

The Tools You Need to Buy the Tools

or

The Nuts and Bolts of Municipal Purchasing

Presented to
The Riley Fletcher Basic Municipal Law Seminar
Texas City Attorneys Association
Austin, Texas
February 12, 2016

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Dear Mr. Handyman:

What are some of the basic tools you keep in your toolbox to help you handle questions regarding the law governing city purchasing?

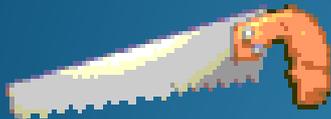
Ima in Eden

Dear Ima: The following tools are always in my toolbox:



- Local Government Code Ch. 252 “Purchasing and Contracting Authority of Municipalities”

- Local Government Code Ch. 271 “Purchasing and Contracting Authority of Municipalities, Counties and Certain Other Local Governments



- Government Code Ch 2253 “Public Work Performance and Payment Bonds

- Government Code Ch. 2254 “Professional Services Procurement Act”



- Government Code Ch. 2269 “Contracting and Delivery Procedures for Construction Projects”

- My City Charter

Mr. Handyman:

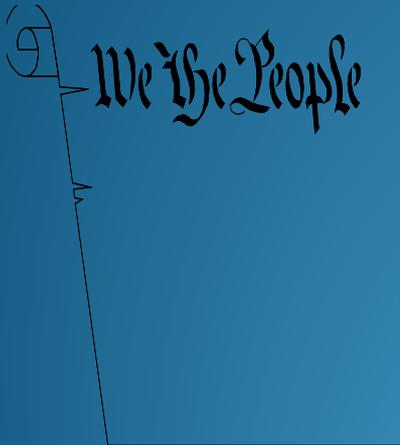
I thought state law covered all I needed to know about city purchasing. Why do I need my city charter?

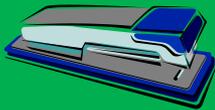
Cowboy in Arlington



Dear Cowboy: When I started out, I used to ask the same question. I often used to forget to look at my city charter. But Tex. Loc. Govt. Code §252.002 states:

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.





Mr. Handyman:

I don't have to bid everything, do I? If I had to do sealed bids every time I had to buy a box of pencils, it would cost me more than going to the store to buy the pencils!

Elvis in Memphis





Dear Elvis:

Of course, not. You only have to get sealed bids or proposals on purchases in excess of \$50,000. Tex. Loc. Govt. Code §252.021(a).

If spending over \$50,000, the City must:

- 1. Comply with competitive sealed bid or proposal procedures;**
- 2. Follow reverse auction procedures set out in Tex Govt Code §2155.062(d); or**
- 3. If a construction project, comply with alternative methods of procurement outlined in Tex Govt Code ch. 2269.**

CAUTION: WATCH OUT FOR CONFLICTS WITH CITY CHARTER AND POLICIES ON THIS ISSUE.



SOME CITY CHARTERS AND ADOPTED CITY POLICIES STILL CONTAIN A LOWER AMOUNT THAT TRIGGERS THE REQUIREMENT TO SEEK COMPETITIVE BIDS OR PROPOSALS. OTHERS MAY NOT ALLOW COMPETITIVE PROPOSALS OR ALTERNATIVE MEANS OF PROCUREMENT.

Dear Mr. Handyman:

Our city council has authorized and budgeted for buying five light cars this year. The suggested retail price for each car is \$13,000.00. Our fleet manager thinks he can get all of the cars locally by negotiating with a local dealership for a price less than \$13,000.00. Our city manager has asked if we can do this. What do you think?

Otto in DeSoto



Dear Otto: Do you want to risk going to jail and losing your job? According to Tex. Loc. Govt. Code §252.062, intentionally or knowingly making or authorizing separate, sequential or component purchases to avoid the competitive bidding requirements is a Class B misdemeanor.

- **“Component purchases” means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase. Tex. Loc. Govt. Code §252.001(2)**
- **“Separate purchases” means purchases made separately, of items that in normal purchasing practices would be purchased in one purchase. Tex. Loc. Govt. Code §252.001(6)**
- **“Sequential purchases” means purchases made over a period, of items that in normal purchasing practices would be purchased in one purchase. Tex. Loc. Govt. Code §252.001(7)**





Dear Handyman:

If a \$125,000.00 sewer lift station pump blows up, our wastewater department can't wait four to five weeks to advertise for sealed bids and get our city council to approve buying a new pump. Have you ever seen a 500,000 gallon per day toilet overflow? It's not a pretty sight!

