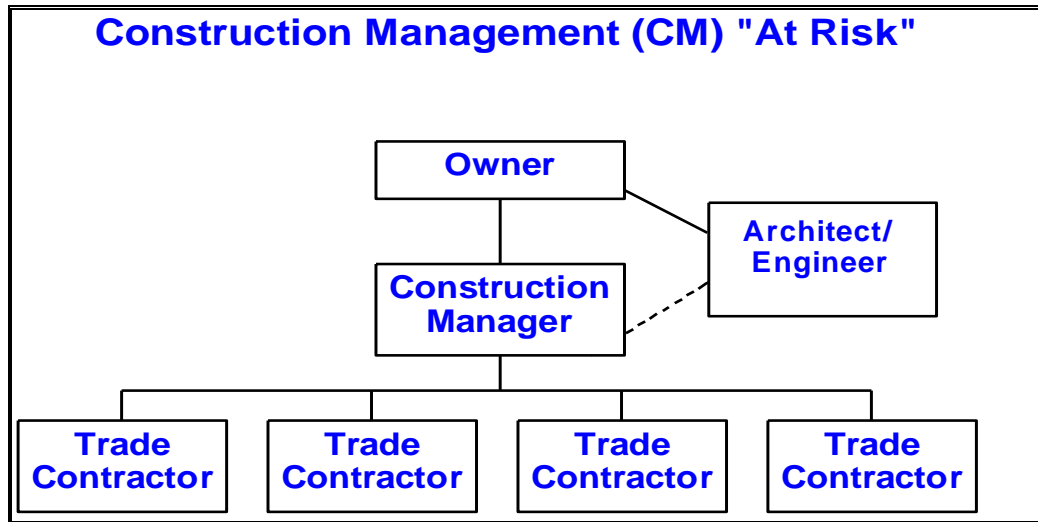
Disadvantages:

- Design-Build projects usually involve a negotiated price for construction and design services; this may translate into an absence of meaningful competition with regard to price.
- Allowing design and construction to be handled by a single entity means the owner must relinquish a degree of control over the project. In particular, the owner has minimal control during the design phase.
- There is a conflict of interest between the owner and the design team. The design team should possess a direct and primary relationship with the owner, without obligations to others, if the owner is to be fully protected.
- Without separate entities to oversee each other, the owner becomes the sole “watchdog” and must have adequate personnel to monitor the product of the design-build firm. The owner must be well qualified to act as overall manager of planning, design, and construction.

A variation to the **Design-Build** method is **Design-Build-Operate**. This method allows an owner to contract with a firm for the design, construction, and operation of a facility. House Bill 1404, which passed in the 2000 Session of the General Assembly and amended O.C.G.A. § 36-60-15.1, provided that local governments may contract with a private firm to design, construct, and operate, for 20 years, any wastewater treatment system, storm-water system, water system, sewer system, or any combination of such systems.

If the **Design-Build-Operate** method is utilized, the construction portion of the project must be procured through a competitive sealed proposal in accordance with the provisions of the Georgia Local Government Public Works Construction Law.

CONSTRUCTION MANAGEMENT (CM) – AT RISK



In this model, the construction manager assumes financial risks and liabilities placing the manager "At Risk." The "At Risk" model eliminates the duplication of services caused by employing both a construction manager and general contractor. The model also allows the owner to avoid entering into contracts with numerous trade contractors.

This model is very similar to the Traditional Method, yet it is different because the owner receives input from the construction manager regarding design, constructability, and cost issues during the design phase. Coordination and planning during the initial phases of the project are services not traditionally offered by the general contractor.

Advantages:

- Typically, the construction manager starts during the project's design phase and functions as a consultant giving advice to the owner.
- The construction manager can serve as the general contractor and holds the subcontracts.
- The owner receives the benefit of having the construction manager serve as general contractor, while also gaining the manager's input on issues during the pre-construction (design) phase.
- An "At Risk" construction manager still serves as the owner's advisor and can handle the day to day administration of the project.

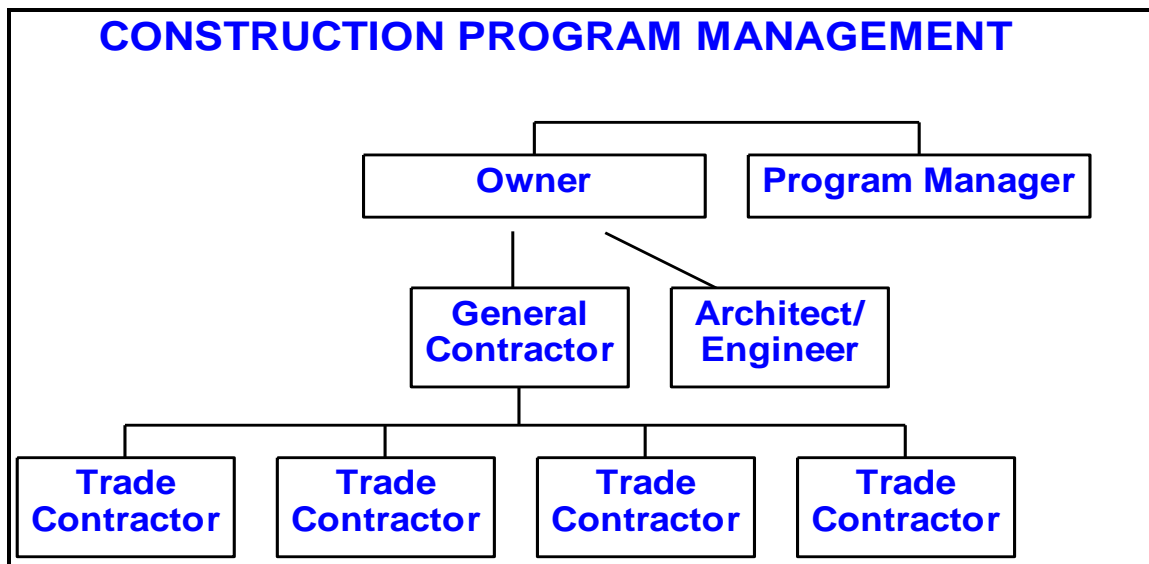
Disadvantages:

- When the Construction Manager is “At Risk,” the manager is no longer free of the conflicts of interest since he now bears financial liability. This may lead to a conflict of interest between the manager’s duties as an objective advisor to the owner and a manager of construction. Problems may result should the construction manager no longer have the owner’s best interest at heart.
- Neither the construction manager nor the design team has sole responsibility to the owner for problems that arise during construction. Conflicts may develop between the construction manager and the design team, leading to “finger-pointing” and to situations where the owner is unable to get the appropriate party to accept responsibility.

B. CONSTRUCTION MANAGEMENT METHODS

Program Management and **Agency Construction Management** are **management methods** rather than project delivery methods. These methods can be used in conjunction with any of the project delivery methods listed above.

PROGRAM MANAGEMENT



Construction Program Management provides professional management services above and beyond normal architectural services. Construction program management utilizes the principles of project management. The program manager functions as an extension of the owner’s staff and acts on the owner’s behalf during all phases of the project. Typically, the program manager will fill the role of the owner’s staff in situations where the owner does not have adequate or experienced personnel.

