

# Municipal Procurement Laws

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# What We'll Learn

- When competitive procurement is required
- How a city picks a bidder
- Local preference
- Exceptions from competitive procurement requirements
- Professional services
- HUBs
- Alternative procurement methods for construction projects
- Remedies for violations

## 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;
- use the reverse auction procedure for purchasing;
- use cooperative purchasing programs under Chapter 271, Local Gov't Code; or
- comply with certain alternative methods for construction procurement.



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

- For general procurement of goods or services, 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.*

## Local Preference

- **LGC 274.905:** 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. This is a useful provision for awarding contracts, but it appears to be directed towards the purchase of tangible items rather than services.
- **LGC 271.9051:** Authorizes a city 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 \$100,00 or less by H.B. 2082 in 2009. *Id.* §271.9051.

# Specific Exceptions

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

- 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).

## 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)



## Historically Underutilized Businesses

- If 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.

# Alternative Methods

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

# 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.



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