

Municipal Procurement

2012 Texas Municipal
Procurement Laws Made Easy

February 21, 2013

1. What city purchases must generally be awarded through the use of statutory procurement methods?

- ▶ before a city may enter into a contract that requires an expenditure of more than \$50,000 from one or more municipal funds, the city must:
 - (1) comply with competitive sealed bidding or competitive sealed proposals;
 - (2) reverse auction procedure; or
 - (3) comply with certain methods of construction procurement.
- Tex. Local Gov't Code § 252.021(a)(2).

2. Is a city economic development corporation required to comply with municipal procurement laws?

- Type A and Type Corporations: The Development Corporation Act does not contain a provision that subjects economic development corporations to municipal procurement requirements.
- Neither the Texas Attorney General nor the Texas courts have directly addressed this question.
 - See, Op. Tex. Att’y Gen. No. JC-0109 (1999).

5. Does a city have to use competitive bids or proposals to lease real property to an entity?

- Chapter 252 of the Local Government Code does not apply to the lease of real property.
- Temporary lease of property is not subject to the notice and bidding requirements in Chapter 272.
 - See, *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex. App. – Austin 2002, pet. denied).

9. Do competitive bidding requirements apply to city purchases of land or right-of-way?

- Do you have to bid the purchase of land? No.
- A city is not required to use competitive bidding to purchase or lease land or a right-of-way.
- When a City sells real property it is generally required to provide notice and take bids pursuant to Section 272.001 of the Texas Local Gov't Code.
- In addition, the sale of parkland generally requires compliance with Section 253.001 of the Texas Local Gov't Code.

10. What is the threshold amount at which competitive bidding or proposals are required?

- \$50,000.00



11. May a home rule city charter provision provide a lower threshold for requiring competitive bids?

- * Yes.
- * If there is a conflict between the statutory threshold amount that triggers the requirements of Chapter 252 and the city's charter, the city should follow the lower of the two amounts.



12. May a home rule city charter provide different procedural requirements for the handling of competitive bids?

- Yes.
- **Sec. 252.002. MUNICIPAL CHARTER CONTROLS IN CASE OF CONFLICT.** Any provision in the charter of a home-rule municipality that relates to the notice of contracts, advertisement of the notice, requirements for the taking of sealed bids based on specifications for public improvements or purchases, the manner of publicly opening bids or reading them aloud, or the manner of letting contracts and that is in conflict with this chapter controls over this chapter unless the governing body of the municipality elects to have this chapter supersede the charter.

13. CAN A GENERAL LAW CITY (CITY UNDER 5,000 POPULATION) IMPOSE A LOWER THRESHOLD FOR REQUIRING COMPETITIVE BIDS?

- Yes. A general law city by ordinance or simply by vote of the city council could impose a lower threshold on itself for competitive bidding than would otherwise be required by state law.
 - See Tex. Att’y Gen. Op. No. DM-106 (1992).

14. Can a city separate out its purchases over time to avoid the application of competitive bidding or proposal laws?

- No. Cannot avoid the application of competitive bidding laws by purposely dividing a single purchase into smaller components so that each component purchase is less than \$50,000.
- Section 252.062 of the Texas Local Government Code makes it a Class B misdemeanor.

17. After a bid contract is awarded, can a city later decrease or increase the amount of its purchase or the quantity of work to be performed?

- **Sec. 252.048. CHANGE ORDERS.**
- (c) decrease or an increase of \$50,000 or less, the city council may grant authority to a city official to approve the change orders.
- (c-1) public works contract in city with a population of 500,000 or more involves a decrease or an increase of \$100,000 or less, or a lesser amount as provided by ordinance, city council may grant general authority to a city official to approve the change order.
- (d) original contract price may not be increased by more than 25 percent. The original contract price may not be decreased by more than 25 percent without the consent of the contractor.

21. What notice must a city provide to announce a request for bids or proposals?

- **Sec. 252.041. NOTICE REQUIREMENT.**
- Notice of the time and place at which the bids will be publicly opened and read aloud must be published at least once a week for two consecutive weeks in a newspaper published in the municipality.
- The date of the first publication must be before the 14th day before the date set to publicly open the bids and read them aloud.
- If no newspaper is published in the municipality, the notice must be posted at the city hall for 14 days before the date set to publicly open the bids and read them aloud.

27. How are contracts awarded by the city that uses the competitive sealed bid proposals?

- When using additional criteria for competitive sealed bid requirements, the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the “best value” for the city.