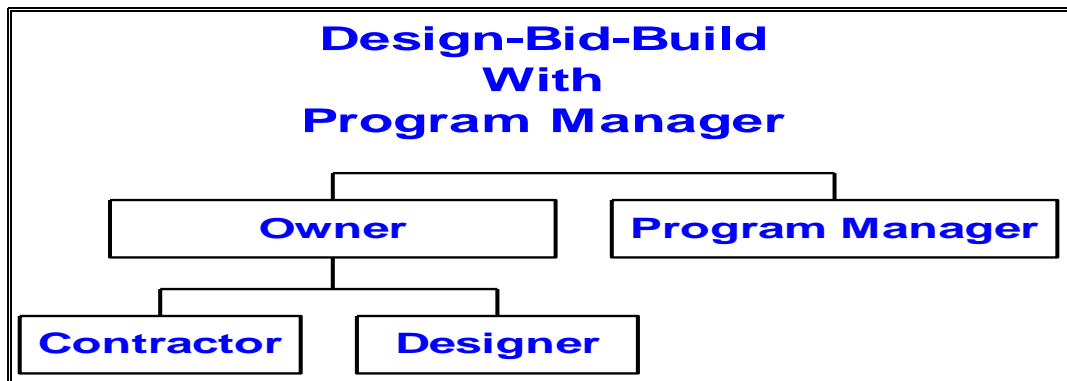
Advantages:

- Program Management may be an effective way for the smaller owner to handle the day-to-day aspects of the construction project at an expert level when experienced staff is not at the manager's disposal.
- The program manager, in essence, becomes an extension of the owner's staff.
- The program manager can be involved in all aspects of the project - operations, design, construction, and maintenance.

Disadvantages:

- The owner has contract obligations to design and construction parties, yet depends on an outside party (having limited financial risk involved) to oversee the project.
- The program manager has no liability for cost and schedule control.
- The program manager has no control over trade contractors.

**TRADITIONAL DESIGN-BID-BUILD MODEL
WITH PROGRAM MANAGER**



In this example, the owner employs a program manager to act on the owner's behalf during all phases of the project.

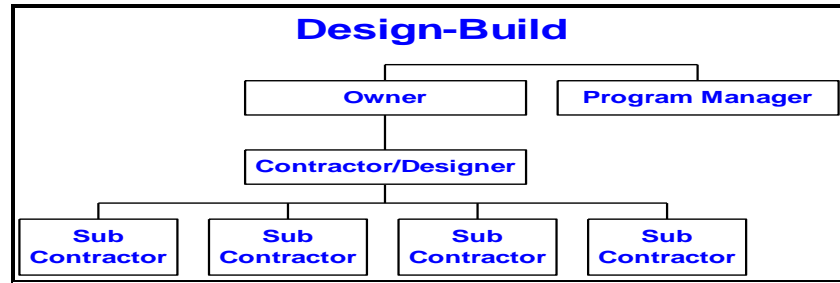
Advantages:

- Can greatly reduce strain on the owner's organization.
- Cost and schedule may be better controlled if a qualified program manager is retained well in advance of selection of the Design team (Architect/Engineer) and the Contractor.

Disadvantages:

- Fairly vulnerable to unwarranted change orders and claims.
- May be difficult for the owner to resolve post-construction problems quickly and without cost to the owner.

DESIGN-BUILD WITH PROGRAM MANAGER



In this example, like the preceding one, the owner again employs a program manager to act on the owner’s behalf during all phases of the project.

Advantages:

- Provides a single point of responsibility for correction of post construction problems if the contract is well written from the owner’s standpoint.
- Conflict issues between the owner and the design team (Architect/Engineer) are less likely if the Program Manager has a strong grasp on the design process as well as on procurement of construction strategies.

Disadvantages:

- The presence of a program manager does not eliminate the design team’s (Architect/Engineer) conflict of interest with the owner.
- The owner may obtain an early fixed price, but it is unclear what the owner will receive for this price.

C. OTHER RELATED PRACTICES

The following practices can be applied to most the construction delivery methods:

1. BRIDGING

Bridging is a process that combines elements of the **traditional (design-bid-build) method** and the **design-build method**. It retains the elements of each that are most advantageous to the owner and eliminates the elements that are most problematic to

the owner. In this method, the owner contracts with an architect or engineer to develop: 1) a project design through the design development stage; and 2) scope of work documents to be used when selecting the project delivery team.

Bridging allows the owner's design team and contract administrator to exclusively serve the owner's best interests throughout all design phases and the actual construction. The Bridging process can be applied to any construction project delivery method in any location or market.

Advantages:

- The owner may obtain a fixed price in less time and with less expenditure of "up-front" project funds.
- The owner's exposure to claims and unwarranted change orders may be diminished, both during and after construction.
- After occupancy, if there is a defect requiring correction, Bridging provides a clear, single responsibility for corrective work that is fair to the owner.

Disadvantages:

- Bridging is still a relatively new concept and is not as widely understood.

2. FAST-TRACK CONSTRUCTION

Fast-Track Construction is a process that normally refers to the overlapping of the design and construction phases of a project. It allows construction to begin as soon as the plans for the first phase of the project are completed. While the selected contractor is constructing the project's initial phase, subsequent phases are being designed, and the remaining contract documents are being prepared. Fast-Track construction does not require the owner to employ the same contractor for each phase of construction. In theory, by eliminating "down time" waiting for design and contract completion, the project is completed in less time than conventional methods permit. Generally, Fast-Track construction is most useful with large, complex projects that require the time-consuming evolution of detailed plans, specifications, and schedules. It may also be useful for projects that can easily be divided into separate phases. While Fast-Track construction is normally used with the Design-Build method, it can also be used with the CM-At Risk method.

Advantages:

- The owner can save money on interest payments for construction financing;
- The owner can save money on increased labor and material costs (especially on projects not having a fixed contract price);
- The owner can utilize the completed project at an earlier date.

Disadvantages:

- There are needs for numerous changes in the project's plans and specifications as work progresses and change typically adds expense;
- There is greater chance for costly design errors and omissions due to a lack of time to carefully review all project documents;
- The overall coordination and control of the project is diminished.

APPENDIX A
Georgia Public Works Construction Law
(O.C.G.A. § 36-91-1 through § 36-91-95)

36-91-1

This chapter shall be known and may be cited as the “Georgia Local Government Public Works Construction Law.”

36-91-2

As used in this chapter, the term:

(1) “Alternate bids” means the amount stated in the bid or proposal to be added to or deducted from the amount of the base bid or base proposal if the corresponding change in project scope or alternate materials or methods of construction is accepted.

(2) “Base bid” or “base proposal” means the amount of money stated in the bid or proposal as the sum for which the bidder or proposer offers to perform the work.

(3) “Bid bond” means a bond with good and sufficient surety or sureties for the faithful acceptance of the contract payable to, in favor of, and for the protection of the governmental entity for which the contract is to be awarded.

(4) “Change order” means an alteration, addition, or deduction from the original scope of work as defined by the contract documents to address changes or unforeseen conditions necessary for project completion.

(5) “Competitive sealed bidding” means a method of soliciting public works construction contracts whereby the award is based upon the lowest responsive, responsible bid in conformance with the provisions of subsection (b) of Code Section 36-91-21.

(6) “Competitive sealed proposals” means a method of soliciting public works contracts whereby the award is based upon criteria identified in a request for proposals in conformance with the provisions of subsection (c) of Code Section 36-91-21.

(7) “Emergency” means any situation resulting in imminent danger to the public health or safety or the loss of an essential governmental service.

(8) “Governing authority” means the official or group of officials responsible for governance of a governmental entity.

