

Municipal Procurement Laws

Presented by:

Bennett M. Wyse
Messer, Campbell & Brady, LLP

Procurement

pro·cure·ment

- Pronunciation: \prə-ˈkyūr-mənt\, prō-\
- Function: *noun*
- Date: 14th century
- The act or process of **procuring**; especially: the obtaining of military supplies by a government

Source: www.merriam-webster.com/dictionary

Procurement

pro·cure

- **Pronunciation:** \prə-ˈkyūr, prō-\
- **Function:** *verb*
- **Etymology:** Middle English, from Anglo-French *procurer*, from Late Latin *procurare*, from Latin, to take care of, from *pro-* for + *cura* care
- **Date:** 14th century

transitive verb

- 1: to get possession of : obtain by particular care and effort
- 2: bring about, achieve

Source: www.merriam-webster.com/dictionary

Procurement

The acquisition of goods and/or services at the best possible total cost of ownership, in the right quality and quantity, at the right time, in the right place and from the right source for the direct benefit or use of ... governments, generally via a contract

Source: <http://en.wikipedia.org/wiki>

Statutes

Chapter 252, Texas Local Government Code

Texas Local Government Code
Chapters 171, 176, 212, 253, 271, 272

Texas Government Code
Chapters 552, 791, 2155, 2253, 2254

Texas Labor Code Chapter 406

Application of Municipal Procurement Laws

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:

- comply with statutory procedures for competitive sealed bidding or competitive sealed proposals when purchasing goods or services, including high technology items or insurance;
- use the reverse auction procedure for purchasing; or
- comply with certain statutorily prescribed methods of construction procurement.

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

- Texas cities must generally follow competitive bidding or proposal procedures if the city enters into a contract requiring the expenditure of more than \$50,000 in city funds. This bidding or proposal requirement applies to most purchases of goods or services.

TEX. LOC. GOV'T CODE ANN. § 252.021 (Vernon Supp. 2009).

- Additionally, instead of using competitive sealed bids or proposals, cities may use reverse auction procedures for purchasing.

TEX. LOC. GOV'T CODE ANN. § 252.021(a)(2) (Vernon Supp. 2009).

Specific Exceptions

(that relieve the city of the duty to bid or seek proposals on an item)

- State law does not require cities to follow any specific procedures to purchase real property (land and/or buildings).

TEX. LOC. GOV'T CODE ANN. § 272.001 (Vernon 2005).

- Contracts for certain professional services (prohibited by law from awarding by competitive bidding) such as for the services of:

- Architects
- Engineers; or
- certified public accountants

The Professional Services Procurement Act sets out a different set of procedures that must be followed to contract for these services.

TEX. GOV'T CODE ANN. § 2254.001, et seq. (Vernon 2008) (Professional Services Procurement Act).

Specific Exceptions

(that relieve the city of the duty to bid or seek proposals on an item)

- Additionally, instead of using competitive sealed bids or proposals, cities may use reverse auction procedures for purchasing.

TEX. LOC. GOV'T CODE ANN. § 252.021(a)(2) (Vernon Supp. 2009).

Simple Leases of Personal Property

- **Examples:** autos, office equipment or other items by a city
- Competitive bidding or proposal requirements do apply to any lease of personal property that will require an expenditure of more than \$50,000 in city funds, unless the expenditure is covered by a specific statutory exception that would relieve the city from the duty to bid or seek proposals on the item.

TEX. LOC. GOV'T CODE ANN. § 252.021.

- **Example:** if the lease were for an item that was necessary to preserve or protect the public health or safety of the city's residents, the city would not be under a duty to use competitive bidding or proposals for its acquisition.

Lease/Purchase Agreements

- Normal statutory procurement requirements would generally apply to these lease-purchase agreements.

TEX. LOC. GOV'T CODE ANN. § 271.006 (requiring that a contract authorized by Section 271.005 comply with any applicable requirements in chapter 252 of the Local Government Code).

- That is, when a lease-purchase agreement for personal property will involve an expenditure of more than \$50,000 in city funds, the contract must be competitively procured unless the type of item purchased is covered by a specific exception to the statutory procurement requirements.

City's Lease of Real Property to another Entity

- Chapter 252 competitive bidding or proposal requirements do not apply to the lease of real property. Cities typically enter into leases of city real property through lease agreements with entities as would any other lessor.
- At least one court has held that a city's temporary lease of property is not subject to the notice and bidding requirements in Chapter 272. A recent attorney general opinion suggests that the following all have a bearing upon the "temporary" status of a lease agreement:
 - 1) the duration of the lease;
 - 2) the city's right to control the land during the lease term; and
 - 3) the city's right to make improvements upon termination of the agreement.

Tex. Att'y Gen. Op. No. GA-0321 at 9 (2005).

- An older opinion suggests that the lessee's option to purchase the leased property upon expiration of the lease may be indicative of a sale.

Tex. Att'y Gen. LO-96-053 at 3.

City's Lease of Real Property to another Entity

- Whether the lessee has an option to purchase the leased property upon expiration of the lease may be indicative of a sale.

Tex. Att'y Gen. LO-96-053 at 3.

- Essentially, if the lease of the real property is for such an extended period that it would almost amount to a sale (*e.g.*, 50 year lease with option to purchase), the lease may be subject to the requirements for advertising the sale of real property under Chapter 272 of the Local Government Code.

What if only state or federal funds are used for the expenditure?

- Not necessarily exempt from competitive bidding or proposal requirements because it involves the use of only federal or state funds (*e.g.*, grant funds or loans). Often, state or federal funds are considered city funds once they are acquired by or given to the city.
- It would ultimately be considered an expenditure of city funds and therefore subject to the bidding or proposal requirements.
- Additionally, many state and federal statutes expressly require that the funds provided to a city under the statute be expended in a manner that complies with local competitive bidding requirements.

