2008 TEXAS MUNICIPAL PROCUREMENT LAWS MADE EASY

Answers to the most frequently asked questions about Texas Municipal Procurement Laws

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Texas Municipal Procurement Laws Made Easy

I. Application of Municipal Procurement Laws

What city purchases must generally be awarded through the use of statutory procurement methods?

The Texas Local Government Code provides that, before a city may enter into a contract that requires an expenditure of more than $50,000 from one or more municipal funds, the city must:

- comply with statutory procedures for competitive sealed bidding or competitive sealed proposals when purchasing goods or services, including high technology items or insurance;
- use the reverse auction procedure for purchasing; or
- comply with certain statutorily prescribed methods of construction procurement.

Texas cities must generally follow competitive bidding or proposal procedures if the city enters into a contract requiring the expenditure of more than $50,000 in city funds.[1] This bidding or proposal requirement applies to most purchases of goods or services.

However, state law provides a number of specific exceptions that relieve the city of the duty to bid or seek proposals on an item. For example, state law does not require cities to follow any specific procedures to purchase real property (land and/or buildings).[2] The major statutory exceptions to the bidding or proposal requirement are discussed later in this article.

For contracts for certain professional services, a city is actually prohibited by law from awarding the contract by competitive bidding. For example, cities may not award contracts for the services of architects, engineers or certified public accountants through competitive bidding. Instead, the Professional Services Procurement Act sets out a different set of procedures that must be followed to contract for these services.[3]

Additionally, instead of using competitive sealed bids or proposals, cities may use reverse auction procedures for purchasing.[4]

Is a city economic development corporation required to comply with municipal procurement laws?

The duty to comply with procurement laws is generally derived from some statute that specifically requires an entity to make its purchases through such a procedure. The implementing legislation for development corporations (the Development Corporation Act) does not contain a provision that subjects economic development corporations to municipal procurement requirements. These corporations are considered and treated for most purposes as

[1] TEX. LOC. GOV'T CODE § 252.021 (as amended by Texas House Bill 3517 and Senate Bill 1765, 80th Legislature, Regular Session (2007)).
[2] *See* TEX. LOC. GOV'T CODE § 272.001.
[3] *See* TEX. GOV'T CODE § 2254.001 *et seq*. (Professional Services Procurement Act).
[4] TEX. LOC. GOV'T CODE § 252.021 (a)(2).

nonprofit corporations. Therefore, some legal analysts argue that if a development corporation (a separate entity from the city) makes an expenditure, it would not be required to follow municipal procurement requirements. Neither the Texas Attorney General nor the Texas courts have directly addressed this question. However, the Texas Supreme Court has found that a county park board must comply with the competitive bidding requirements applicable to counties.[5] The court found that the park board was not autonomous and was under the supervision of the county to at least some degree. Thus, the court reasoned that the park board should be treated as part of the county for purposes of competitive bidding requirements.

While some might argue that, in light of this case, development corporations should be subject to municipal procurement requirements since such corporations are clearly subject to oversight by the city, the prevailing opinion is that development corporations are not subject to these laws because they are functionally separate entities.[6]

Are simple leases of personal property such as the lease of autos, office equipment or other items by a city subject to statutory procurement requirements?

Competitive bidding or proposal requirements apply to any lease of personal property that will require an expenditure of more than $50,000 in city funds unless the expenditure is covered by a specific statutory exception that would relieve the city from the duty to bid or seek proposals on the item.[7] For example, if the lease were for an item that was necessary to preserve or protect the public health or safety of the city's residents, the city would not be under a duty to use competitive bidding or proposals for its acquisition.

Are lease/purchase agreements by a city subject to statutory procurement requirements?

State law expressly authorizes cities to enter into lease-purchase agreements.[8] However, normal statutory procurement requirements would generally apply to these lease-purchase agreements.[9] That is, when a lease-purchase agreement for personal property will involve an expenditure of more than $50,000 in city funds, the contract must be competitively procured unless the type of item purchased is covered by a specific exception to the statutory procurement requirements.

Does a city have to use competitive bids or proposals to lease real property to an entity?

Competitive bidding or proposal requirements under Chapter 252 of the Local Government Code do not apply to the lease of real property. Cities typically enter into leases of city real property through lease agreements with entities as would any other lessor. Additionally, the requirements under Chapter 272 of the Local Government Code that a city advertise the sale of real property do not apply to a normal term lease of a property.

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[5] LOHEC V. GALVESTON COUNTY COMM'RS COURT, 841 S.W.2D 361 (TEX. 1992).
[6] *See, e.g.,* TEX. REV. CIV. STAT. art. 5190.6, §§ 4A (c), 4B (c), 21, 23 (a) (11), and 34.
[7] TEX. LOC. GOV'T CODE § 252.021.
[8] *Id.* § 271.005.
[9] *Id.* § 271.006 (requiring that a contract authorized by Section 271.005 comply with any applicable requirements in chapter 252 Local Government Code).

At least one court has held that a city's temporary lease of property is not subject to the notice and bidding requirements in Chapter 272.[10] A recent attorney general opinion suggests that the following all have a bearing upon the "temporary" status of a lease agreement: (1) the duration of the lease; (2) the city's right to control the land during the lease term; and (3) the city's right to make improvements upon termination of the agreement.[11] An older opinion suggests that the lessee's option to purchase the leased property upon expiration of the lease may be indicative of a sale.[12]

Essentially, if the lease of the real property is for such an extended period that it would almost amount to a sale (e.g.; 50 year lease with option to purchase), the lease may be subject to the requirements for advertising the sale of real property under Chapter 272 of the Local Government.[13]

Are competitive bidding or proposals required if only state or federal funds are used to fund the city expenditure?

A city expenditure is not necessarily exempt from competitive bidding or proposal requirements because it involves the use of only federal or state funds (e.g., grant funds or loans). Often, state or federal funds are considered city funds once they are acquired by or given to the city. Accordingly, any expenditure of these funds would ultimately be considered an expenditure of city funds and therefore subject to the bidding or proposal requirements. Additionally, many state and federal statutes expressly require that the funds provided to a city under the statute be expended in a manner that complies with local competitive bidding requirements. Cities should review applicable state or federal provisions that relate to any such funding they receive from state or federal programs.

One state law provides that competitive bidding requirements do not apply to certain appropriations, loans, or grants for conducting a community development program established under Chapter 373 of the Local Government Code.[14] Such expenditures must instead use the request for proposals process described in Section 252.042 of the Local Government Code.

Must a city bid for health insurance coverage or public official liability insurance for its officials or employees?

Prior to 2007, the procurement requirements for the purchase of insurance were based on population and amount expended. However, legislation passed in 2007 simplified the process. Currently, any city must seek competitive bids or proposals when purchasing insurance that will cost more than $50,000.[15]

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[10] *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex. App.—Austin 2002, pet. denied) ("[T]he plain language of the statute indicates that the Legislature intended for the notice and bidding requirements to apply to the 'sale or exchange' of land, not the lease of land.").
[11] Tex. Att'y Gen. Op. No. GA-0321 (2005) at 9.
[12] Tex. Att'y Gen. LO-96-053 at 3.
[13] *See Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 559 (Tex. App.—Texarkana 2003, pet. denied).
[14] TEX. LOC. GOV'T CODE § 252.021(d).
[15] *Id.* § 252.021(b) (as amended by Texas House Bill 3517, 80th Legislature, Regular Session (2007)).

Chapter 252 of the Local Government Code does not specifically address the need to use competitive bidding or proposals if a city's liability coverage is gained through participation in a group risk pool. Under state law, the coverage provided by risk pools is not considered to be insurance or subject to the traditional requirements applicable to insurance policies. Therefore, most risk pools take the position that statutory procurement requirements do not apply. A city should consult its local legal counsel if it wants to acquire coverage in this manner without participating in competitive bidding or proposals.

Is a city required to bid for excess or surplus insurance?

Section 252.024 of the Texas Local Government Code states that the statutory procurement requirements do not prohibit a city from selecting a licensed insurance broker as the sole broker of record for the city.[16] Such brokers obtain proposals and coverages for "excess or surplus insurance." Excess or surplus coverage may include surplus coverage for public official liability, police professional liability, and airport liability. Some legal analysts have suggested that a city may avoid the bidding requirements when purchasing excess or surplus insurance if the city complies with the requirements of Section 252.024. The Texas Attorney General, however, has rejected this interpretation of Section 252.024.[17] In regard to whether the actual selection of the broker of record must comply with chapter 252, the Attorney General has allowed for the possibility that if the services to be performed by the broker are professional in nature, the selection of the broker would be exempt from competitive bidding. A city should, therefore, consult with its local legal counsel if it wants to select an insurance broker of record without participating in competitive bidding.