(9) “Governmental entity” means a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission

but shall not include any authority, board, department, or commission of the state, or a public transportation agency as defined by Chapter 9 of Title 32.

(10) "Payment bond" means a bond with good and sufficient surety or sureties payable to the governmental entity for which the work is to be done and intended for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the public works construction contract.

(11) "Performance bond" means a bond with good and sufficient surety or sureties for the faithful performance of the contract and to indemnify the governmental entity for any damages occasioned by a failure to perform the same within the prescribed time. Such bond shall be payable to, in favor of, and for the protection of the governmental entity for which the work is to be done.

(12) "Public works construction" means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property other than those projects covered by Chapter 4 of Title 32. Such term does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.

(13) "Responsible bidder" or "responsible offeror" means a person or entity that has the capability in all respects to perform fully and reliably the contract requirements.

(14) "Responsive bidder" or "responsive offeror" means a person or entity that has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.

(15) "Scope of project" means the work required by the original contract documents and any subsequent change orders required or appropriate to accomplish the intent of the project as described in the bid documents.

(16) "Scope of work" means the work that is required by the contract documents.

(17) "Sole source" means those procurements made pursuant to a written determination by a governing authority that there is only one source for the required supply, service, or construction item.

36-91-20

(a) All public works construction contracts subject to this chapter entered into by a governmental entity with private persons or entities shall be in writing and on file and available for public inspection at a place designated by such governmental entity. Municipalities and consolidated governments shall execute and enter into contracts in the manner provided in applicable local legislation or by ordinance.

(b)(1) Prior to entering into a public works construction contract other than those exempted by Code Section 36-91-22, a governmental entity shall publicly advertise the contract opportunity. Such notice shall be posted conspicuously in the governing authority's office and shall be advertised in the legal organ of the county or by electronic means on an Internet website of the governmental entity or an Internet website identified by the governmental entity which may include the Georgia Procurement Registry as provided by Code Section 50-5-69.

(2) Contract opportunities that are advertised in the legal organ shall be advertised a minimum of two times, with the first advertisement occurring at least four weeks prior to the opening of the sealed bids or proposals. The second advertisement shall follow no earlier than two weeks from the first advertisement.

(3) Contract opportunities that are advertised solely on the Internet shall be posted continuously for at least four weeks prior to the opening of sealed bids or proposals. Inadvertent or unintentional loss of Internet service during the advertisement period shall not require the contract award or bid or proposal opening to be delayed.

(4) Contract opportunities that will be awarded by competitive sealed bids shall have plans and specifications available on the first day of the advertisement and shall be open to inspection by the public. The plans and specifications shall indicate if the project will be awarded by base bid or base bid plus selected alternates and:

(A) A statement listing whether all anticipated federal, state, or local permits required for the project have been obtained or an indication of the status of the application for each such permit including when it is expected to be obtained; and

(B) A statement listing whether all anticipated rights of way and easements required for the project have been obtained or an indication of the status as to when each such rights of way or easements are expected to be obtained.

(5) Contract opportunities that will be awarded by competitive sealed proposals shall be publicly advertised with a request for proposals which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project.

(6) The advertisement shall include such details and specifications as will enable the public to know the extent and character of the work to be done.

(7) All required notices of advertisement shall also advise of any mandatory prequalification requirements or pre-bid conferences as well as any federal requirements pursuant to subsection (d) of Code Section 36-91-22. Any advertisement which provides notice of a mandatory pre-bid conference or prequalification shall provide reasonable advance notice of said conference or for the submittal of such prequalification information.

(c) Governmental entities are authorized to utilize any construction delivery method, provided that all public works construction contracts subject to the requirements of this chapter that:

(1) Place the bidder or offeror at risk for construction; and

(2) Require labor or building materials in the execution of the contract shall be awarded on the basis of competitive sealed bidding or competitive sealed proposals. Governmental entities shall have the authority to reject all bids or proposals or any bid or proposal that is nonresponsive or not responsible and to waive technicalities and informalities.

(d) No governmental entity shall issue or cause to be issued any addenda modifying plans and specifications within a period of 72 hours prior to the advertised time for the opening bids or proposals, excluding Saturdays, Sundays, and legal holidays. However, if the necessity arises to issue an addendum modifying plans and specifications within the 72 hour period prior to the advertised time for the opening of bids or proposals, excluding Saturdays, Sundays, and legal holidays, then the opening of bids or proposals shall be extended at least 72 hours, excluding Saturdays, Sundays, and legal holidays, from the date of the original bid or proposal opening without need to readvertise as required by subsection (b) of this Code section.

(e) Bid and contract documents may contain provisions authorizing the issuance of change orders, without the necessity of additional requests for bids or proposals, within the scope of the project when appropriate or necessary in the performance of the contract. Change orders may not be used to evade the purposes of this article.

(f) Any governmental entity may, in its discretion, adopt a process for mandatory prequalification of prospective bidders or offerors; provided, however, that:

(1) Criteria for prequalification must be reasonably related to the project or the quality of work;

(2) Criteria for prequalification must be available to any prospective bidder or offeror requesting such information for each project that requires prequalification;

(3) Any prequalification process must include a method of notifying prospective bidders or offerors of the criteria for or limitations to prequalification; and

(4) Any prequalification process must include a procedure for a disqualified bidder to respond to his or her disqualification to a representative of the governmental entity; provided, however, that such procedure shall not be construed to require the governmental entity to provide a formal appeals procedure. A prequalified bidder or offeror can not be later disqualified without cause.

36-91-21

(a) It shall be unlawful to let out any public works construction contracts subject to the requirements of this chapter without complying with the competitive award requirements contained in this Code section. Any contractor who performs any work of the kind in any other manner and who knows that the public works construction contract was let out without complying with the notice and competitive award requirements of this chapter shall not be entitled to receive any payment for such work.

(b) Any competitive sealed bidding process shall comply with the following requirements:

(1) The governmental entity shall publicly advertise an invitation for bids;

(2) Bidders shall submit sealed bids based on the criteria set forth in such invitation;

(3) The governmental entity shall open the bids publicly and evaluate such bids without discussions with the bidders; and

(4) The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids; provided, however, that if the bid from the lowest responsible and responsive bidder exceeds the funds budgeted for the public works construction contract, the governmental entity may negotiate with such apparent low bidder to obtain a contract price within the budgeted amount. Such negotiations may include changes in the scope of work and other bid requirements.

(c)(1) In making any competitive sealed proposal, a governmental entity shall:

(A) Publicly advertise a request for proposals, which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project, as well as the relative importance of the evaluation factors;

(B) Open all proposals received at the time and place designated in the request for proposals so as to avoid disclosure of contents to competing offerors during the process of negotiations; and

(C) Make an award to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the governmental entity, taking into consideration the evaluation factors set forth in the request for proposals. The evaluation factors shall be the basis on which the award decision is made. The contract file shall indicate the basis on which the award is made.

(2) As set forth in the request for proposals, offerors submitting proposals may be afforded an opportunity for discussion, negotiation, and revision of proposals.

Discussions, negotiations, and revisions may be permitted after submission of proposals and prior to award for the purpose of obtaining best and final offers. In accordance with the request for proposals, all responsible offerors found by the governmental entity to have submitted proposals reasonably susceptible of being selected for award shall be given an opportunity to participate in such discussions, negotiations, and revisions. During the process of discussion, negotiation, and revision, the governmental entity shall not disclose the contents of proposals to competing offerors.