Must a city bid for health insurance coverage or public official liability insurance for its officials or employees?

- Cities must seek competitive bids or proposals when purchasing insurance that will cost more than \$50,000.

TEX. LOC. GOV'T CODE § 252.021(b).

- Chapter 252 of the Local Government Code does not specifically address the need to use competitive bidding or proposals if a city's liability coverage is gained through participation in a group risk pool. Under state law, the coverage provided by risk pools is not considered to be insurance or subject to the traditional requirements applicable to insurance policies. Therefore, most risk pools take the position that statutory procurement requirements do not apply.

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

- A city is not required to use competitive bidding to purchase or lease land or a right-of-way.

See TEX. LOC. GOV'T CODE ANN. § 252.022(a)(6) (Vernon Supp. 2009)

- However, it is important to note that a city is generally required to take bids when it sells a city interest in real property.

TEX. LOC. GOV'T CODE ANN. § 272.001 (Vernon 2005).

- Additionally, there are certain special statutory provisions that apply to the sale of park lands, municipal building sites, or abandoned roadways.

TEX. LOC. GOV'T CODE ANN. § 253.001 (Vernon Supp. 2009).

Threshold Amount for Which Bidding Is Required

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

- Generally, a city is required to follow the bidding or proposal procedures outlined in Local Government Code Chapter 252 when it plans to make an expenditure of more than **\$50,000 in city funds**.

TEX. LOC. GOV'T CODE ANN. § 252.021(a)-(b)

- Recent legislative changes make the above requirement equally applicable to any purchase of goods or services by a city, including insurance and high technology items.

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

- 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.

TEX. LOC. GOV'T CODE ANN. § 252.002 (Vernon 2005).

- Thus, if a city charter sets forth a lower threshold for requiring competitive bids than does state law, the city should follow the charter's requirements.

A city charter may not provide a higher threshold for bidding than is permitted under state law.

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

- A city charter may provide certain different procedural requirements for handling competitive bidding. For example, a city charter may provide different requirements for the **notice** that must be provided for contracts to be bid, **how the notices are advertised**, the manner **for taking certain sealed bids**, the manner of **publicly opening bids or reading them aloud**, and the manner of awarding the contracts.

TEX. LOC. GOV'T CODE ANN. § 252.002 (Vernon 2005).

- Such provisions in a city charter are controlling even if they conflict with Chapter 252 of the Local Government Code. However, a majority of the city council may vote to have the bidding provisions of Chapter 252 override any different procedural requirements contained in the city charter. Note that the city council can vote to override its charter only with regard to the **procedures** for handling competitive bids. The council may not override a city charter provision regarding the *threshold amount* at which competitive bidding is required.

Can a general law city (under 5,000 population) impose a lower threshold for requiring competitive bids?

- 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 Op. Tex. Att'y Gen. No. DM-106 (1992)

- This is true unless a statute forbids a city from using competitive bidding to obtain a particular type of good or service (*e.g.*, Professional Services Procurement Act).

TEX. GOV'T CODE ANN. § 2254.003 (Vernon 2008).

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

- A city may not avoid the application of competitive bidding or proposal laws by purposely dividing a single purchase into smaller components so that each component purchase is less than \$50,000.
- Chapter 252 of the Local Government Code prohibits the use of "separate, sequential, or component purchases" as a means of avoiding bidding requirements.
- It is important to note that the phrases "separate purchases," "sequential purchases," and "component purchases" are all specifically defined by Chapter 252 of the Texas Local Government Code.

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

- "**Separate purchases**" means purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase.
- "**Sequential purchases**" means purchases, made over a period of time, of items that in normal purchasing practices would be purchased in one purchase.
- "**Component purchases**" means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

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

- Waiting a year or more between purchases will not automatically avoid the problem of separate, sequential, or component purchases.
 - the competitive bidding laws do not specify any such waiting period;
 - if the purchases in question would normally have been made in one purchase, then there may be a violation of the bidding laws even though the city waited more than a year between each purchase.

What if a city does not competitively bid an item because the total expenditure would be below the threshold requiring bids, can it later purchase more of the items if the extra items would take the total purchase over the \$50,000 threshold?

- A city may purchase items without competitive bidding **if the total purchase amount** will be below the \$50,000 threshold that requires bidding.

However, if the city later wants to make additional purchases and these purchases would take the total purchase over the \$50,000 threshold, the city should use caution.

- State law provides criminal penalties if a city makes component, sequential or incremental purchases to avoid the competitive bidding requirements.

If individual city departments make their own purchases of such commodities as office supplies, gasoline and vehicle parts, and the sum of all purchases exceeds the bidding threshold, must the purchase of those items be bid?

- Often individual city departments will make separate purchases of office supplies, gasoline or other items without competitive bidding because each department's purchase amount will be below the \$50,000 threshold that requires bidding.
- If a city's total purchases for these items would be over the \$50,000 threshold, the city should use caution as there are criminal penalties if a city makes component, sequential, or incremental purchases to avoid the competitive bidding requirements.

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?

- Even after a bid has been awarded, a city may still increase or decrease the quantity of work to be done or the materials or supplies to be furnished if it is necessary to do so.
- Such changes may not increase or decrease the original contract price by more than 25 percent.

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?

- If the city wants to decrease the contract amount by more than 25 percent, it needs to obtain the **approval of the contractor** for such a change.
- However, there is no comparable authority for the city to simply gain contractor approval to increase the amount of the order by *more* than 25 percent.
- in such a situation, the city would need to seek bids or proposals for the work or products that would be beyond the 25 percent amount.

May a city seek bids or proposals for incrementally purchased items (such as office supplies) and award the contract to a single vendor for an entire year?