Do competitive bidding requirements apply to city purchases of land or right-of-way?

A city is not required to use competitive bidding to purchase or lease land or a right-of-way.[18] However, it is important to note that a city is generally required to take bids when it sells a city interest in real property.[19] Additionally, there are certain special statutory provisions that apply to the sale of park lands, municipal building sites, or abandoned roadways.[20]

II. Threshold Amount for Which Bidding Is Required

What is the threshold amount at which competitive bidding or proposals are required?

Generally, a city is required to follow the bidding or proposal procedures outlined in Local Government Code Chapter 252 when it plans to make an expenditure of more than $50,000 in

[16] *Id.* § 252.024.
[17] Tex. Att'y Gen.Op. No. DM-70 (1991).
[18] *See* TEX. LOC. GOV'T CODE § 252.022(a)(6) (purchase of land or right-of-way exempt from competitive bidding requirements).
[19] *See id.* § 272.001.
[20] *See id.* § 253.001.

city funds.[21] Recent legislative changes make the above requirement equally applicable to any purchase of goods or services by a city, including insurance and high technology items.

May a home rule city charter provide a lower threshold for requiring competitive bids?

If there is a conflict between the statutory threshold amount that triggers the requirements of Chapter 252 and the city's charter, the city should follow the lower of the two amounts.[22] Thus, if a city charter sets forth a lower threshold for requiring competitive bids than does state law, the city should follow the charter's requirements. For example, some city charters require the city to use competitive bidding for any purchases that exceed $3,000. Such cities would have to follow bidding procedures as required by state law and as additionally required by the terms of the city charter. A city charter may not provide a higher threshold for bidding than is permitted under state law.

May a home rule city charter provide different procedural requirements for the handling of competitive bids?

A city charter may provide certain different procedural requirements for handling competitive bidding. For example, a city charter may provide different requirements for the notice that must be provided for contracts to be bid, how the notices are advertised, the manner for taking certain sealed bids, the manner of publicly opening bids or reading them aloud, and the manner of awarding the contracts.[23] Such provisions in a city charter are controlling even if they conflict with Chapter 252 of the Local Government Code. However, a majority of the city council may vote to have the bidding provisions of Chapter 252 override any different procedural requirements contained in the city charter. Note that the city council can vote to override its charter only with regard to the *procedures* for handling competitive bids. The council may not override a city charter provision regarding the *threshold amount* at which competitive bidding is required.

Can a general law city (under 5,000 population) impose a lower threshold for requiring competitive bids?

A general law city by ordinance or simply by vote of the city council could impose a lower threshold on itself for competitive bidding than would otherwise be required by state law.[24] This is true unless a statute forbids a city from using competitive bidding to obtain a particular type of good or service. As noted earlier, the Professional Services Procurement Act prohibits a city from using competitive bidding procedures to secure the services of certain professionals such as architects, engineers, and certified public accountants.[25]

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[21] *Id.* § 252.021(a) and (b) (as amended by Texas House Bill 3517, 80th Legislature, Regular Session (2007)).
[22] *Id.* § 252.002.
[23] *Id.*
[24] *See* Tex. Att'y Gen. Op. No. DM-106 (1992) (city may procure services through competitive bidding even if those services qualify for an exemption from competitive bidding, unless those services are covered by the Professional Services Procurement Act).
[25] TEX. GOV'T CODE § 2254.003.

Can a city separate out its purchases over time to avoid the application of competitive bidding or proposal laws?

A city may not avoid the application of competitive bidding or proposal laws by purposely dividing a single purchase into smaller components so that each component purchase is less than $50,000. Chapter 252 of the Local Government Code prohibits the use of "separate, sequential, or component purchases" as a means of avoiding bidding requirements.[26]

It is important to note that the phrases "separate purchases," "sequential purchases," and "component purchases" are all specifically defined by chapter 252 of the Texas Local Government Code.[27] "Separate purchases" means purchases, made separately, of items that in normal purchasing practices would be purchased in one purchase. "Sequential purchases" means purchases, made over a period of time, of items that in normal purchasing practices would be purchased in one purchase. "Component purchases" means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

Some think that by waiting a year or more between purchases they will automatically avoid the problem of separate, sequential, or component purchases. However, the competitive bidding laws do not specify any such waiting period. Instead, if the purchases in question would normally have been made in one purchase, then there may be a violation of the bidding laws even though the city waited more than a year between each purchase. Accordingly, a city is well advised to look at its purchasing practices in terms of whether such purchases are traditionally done all at once or whether it is necessary or prudent to acquire the items over time. If such items are traditionally purchased at one time, the city would not want to separate out the purchase in order to avoid competitive bidding requirements. If a city is not certain how such items are traditionally handled, it should consult the city's local legal counsel.

If a city does not competitively bid an item because the total expenditure would be below the threshold requiring bids, can it later purchase more of the items if the extra items would take the total purchase over the $50,000 threshold?

A city may purchase items without competitive bidding if the total purchase amount will be below the $50,000 threshold that requires bidding. However, if the city later wants to make additional purchases and these purchases would take the total purchase over the $50,000 threshold, the city should use caution. State law provides criminal penalties if a city makes component, sequential or incremental purchases to avoid the competitive bidding requirements. If such a charge is at issue, the local prosecuting attorney would review the facts surrounding the involved transaction. If it is not irregular for the items to have been purchased by a city in smaller lots and over time, a strong argument could be made that there was no criminal intent to violate the bidding laws. However, if traditional purchasing practices among comparable cities would have resulted in the items being purchased all at once through competitive bidding, city officials may face a criminal prosecution for such a practice.

[26] TEX. LOC. GOV'T CODE § 252.062.
[27] *Id.* § 252.001.

If individual city departments make their own purchases of such commodities as office supplies, gasoline and vehicle parts, and the sum of all purchases exceeds the bidding threshold, must the purchase of those items be bid?

Often individual city departments will make separate purchases of office supplies, gasoline, or other items without competitive bidding because each department's purchase amount will be below the $50,000 threshold that requires bidding. If a city's total purchases for these items would be over the $50,000 threshold, the city should use caution. As noted earlier, state law provides that there are criminal penalties if a city makes component, sequential, or incremental purchases to avoid the competitive bidding requirements. If such a charge is at issue, the local prosecuting attorney would review the facts surrounding the involved transaction. If it is not irregular for items such as gasoline or office supplies to have been purchased by a city in smaller lots and over time, a strong argument could be made that there was no criminal intent to violate the bidding laws. However, if traditional purchasing practices among comparable cities would have resulted in the items being purchased all at once through competitive bidding, the city officials may face a criminal prosecution for such a practice. Cities would be well advised to look at their purchasing practices over past budget years and consider whether certain items should be purchased through competitive bids.

After a bid contract is awarded, can a city later decrease or increase the amount of its purchase or the quantity of work to be performed?

Even after a bid has been awarded, a city may still increase or decrease the quantity of work to be done or the materials or supplies to be furnished if it is necessary to do so.[28] Such changes may not increase or decrease the original contract price by more than 25 percent. If the city wants to decrease the contract amount by more than 25 percent, it needs to obtain the approval of the contractor for such a change. There is no comparable authority for the city to simply gain contractor approval to increase the amount of the order by *more* than 25 percent; in such a situation, the city would need to seek bids or proposals for the work or products that would be beyond the 25 percent amount.

The city council may also delegate to city staff the authority to approve such change orders if it involves less than a $25,000 decrease or increase in the contract amount.

If a city seeks competitive bids for an item, can it include a time frame for extra items to be purchased at the same cost?

The bidding laws do not specifically address whether it is appropriate for a city to include a time frame within which it may seek to purchase items at an awarded contract bid amount. However, if a city would like to have an extended opportunity to make such purchases at that cost, it should indicate this fact in the bid specifications. In no case can a city increase the total contract amount by more than 25 percent of the original awarded amount. If a city needs to purchase additional items that would result in a purchase of more than 25 percent over the original contract price, it would need to seek bids or proposals for the additional purchase.

[28] *Id.* § 252.048.

May a city seek bids or proposals for incrementally purchased items (such as office supplies) and award the contract to a single vendor for an entire year?

Items such as offices supplies could be bid and awarded to a single vendor for the entire year if the vendor committed to a set of prices for the items and all of the bidding procedures were followed to yield such a contract. The contract would need to have a maximum and a minimum number of items to be purchased so it could be determined under what circumstances a change order was permitted.

III. General Procedural Requirements

What is the general procedure for requesting competitive bids or proposals?