(d) Whenever a public works construction contract for any governmental entity subject to the requirements of this chapter is to be let out by competitive sealed bid or proposal, no person, by himself or herself or otherwise, shall prevent or attempt to prevent competition in such bidding or proposals by any means whatever. No person who desires to procure such work for himself or herself or for another shall prevent or endeavor to prevent anyone from making a bid or proposal therefor by any means whatever, nor shall such person so desiring the work cause or induce another to withdraw a bid or proposal for the work.

(e) Before commencing the work, any person who procures such public work by bidding or proposal shall make an oath in writing that he or she has not directly or indirectly violated subsection (d) of this Code section. The oath shall be filed by the officer whose duty it is to make the payment. If the contractor is a partnership, all of the partners and any officer, agent, or other person who may have represented or acted for them in bidding for or procuring the contract shall also make the oath. If the contractor is a corporation, all officers, agents, or other persons who may have acted for or represented the corporation in bidding for or procuring the contract shall make the oath. If such oath is false, the contract shall be void, and all sums paid by the governmental entity on the contract may be recovered by appropriate action.

(f) If any member of a governmental entity lets out any public works construction contract subject to the requirements of this article and receives, takes, or contracts to receive or take, either directly or indirectly, any part of the pay or profit arising out of any such contract, he or she shall be guilty of a misdemeanor.

(g) No public works construction contract with a governing authority shall be valid for any purpose unless the contractor shall comply with all bonding requirements of this chapter. No such contract shall be valid if any governmental entity lets out any public works construction contract subject to the requirements of this chapter without complying with the requirements of this chapter.

36-91-22

(a) The requirements of this chapter shall not apply to public works construction projects, when the same can be performed at a cost of less than \$ 100,000.00. Public works construction projects shall not be subdivided in an effort to evade the provisions of this chapter.

(b) Any governmental entity having a correctional institution shall have the power and authority to purchase material for and use inmate labor in performing public works construction projects; and in such cases, this chapter shall not apply. Any governmental entity may contract with a governmental entity having a correctional institution for the use of inmate labor from such institution and use the inmates in the performance of any public works construction project; and in such cases, this chapter shall not apply.

(c) In the event that the labor used or to be used in a public works construction project is furnished at no expense by the state or federal government or any agency thereof, the governing authority shall have the power and authority to purchase material for such public works construction project and use the labor furnished free to the governmental entity; and in such case, this chapter shall not apply.

(d) Where a public works construction contract involves the expenditure of federal assistance or funds, the receipt of which is conditioned upon compliance with federal laws or regulations regarding the procedures for awarding public works construction contracts, a governmental entity shall comply with such federal requirements and shall not be required to comply with the provisions of this chapter that differ from the federal requirements. The governmental entity shall provide notice that federal procedures exist for the award of such contracts in the advertisement required by subsection (b) of Code Section 36-91-20. The availability and location of such federal requirements shall be provided to any person requesting such information.

(e) The requirements of this chapter shall not apply to public works construction projects necessitated by an emergency; provided, however, that the nature of the emergency shall be described in the minutes of the governing authority. Any contract let by a county pursuant to this subsection shall be ratified, as soon as practicable, on the minutes of the governing authority, and the nature of the emergency shall be described therein.

(f) Except as otherwise provided in Chapter 4 of Title 32, the requirements of this chapter shall not apply to public works construction projects subject to the requirements of Chapter 4 of Title 32.

(g) The requirements of this chapter shall not apply to public works construction projects or any portion of a public works construction project self-performed by a governmental entity. If the governmental entity contracts with a private person or entity for a portion of such project, the provisions of this chapter shall apply to any such contract estimated to exceed \$ 100,000.00.

(h) The requirements of this chapter shall not apply to sole source public works construction contracts.

(i) The requirements of this chapter shall not apply to hospital authorities; provided, however, that a public works construction contract entered into by a hospital authority

shall be subject to the requirements of this chapter if, in connection with such contract, the hospital authority either:

- (1) Incurs indebtedness and secures such indebtedness by pledging amounts to be received by such authority from one or more counties or municipalities through an intergovernmental contract entered into in accordance with Code Section 31-7-85; or
- (2) Receives funds from the state or one or more counties or municipalities for the purpose of financing a public works construction project, which moneys are not for reimbursement of health services provided.

36-91-40

(a)(1) Any bid bond, performance bond, payment bond, or security deposit required for a public works construction contract shall be approved and filed with the treasurer or the person performing the duties usually performed by a treasurer of the obligee named therein. At the option of the governmental entity, if the surety named in the bond is other than a surety company authorized by law to do business in this state pursuant to a current certificate of authority to transact surety business by the Commissioner of Insurance, such bond shall not be approved and filed unless such surety is on the United States Department of Treasury's list of approved bond sureties.

(2) Any bid bond, performance bond, or payment bond required by this Code section shall be approved as to form and as to the solvency of the surety by an officer of the governmental entity negotiating the contract on behalf of the governmental entity. In the case of a bid bond, such approval shall be obtained prior to acceptance of the bid or proposal. In the case of payment bonds and performance bonds, such approval shall be obtained prior to the execution of the contract.

(b) Whenever, in the judgment of the obligee:

- (1) Any surety on a bid, performance, or payment bond has become insolvent;
- (2) Any corporate surety is no longer certified or approved by the Commissioner of Insurance to do business in the state; or
- (3) For any cause there are no longer proper or sufficient sureties on any or all of the bonds,

the obligee may require the contractor to strengthen any or all of the bonds or to furnish a new or additional bond or bonds within ten days. Thereupon, if so ordered by the obligee, all work on the contract shall cease unless such new or additional bond or bonds are furnished. If such bond or bonds are not furnished within such time, the obligee may terminate the contract and complete the same as the agent of and at the expense of the contractor and his or her sureties.

36-91-50

(a) Bid bonds shall be required for all public works construction contracts subject to the requirements of this article with estimated bids or proposals over \$ 100,000.00; provided, however, that a governmental entity may require a bid bond for projects with estimated bids or proposals of \$ 100,000.00 or less.

(b) In the case of competitive sealed bids, except as provided in Code Sections 36-91-52 and 36-91-53, a bid may not be revoked or withdrawn until 60 days after the time set by the governmental entity for opening of bids. Upon expiration of this time period, the bid will cease to be valid, unless the bidder provides written notice to the governmental entity prior to the scheduled expiration date that the bid will be extended for a time period specified by the governmental entity.

(c) In the case of competitive sealed proposals, the governmental entity shall advise offerors in the request for proposals of the number of days that offerors will be required to honor their proposals; provided, however, that if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the governmental entity to be unlikely of being selected for contract award shall be released from his or her proposal.

(d) If a governmental entity requires a bid bond for any public works construction contract, no bid or proposal for a contract with the governmental entity shall be valid for any purpose unless the contractor shall give a bid bond with good and sufficient surety or sureties approved by the governing authority. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid or proposal shall be considered if a proper bid bond or other security authorized in Code Section 36-91-51 has not been submitted. The provisions of this subsection shall not apply to any bid or proposal for a contract that is required by law to be accompanied by a proposal guaranty and shall not apply to any bid or proposal for a contract with any public agency or body which receives funding from the United States Department of Transportation and which is primarily engaged in the business of public transportation.

36-91-51

(a) In lieu of the bid bond provided for in Code Section 36-91-50, the governmental entity may accept a cashier's check, certified check, or cash in the amount of not less than 5 percent of the total amount payable by the terms of the contract payable to and for the protection of the governmental entity for which the contract is to be awarded.

