

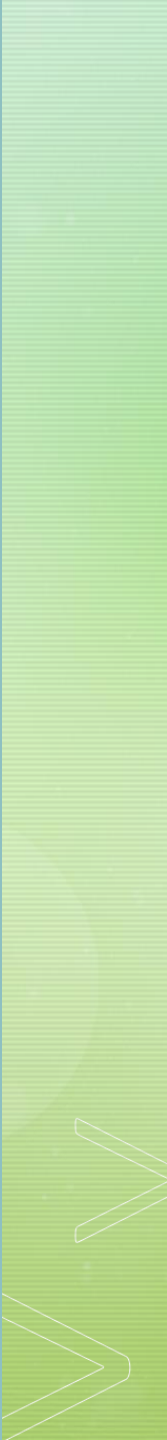
# The Art of Procurement

Navigating the Code with a Focus on Construction

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# Municipal Procurement


- Art – not science
  - Little developed case law as a guide to many nuanced questions
  - Statutory structure
    - Complicated
    - Conflicted
    - Confusing
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# Controlling Law

- Codes Applicable to Municipal Procurement
  - Local Gov't Code ch. 252
  - Local Gov't Code ch. 271
  - Gov't Code ch. 2254
  - Gov't Code ch. 2269
  - Local Gov't Code ch. 253 (real estate broker)
  - Gov't Code ch. 2253
  - Gov't Code ch. 2258 (prevailing wage)



# Court Interpretation

- Very few Texas cases address competitive bidding and procurement for Cities.
    - More county cases – instructive
    - Spawglass v. City of Houston (Tex. App. [14<sup>th</sup> Dist. – 1998)
      - No cases on nonwaivable bid condition in Texas
      - Cited 1992 New Jersey case
  - Procurement and competitive bidding should be conducted so that all bidders receive fair and equal treatment
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# General Intent of Procurement Code

- Equal and Fair Treatment
- Public notice for opportunity to compete
- *City of Austin v. Util. Assocs.*, 517 S.W.3d 300, 309-10 (Tex. App.—Austin 2017)
  - Chapter 252 mandated that “[o]fferors shall be treated fairly and equally with respect to any opportunity for discussion and revision of proposals.”
- *Davray, Inc. v. City of Midlothian*, No. 3: 04-CV-0539-B, 2005 U.S. Dist. LEXIS 41520, at \*11-15 (N.D. Tex. 2005)
  - purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners.

# Professional Procurement - 2254

- May not consider price
- Implies use of RFQ – not express requirement
- Except for A/E – 2254.004
  - Most Highly Qualified on basis of qualification and competence
  - If no deal, move on to next most highly qualified
  - No instruction on how to rank without a formal selection process



# Court Interpretation of 2254

- *La Villa Indep. Sch. Dist. v. Gomez Garza Design*, 79 S.W.3d 217, 222-23 (Tex. App.—Corpus Christi 2002)
- Attempt to Void Architect Contract
- No Proposal or Statement of Qualifications Submitted by A Prior to Award and No Fee Negotiation
- Court held 2254 not Violated b/c No Express Req't for Submission of SOQ
- Court noted that 2254 Only Requires Selection of Most Highly Qualified Architect Who Will Agree to Fair and Reasonable Price

# Professional Procurement under 2254

- 2254 Applies to:
  - Accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, professional nursing, interior design
- Does not apply to:
  - Lawyers, Real Estate Broker, Security Consultant; IT Consultant/Tech Support
  - Subchapter C Controls Contingency Fee Contracts with Lawyers –



# 252 Exemptions

- Professional Services are Exempted from Competitive Bidding
  - For professionals not covered by 2254, 252 does not require competitive procurement, but does not prohibit the same. See *City of Fort Worth v. Lane*, No. 02-11-00048-CV, 2011 Tex. App.LEXIS 10071, at \*1 (Tex. App.—Fort Worth Dec. 22, 2011)
  - City can, but doesn't have to use Competition for Exempted
    - Advertising
      - Print, Radio, Signage?
      - Ad Agency?

# Nuances in Codes

## Local Gov't Code 252 .043

- Provides 8 factors for Best Value Bidding
- City must choose Best Value or Lowest Responsible
- 252.0435 – Determine Responsible Bidder may take into account safety record
- How to Reconcile Best Value and Lowest Responsible

## Government Code 2269

- Facility means an improvement to real property – 2269.001
- Public Work Contract means and building or any public work
- Award under this Chapter, may consider 8 factors (same as 252 Best Value) – 2269.055
- Competitive Bidding means awarding to lowest responsible bidder – 2269.101

# Nuances in Code

## Local Gov't Code

- Civil Works Exceeding \$1.5M must use Lowest Responsible Bidder – can use Competitive Sealed Proposal for <\$1.5M (but not Best Value???)

## Government Code

- 2269.101 “Competitive Bidding” may be used for construction of a facility
- Award of contract to the lowest responsible bidder
- Is that Best Value?

# Nuances in Code

## Local Gov't Code

- 252.021 authorizes competitive sealed proposals – and competitive bidding
- 252.042 If RFP must specify price and importance of other factors
- Post Opening Discussions allowed – May obtain best final offers after submissions – equal opportunity to all offerors

## Government Code

- Controls over other laws relating to public work contract– 2269.003
- Competitive Sealed Proposals
  - For Facilities
  - Requests, Ranks, Negotiates
  - Negotiate with highest ranked and may discuss scope, time, and associated price change

# Practice Tips

- Identify the authorizing statute in the Bid Documents
- Terminology is important
  - Choose the procurement method and use wording appropriate to it
  - Avoid mixing terms – Bidder, Offeror, Respondent, Bid, Proposal
- Reserve rights in Instructions to Bidders/Offerors
- Identify if negotiations or best and final offer be submitted
- Ensure equal opportunity and fairness for all contractors

# Bid Protests

- Irregularities in Bidding or Contractor Selection may draw a Protest
- Failure to advertise
- Failure to state type of procurement
- Confusion in bidding
- Improper negotiations
- 252.061
  - Contract made in violation of chapter is void or voidable
  - Standing to sue granted to any taxpayer or bidder if construction project
- 2269.451 – Contract Voidable as matter of public policy
  - Voidable – not Void
  - 10 Days to Sue for Dec Action or Injunctive Relief



Questions ?

