

The Bolt

Coalition Formed to Address YISD RFP

RFP "Unnecessary, Costly and Not Legal"

In early December Ed Anderson, AGC Board President formed a coalition of interested parties to attempt to persuade the Ysleta ISD Board of Trustees to abandon a Bid Request (RFP-Request for Proposals) for professional services involving a construction quality inspection of specific school bond projects long completed and accepted by the District. Anderson said the RFP is not the best way to proceed. The YISD Board of Trustees wants to hire an outside consultant at a projected cost of up to \$6,000,000 to perform a forensic inspection of 11 School Bond projects.

AGC's (and it's members) problems with this issue are based on accepted business practices. "The projects have

been completed, the punch list for each project has been resolved, the schools and facilities have been inspected and accepted by the district and students staff and faculty are using these facilities with, as far as we know, no complaints," said Anderson. "But if there are issues with any projects, our members are willing to resolve those issues at no cost to YISD."

Additionally, Texas law does not allow engineering, architectural or other professional services to be bid by price, making the RFP illegal and placing the district at jeopardy for statutory penalties. If the YISD Board were to approve a costly forensic inspection, it could result in students and teachers being

relocated to temporary facilities for weeks or months to allow consultants to drill through concrete or tile floors, walls, ceilings, roofs, rip out plumbing and electrical installation and even tear up school grounds and landscaping looking for problems that so far have no surfaced.

The Ysleta ISD Board is scheduled to decide this issue the second week of February and Anderson is urging all AGC members to call or write their school district trustees at YISD to let them know this action, which has divided the board, is unnecessary, costly and not legal according to Texas law. (**Editor's Note:** The AGC "white Paper" on the RFP is in this issue.)

New Board Members to be Elected on Jan 22nd.

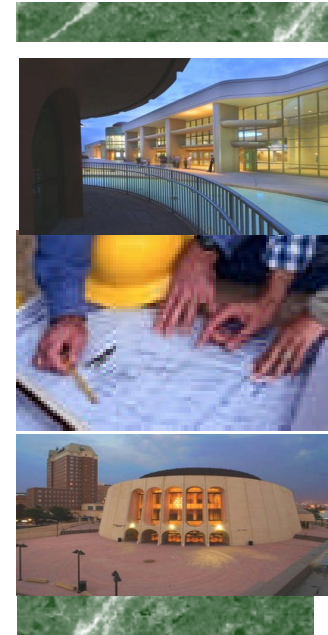
AGC's first General Membership meeting of the year will take place Thursday, January 22nd at 5:00pm at the Sunland Park Holiday Inn.

On the agenda is election of officers, a financial report from the chapter, a 2009 calendar, information on the golf tournament and a presentation by the city of El Paso on their two latest rules changes which will affect every AGC member.

Victor Torres, Director of Development for the city, has mandated that all plans submitted to City Inspection be done over the internet via email or on a disc. Unless the City delays this requirement, most contractors will be unable to submit plans on disc or over the internet immediately. AGC members are asked to come to the meeting to give Mr. Torres an idea of how this might cause a problem for

most local contractors. Additionally the City wants to restrict changing subs on inspection requests. This is another change that AGC members might want to let Mr. Torres know will be difficult to comply with, at least immediately.

Members can also come and meet Larry Trejo, the new AGC Executive Director and get a glimpse of AGC's future plans for 2009, 2010 and beyond.



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Need information on our Apprenticeship Program? Our Safety Program? Membership? Call Christy or Pat @ 585-1533.

Special points of interest:

- March 24, 2009: AGC Legislative Day in Austin
- February 11, 2009: YISD to vote on Construction Quality RFP
- New Member
- Hit 'em long & hit 'em straight. Join our golf tourney committee. (pg. 4)

4. This RFP is an Extremely Dangerous and Costly Precedent

We strongly suggest that this type of 20/20 hindsight review by paid consultants when no suggestion of problems exists sets a very bad precedent for future work. Future bidding will be chilled, and future costs will increase to take into account contractors, architects and engineers having to answer to outside, paid, consulting firms who are paid to *second guess* work previously completed, inspected and paid for.

5. This is a Waste of Taxpayer Money:

The cost of the items in the RFP could conceivably equal the cost of a new elementary school. We believe this is not the best use of taxpayer money. The Texas Education Agency can perform monetary audits for YISD at no cost. YISD should use resources available at no cost to the taxpayer. These projects already been audited at a significant impact to the YISD budget.