To take bids or proposals on a purchase, the city must first publish notice of the time and place at which the bids or proposals will be publicly opened and read aloud. The city should also prepare specifications detailing the requirements that must be met by the goods or services which the city intends to purchase. The published notice should include either a copy of these specifications or information on how a bidder may obtain a copy of the specifications.

If a city wishes to consider factors other than price in its selection, or other factors such as a bidder's previous performance or safety record in its selection, the city's bid specifications should clearly state that such factors will be considered. Also, the governing body of a city that is considering using a method other than competitive sealed bidding (e.g., competitive sealed proposals) must determine before notice is given the method of purchase that provides the best value for the city.

What notice must a city provide to announce a request for bids or proposals?

A city must publish a notice indicating the time and place at which the bids or proposals will be publicly opened and read aloud. The notice must be published at least once a week for two consecutive weeks.[29] The first publication must appear before the 14th day before the date that the bids or proposals are publicly opened and read aloud. The notice must be placed in a newspaper that is published in the city. If there is no newspaper published in the city, the notice must be posted at city hall for 14 days before the date that the bids or proposals are publicly opened and read aloud.

Can city staff personally call potential vendors and ask them to participate in a bid?

Nothing in state law explicitly prohibits a city from providing additional notice to potential bidders. In fact, many cities either keep a list of particular vendors or use a list of vendors that has been prepared by another entity, such as the Texas Facilities Commission. These cities then provide direct notice to the listed vendors when an item or project goes out for bids. However, although this is a common practice, cities should be aware that this practice has not been approved by the Texas courts or by an Attorney General Opinion. In fact, at least one Attorney

[29] *Id.* § 252.041.

General Opinion has concluded that "contact with potential providers outside the statutory notice and bidding process might run afoul of [the competitive bidding notice requirements]."[30] The Attorney General based this conclusion on a Texas case in which the court stated that "[c]ompetitive bidding...requires that all bidders be placed upon the same plane of equality...."[31] The argument appears to be that contacting bidders outside of the normal notice procedures for competitive bidding would give the contacted bidders preferential treatment over the bidders that are not contacted. Thus, a city may wish to discuss any such practice with its local legal counsel.

Can a city require or provide a preference for a particular brand or manufacturer in its bid specifications?

At least one Texas Attorney General Opinion has concluded that a city may not require or indicate a preference for a particular brand name or manufacturer as part of the specifications for a bid request.[32] The only exception to this prohibition would be if it were necessary to acquire a particular brand or product because it is a "captive-replacement part." In such a case, however, competitive bidding is not required. Nonetheless, it is rare that a particular service or enhancement of a system can be accomplished only by one manufacturer or through one particular brand.

Some legal analysts disagree with the Attorney General opinion that addressed this issue. These persons argue that a city may indicate or require a preference for a particular brand name or manufacturer, or for a patented item, as a part of its bid specifications if this does not have the effect of destroying or preventing competition among bidders.[33] However, as previously noted, it is not common that a particular item, service, or enhancement of a system can be supplied by only one manufacturer or supplier or through only one particular brand or process. Because of the legal uncertainties involved, cities that desire to specify particular brands, products or processes should discuss this practice with local legal counsel. In addition, a city should consider adding the phrase "or equal" to specifications that require a particular product, brand or process.

May a city accept the submission of bids by fax?

There do not appear to be any Attorney General opinions or court cases that directly decide whether a city may accept the submission of bids or proposals by fax. However, an argument can be made that accepting bids or proposals by fax does not fulfill the legal requirement that they be "sealed."[34] For this reason, some legal analysts recommend that cities do not accept bids or proposals by fax and that they clearly state in the bid specifications that faxed bids or proposals will not be accepted.

May a city accept bids or proposals through electronic transmission?

In 2001, the Texas Legislature authorized the cities to receive bids or proposals through electronic transmission, provided the city council adopts rules to ensure the identification,

[30] Tex. Att'y Gen.Op. No. DM-70 (1991) at 5.
[31] *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ).
[32] *See* Tex. Att'y Gen.Op. No. C-376 (1965).
[33] *See Vilbig Bros. v. City of Dallas*, 91 S.W.2d 336 (Tex. 1936).
[34] *See, e.g.*, TEX. LOC. GOV'T CODE § 252.041 (requiring sealed bids to be opened publicly).

security, and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time.[35]

Is there a special notice requirement if the city intends to issue time warrants to cover the cost of a contract award?

Special notice requirements apply if a city intends to issue time warrants to pay for the cost of a contract award. The required newspaper notice must include a statement of the city council's intention to issue time warrants.[36] That notice must also include the maximum amount of the proposed time warrant indebtedness, the rate of interest the time warrants will bear, and the maximum maturity date for the time warrants.

If a city chooses not to follow statutory procurement requirements for a particular item, should the city create any documentation to note why bidding laws were not applicable to that transaction?

State law does not indicate any requirement that a city note in its purchasing documentation why bidding laws were not applicable to the involved transaction. Nonetheless, cities should consult local legal counsel regarding whether they would find placing such a justification on the record helpful to the city or the involved staff's legal position.

IV. Consideration and Award of Bid or Proposal Requests

Can a city adopt additional criteria regarding the qualifications of potential bidders?

Prior to 2001, a city could adopt additional criteria regarding the qualifications of bidders only if such criteria had a definite, objective relationship to matters of quality and competence.[37] For example, prior rulings have allowed a city to consider such criteria as a bidder's experience, manpower, equipment, financial resources, business judgment, ability, efficiency, reliability, reputation, facilities, capacity to perform the work required, and likely supervisory requirements. A city may even consider the bidder's performance on similar contracts and the quality of the goods and services provided.

However, the city must be able to relate the criteria to matters of quality and competence of that specific bidder. For example, the Attorney General concluded that a school district could not adopt policies that judge a bidder based on the bidder's participation in voluntary school programs, the amount of local salaries, wages and taxes paid by the bidder, or the number of local jobs created by the bidder, etc. These criteria did not involve the quality or competence of the work the bidder would perform.

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[35] *Id.* § 252.0415 (a) (as added by Texas House Bill 1981, 77th Legislature, Regular Session (2001)).
[36] *Id.* § 252.041.
[37] Tex. Att'y Gen.Op. No. DM-113 (1992).

Legislation in 2001 modified the ability of cities to include various factors in awarding a contract.[38] Under current law, if the city wishes to consider additional criteria, the city's bid specifications should clearly specify the various criteria that will be considered. When using additional criteria for competitive bidding, the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the "best value" for the city using the following criteria:

- the purchase price;
- the reputation of the bidder and of the bidder's goods or services;
- the quality of the bidder's goods or services;
- the extent to which the goods or services meet the municipality's needs;
- the bidder's past relationship with the municipality;
- the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;
- the total long-term cost to the municipality to acquire the bidder's goods or services; and
- any relevant criteria specifically listed in the request for bids or proposals.

If no such additional criteria are spelled out in the bid specifications, state law only allows the city to award the contract to the lowest responsible bidder if using competitive bidding.

Can the city take into account the safety record of the bidder in making the award?

When awarding a contract using traditional competitive bidding, the city may only consider a bidder's safety record in regards to the bidder's "responsiveness" if notice has been given that such a criteria is relevant. Specifically, the governing body must have adopted a written definition and criteria for assessing the bidder's safety record, and must have given notice in the bid specifications that the safety record will be considered. Of course, any decision that the city makes must not be arbitrary or capricious.[39]

What options does a city have if the lowest bidder has a prior history of poor performance?

Prior to 2001, a city arguably had two options when faced with a low bidder who had a prior history of poor performance. First, Chapter 252 states that a city may choose to reject any or all of the bids. If all of the bids are rejected, the city can start the bidding process over. This is probably the safest method to use if the city has not made it clear in the bid specifications that a bidder's prior performance on similar contracts would be a factor in awarding the bid. The city then has an opportunity to include such a requirement in its subsequent bid specifications. Second, some legal analysts argued that a city could individually reject a low bidder who has a poor work history. This theory is based on the argument that the low bidder with such a history would not be considered a "responsible" bidder due to the prior history of poor performance.

[38] TEX. LOC. GOV'T CODE § 252.043 (as amended by Texas Senate Bill 510, 77th Legislature, Regular Session (2001)).
[39] *Id.* § 252.0435.

Legislation passed in 2001 modified the ability of cities to include various factors in awarding a contract.[40] Under current law, if the city wishes to consider additional criteria, the city's bid specifications should clearly specify the various criteria that will be considered. When using additional criteria for competitive bidding, the contract must be awarded to the lowest responsible bidder or to the bidder who provides goods or services at the "best value" for the city using the following criteria:

- the purchase price;
- the reputation of the bidder and of the bidder's goods or services;
- the quality of the bidder's goods or services;
- the extent to which the goods or services meet the municipality's needs;
- the bidder's past relationship with the municipality;
- the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities;
- the total long-term cost to the municipality to acquire the bidder's goods or services; and
- any relevant criteria specifically listed in the request for bids or proposals.

