

Purchasing Basics 2012

(For a comprehensive paper on this topic, look for the attorney general's Municipal Procurement Made Easy Handbook, which should be available shortly at www.oag.state.tx.us.)

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When is a city required to competitively procure goods and services?

With limited exceptions, before a city enters into a contract that requires an expenditure of more than \$50,000, it must comply with the procedures for competitive sealed bidding or competitive sealed proposals in Chapter 252 of the Texas Local Government Code. As an alternative to competitive sealed bidding or proposals, a city may use the following procurement methods: (1) the reverse auction procedure for purchasing in Section 2155.062(d) of the Government Code; (2) a cooperative purchasing program under Subchapters D and F of Chapter 271 of the Local Government Code; or (3) a method described by Subchapter H of Chapter 271 of the Local Government Code (alternative procurement methods for city construction projects)[Note: H.B. 628 passed during the 2011 regular legislative session. The bill, which will become effective September 1, 2011, will – among other things – consolidate the alternative procurement methods for most governmental entities into a new Chapter 2267 of the Texas Government Code.]. *Id.* at §252.022(a).

Note that legislative changes made in 2007 authorize a city to use competitive sealed proposals for the purchase of any goods or services, including high technology items and insurance. However, construction projects must generally be procured using competitive bidding or specific alternative methods (discussed below). TEX. LOC. GOV'T CODE §252.021(b).

What criteria may a city use when competitively procuring a contract?

For general procurement of goods or services (as discussed below, special rules may apply to construction procurement), a contract must be awarded to: (a) the lowest responsible bidder, or (b) the bidder who provides goods or services at the “best value.” TEX. LOC. GOV'T CODE §252.043. When determining “best value,” the city may consider factors other than the purchase price of the goods and services, including among other things: (1) the reputation of the bidder and the bidder's goods or services; (2) the quality of the bidder's goods or services; (3) the bidder's past relationship with the city; and/or (4) any other lawful criteria. *Id.*

The city must indicate in the bid specifications and requirements that the contract will be awarded either to the lowest responsible bidder or to the bidder who provides goods or services at the “best value” for the city. *Id.*

In addition, two provisions authorize the use of local preference when awarding a contract. A city may consider a bidder's principal place of business when a city awards a contract for real or

personal property. *Id.* §274.905. The provision is available only to a city with a population of less than 400,000, and it provides that if a city receives one or more bids from a bidder whose principal place of business is in the city and whose bid is within three percent of the lowest bid price of a non-resident, the city may pick the resident bidder after a written determination that the decision is in the best interests of the city. *Id.* This is a useful provision for awarding contracts, but it appears to be directed towards the purchase of tangible items rather than services. Section 271.9051 authorizes any city with a population of less than 250,000 to give a preference to a local bidder when awarding a contract for personal property *or services* if: (1) the local bid is within five percent of the lowest bid that isn't local, and (2) the city's governing body finds in writing that the local bid offers the best combination of price and economic development factors such as local employment and tax revenues. Note that Section 271.9051 was limited to contracts of \$100,000 or less by H.B. 2082 in 2009. [Note: H.B. 1869, passed during the 2011 regular legislative session, removes the population brackets in current law relating to the above provisions, allowing any city to use those provisions. The bill will become effective immediately if signed by the governor or allowed to take effect by operation of law.] *Id.* §271.9051.

What are common exemptions from the competitive procurement requirements?

A city does not have to comply with competitive procurement requirements for certain expenditures, even if the expenditure is over \$50,000. The most common exemptions are as follows (see Section 252.022(a) of the Local Government Code for a complete list of exemptions):

- A procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality. TEX. LOC. GOV'T CODE §252.022(a)(1).
- A procurement necessary to preserve or protect the public health or safety of the municipality's residents. *Id.* §252.022(a)(2).
- A procurement necessary because of unforeseen damage to public machinery, equipment, or other property. *Id.* §252.022(a)(3).
- A procurement for personal, professional, or planning services. (Note: Certain professional services, however, must be procured through a competitive selection process under Chapter 2254 of the Government Code (the Professional Services Procurement Act)). *Id.* §252.022(a)(4).
- A purchase of land or a right-of-way. *Id.* §252.022(a)(6).
- A procurement of items that are available from only one source. *Id.* §252.022(a)(7).