Sweet Smell in Rose City

Dear Sweet:

Assuming your city charter does not prevent you from using them, you have three possible exceptions in state law available to you in that situation. Chapter 252 of the Texas Local Government Code does not apply to:

- **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. Govt. Code §252.022(a)(1)**
- **a procurement necessary to preserve or protect the public health or safety of the municipality's residents; Tex. Loc. Govt. Code §252.022(a)(2)**
- **a procurement necessary because of unforeseen damage to public machinery, equipment, or other property; Tex. Loc. Govt. Code §252.022(a)(3)**

Examples where public health and safety exception can be used:

- ✚ Negotiation of solid waste collection and landfill operation agreements. *Browning-Ferris, Inc. v. City of Leon Valley*, 590 S.W. 2d 729 (Tex. Civ. App.-San Antonio 1979) writ n.r.e.
- ✚ Contracting with temporary day labor agency to provide temps for garbage collection. Tex. A.G. Opinion No. JC-0281 (Sept. 7, 2000)
- ✚ Expenditures to repair and improve city sewer system. *Hoffman v. City of Mt. Pleasant*, 89 S.W. 2d 193, 194 (Tex. 1936)
- ✚ Purchase of vehicles and equipment used exclusively for solid waste collection (e.g. garbage trucks and trash containers) Tex. A.G. Opinion No. JC-0281 (Sept. 7, 2000)
- ✚ Contract with private ambulance company for ambulance service. Tex. A.G. Opinion No. JM-908 (1988)

AND PROBABLY MANY SIMILAR PURCHASES!!!

Other General Exceptions to Competitive Bid Requirements found in Tex. Loc. Govt. Code § 252.022(a)

- **a procurement for personal, professional, or planning services**
- **a procurement for work that is performed and paid for by the day as the work progresses**
- **a purchase of land or a right-of-way**

Other General Exceptions to Competitive Bid Requirements found in Tex. Loc. Govt. Code § 252.022(a)

A procurement of items that are available from only one source, including:

- (A) items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies;**
- (B) films, manuscripts, or books;**
- (C) gas, water, and other utility services;**
- (D) captive replacement parts or components for equipment**
- (E) books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials; and**
- (F) management services provided by a nonprofit organization to a municipal museum, park, zoo, or other facility to which the organization has provided significant financial or other benefits**

Other General Exceptions to Competitive Bid Requirements found in Tex. Loc. Govt. Code § 252.022(a)

- **A purchase of rare books, papers, and other library materials for a public library**
- **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**
- **A public improvement project, already in progress, authorized by the voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters**
- **A payment under a contract by which a developer participates in the construction of a public improvement as provided by Subchapter C, Chapter 212**

Other General Exceptions to Competitive Bid Requirements found in Tex. Loc. Govt. Code § 252.022(a)

- **Personal property sold:**
 - (A) at an auction by a state licensed auctioneer;**
 - (B) at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code;**
 - (C) by a political subdivision of this state, a state agency of this state, or an entity of the federal government; or**
 - (D) under an interlocal contract for cooperative purchasing administered by a regional planning commission established under Chapter 391;**
- **Services performed by blind or severely disabled persons;**
- **Goods purchased by a municipality for subsequent retail sale by the municipality;**
- **Electricity.**

Tex. Loc. Govt. Code §252.022(c) The Municipally Owned Utility Exception

This chapter does not apply to expenditures by a municipally owned electric or gas utility or unbundled divisions of a municipally owned electric or gas utility in connection with any purchases by the municipally owned utility or divisions of a municipally owned utility made in accordance with procurement procedures adopted by a resolution of the body vested with authority for management and operation of the municipally owned utility or its divisions that sets out the public purpose to be achieved by those procedures. This subsection may not be deemed to exempt a municipally owned utility from any other applicable statute, charter provision, or ordinance.



Tex. Loc. Govt. Code §252.022(d) The Alternative Methods Exception

This chapter does not apply to an expenditure described by Section 252.021(a) if the governing body of a municipality determines that a method described by Chapter 2269, Government Code, provides a better value for the municipality with respect to that expenditure than the procedures described in this chapter and the municipality adopts and uses a method described in that chapter with respect to that expenditure.

Additional exceptions to competitive procurement requirements.