Again, the best practice is to clearly indicate in the city's specifications that a bidder's prior performance on similar contracts may be considered in evaluating the bids.

What options does the city have if the city receives no bids in response to a request?

If competitive bids or proposals are required by Chapter 252 of the Local Government Code, there is no exception which would allow the city to avoid the statutory requirements due to a lack of bids. If a city receives no response to a request, the city must either re-advertise or decide not to undertake the contract.

What options does the city have if the city receives only one bid or proposal in response to a bid request?

If a city receives only one bid or proposal in response to its request, the city may accept the bid or proposal received, reject the bid or proposal and re-advertise, or reject the bid or proposal and decide not to undertake the project.

May competitive bids be rejected by a city staff member or must the city council decide which bids to reject?

State law provides that the governing body of the city may reject any and all bids. There is no provision that would allow the delegation of this decision to city staff. However, in certain cities the city staff will open the bids and provide a recommendation to the city council on whether the bid is responsive to the bid request and whether it should be accepted as the lowest responsible bid.

[40] *Id.* § 252.043 (as amended by Texas Senate Bill 510, 77th Legislature, Regular Session (2001)).

What is the general procedure for awarding a contract pursuant to competitive bidding?

First, bids must be publicly opened and the bid amounts read aloud at the time and place specified in the bid notice.[41] The city council must then award the contract to the lowest responsible bidder or (if previously noticed) the bidder that provides that best value to the city. In the alternative, the city may reject all bids.[42] Once a bid has been opened, it may not be changed to correct minor errors in the bid price. However, under certain circumstances, a bidder may be able to withdraw a bid if it contains a substantial mistake that would cause a great hardship if enforced against the bidder.

What is the general procedure for awarding a contract pursuant to competitive sealed proposals?

If a city decides to use the competitive proposal procedures, it must first give notice of the request for proposals in the same manner as required for competitive bids.[43] Generally, this means that the city must publish at least two newspaper notices of the time and place at which the proposals will be opened. These notices must be published at least once a week for two consecutive weeks, and the first notice must be published more than 14 days before the date set for opening the proposals. Requests for proposals must also solicit quotations and specify the relative importance of price and other evaluation factors.[44]

Once proposals have been submitted, the city may conduct discussions with the offeror or offerors whom the city determines to be reasonably qualified for the award of the contract. Such discussions must comply with the request for proposals and with the regulations set by the city council. To obtain the best offers, the city may allow the submission of revisions after proposals are submitted and before the award of the contract. All offerors must be treated fairly and equally with respect to any opportunity for discussion and revision of the proposals.

In the end, the contract must be awarded to the offeror whose proposal is determined to be the most advantageous to the city.[45] The city is to determine which proposal is the most advantageous based on the relative importance of price and the other evaluation factors included in the request for proposals.[46]

Is information contained in a bid or proposal confidential under the Public Information Act?

Section 552.104 of the Government Code provides as follows:

> (a) Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

[41] TEX. LOC. GOV'T CODE § 252.041.
[42] *Id.* § 252.043.
[43] *Id.* § 252.041.
[44] *Id.* § 252.042.
[45] *Id.* § 252.043.
[46] *Id.* §§ 252.021(c); 252.043.

(b) The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

The purpose of section 552.104(a) is to protect the interests of a governmental body in situations such as competitive bidding and requests for proposals, where the governmental body may wish to withhold information in order to obtain more favorable offers.[47] Significantly, it is not designed to protect the interests of private parties that submit information such as bids and proposals to governmental bodies. Because section 552.104(a) protects only the interests of governmental bodies, it is an exception that a governmental body may waive by, for example, disclosing the information to the public or failing to raise the exception within the ten-day deadline.

Generally, section 552.104(a) protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104(a).[48] Section 552.104(a) is frequently raised to protect information submitted to a governmental body in response to a competitive bidding notice or request for proposals. In this context, the protection of section 552.104(a) is temporal in nature. Generally, section 552.104(a) does not except bids from public disclosure after bidding is completed and the contract has been executed.[49] However, bids may continue to be withheld from public disclosure during the period in which the governmental body seeks to clarify bids and bidders remain at liberty to furnish additional information.[50] Section 552.104(a) does not apply when a single individual or entity is seeking a contract as there are no "competitors" for that contract.[51] Note that even when section 552.104(a) does not protect bids from required public disclosure, section 552.110 will require the governmental body to withhold any portions of those bids that contain trade secrets or other commercial or financial information that is made confidential by law.[52]

In addition to protecting the actual bid proposals, section 552.104(a) may protect information related to the bidding process that is not part of a bid.[53] Although early decisions of the attorney general concluded that section 552.104(a) does not protect the interests of governmental bodies when they engage in competition with private entities in the marketplace,[54] this line of opinions has been reexamined. In Open Records Decision No. 593 (1991), the attorney general concluded that a governmental body may claim section 552.104(a) to withhold information to maintain its competitive advantage in the marketplace if the governmental body can demonstrate: (1) that it

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[47] *See* Tex. Att'y Gen. ORD-592 at 8 (1991).
[48] Tex. Att'y Gen. ORD-593 at 2 (1991), ORD-541 at 4 (1990), ORD-463 (1987).
[49] Tex. Att'y Gen. ORD-541 at 5 (1990), ORD-514 at 2 (1988), ORD-319 at 3 (1982).
[50] Tex. Att'y Gen. ORD-170 (1977); *see also* Tex. Att'y Gen. ORD-541 at 5 (1990) (recognizing limited situation in which statutory predecessor to TEX. GOV'T CODE § 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).
[51] Tex. Att'y Gen. ORD-331 (1982).
[52] *See, e.g.*, Tex. Att'y Gen. ORD-319 (1982), 309 (1982).
[53] *Compare* Tex. Att'y Gen.Op. No. MW-591 (1982) (identity of probable bidders is protected from public disclosure because disclosure could interfere with governmental body's ability to obtain best bids possible) *with* Tex. Att'y Gen. ORD No. 453 (1986) (identity of individuals who receive bid packets are not protected when governmental body fails to show substantial likelihood that these individuals would bid).
[54] *See* Tex. Att'y Gen. ORD Nos. 463 (1987), 231 (1979), 153 (1977), 99 (1975).

has specific marketplace interests and (2) the possibility of specific harm to these marketplace interests from the release of the requested information.[55] A governmental body that demonstrates that section 552.104 applies to information may withhold that information even if it falls within one of the categories of information listed in section 552.022(a).[56]

Is information within a bid request concerning historically underutilized businesses confidential?

In 1997, the Texas Legislature amended the Public Information Act to make confidential certain information about disadvantaged or historically underutilized businesses.[57] General information about these businesses is confidential if it is submitted to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business. With two exceptions, this information may be disclosed only with the express written consent of the applicant or the applicant's agent.

Without such consent, this information may be disclosed to a state or local governmental entity for one of the following two purposes: (1) to verify an applicant's status as a historically underutilized or disadvantaged business; or (2) to conduct a study of public purchasing programs established under state law for historically underutilized or disadvantaged businesses.

It is important to note that this new law protects only the information submitted with an *application for certification* as a historically underutilized or disadvantaged business. The business's actual bid is subject to the same rules of disclosure as any other bid. Additionally, information submitted in connection with a specific proposed contractual relationship or within an application to be placed on a bidders' list would be accessible under usual open records provisions. Thus, this information may be accessible even though it involves data that would be confidential if it were contained in the entity's application for certification as a historically underutilized or disadvantaged business.

Must bidders be allowed to speak at a city council meeting to explain or defend their bids?

A bidder does not have any special right to speak at an open meeting of the city council. The Texas Attorney General has concluded that the Open Meetings Act does not give members of the public a right to speak at an open meeting.[58] Further, if the city chooses to allow members of the public to speak at a council meeting, the council may make reasonable rules regulating the number of speakers on a particular subject and the length of each presentation.[59] However, the city council should not discriminate between one speaker and another, and the rules should be applied equally to all members of the public. The only situation in which the city council may be required to allow members of the public to speak would be if state law requires a public hearing on an issue or if state law requires that public comment be allowed on a particular subject.

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[55] *See, e.g.*, Tex. Att'y Gen. LA-97-2516 (1997) (City of San Antonio records of costs various performers pay for use of Alamodome), LA-96-2186 (1996) (City of Alvin information regarding proposal to provide another city with solid waste disposal services).
[56] TEX. GOV'T CODE § 552.104(b).
[57] *Id.* § 552.127.
[58] Tex. Att'y Gen. Op. No. H-188 (1973).
[59] *See* Tex. Att'y Gen.Op. Nos. LA-96-111 (1996); H-188 (1973).