27. How are contracts awarded by the city that uses the competitive sealed bid proposals? (cont'd)

- **“Best Value”** means:
 - (1) the purchase price;
 - (2) reputation of the bidder and of the bidder's goods or services;
 - (3) quality of the bidder's goods or services;
 - (4) extent to which the goods or services meet the city's needs;
 - (5) bidder's past relationship with the city;
 - (6) the impact on the ability of the city to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;
 - (7) total long-term cost to the city to acquire the bidder's goods or services; and
 - (8) any relevant criteria specifically listed in the request for bids or proposals.
 - - Tex. Local Gov't Code § 252.043(b)(1)-(8)

35. Is information contained in a bid or proposal confidential under the Public Information Act?

- * Section 552.104 of the Texas Government Code – exception to disclosure if released would give advantage to a competitor or bidder.
- * This is an exception which can be waived by failing to raise within the 10-day deadline.
- * Section 552.104(a) does not except bids from public disclosure after bidding is completed and the contract has been executed. ORD No. 541 (1990).

EXCEPTIONS TO COMPETITIVE BIDDING

- Section 252.022(a)(1)-(16) of Texas Local Gov't Code.
 - (1) a procurement made because of a public calamity; [question 72]
 - (2) a procurement necessary to preserve or protect the public health or safety of city residents; [question 73]
 - (3) a procurement necessary because of unforeseen damage to public machinery, equipment or other property; [question 74]



Exceptions to Competitive Bidding (cont'd)

- Section 252.022(a)(1)-(16) of Texas Local Gov't Code.
 - (4) a procurement for personal, professional, or planning services; [questions 75 to 79]
 - "Personal services" – services which are performed personally by the individual who contracted to perform them
 - "Professional services" – services which are mainly mental or intellectual rather than physical or manual
 - "Planning services" – services primarily intended to guide governmental policy to ensure the orderly and coordinated development of the state or of municipal . . . land areas.

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Professional Services Procurement Act

- Chapter 2254 of the Texas Government Code
- "Professional services" means:
 - accounting;
 - architecture;
 - landscape architecture;
 - land surveying;
 - medicine;
 - optometry;
 - professional engineering;
 - real estate appraising; or
 - professional nursing.



Professional Services Procurement Act

- Sec. 2254.003. SELECTION OF PROVIDER; FEES.
- (a) A governmental entity may not select a provider of professional services . . . on the basis of competitive bids . . . but shall make the selection and award:
 - (1) on the basis of demonstrated competence and qualifications to perform the services; and
 - (2) for a fair and reasonable price.



Professional Services Procurement Act

- Sec. 2254.005. VOID CONTRACT.
- A contract entered into or an arrangement made in violation of this subchapter is void as against public policy.



Exceptions to Competitive Bidding (cont'd)

- Section 252.022(a)(1)-(16) of Texas Local Gov't Code.
 - (5) a procurement for work that is performed and paid for by the day as the work progresses; [question 92]
 - (6) a purchase of land or a right-of-way; [question 9]
 - (7) a procurement of items that are available from only one source; [questions 81 and 82]
 - (8) a purchase of rare books, papers, and other library materials for a public library; [question 85]
 - (9) paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements; [question 89]

Exceptions to Competitive Bidding (cont'd)

- Section 252.022(a)(1)-(16) of Texas Local Gov't Code.
 - (10) a public improvement project, already in progress, authorized by the voters of the municipality, for which there is a deficiency of funds; [question 90]
 - (11) a payment under a contract by which a developer participates in the construction of a public improvement; [question 91]
 - (12) personal property sold: [questions 86-88]
 - Eg., Auction, going out of business sale;
 - (13) services performed by blind or severely disabled persons; [question 80]

Exceptions to Competitive Bidding (cont'd)

- Section 252.022(a)(1)-(16) of Texas Local Gov't Code.
 - (14) goods purchased by a municipality for subsequent retail sale by the municipality;
 - (15) electricity; or
 - (16) advertising, other than legal notices.



Penalties

- **Sec. 252.061. INJUNCTION.** If the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by:
 - (1) any property tax paying resident of the municipality; or
 - (2) a person who submitted a bid for a contract for which the competitive sealed bidding requirement applies, regardless of residency, if the contract is for the construction of public works.

Penalties

- **Sec. 252.062. CRIMINAL PENALTIES.**
- (a) A municipal officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements. [Class B misdemeanor]
- (b) A municipal officer or employee intentionally or knowingly violates Section 252.021, other than Subsection (a) [fails to seek bids, reverse auction, other methods]. [Class B misdemeanor]
- (c) A municipal officer or employee violates Chapter 252, other than Subsection (a) or (b). [Class C misdemeanor]

THE END

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