(b) When the amount of any bid bond required under this article does not exceed \$750,000.00, the governmental entity may, in its sole discretion, accept an irrevocable letter of credit issued by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under Code Section 36-91-50.

36-91-52

(a) As used in this Code section, the term “bid” includes proposal and the term “bidder” includes offeror.

(b) Any governmental entity receiving bids subject to this article shall permit a bidder to withdraw a bid from consideration after the bid opening without forfeiture of the bid security if the bidder has made an appreciable error in the calculation of his or her bid and if:

(1) Such error in the calculation of his or her bid can be documented by clear and convincing written evidence;

(2) Such error can be clearly shown by objective evidence drawn from inspection of the original work papers, documents, or materials used in the preparation of the bid sought to be withdrawn;

(3) The bidder serves written notice upon the governmental entity which invited proposals for the work prior to the award of the contract and not later than 48 hours after the opening of bids, excluding Saturdays, Sundays, and legal holidays;

(4) The bid was submitted in good faith and the mistake was due to a calculation or clerical error, an inadvertent omission, or a typographical error as opposed to an error in judgment; and

(5) The withdrawal of the bid will not result in undue prejudice to the governmental entity or other bidders by placing them in a materially worse position than they would have occupied if the bid had never been submitted.

(c) In the event that an apparent successful bidder has withdrawn his or her bid as provided in subsection (b) of this Code section, action on the remaining bids should be considered as though the withdrawn bid had not been received. In the event the project is relet for bids, under no circumstances shall a bidder who has filed a request to withdraw a bid be permitted to resubmit a bid for the work.

(d) No bidder who is permitted to withdraw a bid pursuant to subsection (b) of this Code section shall for compensation supply any material or labor to, or perform any subcontract or other work agreement for, the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

36-91-53

(a) As used in this Code section, the term:

(1) "Affiliated corporation" means, with respect to any corporation, any other corporation related thereto:

(A) As a parent corporation;

(B) As a subsidiary corporation;

(C) As a sister corporation;

(D) By common ownership or control; or

(E) By control of one corporation by the other.

(2) The term "bid" includes proposals.

(b) In any case where two or more affiliated corporations bid for a contract under this Code section and any one or more of such affiliated corporations subsequently rescind or revoke their bid or bids in favor of another such affiliated corporation whose bid is for a higher amount and the contract is awarded at such higher amount to such other affiliated corporation, then the bid bond, proposal guaranty, or other security otherwise required under this article of each affiliated corporation rescinding or revoking its bid shall be forfeited.

36-91-54

The obligee in any bid bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, that no action may be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the governmental entity.

36-91-70

Performance bonds shall be required for all public works construction contracts subject to the requirements of this chapter with an estimated contract amount greater than \$ 100,000.00; provided, however, that a governmental entity may require a performance bond for public works construction contracts that are estimated at \$ 100,000.00 or less. No public works construction contract requiring a performance bond shall be valid for any purpose unless the contractor shall give such performance bond. The performance bond shall be in the amount of at least the total amount payable by the terms of the contract and shall be increased as the contract amount is increased.

36-91-71

When the amount of the performance bond required under this article does not exceed \$750,000.00, the governmental entity may, in its sole discretion, accept an irrevocable letter of credit by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under this article.

36-91-72

The obligee in any performance bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, no action can be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the governmental entity.

36-91-90

Payment bonds shall be required for all public works construction contracts subject to the requirements of this chapter with an estimated contract amount greater than \$ 100,000.00; provided, however, that a governmental entity may require a payment bond for public works construction contracts that are estimated at \$ 100,000.00 or less. No public works construction contract requiring a payment bond shall be valid for any purpose, unless the contractor shall give such payment bond; provided, however, that, in lieu of such payment bond, the governmental entity, in its discretion, may accept a cashier's check, certified check, or cash for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract. The payment bond or other security accepted in lieu of a payment bond shall be in the amount of at least the total amount payable by the terms of the initial contract and shall be increased if requested by the governmental entity as the contract amount is increased.

36-91-91

If a payment bond or security deposit is not taken in the manner and form required in this article, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure. No agreement, modification, or change in the contract, change in the work covered by the contract, or extension of time for the completion of the contract shall release the sureties of such payment bond.

36-91-92

(a) The contractor furnishing the payment bond or security deposit shall post on the public works construction site and file with the clerk of the superior court in the county in which the site is located a notice of commencement no later than 15 days after the

contractor physically commences work on the project and supply a copy of the notice of commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to supply a copy of the notice of commencement within ten calendar days of receipt of the written request from the subcontractor, materialman, or person shall render the provisions of paragraph (1) of subsection (a) of Code Section 36-91-93 inapplicable to the subcontractor, materialman, or person making the request. The notice of commencement shall include:

- (1) The name, address, and telephone number of the contractor;
 - (2) The name and location of the public work being constructed or a general description of the improvement;
 - (3) The name and address of the governmental entity that is contracting for the public works construction;
 - (4) The name and address of the surety for the performance and payment bonds, if any; and
 - (5) The name and address of the holder of the security deposit provided, if any.
- (b) The failure to file a notice of commencement shall render the notice to contractor requirements of paragraph (1) of subsection (a) of Code Section 36-91-93 inapplicable.
- (c) The clerk of the superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the governmental entity and the name of the contractor as contained in the notice of commencement.

36-91-93

(a) Every person entitled to the protection of the payment bond or security deposit required to be given who has not been paid in full for labor or material furnished in the prosecution of the work referred to in such bond or security deposit before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or the material or equipment or machinery was furnished or supplied by such person for which such claim is made, or when he or she has completed his or her subcontract for which claim is made, shall have the right to bring an action on such payment bond or security deposit for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due such person; provided, however, that:

(1) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has not complied with the notice of commencement requirements shall have the right of action upon the payment bond or security deposit upon giving written notice to the contractor within 90 days from the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was performed or done. The notice to the contractor may be served by registered or certified mail, postage prepaid, or statutory overnight delivery, duly addressed to the contractor, at any place at which the contractor maintains an office or conducts his or her business or at his or her residence, by depositing such notice in any post office or branch post office or any letter box under the control of the United States Postal Service; alternatively, notice may be served in any manner in which the sheriffs of this state are authorized by law to serve summons or process; and

(2) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has complied with the notice of commencement requirements in accordance with subsection (a) of Code Section 36-91-92 shall have the right of action on the payment bond or security deposit, provided that such person shall, within 30 days from the filing of the notice of commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, give to the contractor a written notice setting forth:

(A) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;

(B) The name and address of each person at whose instance the labor, material, machinery, or equipment is being furnished;

(C) The name and the location of the public works construction site; and

(D) A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.

(b) Nothing contained in this Code section shall limit the right of action of a person entitled to the protection of the payment bond or security deposit required to be given pursuant to this article to the 90 day period following the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made.

(c) Every action instituted under this Code section shall be brought in the name of the claimant without making the governmental entity for which the work was done or was to be done a party to such action.

36-91-94

The official who has the custody of the bond or security deposit required by this article is authorized and directed to furnish to any person making application therefor a copy of the bond or security deposit agreement and the contract for which it was given, certified by the official who has custody of the bond or security deposit. With his or her application, such person shall also submit an affidavit that he or she has supplied labor or materials for such work and that payment therefor has not been made or that he or she is being sued on any such bond or security deposit. Such copy shall be primary evidence of the bond or security deposit and contract and shall be admitted in evidence without further proof. Applicants shall pay for such certified copies and such certified statements such fees as the official fixes to cover the cost of preparation thereof, provided that in no case shall the fee fixed exceed the fees which the clerks of the superior courts are permitted to charge for similar copies.