However, there is no such public hearing or comment requirement that is applicable to competitive bidding issues.

V. Bids for the Construction or Repair of Public Structures or Roads

Is there a special bidding procedure for contracts in excess of $50,000 for the construction or repair of a structure, road or other improvement to real property?

Texas law does not single out municipalities or dictate special bidding procedures for procurement contracts exceeding $50,000. In the past, chapter 271, subchapter B, of the Texas Local Government Code dictated a special bidding procedure for municipalities. However, the Legislature exempted cities from that procedure in 1997.

Currently, on expenditures greater than $50,000, municipalities may follow one of three basic procurement methods: (1) competitive sealed bidding or competitive sealed proposals[60], (2) the reverse auction procedure[61], or (3) an alternative procurement method.[62] While each of these procurement methods is authorized for general use by cities, the legislature has precluded the application of some of these methods for specific types of construction projects. These preclusions, as well as other procurement issues, are discussed further in this paper.

Are there special rules for the purchase of machinery for road construction or road maintenance?

As with other procurement efforts, a city seeking to procure machinery for road construction or maintenance should provide notice in the newspaper.[63] The notice for this type of purchase must contain a general description of the type and specifications of machinery required.[64]

For example, a city requiring a bulldozer should specify the minimum size and horsepower of the desired bulldozer. In this way, newspaper notices can be kept reasonably brief and inexpensive, and more detail can be provided in the bid specifications, if necessary.

If, however, the procurement is required to replace unforeseen damage to previously owned equipment, the notice and bidding procedures do not apply.[65]

Can a city require that bids for a public work or for the purchase of materials, equipment, or supplies be on a unit price basis?

Yes. Cities may request bids based on unit prices. This type of procurement may be especially helpful in the procurement of equipment and machinery. The municipality must publish the quantities desired with its notice. If the quantities actually consumed differ from the

[60] TEX. LOC. GOV'T CODE Ch. 252, Subch. B.
[61] TEX. GOV'T CODE § 2155.062(d).
[62] TEX. LOC. GOV'T CODE Ch. 271, Subch. H.
[63] *Id.* § 252.041(a).
[64] *Id.* § 252.041(c).
[65] *Id.* § 252.022(a)(3).

municipality's anticipated needs, then the actual purchase shall reflect the quantities supplied or consumed in the procurement.[66]

Cities may ask bidders to indicate both a lump-sum price and a per-unit price. In fact, some cities specify that bids may be awarded on a lump-sum basis, a per-unit basis, or on whatever basis best serves the city's interest.

Must a bidder execute a performance or payment bond if the contract is for the construction of a public work?

The Government Code mandates that a municipality contracting for public work in excess of $25,000 shall require its contractor to execute a payment bond solely for the protection of beneficiaries who supply materials or labor to the public works project and have a direct contractual relationship with the contractor.[67] A payment bond is required because material suppliers and laborers do not enjoy the same lien rights on public projects as they do on private projects. Without the benefit of lien rights to secure payments that are not timely received, those suppliers and laborers would lose much of their legal protection regarding payment. The payment bond requirements for public work essentially replace the protections afforded by lien rights with protections guaranteed by a surety.

The Government Code also mandates that a municipality contracting for public work in excess of $100,000 shall require its contractor to execute a performance bond solely for the protection of the municipality. The performance bond protects the municipality in the event of a contractor default and/or termination.

Both the payment and performance bonds must be written for the total contract value and should be executed by a corporate surety in accordance with the Texas Insurance Code prior to commencement of the work.

For more information on payment and performance bonds, a city should review chapter 2253 of the Texas Government Code and consult legal counsel.

May a city require a performance or payment bond from a bidder even when state law does not require such bonds?

Yes. Nothing in state law appears to prohibit a city from requiring a performance bond, a payment bond, or both, from anyone contracting to do work for the city regardless of the amount of the contracts in question. If a city wishes to impose such a requirement, it is advisable that the city make the requirement part of the bid specifications so all potential bidders are informed of the requirement before bidding.

Is the city required to hire an engineer for the construction of a public work?

If public health, safety or welfare and professional engineering issues are involved, the engineering plans, specifications and estimates for the construction of a public work generally

[66] *Id.* § 252.047.
[67] TEX. GOV'T CODE § 2253.021.

must be prepared by a licensed professional engineer.[68] Further, the engineering for construction usually must be executed under the direct supervision of a licensed professional engineer.

There are two circumstances in which the above requirements do not apply to the construction of a public work by a city. First, they do not apply to a public work that involves a total expenditure of $8,000 or less, even if the work involves structural, electrical or mechanical engineering. If the expenditure for such a public work will amount to or exceed $8,000, the use of an engineer is required as noted above. If the work does not involve structural, electrical or mechanical engineering, then the use of an engineer is not required as long as the total contemplated expenditure on the project will not exceed $20,000.

Is the city required to hire an architect if the contract is for the construction of a public work?

A registered architect must prepare the architectural plans and specifications for constructing a new city building if:

- the building will be used for education, assembly or office occupancy; and
- the construction costs exceed $100,000.[69]

Also, for any alteration or addition to an existing city building, a registered architect must prepare the architectural plans and specifications if all three of the following circumstances are present:

- the building is used or will be used for education, assembly or office occupancy;
- the construction costs for the alteration or addition exceed $50,000; and
- the alteration or addition requires the removal, relocation, or addition of any walls or partitions or requires the alteration or addition of an exit.

If a contract is for the construction of a public work, is the city required to ensure that all contractors provide workers' compensation coverage?

Any city "building or construction" contract must require the general contractor to certify in writing that the contractor provides workers' compensation insurance to all of the contractor's employees involved in the project.[70] Additionally, each subcontractor must certify in writing to the general contractor that the subcontractor's employees are covered by workers' compensation insurance. The general contractor, in turn, must provide the subcontractor's written certification to the city.

The phrase "building or construction" is defined to include any of the following:

- erecting or preparing to erect a structure, including a building, bridge, road, public utility facility, or related structure;
- remodeling, extending, repairing, or demolishing a structure; or

[68] TEX. OCC. CODE § 1001.001, *et. seq.*
[69] *Id.* § 1051.303.
[70] TEX. LAB. CODE § 406.096.

- otherwise improving real property or a structure related to real property through similar activities.

Thus, a city must require contractors and subcontractors to provide workers' compensation insurance in any contract involving one or more of these activities. However, the contractor may provide this coverage through a group plan or through another method that is satisfactory to the city council.

State law specifies that the employment of a maintenance worker does not generally constitute engaging in "building or construction." State statutes do not appear to provide any other clear exceptions to the requirement that public works contractors provide workers' compensation insurance.

If a contract is for the construction of a public work, must a city ensure that the contractors pay their workers according to the local prevailing wage rate for the work that is performed?

Texas law requires that any worker employed on a public work contract be paid at least the general prevailing daily wage rate for work of a similar character performed in the same locality.[71] If a worker works overtime or on legal holidays, the worker must be paid at least the general daily wage rate for overtime or legal holiday work. The city council must determine the general prevailing daily wage rate for each craft or type of worker needed to execute a public works contract and the prevailing rate for legal holiday and overtime worked.[72] This determination must be based on either a survey conducted by the city or on the prevailing wage rate in the city as determined by the U.S. Department of Labor (if that department's figures are considered to be current). Further, both the call for bids and the contract itself must specify the applicable wage rates as determined by the city.

The prevailing wage rate requirement applies to any public work that is paid for in whole or in part from public funds, without regard to whether the work is done under public supervision or direction.[73] The requirement, however, does not apply to work done directly by a public utility company under an order of a public authority. The prevailing wage requirement also does not apply to maintenance work.[74]

For more information on the prevailing wage rate requirements, a city should review chapter 2258 of the Government Code and consult legal counsel.

[71] TEX. GOV'T CODE § 2258.021.
[72] *Id.* § 2258.022.
[73] *Id.* § 2258.002.
[74] *Id.* § 2258.021.

VI. Alternative Delivery Methods for the Construction of Structures

Background and Authority

What are alternative delivery methods for city construction projects?

In 1995, the Texas Legislature gave public school districts the authority to use procurement and delivery methods other than competitive bidding that provide the "best value" for their construction projects. In 1997, this authority was extended to institutions of higher education. The innovative Texas Education Code provisions have become a model for states throughout the country. In 2001, Subchapter H of Chapter 271 was added to the Texas Local Government Code and extended the authority to use alternative delivery systems, including best-value competitive bidding, competitive sealed proposals, design-build, construction management, and job order contracting, to Texas cities for certain projects.

