



HUSCH BLACKWELL

**Procurement Disputes:
Preventing, Managing,
and Litigating**

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Local Procedures

- Adopt policies and procedures
 - Required for federal programs
 - Include record keeping requirements
 - Bid cancellation and power to award multiple contracts
 - Ethics provisions



Local Procedures

- Protest Procedures
 - Deadline requirements
 - Post-Award Debriefing
 - Protest Requirements
 - Written protest
 - Identifying legal and factual grounds
 - Protest Process
 - Multi-step
 - Single/Multiple person panel
 - Include language in bid



Chapter 252 procedures

- Charter controls when in conflict with 252
- City may reject any and all bids 252.043(f)
- Bid price error cannot be changed after opening



Chapter 252 procedures

- Awarded to lowest responsible bidder or bidder with best value
- Various factors to consider in determining “best value”:
 - Purchase price
 - Reputation
 - Quality
 - Past relationship
 - “Any relevant criteria specifically listed” in the RFP/RFQ



Chapter 252 procedures

- Enforcement
 - Non-compliant procurement is void
 - Performance of contract may be enjoined by
 - Tax paying resident
 - Person submitted bid, if for public works
 - Criminal Penalties



Case Study

4 Families of Hobby, LLC

v.

City of Houston and Areas HOU JV, LLC

Pappas Restaurants sues City of Houston after losing Hobby Airport contract, asks judge to void competitor's deal

The city awarded a 10-year, \$470 million concessions contract last month to a joint venture group led by a U.S. subsidiary of Spain-based Areas, ending a 20-year reign at Hobby Airport for Houston-based Pappas.

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Chapter 252

- Threshold question: expenditure of more than \$50,000?
- If no – Chapter 252 does not apply
- If yes – exceptions may still apply, e.g., procurements involving:
 - Preservation or protection of public health
 - Personal, professional, or planning services
 - Land purchases
 - Procurement of items from one source (patents, books, utilities)
 - Electricity
 - Advertising



Chapter 252

- Who do you sue?
 - City; bidder (necessary party); officials on ultra vires theory for acting without legal authority or for failing to perform a ministerial act?
- *In re Griffith*, 485 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2015, no pet.)
 - Tow truck contract; undisputed that contract did not require an expenditure because the owner or operator of the vehicle paid for the tow
 - No *ultra vires* claim because defendant officials were not required to comply with Chapter 252



Chapter 252

- Chapter 252 requires (1) adherence to the RFP; (2) fair evaluation of proposals; and (3) consideration of best value criteria
- Allegation that the concessions contract is a “disguised expenditure contract” that would indirectly require the City to expend over \$50,000
- Various allegations that Chapter 252 standard were not met



Breach of Unilateral Procurement Contract

- Claim: City’s RFP, plus ordinance, creates a “unilateral contract in connection with the City’s conduct of procurements”
- *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011)
 - Firefighters sued Houston for underpayment of lump sums due upon termination of employment – not a procurement case
 - SCOTX found a set of City ordinances concerning firefighters contained the “essential terms” of an agreement
 - Time of performance (“workweek”); compensation (“regular rate of pay” + “overtime”); services to be performed (“duties generally”)



Open Meetings Act

- Theory: find a defect in the notice of meeting at which the contract was approved
- Remedy: “An action taken by a governmental body in violation of this chapter is voidable.” Tex. Loc. Gov’t Code § 551.141.
- Immunity waived for claims for declaratory or injunctive relief for OMA violations



Open Meetings Act

- “A governmental body shall give written notice fo the date, hour, place, and subject of each meeting held by the governmental body.” Tex. Gov’t Code 551.041.
 - “Not a legislative scheme for service of process; it has no due process implications.” *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991).
 - Compare *Cox Enterprises, Inc. v. Board of Trustees*, in which SCOTX “finally held a notice inadequate”
 - “Personnel” item not enough to place general public on notice that Board would hire a new superintendent – selection of new superintendent was of “special interest” to the public



Case Study

Gil Ramirez Grp. LLC

v.

Houston Independent School District

- Multiple causes of action based on allegations of bribery to procure construction contracts
- Filed against HISD, former trustee Lawrence Marshall and his consulting company, alleged coconspirator Joyce Moss Clay and her consulting company, and two of the plaintiff's competitors (RHJ–JOC and Fort Bend Mechanical), and their respective owners



Case Study

- \$800m HISD bond issuance
- RFP issued, bids received
- HISD board of trustees chair changed after contract was awarded; owner of competing contractor was donor to new chair
- RFP re-done, contract awarded to competing contractor
- “bond siphoning”: 2% of bills returned to HISD as a “marketing fee”



Case Study

- 42 USC § 1983
 - Arbitrary and capricious termination of contract
- RICO
 - Racketeering enterprise, incl. bribery, wire fraud, and money laundering
- Breach of contract/breach of duty of good faith
- Equitable claims (promissory estoppel and quasi estoppel)
- Tort claims (negligent misrepresentation, tortious interference)
- Jury verdict on RICO and tortious interference
- HISD dismissed on immunity grounds



Thank You!

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