36-91-95

No action can be instituted on the payment bonds or security deposits after one year from the completion of the contract and the acceptance of the public works construction by the proper public authorities. Every action instituted under this article shall be brought in the name of the claimant, without the governmental entity for which the work was done or was to be done being made a party thereto.

**APPENDIX B
SAMPLE FORMS**

**CHECKLIST FOR PUBLIC WORKS CONSTRUCTION PROJECTS
SUBJECT TO THE GEORGIA LOCAL GOVERNMENT
PUBLIC WORKS CONSTRUCTION LAW**

- _____ 1. Is the project for **public works construction** as defined by the Georgia Local Government Public Works Construction Law? (If yes, continue.)
- _____ 2. Is the project exempt from these requirements? (O.C.G.A. 36-91-22)
- _____ a. Is force account labor being used for this project?
 - _____ b. Is inmate labor being used for this project?
 - _____ c. Is the project needed due to an emergency as defined by O.C.G.A. 36-91-2(5)?
 - _____ d. Is the project exempt for another reason? (List.) _____
3. What advertising method will be used? (O.C.G.A. 36-91-20(b))
- _____ a. Legal organ of the county.
 - _____ b. Internet website. (If b., check 1. or 2., below.)
 - _____ 1. City's website?
 - _____ 2. Other website identified by the city.
 - _____ a. Georgia Local Government Access (www.glga.org)
 - _____ c. Has the city posted notice of the contract opportunity at city hall?
 - _____ d. Are plans and specifications available?
4. Which competitive process will be utilized? (O.C.G.A. 36-91-21)
- _____ a. Competitive Sealed Bids
 - _____ b. Competitive Sealed Proposals
5. What construction delivery method will be used? (Check one.)
- _____ a. Traditional (Design-Bid-Build)
 - _____ b. Design-Build
 - _____ c. Construction Management (CM) At-Risk
 - _____ d. Other (List.) _____
6. Will prequalification of bidders/offerors be used?
- _____ a. Have the criteria for prequalification been followed?
 - _____ b. Has a procedure been established for disqualified offerors?
7. Pre-bid conferences.
- _____ a. If a bidder or offeror's attendance at a pre-bid conference is mandatory, this requirement must be stated in the city's advertisement of the contract opportunity. O.C.G.A. § 36-91-20(b).
8. Issuance of Addenda.
- _____ a. If issued within 72 hours prior to the advertised time for opening bids or proposals (excluding Saturdays, Sundays, and legal holidays), then the opening of bids or proposals must be extended at least 72 hours (excluding Saturdays, Sundays, and legal holidays). O.C.G.A. § 36-91-20(d).

9. Bid Bonds. Required for all public works construction contracts with estimated bids or proposals over \$100,000.
- a. Was bid bond received with the bid or proposal?
 - b. Does the bond surety have a current certificate of authority to transact business from the Georgia Insurance Commissioner? If not, is the surety on the U.S. Department of Treasury's list of approved bond sureties?
 - c. The city must approve the form and solvency of the surety prior to acceptance of the bid or proposal. O.C.G.A. § 36-91-40(a)(2).
10. Bid/Proposal Opening. (Check one.)
- a. If the Bid Method is used, the city must open the bids in public on the bid opening date specified in the bid invitation. O.C.G.A. § 36-91-21(b)(3). All bidders, as well as the general public, may attend the bid opening.
 - b. If the Proposal Method is used, the city must open the proposals on the date specified in the RFP. Additionally, the proposals must be opened in a manner that does not disclose the contents of the proposals to competing offerors. O.C.G.A. § 36-91-21(c)(1)(B).
10. Length of Time that Bids/Proposals Must Remain Open.
- a. Competitive Sealed Bids. A bid may not be revoked or withdrawn until 60 days after the date for opening bids. After this time, the bid will cease to be valid, unless the bidder provides written notice to the city prior to the scheduled expiration date the bid will be extended for a time period specified by the city.
 - b. Competitive Sealed Proposals. The city must advise offerors in the RFP of the number of days that offerors will be required to honor their proposals. However, if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the city to be unlikely of being selected for contract award must be released.
11. Performance Bonds. Required for all public works construction contracts over \$100,000.
- a. Was bond received?
 - b. Does the bond surety have a current certificate of authority to transact business from the Georgia Insurance Commissioner? If not, is the surety on the U.S. Department of Treasury's list of approved bond sureties?
 - c. The city must approve the form and solvency of the surety prior to the execution of the contract. O.C.G.A. § 36-91-40(a)(2).
12. Payment Bonds. Required for all public works construction contracts over \$100,000.
- a. Was bond received?
 - b. Does the bond surety have a current certificate of authority to transact business from the Georgia Insurance Commissioner? If not, is the surety on the U.S. Department of Treasury's list of approved bond sureties?
 - c. The city must approve the form and solvency of the surety prior to the execution of the contract. O.C.G.A. § 36-91-40(a)(2).
13. Approval of Contracts.
- a. The city may reject any and all bids or proposals.
 - b. Contracts subject to the requirements of the Georgia Local Government Public Works Construction Law must be in writing, on file, and available for public inspection.
 - c. E-Verify Requirement

Sample Bid Bond

Disclaimer: *This sample bid bond is provided for general informational purposes and may not apply to your city's specific situation. It should be tailored to reflect the actual needs of your city. Please consult with your city attorney before using this form.*

KNOW ALL MEN BY THESE PRESENTS THAT WE (Contractor) _____

as Principal, hereinafter called the Principal, and (Surety) _____, a corporation duly organized under the laws of the State of _____ as Surety, hereinafter called the Surety, are held and firmly bound unto

(Insert full name, address, and legal title of Owner)

as Obligee, hereinafter called Obligee, in the sum of _____ Dollars (), or _____ (___ %) percent of the amount bid, whichever is less,

for the payment of which sum well and truly to be made, the said Principal and the said Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for

(Insert name, address, and description of project)

NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed and sealed this _____ day of _____, 2_____.

(Witness)

(Principal)

By: _____
(Title)

(Witness)

(Surety)

By: _____
(Title)

Sample Performance Bond

Disclaimer: *This sample performance bond is provided for general informational purposes and may not apply to your city's specific situation. It should be tailored to reflect the actual needs of your city. Please consult with your city attorney before using this form.*

KNOW ALL MEN BY THESE PRESENTS _____ [name of CONTRACTOR] (hereinafter called the "Principal") and _____ [name of SURETY] (hereinafter called the "Surety"), are held and firmly bound unto _____ [name of OWNER] (hereinafter called the "Owner") and their successors and assigns, in the penal sum of _____ Dollars (\$_____), lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated _____ which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the _____ [description of the project], more particularly described in the Construction Contract (hereinafter called the "Project"); and

NOW, THEREFORE, the conditions of this obligation are as follows, that if the Principal shall fully and completely perform all the undertakings, covenants, terms, conditions, warranties, and guarantees contained in the Construction Contract, including all modifications, amendments, changes, deletions, additions, and alterations thereto that may hereafter be made, then this obligation shall be void; otherwise, it shall remain in full force and effect.