Alternative procurement and delivery methods have many advantages over traditional competitive bidding. In the traditional competitive bidding process, a contract must be awarded to the lowest responsible bidder. Subjective considerations such as the contractor's track record on a particular type of project, anticipated use of minority and local contractors, and other factors generally cannot be taken into account. When subjective criteria are used in the selection process, contractors are put on their toes and encouraged to provide maximum quality on every project. Additionally, contractors may be less likely to bring suit against a city because litigiousness and relationships with prior customers may be taken into account in the selection process.

Further, alternative delivery systems are particularly advantageous on projects where time, flexibility, or innovation is critical. The design and construction phases overlap, as opposed to the sequential design-bid-build method. Once a firm is chosen, construction can begin even before all the plans are completed. The time savings are clear. Land can be cleared before the foundation is fully designed, and pier holes can be drilled before the interior colors are picked. Increased flexibility throughout the process allows the number of offices or rooms in a building to be changed relatively easily during the construction. Instead of following the old method of having an engineer design a project in the traditional way, alternative delivery systems can and do encourage innovation. A city can present a request for proposals with an end in mind, and allow a firm to develop a plan whereby the most efficient and innovative materials and procedures are used.

Of course, alternative procurement and delivery systems also have drawbacks. The first is overcoming deep-seated traditions in public procurement. In the political arena, a legitimate fear may exist that picking a contractor based on criteria other than the lowest price will promote cronyism and favoritism. Also, it is often difficult for a governing body to pick between competing firms. From the staff perspective, public procurement employees and officials are accustomed to an adversarial process. Alternative delivery systems require trust and team building to be successful.

At any rate, alternative delivery methods are a part of the natural evolvement of the construction of public works projects. New legislation allowing for these methods certainly does not mandate their utilization, but simply allows for greater flexibility in the design and construction processes.

What alternative methods are cities currently authorized to use, and for what types of projects?

Under current law, any city may use any of the alternative delivery methods (discussed below) for "horizontal projects." A horizontal project is one that is defined in state law as a "facility." Facility means buildings the design and construction of which are governed by accepted building codes. The term does not include:

- highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects or related types of projects associated with civil engineering construction; or
- buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

In addition, legislation passed in 2007 authorizes the use of some alternative methods, including construction manager at-risk and competitive sealed proposals, for horizontal projects, such as roads and utility projects.[75] The legislature has also extended the authority of certain large cities to "phase in" the use of design-build for a limited number of horizontal projects over the next several years.

What are some preliminary matters in selecting which method to use?

A city must choose which, if any, of the new methods will produce the best value for the city.[76] In many circumstances, traditional competitive bidding may remain the most appropriate choice.

Further, any provision in the charter of a home rule city that requires the use of competitive bidding or that prescribes procurement procedures and that is in conflict with Subchapter H controls unless the governing body elects to have Subchapter H supersede the charter or regulation.[77]

Finally, a city must post notice of bids or proposals, as applicable, in a newspaper of general circulation in the county in which the city's central administrative office is located. In a two-step procurement process, the time and place that the second step bids, proposals or responses will be received are not required to be published separately.[78]

When a city understands and meets, as appropriate, these preliminary requirements, the Local Government Code expressly states that procurement procedures for each type of alternative delivery method may be used as outlined below

[75] TEX. LOC. GOV'T CODE § 271.116 and 271.118 (as amended by Texas House Bill 1886, 80th Legislature, Regular Session (2007)).
[76] *Id.* § 271.114(a).
[77] *Id.* § 271.112(a).
[78] *Id.* § 271.112(d).

The Alternative Methods

What is the design-build method?

The design-build method differs from traditional design-bid-build models in that the municipality contracts with one firm to perform both pre-construction design and post-design construction activities. This method can save time and money if employed correctly. This method can facilitate multi-phased projects without the time consuming process of putting each phase out to bid separately. It may also allow work to begin before all decisions regarding the design or finish out are made by the owner. The design-build method may also alleviate the problems that cities often encounter related to project inefficiencies when dealing with items such as change orders or requests for information.

Under the design-build method of construction contract procurement, the city awards a single contract to a firm who both designs and constructs the facility. A design-build firm, as that term is commonly defined, consists of a team that includes a design professional, an architect or engineer, and a builder qualified to engage in building construction in Texas. The design professional member of the design-build team will serve as the architect/engineer of record for the project. However, the city must designate an independent design professional to act as its representative for the duration of the project. The city must select the design professional in accordance with Section 2254.004 of the Government Code, if the city does not employ, as a full-time employee, its own architect or engineer who can serve as that representative.[79] The design-build team may construct the work itself or it may subcontract out all or portions of the work. In so doing, the designer-builder contracts directly with its subcontractors and assumes complete responsibility for both the design and construction of the project.

If a city determines that the design-build method will provide the best value, it must prepare a request for qualifications (RFQ) and a design criteria package. The design criteria package must specify both the criteria for selecting the design/build firm and the aspects or qualities the city considers necessary to design the project. The criteria may include the following information: a legal description of the project site, survey information, interior space requirements, special material requirements, material quality standards, conceptual criteria, special equipment requirements, cost/budget estimates, schedules, quality assurance and control requirements, site development requirements, applicable codes/ordinances, utility provisions, parking requirements, and other requirements as applicable.[80] After preparing the RFQ and the design criteria package, the procedure for the selection of a design-builder is a two-step process.

Phase One – Evaluate Statements of Qualification

After preparing its RFQ and design criteria package and advertising for proposals, the city evaluates statements of qualifications submitted by the potential offerors. The city may evaluate qualifications according to the following criteria: offeror's experience, technical competence, capability to perform, and past performance of offeror's team and members thereof. The city may also consider other appropriate factors submitted by the offeror in response to the RFQ.

[79] *Id.* § 271.119(b).
[80] *Id.* § 271.111(5).

However, the city may not consider cost-related or price-related evaluation factors during this first phase, nor should such information be requested or submitted. In this phase, the design-build offerors must certify that each architect or engineer that is a member of its team was selected on the basis of demonstrated competence and qualifications in the manner provided by section 2254.004 of the Government Code.[81] After reviewing the statements of qualifications, the city then selects no more than five offerors to submit additional information and, if the city chooses, to interview for final selection.[82]

Phase Two – Selection

The city then evaluates the selected offerors based on the criteria in the RFQ and the results of any interviews that occurred. Additionally, the city may request information on the offeror's demonstrated competence, safety and durability considerations, the feasibility of the project as proposed, the offeror's ability to meet scheduling requirements, cost methodology and other appropriate factors.

After evaluations, the city ranks the offerors according to the RFQ and selects the design-build firm that offers the best value for the city based on the published selection criteria and its ranking evaluations.[83]

Post-Selection Procedure

After selecting the design-build firm that offers the best value for the city, the contract negotiation process begins. The city first negotiates with the selected offeror. If the parties cannot reach an agreement, the city must formally, and in writing, inform the offeror that it is ending the negotiations. The city may then negotiate with the next offeror in the order of the selection ranking process from Phase Two. The same negotiation process will continue until an agreement is reached that culminates in an executed contract or negotiations with all ranked offerors ends.[84]

Following selection and contract award, the chosen design-build firm then completes the design and submits all design elements to the city or its design professional representative for review and determination of scope compliance. The city's review may be done prior to or during construction.[85]

The city must contract for testing, inspection and verification necessary for acceptance of the facility independently of the design-build firm. Testing services must be procured in accordance with Section 2254.004 of the Government Code.[86]

The design-build firm has the responsibility to provide the city with a signed and sealed set of construction documents, (as-built drawings) at the project's conclusion.[87]

The design-build firm's payment and performance bonds are not required to provide, and may not provide, coverage for that portion of the design-build contract that includes design services

[81] *Id.* § 271.119(d)(1).
[82] *Id.*
[83] *Id.* § 271.119(d)(2).
[84] *Id.*
[85] *Id.* § 271.119(e).
[86] *Id.* § 271.119(g).
[87] *Id.* § 271.119(h).

only. If no guaranteed maximum price or fixed price has been established when the contract is awarded, the performance and payment bonds are required to be in the penal sum of the estimated budget for the project as specified in the Design Criteria Package. The design-build firm must deliver the performance and payment bonds not later than the 10th day after the firm executes the contract. However, if the design-build firm provides a bid bond or other financial security acceptable to the city to ensure it will provide the performance and payment bonds, the delivery of those bonds can be postponed until a fixed or guaranteed maximum price is established.[88]

What is the "best value" competitive bidding method?