- Items such as office supplies could be bid and awarded to a single vendor for the entire year if the vendor committed to a set of prices for the items and all of the bidding procedures were followed to yield such a contract.
- The contract would need to have a maximum and a minimum number of items to be purchased so it could be determined under what circumstances a change order was permitted.

General Procedural Requirements

What is the general procedure for requesting competitive bids or proposals?

- To take bids or proposals on a purchase, the city must first publish notice of the time and place at which the bids or proposals will be publicly opened and read aloud.
- The city should also prepare specifications detailing the requirements that must be met by the goods or services which the city intends to purchase.
- The published notice should include either a copy of these specifications or information on how a bidder may obtain a copy of the specifications.
- If a city wishes to consider factors other than price in its selection, or other factors such as a bidder's previous performance or safety record in its selection, the city's **bid specifications should clearly state that such factors will be considered**. Also, the governing body of a city that is considering using a method other than competitive sealed bidding (*e.g.*, competitive sealed proposals) must determine before notice is given the method of purchase that provides the **best value** for the city.

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

- A city must publish a notice indicating the time and place at which the bids or proposals will be publicly opened and read aloud. The notice must be published at least once a week for two consecutive weeks.
- The first publication must appear before the 14th day before the date that the bids or proposals are publicly opened and read aloud. The notice must be placed in a newspaper that is published in the city.

If there is no newspaper published in the city, the notice must be posted at city hall for 14 days before the date that the bids or proposals are publicly opened and read aloud.

Can city staff personally call potential vendors and ask them to participate in a bid?

- Nothing in state law explicitly prohibits a city from providing additional notice to potential bidders. In fact, many cities either keep a list of particular vendors or use a list of vendors that has been prepared by another entity, such as the Texas Facilities Commission. These cities then provide direct notice to the listed vendors when an item or project goes out for bids.

However, although this is a common practice, cities should be aware that this practice has not been approved by the Texas courts or by an attorney general opinion. In fact, at least one attorney general opinion has concluded that **"contact with potential providers outside the statutory notice and bidding process might run afoul of [the competitive bidding notice requirements]."**

Op. Tex. Atty Gen. No. DM-70 at 5 (1991).

Can city staff personally call potential vendors and ask them to participate in a bid?

- The attorney general based this conclusion on a Texas case in which the court stated that “[c]ompetitive bidding...requires that all bidders be placed upon the same plane of equality....”

Sterrett v. Bell, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ).

- The argument appears to be that contacting bidders outside of the normal notice procedures for competitive bidding would give the contacted bidders preferential treatment over the bidders that are not contacted. Thus, a city may wish to discuss any such practice with its local legal counsel.

May a city accept the submission of bids by fax?

- There do not appear to be any attorney general opinions or court cases that directly decide whether a city may accept the submission of bids or proposals by fax. However, an argument can be made that accepting bids or proposals by fax does not fulfill the legal requirement that they be “sealed.”

See, e.g., TEX. LOC. GOV'T CODE ANN. § 252.041 (Vernon 2005) (requiring sealed bids to be opened publicly).

- For this reason, some legal analysts recommend that cities do not accept bids or proposals by fax and that they clearly state in the bid specifications that faxed bids or proposals will not be accepted.

May a city accept bids or proposals through electronic transmission?

- Cities may receive bids or proposals through electronic transmission, provided the city council adopts rules to ensure the identification, security and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time.

TEX. LOC. GOV'T CODE ANN. § 252.0415(a).

Consideration and Award of Bid or Proposal Requests

Can a city adopt additional criteria regarding the qualifications of potential bidders?

- Under current law, if the city wishes to consider **additional criteria**, the city's bid specifications should clearly specify the various criteria that will be considered. When using additional criteria for competitive bidding, 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.

TEX. LOC. GOVT CODE ANN. § 252.0435 (Vernon Supp. 2005).

Can a city adopt additional criteria regarding the qualifications of potential bidders?

The "**best value**" for the city would be determined using the following criteria:

- the purchase price;
- the reputation of the bidder and of the bidder's goods or services;
- the quality of the bidder's goods or services;
- the extent to which the goods or services meet the municipality's needs;
- the bidder's past relationship with the municipality;
- the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;
- the total long-term cost to the municipality to acquire the bidder's goods or services; and
- any relevant criteria specifically listed in the request for bids or proposals.

Can a city adopt additional criteria regarding the qualifications of potential bidders?

- If no such additional criteria are spelled out in the bid specifications, state law only allows the city to award the contract to the lowest responsible bidder if using competitive bidding.

Can the city take into account the safety record of the bidder in making the award?

- When awarding a contract using traditional competitive bidding, the city may only consider a bidder's safety record in regards to the bidder's "responsiveness" if notice has been given that such a criterion is relevant.

Specifically, the governing body must have adopted a written definition and criteria for assessing the bidder's safety record and must have given notice in the bid specifications that the safety record will be considered. Any decision that the city makes must not be arbitrary or capricious.

What options does a city have if the lowest bidder has a prior history of poor performance?

- If the city wishes to consider additional criteria, the city's bid specifications should clearly specify the various criteria that will be considered. When using additional criteria for competitive bidding, 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 using the following criteria:
 - the purchase price;
 - the reputation of the bidder and of the bidder's goods or services;
 - the quality of the bidder's goods or services;
 - the extent to which the goods or services meet the municipality's needs;
 - the bidder's past relationship with the municipality;
 - the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;
 - the total long-term cost to the municipality to acquire the bidder's goods or services; and
 - any relevant criteria specifically listed in the request for bids or proposals.
- The best practice is to clearly indicate in the city's specifications that a bidder's prior performance on similar contracts may be considered in evaluating the bids.

What options does the city have if the city receives no bids in response to a request?

- If competitive bids or proposals are required by Chapter 252 of the Local Government Code, there is no exception which would allow the city to avoid the statutory requirements due to a lack of bids. If a city receives no response to a request, the city must either re-advertise or decide not to undertake the contract.

