

# Purchasing: Legal Framework for Municipal Procurement

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## **Procurement 101. How to Navigate Purchasing with Municipalities.**

Under our statutory framework for municipal procurement and purchasing multiple laws control various aspects of city purchasing that make compliance challenging. The web of codes and statutes, as well as particular obligations that direct specific procedures, creates a challenging landscape for purchasing professionals and city attorneys.

The following laws provide the basic framework for procurement: Texas Local Government Code chapters 252 and 271 and Texas Government Code chapters 2253, 2254, 2269, and 2271. These laws contain most of the processes and procedures for ordinary municipal purchasing of goods and services, professional services, and construction procurement.

This article, along with the presentation and handout that is being provided as the materials for my presentation are intended to provide a broad overview and introduction to the world of municipal purchasing and procurement. For an excellent resource about procurement, TML publishes a Made-easy paper that can be found at the following link which is current through the 2023 legislative session: [https://www.tml.org/DocumentCenter/View/3999/procurement\\_easy-FINAL-1112023](https://www.tml.org/DocumentCenter/View/3999/procurement_easy-FINAL-1112023).

## **Competitive Bidding and Notice**

As a general rule, municipal purchases require public notice and bidding prior to the expenditure of significant sums of public funds unless a purchase can be made through a co-op or buy-board purchasing arrangement. The current exceptions to competitive procurement are 1)

purchases made under a contract with the State of Texas to participate in the General Services Commission state purchasing program<sup>1</sup>, 2) 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<sup>2</sup>, and 3) purchases made under federal supply schedules of the United States General Services Administration.<sup>3</sup>

For expenditures exceeding \$50,000, municipalities must adhere to the statutory procedures for competitive sealed bidding or use the reverse auction procedure for purchasing unless an exemption applies to any individual purchase.<sup>4</sup> Chapter 252 of the local government code contains various sections that describe and outline the basic obligations of any city seeking to purchase something of value that exceeds \$50,000. The law provides specific procedures for advertising of a request for bids, the manner and process for evaluation of bids or proposals, award of bids, as well as post award obligations and restrictions.

The exemptions to competitive bidding includes instances where a municipality makes a purchase due to a public calamity<sup>5</sup>; out of necessary to preserve or protect the public health or safety<sup>6</sup>; because of unforeseen damage to public machinery equipment or other property; <sup>7</sup>or for specialized services ie: for land or professional services.<sup>8</sup> These exemptions to public bidding acknowledge that in certain scenarios the time required for public purchasing may be inappropriate or problematic. However, cities should avoid attempting to skirt procurement laws by invoking an exemption that may not actually exist.

Adherence to public procurement obligations can be challenging and, while the laws do contain specific obligations and restrictions on municipal procurement, Texas jurisprudence does not contain a high number of cases that are instructive for practitioners seeking to keep their cities on the right side of procurement law. Having said that, the case law that does exist recognizes that the underlying purpose of the procurement codes is to ensure an equal and fair opportunity for interested providers to compete for government contracts.

Before a city may enter into a purchase and interested companies may submit bids or proposals, the city must first publish a notice providing the time and location for receipt of bids or proposals. The City must then open and read aloud the bids following the advertising process which requires publication at least once Accordingly, notice in a newspaper must be published at least twice, 2-weeks prior to the bid opening date. The notice should include a copy of the requirements the goods or services should meet, or information how to obtain the requirements. In most situations, the notice will provide details for interested bidders to obtain a complete bid package published by the City as a Request for Bids or a Request for Proposals.

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<sup>1</sup> *Id.* § 271.083

<sup>2</sup> *Id.* § 271.102

<sup>3</sup> *Id.* § 271.103

<sup>44</sup> TEX. LOC. GOV'T CODE § 252.021(a), 252.022

<sup>5</sup> *Id.* §252.022(a)(1)

<sup>6</sup>*Id.* §252.002(a)(2)

<sup>7</sup>*Id.* § 252.022(a)(3)

<sup>8</sup> *Id.* §252.002(a)

The traditional procedure for awarding a contract pursuant to traditional competitive bidding requires the city awarding the contract to the lowest responsible bidder or the bidder that provides the best value to the city. The best value factors are codified in chapter 252. If a city intends to evaluate submissions with best value consideration, the solicitation should inform bidders of that fact so they may tailor their submittals or proposals accordingly.