- ▶ **Purchases made under a contract with the State of Texas to participate in the General Services Commission state purchasing program. Tex. Loc. Govt. Code §271.083**
- ▶ **Purchases through a cooperative purchasing program with another local government of this state or another state or with a local cooperative organization of this state or another state.. Tex. Loc. Govt. Code §271.102**
- ▶ **Purchases made under federal supply schedules of the United States General Services Administration. Tex. Loc. Govt. Code §271.103**

Dear Mr. Handyman:

So just what kind of notice is required for soliciting competitive sealed bids or proposals?



Woody in Oak Leaf

Dear Woody: That's an easy one! Tex. Loc. Govt. Code §252.041 spells it all out for you.

In general:



If there is a newspaper published in the city:

1. the time and place where the bids or proposals will be opened and read aloud must be published at least once a week for two consecutive weeks; and
2. the first notice must be published before the 14th before the date of the bid opening.



If there is no newspaper published in the city, post the notice at city hall for 14 days before the bid opening.

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Tex. Loc. Govt. Code § 252.0415

Procedures for Electronic Bids or Proposals

- 1. Bids or proposals under Chapter 252 can be received through electronic transmission if the city council/commission 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.**
- 2. Not required to be sealed if submitted electronically in compliance with the rules and procedures established by the city.**

Dear Handyman:

Some purchases do not lend themselves to a bidding process, like a financial software package for our accounting department that does not even know what it wants?



Judge Roy in Pecos



Dear Judge: Not to worry. Tex. Loc. Govt. Code §252.021 allows you to make certain high technology purchases using the sealed competitive proposal method.

First, when soliciting initial quotations, must state the relative importance of price and other factors on which the proposals will be evaluated. Tex. Loc. Govt. Code §252.402(a).

Tex. Loc. Govt. Code §252.042(b) then allows you to discuss those proposals with the qualified vendors submitting the proposals so long as you give everyone the opportunity to meet with you and revise their proposal.



“High Technology Procurement”

Tex. Loc. Govt. Code §252.001(4)

...the procurement of equipment, goods, or services of a highly technical nature, including:

- (A) data processing equipment and software and firmware used in conjunction with data processing equipment**
- (B) telecommunications equipment and radio and microwave systems**
- (C) electronic distributed control systems, including building energy management systems; and**
- (D) technical services related to those items**

Mr. Handyman:

We just opened some bids on a new water line project. We checked references on the contractor who was low bidder and found out that he has three unfinished jobs that are currently the subject of subcontractor and supplier claims for non-payment. We don't have to go with the low bidder, do we?



Worried in Wichita Falls

Dear Worried: Don't be! The key phrase is:

“lowest RESPONSIBLE bidder”

Tex. Loc. Govt. Code §252.043(a) allows a city to award a contract based on certain objective factors other than the lowest price. The contractor must also be a “responsible” bidder. In fact, a city can reject any and all bids without making an award.



WARNING: TEX. LOC. GOVT. CODE §271.027(B)

If you do not award a contract for certain public works projects to the lowest bidder, you **MUST notify the low bidder and provide an opportunity to present evidence to the city council or the city council's designated representative as to why the low bidder should be considered the lowest responsible bidder.**



Mr. Handyman:

Our purchasing department keeps sending out requests for bids for architectural, engineering, and surveying services, but they can't get anyone to give us a price for their services. What's going on?

Star in Hollywood Park



Dear Star:

The Professional Services Procurement Act (Tex. Govt. Code Ch. 2254) prohibits a city from bidding the following professional services:

(i) accounting

(ii) architecture

(iii) landscape architecture

(iv) land surveying

(v) medicine

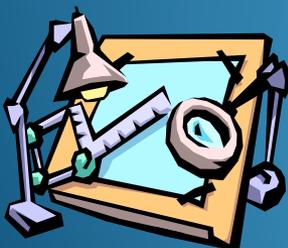


(vi) optometry

(vii) professional engineering

(viii) real estate appraising

(ix) professional nursing



Contracts for Architectural, Engineering, and Surveying Services – Tex. Govt. Code §2254.004

- (a) In procuring architectural, engineering, or land surveying services, a governmental entity shall:**
 - (1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and**
 - (2) then attempt to negotiate with that provider a contract at a fair and reasonable price.**

- (b) If a satisfactory contract cannot be negotiated with the most highly qualified provider, the entity shall:**
 - (1) formally end negotiations with that provider;**
 - (2) select the next most highly qualified provider; and**
 - (3) attempt to negotiate a contract with that provider at a fair and reasonable price.**

Dear Handyman:

In order to save money, my public works director doesn't want to require payment and performance bonds on smaller contracts. We have never had a claim. Should we continue to require these bonds?