What options does the city have if the city receives only one bid or proposal in response to a bid request?

- If a city receives only one bid or proposal in response to its request, the city may:
 - accept the bid or proposal received,
 - reject the bid or proposal and re-advertise, or
 - reject the bid or proposal and decide not to undertake the project.

May competitive bids be rejected by a city staff member or must the city council decide which bids to reject?

- State law provides that **the governing body** of the city may reject any and all bids. There is no provision that would allow the delegation of this decision to city staff.

However, in certain cities the city staff will open the bids and provide a recommendation to the city council on whether the bid is responsive to the bid request and whether it should be accepted as the lowest responsible bid.

What is the general procedure for awarding a contract pursuant to competitive bidding?

- First, bids must be publicly opened and the bid amounts read aloud at the time and place specified in the bid notice.
- The city council must then award the contract to the lowest responsible bidder **or** (if previously noticed) the bidder that provides the **best value** to the city.
 - In the alternative, the city may reject all bids.
- Once a bid has been opened, it may not be changed to correct minor errors in the bid price. However, under certain circumstances, a bidder may be able to withdraw a bid if it contains a substantial mistake that would cause a great hardship if enforced against the bidder.

What is the general procedure for awarding a contract pursuant to competitive sealed proposals?

- If a city decides to use the competitive, sealed proposal procedures, it must first give notice of the request for proposals in the same manner as required for competitive bids.

Generally, this means that the city must publish at least two newspaper notices of the time and place at which the proposals will be opened.

These notices must be published at least once a week for two consecutive weeks, and the first notice must be published more than 14 days before the date set for opening the proposals.

Requests for proposals must also solicit quotations and specify the relative importance of price and other evaluation factors.

What is the general procedure for awarding a contract pursuant to competitive sealed proposals?

- Once proposals have been submitted, the city may conduct discussions with the offeror or offerors whom the city determines to be reasonably qualified for the award of the contract.

Such discussions must comply with the request for proposals and with the regulations set by the city council. To obtain the best offers, the city may allow the submission of revisions after proposals are submitted and before the award of the contract.

- All offerors must be treated fairly and equally with respect to any opportunity for discussion and revision of the proposals.
- In the end, the contract must be awarded to the offeror whose proposal is determined to be the most advantageous to the city.
- The city is to determine which proposal is the most advantageous based on the relative importance of price and the other evaluation factors included in the request for proposals.

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

- Section 552.104 of the Government Code provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

(b) The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

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

- The purpose of section 552.104(a) is **to protect the interests of a governmental body** in situations such as competitive bidding and requests for proposals, where the governmental body may wish to withhold information in order to obtain more favorable offers.

Significantly, **it is not designed to protect the interests of private parties that submit information** such as bids and proposals to governmental bodies. Because section 552.104(a) protects only the interests of governmental bodies, it is an exception that a governmental body may waive by, for example, disclosing the information to the public or failing to raise the exception within the ten-day deadline.

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

- Generally, section 552.104(a) protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation.

A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104(a).

Section 552.104(a) is frequently raised to protect information submitted to a governmental body in response to a competitive bidding notice or request for proposals.

In this context, the protection of section 552.104(a) is temporal in nature. Generally, section 552.104(a) does not except bids from public disclosure after bidding is completed and the contract has been executed.

However, bids may continue to be withheld from public disclosure during the period in which the governmental body seeks to clarify bids and bidders remain at liberty to furnish additional information.

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

- Section 552.104(a) does not apply when a single individual or entity is seeking a contract as there are no "competitors" for that contract.

Note that even when section 552.104(a) does not protect bids from required public disclosure, section 552.110 will require the governmental body to withhold any portions of those bids that contain **trade secrets or other commercial or financial information that is made confidential by law.**

Must bidders be allowed to speak at a city council meeting to explain or defend their bids?

- A bidder does not have any special right to speak at an open meeting of the city council.

The Texas Attorney General has concluded that the Open Meetings Act does not give members of the public a right to speak at an open meeting.

Tex. Att'y Gen. Op. No. H-188 (1973).

- Further, if the city chooses to allow members of the public to speak at a council meeting, the council may make reasonable rules regulating the number of speakers on a particular subject and the length of each presentation.

Tex. Att'y Gen. Op. No. H-188 (1973)

Must bidders be allowed to speak at a city council meeting to explain or defend their bids?

- However, the city council should not discriminate between one speaker and another, and the rules should be applied equally to all members of the public.

The only situation in which the city council may be required to allow members of the public to speak would be if state law requires a public hearing on an issue or if state law requires that public comment be allowed on a particular subject.

- However, there is no such public hearing or comment requirement that is applicable to competitive bidding issues.

Bids for the Construction or Repair of Public Structures or Roads

Is there a special bidding procedure for contracts in excess of \$50,000 for the construction or repair of a structure, road or other improvement to real property?

- Texas law does not single out municipalities or dictate special bidding procedures for procurement contracts exceeding \$50,000.

In the past, Chapter 271, subchapter B, of the Local Government Code dictated a special bidding procedure for municipalities. However, the legislature exempted cities from that procedure in 1997.

- Currently, on expenditures greater than \$50,000, municipalities may follow one of three basic procurement methods:
 - competitive sealed bidding or competitive sealed proposals,
 - the reverse auction procedure, or
 - an alternative procurement method.

Can a city require that bids for a public work or for the purchase of materials, equipment, or supplies be on a unit price basis?

- Yes. Cities may request bids based on unit prices. This type of procurement may be especially helpful in the procurement of equipment and machinery. The municipality must publish the quantities desired with its notice. If the quantities actually consumed differ from the municipality's anticipated needs, then the actual purchase shall reflect the quantities supplied or consumed in the procurement.