6. The Potential for Litigation & No Insurance:

The RFP assumes that the consultants will find architectural problems, design problems, construction defects, back-charges due, liquidated damages due, and change orders not approved, **after these jobs have been closed out**. The consultants will of necessity find perceived problems to earn their fee. If this is the case, each of the general contractors or construction managers will be dragged into protracted litigation, not only with YISD but also with each of the subcontractors involved in the projects, and most certainly against the consulting firm itself. The lawyers will get rich. The contractors, architects and engineers will of necessity defend their performance under their respective contracts, as will the subcontractors, and there will be **NO INSURANCE** to pay any of these litigation expenses or any awards. The performance bonds on the projects will not be responsible, nor will the contractors' liability policies. The money would have to come out of each parties' respective pockets. We predict this could cause more than one unnecessary bankruptcy, loss of jobs for literally hundreds of craftsmen, journeymen, apprentices and laborers, all in an attempt to wipe out an unfounded claim of defect.

7. The RFP Fails to Account for Bid-Project Differences

The RFP is further flawed because it asks the architects, engineers and accountants who will perform the services for the Independent Construction Quality Control Specialist Firm to literally "compare apples to oranges." Some of the eleven projects to be studied were bid as Complete Sealed Proposals (low-bid) projects, and others were bid as Construction Manager at Risk/Design Build projects. These will require different audit procedures that can be performed for no cost to YISD by its in-house staff and by the Texas Education Agency upon request.

In Summary:

The schools and projects have been completed, reviewed, inspected and accepted by the YISD. These projects are being used everyday by students, teachers and staff.

If there are deficiencies in any of the cited Ysleta school projects, AGC believes YISD should first attempt to work with the General Contractors for each project to resolve any issues that have surfaced and which have not been dealt with. We believe the Board should abandon this effort, saving time, money and other district resources which could be better utilized on on-going YISD operations or projects.



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We're on the Web! But DON'T GO to <www.agcelpaso.org>

at least not yet. Our webpage is temporarily DOWN as we rework it into a more modern and user friendly version.



Report from the State Capital



AGC TBB (State Chapter) Delivers Annual Financial Report to Members

The State AGC Chapter has reported that revenue for 2008 totaled \$693,578 while expenses \$623,949 for a rare income over expenses figure of \$69,629 for the year. Of the total income \$667,000 or 101% of the budgeted amount was collected. Further, legislative expenses were 115% of anticipated budget, while operating expenses were only 85%. **TBB**

Purchasing Power Lunch

The Greater El Paso Chamber of Commerce is having a "Purchasing Power Lunch" at 11:30 on Thursday, January 22nd at the Marriott Hotel. Ft. Bliss officials led by Col White will be there to talk about future growth for the base. We know the U.S. Army is spending \$5 billion on the base through 2012, but what are the possibilities of more investment? Tickets are \$18 for members/\$36 non-AGC is a member. **TB**

Prevailing Wage Rate Consortium

AGC was part of a group that met recently on the prevailing wage rate statute which is up for modification in the current state legislative session. Changes are minimal, most deal with making language in the statute uniform with local understanding and regulation. AGC, YISD, building trades, the city and county are members of the committee. State Senator Elliot Shapleigh is being asked to sponsor the bill. **TB**

OSHA 10-Hour Safety Training coming to El Paso

A push has been started to organize an OSHA "10-hour Marathon" in August in El Paso. The Tejano Contractors Association and the OSHA regional office are the sparkplugs behind this. The plan is to offer ten hours of safety training by OSHA certified instructors to as many as 500-600 construction employees in a one-day session for only \$10 per person. The sessions would be held concurrently in 20 classrooms at a site to be determined and in both English and Spanish. This type of seminar has reportedly been very successful in the Dallas-Forth Worth area since 2007.

February TBB Board Meeting details set

The next board meeting of AGC-Texas Building Branch (state chapter) will be February 11. It will be preceded by a reception at the Headliners for the new Texas House Speaker on the evening of February 10th. AGC El Paso has not yet been briefed on what the new speaker's positions on issues of critical im-

portance to AGC are. The Speaker sets the tone for the legislative session, determines what legislation gets to the floor for a vote and generally is considered the most powerful man in the legislature.