Thomas in Jefferson

Dear Tom:

Payment and performance bond requirements are spelled out in Tex. Govt. Code Ch. 2253. In short, with respect to public works contracts:

If the contract is for more than \$25,000, a payment bond is required to protect the interest of suppliers and subcontractors (Tex. Govt. Code. §2253.021(a)(2); and

If the contract is for more than \$100,000, a performance bond is required to protect the interest of the city (Tex. Govt. Code. §2253.021(a)(1))



CAUTION: TEX. GOV'T. CODE §2253.027

If a governmental entity fails to obtain from a prime contractor a payment bond as required by Section 2253.021:

(1) the entity is subject to the same liability that a surety would have if the surety had issued a payment bond and if the entity had obtained the bond; and

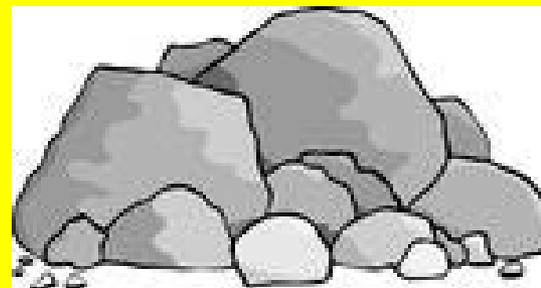
(2) a payment bond beneficiary is entitled to a lien on money due to the prime contractor in the same manner and to the same extent as if the public work contract were subject to Subchapter J, Chapter 53, Property Code.



Mr. Handyman:

Our contractor has run into some tough rock we did not realize was in the way of our new water line project. The contractor says this is extra work and, well, you know, he wants more \$\$\$\$ for that work. We are too far into the project to solicit new bids. What do we do?

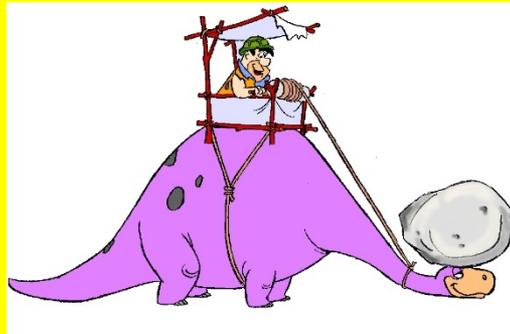
Wilma in Fredricksburg



Wilma: All is not lost. City's can, with some limitations, do change orders involving an increase OR decrease in contract price without re-bidding the contract.

Tex. Loc. Govt. Code §252.048(d) allows:

- Increase of contract price not greater than 25% of original bid award**
- Decrease of contract price not greater than 25% of original bid award with contractor consent**



Additional Note on Change Orders

- 1. City Council in any city can delegate authority to approve change orders to a city official of \$50,000 or less. Tex. Loc. Govt. Code §252.048(c).**
- 2. City Council in cities with population of 300,000 or more can delegate approval of change orders of \$100,000 or less on public works contracts . Tex. Loc. Govt. Code §252.048(c-1).**

Additional Topics Recommended for Review

- **Alternative Methods of Procurement: Design/Build, Construction Manager-at-Risk, etc.**
- **Conflicts of Interest: TLGC Chapters 171 and 176.**
- **“Best Value” Awards and the factors that can be considered.**
- **Various provisions regarding the sale of real property.**

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- **Conflicts of Interest: TLGC Chapters 171 and 176.**
- **“Best Value” Awards and the factors that can be considered.**
- **Various provisions regarding the sale of real property.**
- **Statutes requiring or otherwise authorizing awarding bids based on being resident of the City.**

**THANK YOU FOR YOU FOR DOING WHAT YOU
HAVE CHOSEN TO DO WITH THIS PART OF
YOUR PROFESSIONAL LIFE. ENJOY THE
KNOWLEDGE THAT WHAT YOU DO TODAY FOR
THE CITY OR CITIES YOU REPRESENT CAN
POSITIVELY AFFECT THE LIVES OF THE
RESIDENTS AND LOCAL BUSINESSES YOU
SERVE FOR YEARS TO COME!**

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