While similar to the traditional method that awarded contracts to the lowest responsible bidder, the "best value' method in subchapter B of chapter 271 of the Local Government Code provides an alternative to cities looking for a delivery method that provides more flexibility than the traditional method. Chapter 271, subchapter B, of the Local Government Code does not apply to the "best value" competitive bidding method, except for sections 271.026 (dealing with public opening of bids and changing bids after opening), 271.027(a) (governmental entity's right to reject any and all bids), and 271.0275 (right to consider safety record of bidders).

Within subchapter H, section 271.115 of the Local Government Code mandates the selection of the bid offering the best value to the city according to the selection criteria that were established. Note, however, that the contract must be awarded at the bid amount offered by the bidder whose bid is considered to offer the best value.

When a city decides to employ the best value method, it must include selection criteria and relative weighting of the criteria in the bid specifications. The city may consider the following criteria in determining who offers the best value: the purchase price; the reputation of the vendor and of the vendor's goods or services; the quality of the vendor's goods or services; the extent to which the goods or services meet the city's needs; the vendor's past relationship with the city; the impact on the ability of the city to comply with rules relating to historically underutilized businesses; the total long-term cost to the city to acquire the vendor's goods or services; and any other relevant factor specifically listed in the request for bids or proposals.

Even though subchapter H has been adopted and used by many cities, a city may still elect to use the traditional competitive bidding procedures. If it does so and the contract is of a size that requires competitive proposals, (i.e. $50,000 or more) then the contract must be awarded to the lowest responsible bidder.

What are competitive sealed proposals?

In the competitive sealed proposal method, the city must first hire an independent design professional to prepare construction documents according to the process required by section 2254.004 of the Government Code if the city does not employ, as a full time employee, its own design professional to perform this service.[89] Once the construction documents have been completed, the city prepares a Request for Competitive Sealed Proposals (RFCSP). The RFCSP should include construction documents, estimated budget, project scope, schedule, and other

[88] *Id.* § 271.119(i).
[89] *Id.* § 271.116(b).

information contractors may require to respond to the request. The city must also state the selection criteria and the relative weighting of the criteria that the city will employ in selecting the successful offeror. Unlike an RFQ under the design-build method, price information may be requested in the RFCSP and may be a selection criteria.[90]

The city must publicly open and read aloud the proposals, including price information if such was required. The city must also evaluate and rank the proposals in relation to the published selection criteria within 45 days after the opening. Then the city selects the proposal that offers the best value based on the published selection criteria and its ranking evaluation.[91]

Following the selection, the contract negotiation process begins. The city negotiates first with the highest ranked offeror. At this stage, the city and its design professional may discuss modifications to the proposed scope, time, and price. Modifications are not required, and if they are discussed but not agreed to by the city and the offeror, a final contract may still be negotiated and agreed upon based on the original response to the RFCSP. If the two parties are unable to reach a final agreement, the city must inform that offeror in writing that negotiations are ended. The city may then negotiate with the next ranked offeror. This continues in the order of the selection ranking until a contract is reached or all proposals are rejected. In this form of contract procurement, the city is not restricted to considering price alone in its selection, but may consider any other factor from among the established selection criteria to determine which offeror offers the city the best value.[92]

The city must provide for independent testing, verification, and inspection of the finished work required for acceptance of the work by the city.[93] Testing services must be procured in accordance with Section 2254.004 of the Government Code.

What is the construction manager agent method?

The Construction Manager-Agent method allows cities which may not have the in-house expertise and/or sufficient staff to effectively oversee a construction project to employ an agent to oversee a project on their behalf. The party hired by the city to act on its behalf in overseeing the project is known as a Construction Manager-Agent (CMA).[94]

A CMA is defined as a legal entity that provides consultation to the city regarding construction, during and after the design of a facility.[95] Practically speaking, the CMA will almost always be a general contractor or design professional with experience constructing the type of project the city is building. The CMA manages the project for the city both during the procurement process and after a contract has been executed. A CMA can assist the city by providing recommendations on the selection of the contractor, for example. A CMA represents the city in a fiduciary capacity. Therefore, the CMA may not perform any portion of the actual design or construction of the Project, with the exception of the general field conditions as provided by the contract. General field conditions, when used in the context of a facilities construction contract, customarily

[90] *Id.* § 271.116(d).
[91] *Id.* § 271.116(e)-(f).
[92] *Id.* § 271.116(f)-(g).
[93] *Id.* § 271.116(c).
[94] *Id.* § 271.118.
[95] *Id.* § 271.118(b).

include on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials.[96]

Prior to or concurrent with the selection of a CMA, the city must hire a design professional according to the requirements of section 2254.004 of the Government Code to design the project if the city does not utilize for the design a design professional which it employs on a full-time basis. The design professional may not serve, alone or in combination with any other person, as the CMA, unless hired as the CMA in a separate or concurrent CMA procurement process. This does not prevent the design professional from providing customary construction phase services under the original professional services agreement and applicable licensing laws.[97]

Either after or concurrent with the selection of a design professional, the city selects a CMA based on the same professional services procurement rules provided for the selection of a design professional under section 2254.004 of the Government Code, except that the advertising requirements of section 271.112(d) of the Local Government Code (applicable to municipalities and river authorities, but not counties) must be met.

Under the CMA method, the city may engage a single prime contractor or multiple trade contractors to serve as prime contractors for their respective portions of the work in any manner authorized by the statutes governing the particular city.[98] The city or the CMA (i.e. not the contractor(s)) is responsible for procuring all inspection, testing and verification services required for the city's acceptance of the facility in accordance with section 2254.004 of the Government Code.[99]

What is the construction manager at-risk method?

A construction manager-at-risk (CMAR) assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price in the same manner as a general contractor, but also provides consultation to the city regarding construction during and after the design of the facility.[100] A CMAR may be hired by the city in either case by a one-step or two-step process that is outlined below.

Prior to or concurrently with selecting a CMAR, the city must select or designate a design professional who will be responsible for preparing the design and construction documents for the project. This design professional, if not a full-time employee of the city, must be selected according to section 2254.004 of the Government Code. The city's design professional may not serve, either alone or in combination with another, as the CMAR unless the city also chooses that design professional to act as CMAR under a separate or concurrent selection process.[101] As with other alternative methods, the city must provide for inspection, testing, and verification required for its acceptance of the work independently of the CMAR. Those testing services shall be selected according to section 2254.004 of the Government Code.[102]

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[96] *Id.* § 271.117(b).
[97] *Id.* § 271.117(c).
[98] *Id.* § 271.117(e).
[99] *Id.* § 271.117(f).
[100] *Id.* § 271.118(b).
[101] *Id.* § 271.118(c).
[102] *Id.* § 271.118(d).

In the one-step selection process, the city issues a request for proposals (RFP). This RFP should include general information on the project site, scope, schedule, selection criteria and relative weighting of selection criteria, estimated budget, time/place for receipt of the proposal, whether a one or two-step selection process will be used, and any other information that would assist the city in its selection of a CMAR. In the one-step process, the city may request, as part of the requested proposals, information regarding proposed fees and prices for the fulfillment of the general field conditions. In other words, both qualifications and pricing are evaluated in one process.[103]

In the two-step selection process, the city first produces a Request for Qualifications (RFQ), which is identical to the RFP as described above, except that no cost or price information may be requested of offerors in the initial RFQ. In the second step, the city selects a maximum of five offerors who responded to the RFQ to provide additional information. That information may include proposed fees and prices for the completion of the CMAR's general field conditions. The two-step CMAR process is similar to the two-step method for selecting a design-build firm discussed earlier in this paper.[104]

In both the one and two-step processes, the city must evaluate and rank the offers according to its published selection criteria within 45 days of the responses having been opened. All proposals must be publicly opened and read aloud in their entirety, including pricing information included in the proposal at the appropriate step.[105] The city then selects the proposal that offers the best value for the city according to the published selection criteria and the ranking evaluation. Following the selection of the offeror that offers the best value for the city, the contract negotiation process begins. The city negotiates first with the selected offeror. If the two parties cannot reach an agreement, the city must give formal written notice to that offeror that negotiations are ended. The city may then negotiate with the next ranked offeror. This process continues until the city and an offeror reach an agreement on a contract or negotiations with all ranked offerors end.[106]

The CMAR is required to properly advertise, according to section 271.025 of the Local Government Code, for bids or proposals from trade contractors or subcontractors for all work, except minor work that may be included in the general field conditions. The CMAR administers this process and selects the contract procurement method determined to provide the best value from among the various methods available to the city. The CMAR may seek to perform any part of the work on the project as long as the CMAR presents its bid or proposal in the same manner as any trade contractor or subcontractor and the CMAR's bid or proposal is determined by the city to provide the best value.[107]

The CMAR, city, and its representative design professional review the bid and proposals and select the various trade contractors or subcontractors in a manner so as not to disclose the price of the bids or proposals to the public. Ultimately, however, all bids or proposals shall be made public once the related contract has been awarded, or seven days after the final selection of bids, whichever is later.[108]

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[103] *Id.* § 271.118(e).
[104] *Id.*
[105] *Id.* § 271.118(f).
[106] *Id.* § 271.118(g).
[107] *Id.* § 271.118(h).
[108] *Id.* § 271.118(i).