TEX. LOC. GOV'T CODE ANN. § 252.047 (Vernon 2005).

- Cities may ask bidders to indicate both a lump-sum price and a per-unit price. In fact, some cities specify that bids may be awarded on a lump-sum basis, a per-unit basis, or on whatever basis best serves the city's interest.

Must a bidder execute a performance or payment bond if the contract is for the construction of a public work?

- The Government Code mandates that a municipality contracting for public work in excess of \$50,000 shall require its contractor to execute a **payment bond** solely for the protection of beneficiaries who supply materials or labor to the public works project and have a direct contractual relationship with the contractor.

A payment bond is required because material suppliers and laborers **do not enjoy the same lien rights on public projects as they do on private projects**. Without the benefit of lien rights to secure payments that are not timely received, those suppliers and laborers would lose much of their legal protection regarding payment. The payment bond requirements for public work essentially replace the protections afforded by lien rights with protections guaranteed by a surety.

TEX. GOV'T CODE ANN. § 2253.021 (Vernon 2008).

Must a bidder execute a performance or payment bond if the contract is for the construction of a public work?

- The Government Code also mandates that a municipality contracting for public work in excess of \$100,000 shall require its contractor to execute a **performance bond** solely for the protection of the municipality. The performance bond protects the municipality in the event of a contractor default and/or termination.
- Both the payment and performance bonds must be written for the **total contract value** and should be executed by a corporate surety in accordance with the Insurance Code prior to commencement of the work

May a city require a performance or payment bond from a bidder even when state law does not require such bonds?

- Yes. Nothing in state law appears to prohibit a city from requiring a performance bond, a payment bond, or both, from anyone contracting to do work for the city regardless of the amount of the contracts in question.

If a city wishes to impose such a requirement, it is advisable that the city **make the requirement part of the bid specifications** so all potential bidders are informed of the requirement before bidding.

Is the city required to hire an engineer for the construction of a public work?

- If public health, safety, or welfare and professional engineering issues are involved, the engineering plans, specifications, and estimates for the construction of a public work generally must be prepared by a licensed professional engineer. Further, the engineering for construction usually must be executed under the direct supervision of a licensed professional engineer.

Is the city required to hire an engineer for the construction of a public work?

- A registered architect must prepare the architectural plans and specifications for constructing a new city building if:
 - the building will be used for education, assembly or office occupancy; and
 - the construction costs exceed \$100,000.

- Also, for any alteration or addition to an existing city building, a registered architect must prepare the architectural plans and specifications if all three of the following circumstances are present:
 - the building is used or will be used for education, assembly or office occupancy;
 - the construction costs for the alteration or addition exceed \$50,000; and
 - the alteration or addition requires the removal, relocation, or addition of any walls or partitions or requires the alteration or addition of an exit.

If a contract is for the construction of a public work, is the city required to ensure that all contractors provide workers' compensation coverage?

- Any city "building or construction" contract must require the general contractor to certify in writing that the contractor provides workers' compensation insurance to all of the contractor's employees involved in the project.

TEX. LAB. CODE ANN. § 406.096 (Vernon 2006).

- Additionally, each subcontractor must certify in writing to the general contractor that the subcontractor's employees are covered by workers' compensation insurance. The general contractor, in turn, must provide the subcontractor's written certification insurance. The general contractor, in turn, must provide the subcontractor's written certification to the city.

- The phrase "building or construction" is defined to include any of the following:
 - erecting or preparing to erect a structure, including a building, bridge, road, public utility facility, or related structure;
 - remodeling, extending, repairing or demolishing a structure; or
 - otherwise improving real property or a structure related to real property through similar activities.

- Thus, a city must require contractors and subcontractors to provide workers' compensation insurance in any contract involving one or more of these activities. However, the contractor may provide this coverage through a group plan or through another method that is satisfactory to the city council.

- State law specifies that the employment of a maintenance worker does not generally constitute engaging in "building or construction." State statutes do not appear to provide any other clear exceptions to the requirement that public works contractors provide workers' compensation insurance.

Alternative Delivery Methods for the Construction of Structures

What are alternative delivery methods for city construction projects?

- In 2001, subchapter H of Chapter 271 was added to the Texas Local Government Code providing the authority to use procurement and delivery methods other than competitive bidding that provide the "best value" for certain projects and extended the authority to use alternative delivery systems, including best-value competitive bidding, competitive sealed proposals, design-build, construction management, and job order contracting, to Texas cities.

Alternative procurement and delivery methods have many advantages over traditional competitive bidding. In the traditional competitive bidding process, a contract must be awarded to the lowest responsible bidder.

Subjective considerations such as the contractor's track record on a particular type of project, anticipated use of minority and local contractors, and other factors generally cannot be taken into account. When subjective criteria are used in the selection process, contractors are put on their toes and encouraged to provide maximum quality on every project. Additionally, contractors may be less likely to bring suit against a city because litigiousness and relationships with prior customers may be taken into account in the selection process.

What are alternative delivery methods for city construction projects?

- Alternative delivery systems are particularly advantageous on projects where time, flexibility and/or innovation is critical. The design and construction phases overlap, as opposed to the sequential design-bid-build method. Once a firm is chosen, construction can begin even before all the plans are completed. The time savings are clear. Land can be cleared before the foundation is fully designed, and pier holes can be drilled before the interior colors are picked.

Alternative procurement and delivery systems also have drawbacks including overcoming deep-seated traditions in public procurement, and a legitimate fear that picking a contractor based on criteria other than the lowest price will promote cronyism and favoritism.

What alternative methods are cities currently authorized to use and for what types of projects?

- Under current law, any city may use any of the alternative delivery methods (discussed below) for "vertical projects." A vertical project is one that is defined in state law as a "facility." Facility means buildings the design and construction of which are governed by accepted building codes.