Whenever the Principal shall be, and declared by the Owner to be, in default under the Construction Contract, the Surety shall promptly remedy the default as follows:

- 1) Complete the Construction Contract in accordance with the terms and conditions; or
- 2) Obtain a bid or bids for completing the Construction Contract in accordance with its terms and conditions, and upon determination by the Surety and the Owner of the lowest responsible bidder, arrange for a contract between such bidder and Owner and make available as the work progresses (even though there should be a default or succession of defaults under the Construction Contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the penal sum set forth in the first paragraph hereof, as may be adjusted, and the Surety shall make available and pay to the Owner the funds required by this Paragraph prior to the payment of the Owner of the balance of the contract price, or any portion thereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by the Owner to the Contractor under the Construction Contract, and any amendments thereto, less the amount paid by the Owner to the Contractor; or, at the option of the Owner,
- 3) Allow Owner to compute the work and reimburse the Owner for all reasonable costs incurred in completing the work.

In addition to performing as required in the above paragraphs, the Surety shall indemnify and hold harmless the Owner from any and all losses, liability and damages, claims, judgments, liens, costs, and fees of every description, including reasonable attorney's fees, litigation costs and expert witness fees, which the Owner may incur, sustain, or suffer by reason of the failure or

default on the part of the Principal in the performance of any or all of the terms, provisions, and requirements of the Construction Contract, including any and all amendments and modifications thereto, or incurred by the Owner in making good any such failure of performance on the part of the Principal.

The Surety shall commence performance of its obligations and undertakings under this Bond promptly and without delay, after written notice from the Owner to the Surety.

The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract, and agrees that the obligations undertaken by this bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, change in payment terms, and amendments.

The Surety hereby agrees that this Bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment to the Construction Contract, so as to bind the Principal and the Surety to the full and faithful performance of the Construction Contract as so amended or modified, and so as to increase the penal sum to the adjusted Contract Price of the Construction Contract.

No right of action shall accrue on this Bond to or for the use of any person, entity, or corporation other than the Owner and any other obligee named herein, or their executors, administrators, successors or assigns.

This Bond is intended to comply with O.C.G.A. Section 36-91-50, and shall be interpreted so as to comply with the minimum requirements thereof. However, in the event the express language of this Bond extends protection to the Owner beyond that contemplated by O.C.G.A. Section 36-91-50, or any other statutory law applicable to this Project, then the additional protection shall be enforced in favor of the Owner, whether or not such protection is found in the applicable statutes.

IN WITNESS WHEREOF the undersigned have caused this instrument to be executed and their respective corporate seals to be affixed and attested by their duly authorized representatives this ____ day of _____, 2____.

_____ (SEAL)
(Principal)

By: _____

Attest:

Secretary

_____ (SEAL)

By: _____

Secretary

[Attach power of attorney]

(Source: Robert L. Crewdson, Alston & Bird LLP, Atlanta, Georgia, 404-881-7291)

Sample Payment Bond

Disclaimer: *This sample performance bond is provided for general informational purposes and may not apply to your city's specific situation. It should be tailored to reflect the actual needs of your city. Please consult with your city attorney before using this form.*

KNOW ALL MEN BY THESE PRESENTS that [insert name of contractor] (hereinafter called the "Principal") and [insert name of surety] (hereinafter called the "Surety"), are held and firmly bound unto [insert name of owner] (hereinafter called the "Owner"), its successors and assigns as obligee, in the penal sum of [contract amount], lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated [insert date of contract], which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the construction of a project known as [insert name of project], as more particularly described in the Construction Contract (hereinafter called the "Project");

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall promptly make payment to all persons working on or supplying labor or materials under the Construction Contract, and any amendments thereto, with regard to labor or materials furnished and used in the Project, and with regard to labor or materials furnished but not so used, then this obligation shall be void; but otherwise it shall remain in full force and effect.

1. A "Claimant" shall be defined herein as any subcontractor, person, party, partnership, corporation or other entity furnishing labor, services, or materials used, or reasonably required for use, in the performance of the Construction Contract, without regard to whether such labor, services, or materials were sold, leased, or rented, and without regard to whether such Claimant is or is not in privity of contract with the Principal or any subcontractor performing work on the Project, including, but not limited to, the following labor, services, or materials: water, gas, power, light, heat, oil, gasoline, telephone service, or rental of equipment directly applicable to the Construction Contract.
2. In the event a Claimant files a claim against the Owner, or the property of the Owner, and the Principal fails or refuses to satisfy or discharge it promptly, the Surety shall satisfy or discharge the claim promptly upon written notice from the Owner, either by bond or as otherwise provided in the Construction Contract.
3. The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract and agrees that the obligations undertaken by this Bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and amendments.
4. The Surety hereby agrees that this Bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment or modification to the Construction Contract, so as to bind the Principal and Surety, jointly and severally, to the full payment of any Claimant under the Construction Contract, as amended or modified, provided only that the Surety shall not be liable for more than the penal sum of the Bond, as specified in the first paragraph hereof.

5. This Bond is made for the use and benefit of all persons, firms, and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed or supplied under the Construction Contract, and any amendments thereto, and they and each of them may sue hereon.
6. No action may be maintained on this Bond after one (1) year from the date the last services, labor, or materials were provided under the Construction Contract by the Claimant prosecuting said action.
7. This Bond is intended to comply with O.C.G.A. Section 36-91-70, and shall be interpreted so as to comply with the minimum requirements thereof. However, in the event the express language of this Bond extends protection to the Owner beyond that contemplated by O.C.G.A. Section 36-91-70, or any other statutory law applicable to this Project, then the additional protection shall be enforce in favor of the Owner, whether or not such protection is found in the applicable statutes.

IN WITNESS WHEREOF, the Principal and Surety have hereunto affixed their corporate seals and caused this obligation to be signed by their duly authorized representatives this [day] of [month and year].

Attest:

[Principal]

Attest:

[Title]

[Surety]

[Title]

(Source: Robert L. Crewdson, Alston & Bird LLP, Atlanta, Georgia, 404-881-7291)

Sample E-Verify Contractor Affidavit

CONTRACTOR AFFIDAVIT

By executing this affidavit, the undersigned contractor verifies its compliance with O.C.G.A. §13-10-91, stating affirmatively _____, has registered with and is participating in a federal work authorization program [any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA), P.L. 99-603], in accordance with the applicable provisions of O.C.G.A. §13-10-91.

The undersigned agrees that should it employ any subcontractor(s) in connection with the physical performance of services in Georgia pursuant to this contract, GMA will secure from such subcontractor(s) similar verification of compliance with O.C.G.A. § 13-10-91 on the Subcontractor Affidavit provided in Rule 300-10-01-.08 or a substantially similar form.

EEV / Basic Pilot Program User Identification Number

BY: Authorized Officer or Agent

Date

Title of Authorized Officer or Agent

Printed Name of Authorized Officer or Agent

SUBSCRIBED AND SWORN
BEFORE ME ON THIS THE
_____ DAY OF _____, 2010

Notary Public
My Commission Expires:

APPENDIX C BRIDGING

BRIDGING

*Wayne K. Robertson, P.E.
The Brookwood Group*

Advocates of Bridging say that this method provides much more protection for the project's owner.

Typically, a construction contract is based on the architect and engineers being engaged by the owner; the architect and engineers prepare contract documents that form the basis of agreement on the construction contract price. However, sometimes owners use a design-build form of contract, in which the contractor employs the architects and engineers.

Owners, financing entities and others usually feel safer with the former (architect and engineers engaged by the owner) though more and more owners are using the latter (design-build). However, neither is as safe for owners or financing entities as the Bridging method.

