

AVOIDING PROCUREMENT AND PURCHASING MISTAKES: RECENT CASE LAW AND PRACTITIONER'S TIPS

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GENERAL OUTLINE

- No Fun or Cool Images or Videos
- Hardly any (funny) jokes
- But – A few Cases showcasing procurement mistakes
- A few more “learning moments” from practice
 - The names have been changed to protect the innocent (and guilty)

CITY OF AUSTIN V. UTILITY ASSOC., INC., 517
S.W.3D 300 (TEX. APP.—AUSTIN 2017, PET.
DEN'D)

- Taser and Utility Assoc. bid on RFP for provision of body cameras to police
 - UA asserted the Taser bid should be disqualified b/c Taser failed to respond or demonstrate that its cameras could meet technical requirements in RFP
 - City chose to disregard recommendation for the full purchase under the RFP
 - Instead - opted to buy 1/3 of the # of cameras via a Texas Assoc. of School Board purchasing cooperative (\$4M worth of cameras instead of \$12.2M bid originally)

COURT ANALYSIS OF AUSTIN CASE

- Primarily Immunity and Jurisdictional Case
- Upheld plea to the jurisdiction on the UDJA claim of ultra vires acts
- Reversed the lower court on the plea as to §252.061
- Reversed and vacated the injunction preventing the City from cancelling or terminating the RFP
- §252.061. Injunction.
- If the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by:
 - (1) any property tax paying resident of the municipality; or
 - (2) a person who submitted a bid for a contract for which the competitive sealed bidding requirement applies, regardless of residency, if the contract is for the construction of public works.

The Takeaway – Evaluate the use of discretion in the RFP and understand that a judicial challenge to the procurement can withstand jurisdictional challenges

CITY OF NEW BRAUNFELS V. CAROWEST LAND LTD.,
2017 LEXIS 6130, (TEX. APP.—AUSTIN 2017)

- Dispute between City and Carowest over land for wastewater treatment plant and two contracts to Yantis
 - South Tributary (1st Project – Delay Claim asserted)
 - North Tributary – Contract at Issue
- Rule 11 Agreement
 - Dismiss delay claim if Awarded North Tributary Project

CITY OF NEW BRAUNFELS V. CAROWEST LAND LTD.

- In awarding the North Tributary Contract, the City failed to award the contract to the lowest responsible bidder
- In awarding the North Tributary Contract, the City failed to provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications
- The City allowed Yantis to submit additional consideration for its bid for the North Tributary Contract after opening
- Yantis provided a release of the Delay Claims to the City in exchange for the award

NEW BRAUNFELS V. CAROWEST

- Publicly bid the project
- Allow Add'l Consideration
- Determined Award in Executive Session
- Quid Pro Quo Award

CODE REQUIREMENTS

- §252.042
 - Offerors must be treated fairly and equally with respect to revision of award
 - Revisions permitted after submission before award
- §252.043(d) presumably applied to this RFP – Lowest Responsible Bidder (2011)
- Tex. Gov't Code ch. 2269 enacted & effect Sept. 1, 2011

What did the City do wrong?

DAVRAY, INC. V. CITY OF MIDLOTHIAN, 2005
U.S. DIST. LEXIS 41520, (U.S. DIST. DALLAS)

- RFP required specific manufacturer for fire hydrants
- Davray challenge and City assert absolute right to select the manufacturer
- City asserted “health & safety” exception to §252.042
 - §252.022(a)(2) “This chapter does not apply to an expenditure for a procurement necessary to preserve or protect the public health or safety of the municipality's residents;”
 - Fire hydrant necessary to protect public safety
 - Insufficient because would allow a city to declare all purchases necessary for H&S
 - But was this brand superior to all others?
 - Both parties presented evidence which precluded summary judgment on the issue

Procurement Considerations based on *Davray*

- Raises issues relating to commonly cited exemptions
 - Protect Health or Safety —Tex. Loc. Gov't Code §252.022(a)(2)
 - Single Source —Tex. Loc. Gov't Code §252.022(a)(7)(A) items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies;
 - Prohibition against component purchases
 - RFP identify 20 hydrants – City bought 5 for \$997 each. Claimed to be under the then \$25,000 threshold (in 2007, Legislature raised the floor to \$50,000)

REQUEST FOR PROPOSAL – TERMS

- City may provide conditions in the RFP
 - City may reject any and all bids Tex. Loc. Gov't Code §252.043(f)
 - City has the absolute right to reject any and all bids, and that a rejected bidder has no property right in the award of the construction contract. See *Spawglass Constr. v. City of Houston*, 974 S.W.2d 876 (Tex.App.—Houston [14th Dist.] 1998, pet den'd)
 - Solicitation of bids by City does not constitute an offer See *Urban Elec. Serv., Inc. v. Brownwood Indep. Sch. Dist.*, 852 S.W.2d 676 (Tex.App.—Eastland 1993, no writ)
 - City had right to select the bid most advantageous, and reject all other bid See *Associated General Contractors v. Corpus Christi*, 694 S.W.2d 581 (Tex.App.—Corpus Christi 1985, no writ)

PROCUREMENT ISSUES

- Debriefing to Avoid Potential Protest
- Construction Project. Sub-ch. D of 2269 — Competitive Sealed Proposal
 - Proper Scoring, Evaluation, and Application of Scoring to Award
 - Post-Evaluation Negotiations result in different price
 - Debriefing – explain authority and actions under §2269.155(b)
Negotiate, scope, time, and associated price modification
- Scope Increase & Change Order
- Facilities Master Plan – RFQ for land use and repurpose/add to existing facilities – no statute listed in RFP
 - Contract with architectural firm for services
 - Scope increase with cost proposal for change at 50% - Can the City do this or rebid?
 - Gov't Code 2254 - No 25% change order rule per §252.048

ISSUE – NEGOTIATION OF MATERIAL CONTRACT TERMS POST-OPENING

- RFP issued under Ch. 2269
 - Yes or No? To what extent?
 - Per §2269.154 and .155, negotiation occurs following 45th Day deadline for evaluation and ranking
 - Not required to afford same opportunity to all Offerors
- RFP issued under Ch. 252
 - §252.042(b) Discussions in accordance with terms of RFP may be conducted with qualified offerors. Offerors shall be treated fairly and equally with respect to any opportunity for discussion and revision of proposals. To obtain the best final offers, revisions may be permitted after submissions and before the award of the contract.
 - Implies that all must be allowed same opportunity to revise

ISSUE – RESERVATION OF RIGHTS IN RFP

- City has the right to reject any and all bids
- Reserve right to disregard or ignore minor deviations or omissions in a submission
- Right to seek clarification
- For CSP – reserve right to interview each Offeror and incorporate results of interview into scoring of published criteria
- 2 Examples – Offeror's Omit or Unclear about Inclusion of Complete Scope in Bid
 - Omit Fire Suppression Scope – 2269 CSP
 - Bid lowest and scheduled fastest
 - Highest ranked – omission determined immaterial by selection committee
 - Revised, still low, awarded contract
 - 252 Lowest responsible bidder
 - Unclear if price include complete scope
 - City asked for clarification
 - Yes it does and no price increase

QUESTIONS?