The term does not include: highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction; or buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

- Recent legislation passed in 2007 authorizes the use of some alternative methods, including construction manager at-risk and competitive, sealed proposals for horizontal projects, such as roads and utility projects.

Alternative Methods

Include:

- **Design-build method**
- **"Best value" competitive bidding method**
- **Competitive sealed proposals**
- **Construction manager-agent method**
- **Construction manager at-risk method**
- **Job order contracting method**

Statutory Exceptions to the
Competitive Bidding or
Proposal Requirements

Exceptions Due to Public Health, Safety, or Welfare

Exceptions Due to Public Health, Safety, or Welfare

- **Public Calamity**

Public Calamity

- A city is not required to follow the competitive procurement requirements of Local Government Code Chapter 252 when making an expenditure because of a public calamity.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(1) (Vernon Supp. 2009).

- one that requires the immediate appropriation of money to relieve the necessity of the city's residents or to preserve the property of the city. (e.g., need to purchase medicines or blankets to be dispersed at a temporary city shelter for victims of flooding or tornadoes.)

Exceptions Due to Public Health, Safety, or Welfare

- **Public Calamity**
- **Purchases that are necessary to protect the public health or safety of city residents**

Purchases that are necessary to protect the public health or safety of city residents

- A city may forego the competitive bidding procedures of Chapter 252 of the Local Government Code when making a purchase that is necessary to preserve or protect the public health or safety of the city's residents.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(20) (Vernon Supp. 2009).

- Activities that have been found to fall within the health and safety exception (and thus do not require competitive bidding):
 - building a sanitary sewage system and disposal plant;
 - establishing a county ambulance service; and
 - awarding a contract for collection, hauling, and disposal of solid waste (garbage).

Exceptions Due to Public Health, Safety, or Welfare

- **Public Calamity**
- **Purchases that are necessary to protect the public health or safety of city residents**
- **Purchases that are necessary due to unforeseen damage to public machinery, equipment or other property**

Purchases that are necessary due to unforeseen damage to public machinery, equipment or other property

- A city is not required to follow the competitive bidding procedures when making a purchase that is necessary because of unforeseen damage to public machinery, equipment or other property (e.g., emergency equipment, such as firefighting equipment, when the equipment was unexpectedly damaged or broken).

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(3) (Vernon Supp. 2009).

Exceptions for Specialized Services

Contracts for personal services

- Texas law specifically exempts contracts for personal services from the competitive bidding requirements.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(4) (Vernon Supp. 2009).

- The Texas Supreme Court has defined "personal services" to include only those services which are performed personally by the individual who contracted to perform them.

Van Zandt v. Fort Worth Press, 359 S.W.2d 893, 895-896 (Tex. 1962). Further, for a contract to qualify as a contract for personal services, the compensation in the contract should mainly pay for the labor of the individual providing the service, not for such things as insurance or materials.

Contracts for professional services

- Texas law specifically exempts contracts for professional services from the competitive bidding requirements.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(4) (Vernon Supp. 2009).

- Professional services have been described as those services which are:

- mainly mental or intellectual rather than physical or manual.
- those disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence.

Op. Tex. Att'y Gen. Nos. JM-1038 (1989); JM-940 (1988); MW-344 (1981)

- A city is specifically prohibited under state law from obtaining certain professional services through competitive bidding such as the services of:
 - architects, engineers, certified public accountants, land surveyors, physicians, optometrists, or state-certified real estate appraisers.

Op. Tex. Att'y Gen. No. DM-106 (1992)

What procedure must cities use to obtain the services of a lawyer or the services of a law firm?

- State law does not specify any particular procedures for obtaining the services of a lawyer or of a law firm. The Professional Services Procurement Act does not apply to attorneys, and the selection of an attorney is presumably exempt from competitive bidding requirements as a "professional service."

See TEX. GOV'T CODE ANN. §§ 2254.002 (definition of "professional services" within the meaning of the Professional Services Procurement Act); *See* TEX. LOC. GOV'T CODE ANN § 252.022(a)(4) (Vernon Supp. 2009); Op. Tex. Att'y Gen. No. JM-1189 at 5 (1990) (quoting *Hunter v. Whiteacre and Washington*, 230 S.W. 1096, 1098 (Tex. Civ. App. – San Antonio 1921, writ ref'd)).

- Thus, a city may choose to obtain the services of an attorney with or without the use of competitive bidding. Many cities simply hire their legal counsel by majority vote of the city's governing body and then execute a contract for such services.

Op. Tex. Att'y Gen. No. DM-106 (1992).

Exceptions for Items Available From Only One Source

Purchase of items that are available from only one source because of copyrights or “natural monopolies”

- Competitive bidding requirements do not apply to items that are available from only one source due to “patents, copyrights, secret processes, or natural monopolies.”

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(7)(A) (Vernon Supp. 2009).

Purchase of electricity, gas, water and other utility services

- Competitive bidding is not required for the purchase of gas, water and other utility services if those services are available from only one source.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(7) (C).

- The competitive bidding requirements do not apply to an expenditure for electricity.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(15).

Exceptions for Distress or Auction Purchases

Does a city violate bidding requirements if it purchases personal property at an auction?

- A city is not required to comply with competitive bidding procedures when purchasing personal property at an auction by a state licensed auctioneer.

TEX. LOC. GOVT CODE ANN. § 252.022(a)(12)(A).

Does a city violate bidding requirements if it purchases personal property at an auction?

- A city is not required to comply with the competitive bidding procedures when purchasing personal property at a going-out-of-business sale.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(12)(B).