Under the traditional process of the owner engaging the architect and engineers, a constant issue for owners is knowing what the construction contract price will be as soon as possible. Many owners have tried using a "GMP" (guaranteed maximum price) issued during preliminary design. But such a GMP is not contractually enforceable for the owner and many public sector owners have been hurt more than helped with GMPs because they give the owner a false sense of security.

Many owners feel the traditional design-bid-build method is safer in terms of their knowing what the final cost will be. They assume that with the design and contract documents prepared by the owner's architect and engineers, the owner has a high level of assurance that the final construction cost will be within a few percentage points of the original contract price. However, there are many cases of things not working out that way. The reason is that all such documents contain human errors and omissions in them that leave the owner vulnerable to unwarranted change orders and, sometimes, substantial claims against them. Professional liability insurance carried by the architect and engineers is of relatively little help and usually involves long disputes if the owner has a claim.

Also, the traditional form of contract with the owner engaging the architect and engineers leaves the owner more vulnerable to the cost of correcting post construction "bugs". Often, these post construction problems require additional unexpected investment in the building by the owner. This is due to the traditional relationships between owner, contractor and third party architect/engineers, relationships that often leave some confusion as to the party at fault and encourage finger pointing. This is an important point in that a fairly high percentage of buildings have one or more post construction bugs which must be resolved, and some are quite expensive to resolve. Under the traditional approach, the owner often has costs related to this corrective work and/or related disputes.

Under the design-build approach, because the architect and engineers are employed by the contractor, the owner has no serious exposure to unwarranted change orders or claims arising out of errors or omissions in the contract documents, and there is no question about who fixes any post construction bugs if the owner can get under contract in the first place that fully documents the end product.

In the typical design-build approach the owner is assured of some fundamental parameters of the building's details such as its size and height along with compliance with all applicable laws and building codes. However, the owner has inadequate information about the design prior to final commitment to the contractor. Therefore, the owner cannot safely determine whether or not the building is suitable for generating the projected income nor can the owner know that the building will be operable within the projected maintenance and operating cost budgets.

The Bridging process employs a design-build form of agreement but with the architectural design of the building having been completed and extensive design development level of drawings and performance specifications made a part of the contract. These drawings and specifications clearly and adequately illustrate and document the design. Further, the form of agreement is prepared by the owner's consultant. This form of agreement and the attached drawings and specifications are in much more detail than the typical design-build contract, usually prepared by the design-build proposing contractor. These Contract Documents protect the owner from the standpoints of knowing just what the end product will be, how much income it can generate, and what the building's maintenance and operating costs will be. Additionally, it also provides the owner with the same protection found in typical design-build contracts. These are the protections against unwarranted change orders, claims, post construction confusion, and additional unscheduled investment.

Thus, in a Bridging type of contract, the owner and financing entities have the best of both worlds. For this reason many owners are starting to use Bridging. The University of California System has now gone heavily to Bridging. Georgia State University has recently used Bridging with good success on one of its academic facilities and now has a second project under construction by the Bridging method. GSA has gone to Bridging for most of its projects with a very successful \$200 million courthouse just completed in Nevada and another \$300 million courthouse in L. A. now going forward under Bridging. The U. S. Navy has used the approach quite successfully. The U. S. Air Force has adopted Bridging with approval from the Corps of Engineers, while the Department of State plans to use this method in new embassy design and construction.

APPENDIX D

SELECTING A DESIGN PROFESSIONAL

How to Hire an Engineer

*Thomas C. Leslie, Executive Director
American Consulting Engineers Council of Georgia*

Assume for the moment that your community needs to accomplish a “project;” say it is a road, water/sewer plant or lines, master plan, watershed study, industrial park or some other capital project. You need a consulting firm to perform the tasks to successfully accomplish the project. How, then, do you hire the engineer? It’s simple: select the most qualified engineering firm and negotiate a complete scope of work and a fair fee. Simple, huh? Does it require effort? Yes. But isn’t the success of your project worth it? If the project doesn’t matter then the qualification of the engineer doesn’t matter. For projects that matter, the generally accepted process to select an engineer is referred to as Qualifications Based Selection, or QBS.

Qualifications Based Selection means you consider a variety of competing engineering firms, rank them in the order of qualifications and negotiate a scope/fee with the top ranked firm. QBS is required by the federal government in the selection of design professionals under provisions of the Brooks Law. The American Public Works Association, which is primarily composed of public sector officials, endorses QBS and recommends its use in professional services procurements. The American Bar Association endorses QBS in their model procurement code. State agencies endorse QBS (including, DOT, Board of Regents, EPD, DCA and Georgia State Finance and Investment Commission). Both GMA and ACCG have endorsed QBS in procuring professional services. As you may suspect, all of the professional societies support QBS.

In some communities, a city may have an ongoing relationship with an engineer. If the engineer has a unique understanding of a particular facility or, for example a water/sewer system, it is sensible to continue in that relationship. These relationships are like those with the City Attorney, for example; you do not go hire a new attorney whenever a new legal issue arises (while you may if there is a complex issue requiring special expertise).

QBS involves a few basic steps:

- Advertise the need for an engineer and invite statements of qualifications or project proposals.
- Use a panel (say 3-5 people) to evaluate the qualifications and select 3-5 firms for an interview.
- On a single day, interview the short-listed firms for 30-45 minutes to get a better understanding of their qualifications and the people assigned to your project. Allow time for questions and listen carefully to answers.
- Immediately after the interview, discuss the merits of the firms and rank them in order of qualifications.
- Meet with the top ranked firm to negotiate the terms of a contract, including scope of work and fee. You should devote considerable time to understanding the scope of work – be sure you know what you want and make sure it is in the scope of work.

- If unable to reach agreement with the top ranked firm, terminate negotiations in writing and begin negotiations with the second ranked firm. This gives the community a powerful tool in the negotiations.

What is not part of QBS? QBS is not a simple request for a lump sum fee for an ill-defined project. QBS is not a request for a technical proposal *and* a lump sum fee proposal. Why not? Once price is introduced into the proposal evaluation, qualifications are frequently discarded and selection is on the basis of cheap fee. If fee is considered prior to negotiations with the best-qualified firm, respondents frequently will reduce the scope of work or use the least experienced and lowest paid staff to execute the minimum scope of work. Quality is driven out, and the ultimate goal – a successful project – is jeopardized.

Time and again, QBS has proved to be the method that has the highest likelihood of leading to a successful project. If you don't care about a successful project, it doesn't matter. If you want a project that is successful and serves your community effectively for the long term use QBS in selecting your consulting engineering firm.

(For additional information on QBS, contact the American Consulting Engineers Council of Georgia at 404-521-2324 or visit their website at www.acecga.org.)

**APPENDIX E
SAMPLE DESIGNER SELECTION
EVALUATION CRITERIA FORM**

Sample Designer Selection Evaluation Criteria Sheet

	Rating	Weight	Score	Comment
1. Organization a. Size b. Location c. Depth				
2. Firm a. Similar b. Related c. Designing Within Budget d. Designing Within Schedule				
3. Project Team a. Project Architect Related b. Project Team Related				
4. Specific Capabilities a. Management b. CADD c. Inspection				
5. Professional Attitude				
6. Project Approach				
7. Project Understanding				

Additional Comments: _____

(Source: The Brookwood Group, Atlanta, Georgia. Contact: Wayne Robertson, PE, 404-350-9988)