Indemnification Legislation Pending

The final draft of legislation to modify **indemnification clauses** in construction contracts is now in the hands of

the legislature. This bill deals with contractors and subcontractors indemnifying each other through standard clauses in construction contracts. **TB**

AGC Days in Austin Mar 24

All AGC members interested in attending AGC Days in Austin and meeting with state legislators should keep this date clear on their calendars. Details to come. **TB**

On the Homefront

Golf Committee Looking for Volunteers: If you like to chase the little white ball through the grass, you might be interested in becoming a member of our Golf Tournament Committee. We are forming a group of 5-6 volunteers to help organize, plan and run the "best-ever" AGC golf tournament. Mulligans, hole-in-one contest, etc. They're coming back!

New Members: Allen Concrete is a recent new member. Photo and details with next issue.

Dues Invoice Not Clear?: Please don't be bashful. If your dues invoice is not clear to you or you need an explanation as to why dues might have increased, we've got the answer. Call us.

We need to let YISD Know our Stance: Read the YISD "White Paper" (in this issue). Make copies or call us and we'll send you copies to distribute to your families, friends and co-workers.

Reasons Why Ysleta ISD Should Not Continue with a Proposed Construction Quality Forensic Inspection

FACT: In the fall of 2008, the Board of Trustees of the Ysleta Independent School District (YISD) issued a call for proposals to conduct an extensive, forensic inspection of eleven (11) school projects completed under their \$250 million Bond Issue.

FACT: The RFP (Request for Proposals) asked for professional services to investigate whether or not the eleven projects were built according to specifications and code and if the projects were of acceptable quality as per contracts given to area general contractors.

FACT: YISD would be required to hire outside consultants at a significant cost (\$6,000,000) to conduct a Quality Control Review, Overall Performance Audit and Physical Inspection of eleven YISD construction projects as solicited through the RFP. Two companies HAVE submitted bids.

FACT: The El Paso Chapter of the Associated General Contractors (AGC) and its member contractors, subcontractors and associates, plus the affiliated architects, engineers and others who worked on Ysleta Independent School District (YISD) projects, respect the right of the Board of Trustees to protect the rights and assets of the District in the best interests of its students, faculty, staff and tax paying public.

However, AGC El Paso and its membership respectfully ask that the YISD Board of Trustees abandon the RFP and should instead first utilize procedures in the contracts of the said projects to remedy any defects or problems before spending taxpayer's money to pursue what AGC believes is a no-win situation. The RFP is neither necessary, prudent nor legal for the following reasons:

1. The RFP Solicitation Violates State Law

Texas Government Code prohibits YISD from selecting a provider of professional services or awarding a contract for professional services **on the basis of competitive bids such as the Request For Proposals issued by YISD.**

§2254.003. SELECTION OF PROVIDER; FEES. (a) A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection award:

- (1) on the basis of demonstrated competence and qualifications to perform the services; and*
- (2) for a fair and reasonable price*
- (b) The professional fees under the contract may not exceed any maximum provided by law.*

A simple sentence or clause in the RFP fails to conceal the fact that the RFP solicitation is in fact requesting professional services which by state law, cannot be solicited in this manner. Any contract entered into by YISD in violation of the above provisions of the Texas Government Code is void pursuant to § 2251.005 and subject to Declaratory or Injunctive Relief under §2254.007.

2. YISD has Not stated SPECIFIC Problems with Any School Projects

None of the architectural or engineering firms involved in the eleven projects stipulated in the RFP have received any indication or notice that there are ANY design deficiencies on ANY of the projects. And none of the contractors have been notified of construction defects, except in the normal course of construction, all of which have been, or all in the process of being remedied. Each of the projects has undergone numerous inspections and evaluations by city inspectors, independent auditors, YISD, the quality control divisions of the contractors themselves, as well as by the architects and engineers who designed them.

3. There is no Reason to Hire Outside Consultants

The contractual documents that exist between YISD and the Architects, Engineers and Contractors involved in the projects contain procedures to perform, **at no further cost to YISD**, the same evaluations that will be performed by the architects, accountants and engineers who will perform the services to complete the evaluations called for in the RFP.

YISD's in-house construction department and its in-house accounting firm are entirely capable of performing any timeline, back-charge or change order audits at no extra expense to YISD. We understand that employees in YISD's own construction department have serious doubts about the legality or need for such a forensic study, but for whatever reasons are being left out of the dialog and decision process.