- However, for this exception to apply, the sale must comply with the requirements of subchapter F in Chapter 17 of the Texas Business and Commerce Code. So, for example, a city might use this exception to purchase large quantities of office supplies at a going-out-of-business sale if the sale complied with the requirements of the Business and Commerce Code. However, this practice has not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

Exceptions for Purchases from Other Governmental Entities

Does a city violate bidding law if it purchases property or services directly from another political subdivision of this state, a state agency or a federal agency without following competitive bidding procedures?

- Several statutes allow a city to purchase either property or services from other governmental entities or agencies without following competitive bidding procedures.
- The Interlocal Cooperation Act generally allows a city to enter into an agreement with another local governmental entity, such as a county or another city, to perform specific governmental functions and services, such as solid waste collection, fire protection, planning and administrative services.
- The Act further provides that a city may agree with another local government, a state agency (including the Texas Comptrollers Office), or a council of governments to purchase goods (and services reasonably related to the operation and maintenance of the goods) from that entity.

TEX. GOV'T CODE ANN. § 791.001 et seq. (Vernon 2004 & Supp. 2009)

**Exceptions for Purchases with
Specialized Financing**

Certain contracts for paving drainage, street widening, and other public improvements

- A city is not required to comply with competitive bidding requirements when expending money for paving drainage, street widening, and other public improvements if at least one-third of the cost is to be paid by special assessments levied on the benefited property.

TEX. LOC. GOV'T CODE ANN. §252.022(a)(9) (Vernon Supp. 2009).

Does competitive bidding apply to a contract for a previously authorized public improvement that is experiencing a deficiency in funding to complete the project?

- Competitive bidding requirements do not apply to expenditures for a public improvement that is already in progress if there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters.

TEX. LOC. GOV'T CODE ANN. § 252.022(a)(10) (Vernon Supp. 2009).

- This exception to the competitive bidding requirement only applies to a project that was authorized by the voters of the city.

Ethical Requirements Relating to Municipal Procurement

Chapter 176 of the Local Government Code

- Chapter 176 is an ethics law enacted by **H.B. 914** in 2005.
- It requires certain local government officials to disclose employment and business relationships with vendors who conduct business with local government entities.
- The bill's author subsequently sought an opinion from the Texas Attorney General to clarify many provisions of Chapter 176. In response, the Attorney General's Office released **Opinion Number GA-0446**, which concluded that legislative changes to the law would be necessary if the bill's author wished to lessen extremely tough requirements.
- In response, the Legislature passed **H.B. 1491** during the 2007 regular legislative session. The bill became effective on May 25, 2007.

What local government entities are subject to this law?

- The requirements of the bill apply to most political subdivisions, including a city.

TEX. LOC. GOV'T CODE ANN. § 176.001(3) (Vernon 2008).

- The statute also applies to a local government corporation, board, commission, district or authority whose members are appointed by a mayor or the city council.

What local government officers are subject to this law?

- A city councilmember, director, superintendent, administrator, president, or any other person who is designated as the executive officer of the local government entity is considered a local government officer ("officer").

TEX. LOC. GOV'T CODE ANN. § 176.001(4) (Vernon 2008).

- A city may also extend the requirements of the statute to an employee of the city who has the authority to approve contracts on behalf of the city.

TEX. LOC. GOV'T CODE ANN. § 176.005(a) (Vernon 2008).

When is an officer required to file a "conflicts disclosure statement"?

- if a vendor enters into a contract with the city, or if the city is considering entering into a contract with the vendor, and the officer or officer's family member has an employment or other business relationship with the vendor that results in the officer or officer's family member receiving taxable income that is more than \$2,500 in the preceding twelve months.

TEX. LOC. GOV'T CODE ANN. § 176.003(a)(2) (Vernon 2008).

- An officer who receives investment income, regardless of amount, is not required to file a disclosure statement. Investment income includes dividends, capital gains, or interest income gained from a personal or business checking or savings account or other similar account, a personal or business investment, or a personal or business loan.

TEX. LOC. GOV'T CODE ANN. § 176.001(2-b) (Vernon 2008).

When is an officer required to file a "conflicts disclosure statement"?

- An officer is also required to file a statement if the officer or officer's family member accepts from a vendor one or more gifts with an aggregate value of more than \$250 in the preceding twelve months.

TEX. LOC. GOV'T CODE ANN. § 176.003(a)(2)(B) (Vernon 2008).

- An officer is not required to file a statement in relation to a gift, regardless of amount, that is accepted by an officer or officer's family member if the gift is given by a family member of the person accepting the gift, is a political contribution, or is food, lodging, transportation, or entertainment accepted as a guest.

TEX. LOC. GOV'T CODE ANN. § 176.003(a-1) (Vernon 2008).

When is an officer required to file a "conflicts disclosure statement"?

- An officer is required to file a statement no later than 5:00 p.m. on the seventh business day after the date on which the officer becomes aware of facts that require a filing of the statement.

TEX. LOC. GOV'T CODE ANN. § 176.003(b) (Vernon 2008).

How does Chapter 176 define a "family member"?

- A family member is defined as a person related to another person within the first degree of consanguinity (blood) or affinity (marriage). An officer's family member would include the officer's spouse, father, mother, son, daughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, or stepchild.

TEX. LOC. GOV'T CODE ANN. § 176.001(a) (Vernon 2008).

To what types of contracts does the law apply?

- The law applies to any written contract for the sale or purchase of real property, goods, or services.

TEX. LOC. GOV'T CODE ANN. § 176.001(1-d). (Vernon 2008).

- A contract for services would include one for skilled or unskilled labor, as well as for professional services.

TEX. LOC. GOV'T CODE ANN. § 176.001(6)

When is a vendor required to file a "conflicts of interest questionnaire"?

- A vendor is required to file a conflicts of interest questionnaire if the vendor has a business relationship with the city and has:

1) an employment or other business relationship with an officer or an officer's family member that results in the officer receiving taxable income that is more than \$2,500 in the preceding twelve months; or

2) has given an officer or an officer's family member one or more gifts totaling more than \$250 in the preceding twelve months.

