

Drafting Construction Procurement and Contract Documents

Avoiding Legal Uncertainty

Statutory Overview & Recent Legislative Update

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Overview

- Procurement
 - Delineation of Process
 - Transparency
 - Delivery method selection
 - Decision making process
- Contracts
 - Statutorily required clauses
 - Delay Damages
 - Retainage
 - Dispute Resolution
 - Bond Claims – Final Completion

General Procurement Obligations

- *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)
 - The purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interest and benefit of the taxpayers and property owners.

Procurement – Authorizing Statute

- Consider & state authorizing statute for any alternative delivery purchase
- Competitive Sealed Proposals
 - Tex. Loc. Gov't Code §252.021
 - Tex. Gov't Code ch. 2269, sub. D
- Delegation required §252.043 or §2269.053

Procurement – Bid Documents

- Outline process, provide notice, identify delivery method
- Competitive Bidding
 - ch. 2269, sub. C or §252.043 “best value”
- Best and final offer – §252.042
- Put all options into RFP

Procurement – Conflicting/Confusing Statutory Provisions

- §2269.003 Prevails – Does not invalidate
 - Conflict with §252.043(D) & (D-1) - CSP < \$1.5M
 - §2269.001(3) “Facility” means, unless otherwise specifically provided, an improvement to real property.
 - §2269.151 – Permits CSP for “construction, rehabilitation, alteration, or repair of a facility.”
- No Conflict – Both 252 and 2269 may apply
 - Bidding threshold, co-op purchases, TPIA and other Public Works Contract obligation

Legislative Change

Change Orders

- §252.048 – 25% limit still applies
- Population threshold for \$100,000 delegable authority reduced to 240,000
- Added Section (e) – “This section applies only to a contract awarded through a competitive procedure as required by Section 252.021.”
 - Does this create a 2269 conflict? Probably not?
 - §252.021 requires compliance with ch. 2269
 - effective as of Sept. 1, 2023

Procurement – Interplay of laws

§252.049 – Trade Secrets are confidential

§552.110 Exempts Trade Secrets

§552.371 – Require additional disclosure

- for Contracts exceeding \$1M or Bids for same

Procurement – Practice Tips

Provide

Provide Clear & Concise Instructions to Bidders

Consider

Consider Prequalification
Discretionary Interviews for Alternative Delivery
Method



Contract Drafting

- Bid documents as Contract Documents?
- Contract form selection – AIA, EJCDC, Manuscript
- Evaluate Project specific risk and challenges
 - Owner's management resources, funding source (grant or loan)
 - Impact on contract language:
 - Insurance, payment, notice, close-out, warranty and bonding
- Provide requisite bond forms



Contract Drafting

- Retainage – reduce, time for release, right to withhold
- Final Completion - §2253.078 “termination, abandonment, final completion”
- No Damages for Delay
- Dispute Resolution – Arbitration?

Closing Thoughts

01

Don't over do it, but don't skimp

02

Provide procurement training to staff

03

Consider economic climate & risk profile

Questions ?