## Construction Procurement

In addition to procurement obligations regarding notice, publication, bid opening, etc., where a city is seeking construction services, payment and performance bond may be required by law. The payment bonds help protect persons and entities who perform work on public projects from nonpayment. The performance bond helps protect the city in the event a contractor fails to perform. A performance bond is required if the public works contract is worth more than \$100,000.<sup>9</sup>

A payment bond is required for public works contracts worth more than \$50,000.<sup>10</sup> The payment bond exists to protect downstream subcontractors and material suppliers from nonpayment on the public works project. If a governmental entity fails to obtain a payment bond from a prime contractor as required, the governmental entity is subject to the same liability a surety would have if the payment bond had been issued.<sup>11</sup> The payment bond acts as a replacement for a supplier or subcontractors' lien rights because public land is constitutionally protected from encumbrance or seizure.

Another distinction between general procurement obligations and construction procurement is the availability of alternative delivery methods for construction projects. These methods, specifically permitted via chapter 2269 of the government code, provide benefits to cities such as greater flexibility in contractor selection. Alternate methods allowed by chapter 2269 are the following:

- Best-value competitive bidding process.<sup>12</sup>
- Competitive sealed proposal method.<sup>13</sup>
- Construction manager-agent method.<sup>14</sup>
- Construction manager-at-risk method.<sup>15</sup>
- Design-build method.<sup>16</sup>
- Job-order contract method.<sup>17</sup>

Chapter 2269 controls over other procurement laws that conflict with 2269, but all other laws apply in the absence of a conflict. For example, where 2269 will allow the use of a method other than lowest

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<sup>9</sup> *Id.* §2253.021(a)(1)

<sup>10</sup> *Id.* § 2253.021(a)(2).

<sup>11</sup> *Id.* § 2253.027(a).

<sup>12</sup> *Id.* §2269.101

<sup>13</sup> *Id.* §2269.151

<sup>14</sup> *Id.* §2269.201(a)

<sup>15</sup> *Id.* §2269.25

<sup>16</sup> *Id.* §2269.301

<sup>17</sup> *Id.* §2269.401

responsible bidder for civil works exceeding \$1,500,000, 2269 prevails over chapter 271 of the local government code which limits the award of such project to a single, traditional delivery method.

Traditionally, construction contracts for privately owned projects require withholding of 10% retainage per chapter 53 of the Texas Property Code. Retainage protects downstream providers in the same way a payment bond does for public projects. Nevertheless, even with payment bonds in place, public owners may, and typically do, withhold retainage as an industry-standard practice. When so doing, however, a city must adhere to limitations about retainage. For contracts valued at less than \$5,000,000, no more than 10% may be withheld as retainage.<sup>18</sup> For contracts valued at more than \$5,000,000, no more than 5% may be withheld as retainage.<sup>19</sup>

## **Professional Services**

Municipalities are prohibited from bidding services for accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, and professional nursing. A governmental entity must first publish a Request for Qualifications that identifies the qualifications sought for the specific project. The entity must select the most highly qualified provider and then attempt to negotiate a fair and reasonable price.<sup>20</sup>

## **Prevailing Wage Rates**

The prevailing wage rate is required for all publicly funded construction projects. Contractors and subcontractors must pay employees at least the general prevailing wage rate performed in the same locality.<sup>21</sup> The same is true for workers performing overtime or working on legal holidays. The prevailing wage is determined through (1) results of a survey documenting wages received by classes of workers employed on projects of a character similar to the contract work to be performed; or (2) using the prevailing wage rate as determined by the U.S. Department of Labor in accordance with the Davis-Bacon Act.<sup>22</sup>

Failure to comply with prevailing wage requirements can result in penalties and retainage withheld to pay workers the pay difference if underpaid.<sup>23</sup> However, if the governmental entity fails to determine the prevailing wage rates and also fails to specify those rates in the prime contract, then contractors and subcontractors aren't liable.<sup>24</sup>

## **Conclusion**

The above, along with the referenced and linked Made-Easy Paper provides a high-level overview of various laws governing purchasing and procurement. Compliance with these laws can be

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<sup>18</sup> Id. §2258.023(b)(1).

<sup>19</sup> Id. §2258.023(b)(2).

<sup>20</sup> Id. 2254.004.

<sup>21</sup> Id. §2269

<sup>22</sup> Id. §2258.022(a).

<sup>23</sup> Id. §2258.023(b), 2258.026.

<sup>24</sup> Id. §2258.023(c).

challenging given the many different obligations and the lack of a consolidated code. However, both this paper and the Made-Easy paper contain citations to relevant statutory sections that city attorneys and practitioners can review to evaluate compliance. Having said that, I routinely get asked procurement questions that do not have clear answers in our statutory framework. In those scenarios, practitioners should evaluate compliance for any fact specific exercise in light of the legislative intent behind any particular enactment as well as Texas jurisprudence that requires equal and fair opportunity and access for entities interested in winning government contracts.