

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
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Dear Mr. Handyman:

What tools do you keep in your toolbox to help you handle questions regarding municipal purchasing?

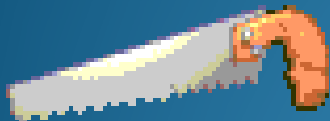
Ima in Eden

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:

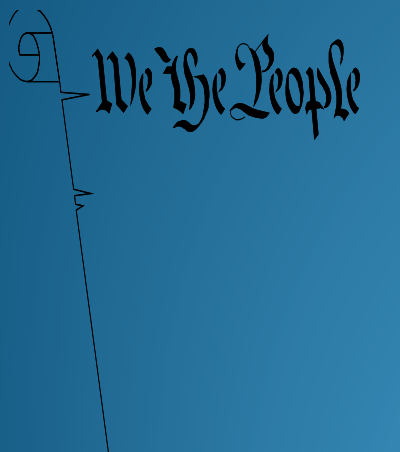
Why do I need my city charter in
my purchasing tool box?

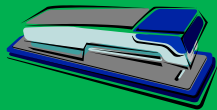
Cowboy in Arlington



Dear Cowboy: I 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.

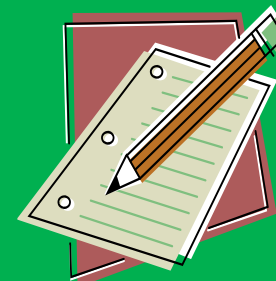
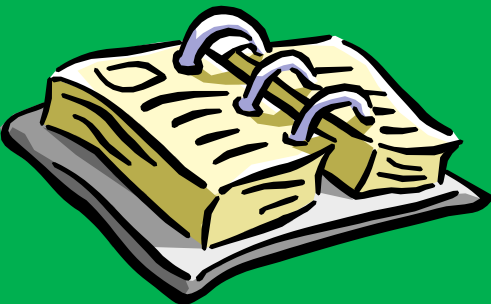


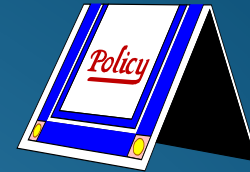
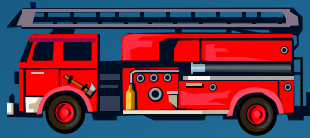


Mr. Handyman:

Do I have to take bids on everything? For some purchases, the bid process would cost more than the purchase!

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.

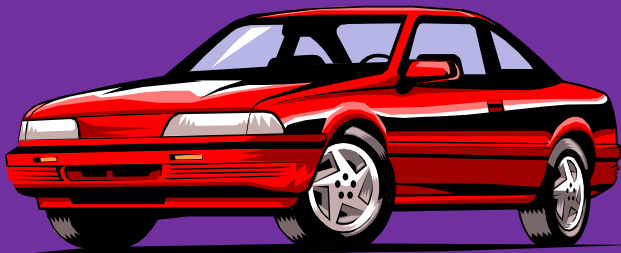


- **Look for lower \$\$ amount on bidding threshold!**
- **Look for prohibitions on other methods of procurement!**

Dear Mr. Handyman:

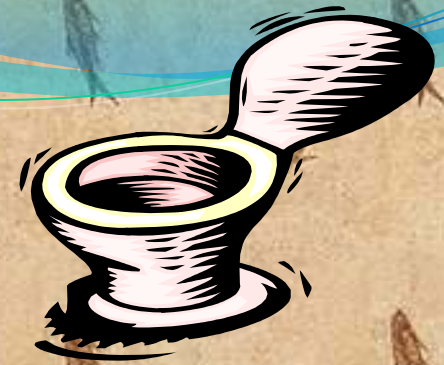
We budgeted for buying five new cars this year. Suggested retail is \$13,000.00 per car. Our fleet manager thinks he can get all of the cars locally by negotiating with a local dealership for a price less than \$13,000.00. Our city manager has asked if we can do this. What do you think?

Otto in DeSoto



Dear Otto: Probably not a good idea! 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 sewer lift station pump blows up, we 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:

You have three possible legal exceptions available to you. 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(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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Dear Handyman:

Some purchases, like certain software applications do not lend themselves to a bidding process?

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 low bidder and found out that he has three unfinished jobs because he hasn't been paying his subcontractors and suppliers. Do we have to go with the low bidder?



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)

For certain public works projects, 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

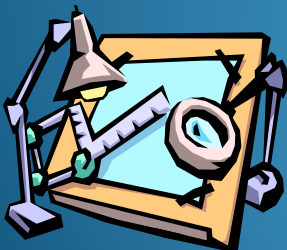


(vi) optometry

(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:

Our public works director doesn't want to require payment and performance bonds on smaller contracts to save money. We have never had a claim. What do you think?



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:

Payment bond required if public works contract is more than \$50,000 (Tex. Govt. Code. §2253.021(a)(2); and

Performance bond required if the public works contract is for more than \$100,000 (Tex. Govt. Code. §2253.021(a)(1))



CAUTION: TEX. GOVT. CODE §2253.027

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

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

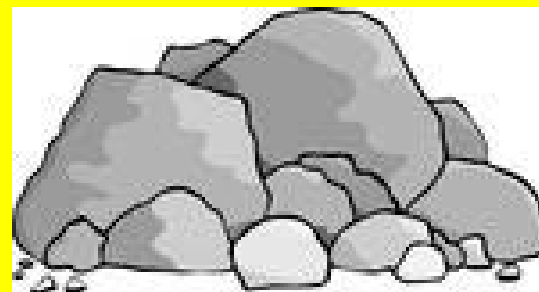
(2) a payment bond beneficiary entitled to a lien on money due to the prime contractor.



Mr. Handyman:

Our contractor has run into some unpredicted rock on a water line project. The contractor says this is extra work and wants more \$\$\$\$ for that work. We are too far into the project to solicit new bids. What do we do?

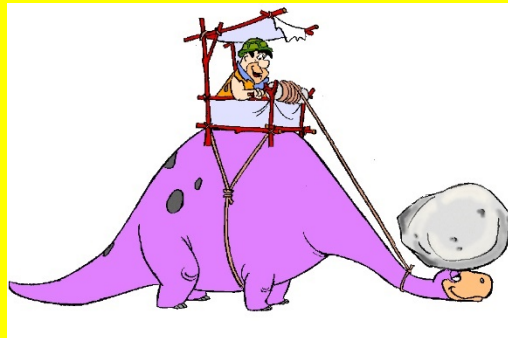
Wilma in Fredricksburg



Wilma: All is not lost. City's can, with some limitations, agree to 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 can delegate authority to a city official to approve change orders 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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