Whether or not to use any of the exemptions is up to each city, and the decision should be made based on the advice of local legal counsel.

When is a city required to contact historically underutilized businesses (HUBs) when making a purchase?

A city, in making an expenditure of more than \$3,000 but less than \$50,000, shall contact at least two HUBs on a rotating basis, based on information provided by the Texas Comptroller's Office pursuant to Chapter 2161 of the Government Code (<http://cpa.state.tx.us/procurement/prog/hub/>). If the list fails to identify a HUB in the county in which the city is located, the city is exempt. TEX. LOC. GOV'T CODE §252.0215.

What are the purchasing rules regarding city construction projects?

For construction projects that involve the construction of a building that is to be designed and constructed in accordance with accepted building codes (commonly referred to as “vertical construction projects”), a city may use any of the alternative procurement methods set out in Chapter 271, Subchapter H, of the Local Government Code. [Note: H.B. 628 passed during the 2011 regular legislative session. The bill, which will become effective September 1, 2011, will – among other things – consolidate the alternative procurement methods for most governmental entities into a new Chapter 2267 of the Texas Government Code.]. TEX. LOC. GOV'T CODE §252.043. Unless otherwise noted below, the alternative methods may not be used to procure civil engineering projects (commonly referred to as “horizontal construction projects,” such as roads and utility projects). The alternative methods are:

- Competitive bidding (which is different than the “standard” competitive bidding processes in Chapter 252/Chapter 271, Subchapter B). *Id.* §271.115.
- Competitive sealed proposals (may be used for civil engineering projects). *Id.* §271.116.
- Construction manager agent. *Id.* §271.117.
- Construction manager at risk (may be used for civil engineering projects). *Id.* §271.118.
- Design-build. *Id.* §271.119; 271.181 et seq. (A handful of very large cities – those over 100,000 in population – may use design-build for a limited number of civil engineering projects)
- Job order contract. *Id.* §271.120.

For each of the methods listed above, a city awards the contract to the contractor who provides the “best value” to the city based on the selection criteria established by the city in its procurement documents. The selection criteria may generally include factors other than the construction cost, including among other things: (1) the reputation of the contractor and the contractor's goods or services; (2) the quality of the contractor's goods or services; and (3) the contractor's past relationship with the city. *Id.* §271.113.

What effect does a home rule charter provision have on state purchasing rules?

Any provision in the charter of a home rule city 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 that is in conflict with Chapter 252 controls unless the governing body elects to have Chapter 252 supersede the charter. TEX. LOC. GOV'T CODE §252.022.

What is a cooperative purchasing program?

Chapter 271, Subchapters D and F, of the Local Government Code (Cooperative Purchasing Programs) authorize cities to enter into cooperatives with the state or other local governments for the purpose of procuring goods and services. The state purchasing cooperative is online at <http://www.window.state.tx.us/procurement/>, and a joint TML/Texas Association of School Board cooperative is online at www.tml.org. In addition, several councils of governments offer cooperative purchasing.

What is reverse auction procurement?

Section 2155.062(d) of the Texas Government Code authorizes the use of the reverse auction method for the purchase of goods and services. A reverse auction procedure is: (1) real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services; or (2) a bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services. TEX. GOV'T CODE §2155.062(d).

What are the penalties for failing to comply with competitive procurement laws?

A contract made without compliance with competitive procurement laws is void, and performance of the contract may be enjoined by any property tax paying resident or a person who submitted a bid for a contract to which the competitive sealed bidding requirement applies, regardless of residency, if the contract is for the construction of public works. TEX. LOC. GOV'T CODE §252.061. The specific criminal penalties are as follows:

- A municipal officer or employee who intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive procurement requirements of Chapter 252 commits a Class B misdemeanor. *Id.* §252.062.
- A municipal officer or employee who intentionally or knowingly violates the competitive procurement requirements of Chapter 252 commits a Class B misdemeanor. *Id.*
- A municipal officer or employee who intentionally or knowingly violates Chapter 252 other than by conduct described above commits a Class C misdemeanor. *Id.*

A final conviction for an offense constituting a Class B misdemeanor results in the immediate removal of that person from office or employment. For a period of four years following conviction, the removed officer or employee is ineligible to be appointed or elected to a public office in Texas, to be re-employed by the city, or to receive any compensation through a contract with that city. *Id.* §252.063.