- A vendor is required to file a questionnaire not later than the seventh business day after the latter of the following:

1) the date the vendor begins discussions or negotiations to enter into a contract with the city or submits an application or response to a bid proposal; or

2) the date the vendor becomes aware of a relationship or gives a gift to an officer or officer's family member.

TEX. LOC. GOV'T CODE ANN. § 176.006 (Vernon Supp. 2009)

With whom should the statements and/or disclosures be filed?

- The statements and disclosures must be filed with the records administrator of the city.

TEX. LOC. GOV'T CODE ANN. § 176.003(b) (Vernon 2008).

- A records administrator includes a city secretary, a person responsible for maintaining city records, or a person who is designated by the city to maintain the statements and disclosures filed under this bill. A city does not have a duty to ensure that a vendor that is required to file a questionnaire does so.

TEX. LOC. GOV'T CODE ANN. § 176.006 (h) (Vernon Supp. 2009).

- A city that maintains a Web site is required to post statements and disclosures that are required to be filed under the bill. However, a city that does not have a Web site is not required to create or maintain one.

TEX. LOC. GOV'T CODE ANN. § 176.009(a) (Vernon 2008).

What happens if a statement is not filed?

- An officer or vendor who knowingly fails to file a statement or a disclosure when required to do so commits a Class C misdemeanor.

TEX. LOC. GOV'T CODE ANN. § 176.006 (f) (Vernon Supp. 2009).

- A Class C misdemeanor is punishable by a fine of up to \$500. It is an exception to prosecution if an officer/vendor files a statement/questionnaire not later than the seventh day after the date the person receives notice from the city of the alleged violation. The validity of a contract between a city and a vendor is not affected solely because an officer or vendor fails to file a statement or disclosure.

TEX. LOC. GOV'T CODE ANN. § 176.006 (i) (Vernon Supp. 2009).

Where can an officer or vendor obtain the necessary forms?

The Texas Ethics Commission is charged with creating statement and disclosure forms and has adopted new forms that conform to the new bill. The forms can be found at www.ethics.state.tx.us.

What is Chapter 171 of the Local Government Code?

- Chapter 171 of the Local Government Code regulates local public officials' conflicts of interest.

TEX. LOC. GOV'T CODE ANN. § 171.001-.010 (Vernon 2008).

- It prohibits a local public official from voting or participating in a matter involving a business entity or real property in which the official has a substantial interest if an action on the matter will result in a special economic effect on the business that is distinguishable from the effect on the public or, in the case of a substantial interest in real property, it is reasonably foreseeable that the action will have a special economic effect on the value of the property, distinguishable from its effect on the public.

TEX. LOC. GOV'T CODE ANN. § 171.004(a) (Vernon 2008).

- A public official who has such interest is required to file, before a vote or decision on any matter involving the business entity or real property, an affidavit with the city's official record keeper, stating the nature and extent of the interest.

TEX. LOC. GOV'T CODE ANN. § 171.004(b) (Vernon 2008).

What is Chapter 171 of the Local Government Code?

- In addition, a public official is required to abstain from further participating in the matter.
- However, a public official who is required to file an affidavit is not required to abstain from participating in the matter if a majority of the members of the governing body have a substantial interest and are required to file and do file affidavits of similar interests on the same official matter.

TEX. LOC. GOV'T CODE ANN. § 171.004(c) (Vernon 2008).

More detailed information on Chapter 171 is available in a separate Attorney General publication known as "Conflicts of Interest Made Easy" located online at www.texasattorneygeneral.gov .

Enforcement of Bidding Requirements

What civil remedies are available to an individual or entity if the competitive bidding laws are not followed?

- If a city enters into a contract without complying with the requirements of Chapter 252, the contract is void.

TEX. LOC. GOV'T CODE ANN. § 252.061 (Vernon Supp. 2009).

- Any property tax paying resident of the city may bring suit in district court to stop the performance or payment of the contract. Further, if the contract is for the construction of public works, a person who submitted a bid for a contract for which the competitive sealed bidding requirement applies, regardless of residency, may bring suit in district court to stop the performance or payment of the contract.

TEX. LOC. GOV'T CODE ANN. § 252.061 (Vernon Supp. 2009) (as amended by H.B. 3668, 81st Leg., R.S. (2009)).

What criminal penalties apply if the competitive bidding laws are not followed?

- If a person fails to comply with the competitive bidding or competitive proposal procedures required by Local Government Code Chapter 252, that person may be convicted of a Class B misdemeanor.

TEX. LOC. GOV'T CODE ANN. § 252.062 (Vernon Supp. 2005).

- This includes a situation in which a person makes or authorizes separate, sequential, or component purchases in an attempt to avoid competitive bidding requirements. A Class B misdemeanor may be punished by a fine of up to \$2,000, confinement in jail for up to 180 days, or both the fine and confinement.

TEX. PENAL CODE ANN. § 12.22 (Vernon 2003).

Can city officials or employees be removed from office for failure to comply with competitive bidding laws?

- Under Texas law, an individual is automatically removed from his or her position if that person is finally convicted of failing to comply with the competitive bidding or competitive proposal procedures required by Local Government Code Chapter 252.

TEX. LOC. GOV'T CODE ANN. § 252.063 (Vernon 2005).

- Once removed from office, such a person may not hold any public office in this state for four years after the date of final conviction. Also, for four years after the date of final conviction, the convicted person may not be employed by the city where the person was serving when the offense occurred and may not receive any compensation through a contract with the city. The convicted person may, however, continue to receive any retirement or workers' compensation benefits.

Thank You

Municipal Procurement Laws

Presented by:

Bennett M. Wyse
Messer, Campbell & Brady, LLP