The CMAR may recommend the acceptance of a particular bid or proposal, but the city has the right to require another bid or proposal be accepted. If the city overrides the CMAR's recommendation in selection of any trade contractor or subcontractor, it must compensate the CMAR for any changes in price, time, guaranteed maximum cost, or any additional cost or risk associated with the city's choice that differs from that recommended by the CMAR.[109]

The CMAR contracts directly with the selected trade contractors and subcontractors. If any trade contractor or subcontractor defaults the CMAR may complete the work, without advertising for completion bids, or may select a replacement trade contractor or subcontractor.[110]

If no fixed contract amount or guaranteed maximum price has been determined when the CMAR's contract is executed, the performance and payment bonds shall be in the amount of the estimated budget of the project as set out in the RFQ or RFP. The CMAR must deliver the required bonds not later than the tenth day after the CMAR executes the contract unless the CMAR furnishes a bid bond or other financial security acceptable to the city to ensure, that the CMAR will provide the performance and payment bonds once the price is fixed.[111]

What is the job order contracting method?

The job order method for procurement may be used in the following instances: (1) when the contract is for the minor repair, rehabilitation or alteration of a facility; (2) the work called for by the contract is of a recurring nature, but delivery times and quantities are indefinite; and (3) the orders are awarded substantially on the basis of pre-described and pre-priced tasks (e.g., unit prices). Examples of the type of work that would qualify for job order procurement would be ceiling tile replacement, door hanging, sidewalk construction and repainting.[112]

The city must properly advertise for and publicly open sealed proposals for job order contracts.[113] The base term of the job order contract is for any period plus any renewal option set forth in the RFP. If the city does not advertise that term, it cannot exceed two years, and is not renewable without further advertisement and solicitation of proposals.[114]

The city may award job order contracts to one or more of the offerors in the same solicitation. The city is not required to award a contract to whoever submits the lowest rates.[115] Instead, the city may award on the basis of a combination of price and other factors including experience, past performance, proposed personnel, methodology, safety record and other appropriate factors.[116]

[109] *Id.* § 271.118(j).
[110] *Id.* § 271.118(k).
[111] *Id.* § 271.118(l).
[112] *Id.* § 271.120(a), (b)(1)-(2).
[113] *Id.* § 271.120(c).
[114] *Id.* § 271.120(h).
[115] *Id.* § 271.120(e).
[116] *Id.* § 271.120(d).

Under a job order contract, specific work projects are authorized by the execution of a job order by the city and the contractor. The order may be a fixed price, lump sum order or a unit price order based on estimated quantities.[117]

If the amount or estimated amount of the job order is in excess of $25,000, then the contractor must post a payment bond on the job order. If the job order is $100,000 or more, a performance bond is also required. Note, however, that the bonds are provided on each specific job order and not on the overall job order contract. Given the nature of job order work, it is possible that many job orders may not be of a size that would require performance bonds. However, it also means that a contractor may be required to post multiple bonds for multiple job orders during the same time period.

VII. Ability to Provide Preferences in Bid Awards

Can a city provide a preference for local businesses in its bid award?

In most cases, a city may not provide a preference for local businesses when awarding bids.[118] State law allows such a preference only in specifically authorized situations.

In the first situation, if two or more bidders have bids that are identical in nature and amount, with one bidder being a resident of the city and the other bidder or bidders being non-residents, the city council must select the resident bidder.[119]

A provision added in 1999 allows the consideration of a bidder's principal place of business when a city awards a contract. The provision is only available to a city with a population of less than 400,000.[120] The statute states that:

> "In purchasing under this title any real property or personal property that is not affixed to real property, if a local government receives one or more bids from a bidder whose principal place of business is in the local government and whose bid is within three percent of the lowest bid price received by the local government from a bidder who is not a resident of the local government, the local government may enter into a contract with [either]…the lowest bidder; or…the bidder whose principal place of business is in the local government if the governing body of the local government determines, in writing, that the local bidder offers the local government the best combination of contract price and additional economic development opportunities for the local government created by the contract award, including the employment of residents of the local government and increased tax revenues to the local government."[121]

[117] *Id.* § 271.120(f).
[118] *See* Tex. Att'y Gen.Op. Nos. DM-113 (1992); LA-93-073 (1993).
[119] TEX. LOC. GOV'T CODE § 271.901.
[120] *Id.* § 271.905(a).
[121] *Id*. § 271.905(b).

This is a useful provision for awarding contracts, but it appears to be geared more towards purchases of tangible items. The provision may not fit exactly in the context of the procurement of services.

In addition, a provision added in 2005 authorizes a city that is purchasing real property, personal property, or services (with the exception of certain telecommunications services) to enter into a contract with either: (1) the lowest bidder; or (2) a bidder whose principal place of business is in the city and whose bid is within five percent of the lowest bid price, if the governing body determines that the local bidder offers the city the best combination of contract price and additional economic development opportunities, including the employment of residents of the local government and increased tax revenues.[122]

Finally, Texas cities must give a preference to local businesses if there are out-of-state bidders that have bid on the contract and the out-of-state bidder is located in a state that discriminates against out-of-state bidders in its bid awards in favor of local bidders.[123] For example, some states have laws that require an out-of-state bidder to underbid an in-state bidder by a certain minimum amount. In response to such requirements by other states, the Texas Legislature included a provision in Chapter 2252 of the Texas Government Code. That chapter requires that Texas cities determine if a Texas bidder would be required to underbid the non-Texas bidder for a comparable contract in the non-Texas bidder's own state.[124] If such a preference is provided in that state, the non-Texas bidder is then required to underbid the lowest responsible Texas bidder by at least that amount. Thus, if a Texas city receives a bid from a non-Texas bidder, chapter 2252 will give the lowest responsible Texas bidder the same advantage as the non-Texas bidder would have in its home state. If the non-Texas bidder is from a state where in-state bidders are not given preference over Texas bidders, then chapter 2252 will not give the Texas bidder any advantage over the non-Texas bidder.

There are several important points to note with regard to the requirements of chapter 2252 of the Government Code. First, a bidder's home state is determined by the location of its principal place of business. A contractor whose ultimate parent company or majority owner has its principal place of business in Texas would be considered a Texas bidder.[125] Second, information on the relevant bidding laws of other states is compiled by the Texas Facilities Commission. In ascertaining the relevant bidding laws of a particular state for purposes of meeting the requirements of chapter 2252, a city must use the information provided by the Facilities Commission.[126] Finally, chapter 2252 does not apply to a contract involving federal funds.[127]

Can a city provide a preference for historically underutilized businesses?

In the past, state law specifically authorized certain home rule cities to adopt programs designed to increase participation by minority business enterprises in public contract awards.[128] However, that law expired on January 1, 1999. After that date, any city that wished to continue such a

[122] *Id.* § 271.9051.
[123] TEX. GOV'T CODE ch. 2252.
[124] *Id.* § 2252.002.
[125] *Id.* § 2252.001.
[126] *Id.* § 2252.003.
[127] *Id.* § 2252.004.
[128] TEX. CIV. PRAC. & REM. CODE § 106.001.

program would presumably have to look to its city charter or other statutory provisions for authorization.

Current law allows a city that chooses to award a competitive bid or competitive proposal based on "best value" criteria to consider "the impact on the ability of the municipality to comply with laws and rules relating to contracting with historically underutilized businesses and nonprofit organizations employing persons with disabilities" or "any other relevant criteria" listed by the city in the specifications. Some cities have used these provisions to continue seeking to procure services from historically underutilized businesses. In any case, a city may consider a factor that is not related to the bidder's capacity to fulfill the contract only when state law specifically authorizes the city to take that factor into account.[129]

When is a city required to contact historically underutilized businesses?

A city must contact at least two historically underutilized businesses if the city makes an expenditure of between $3,000 and $50,000.[130] If the expenditure is for less than $3,000 or for more than $50,000, this special notification requirement would not apply. To determine what businesses within the county are classified as historically underutilized businesses, the city should use the list of such businesses provided by the Texas Facilities Commission.[131] If there are more than two such businesses in the county, the city can contact the listed businesses on a rotating basis. Even if the historically underutilized businesses in the county do not provide the goods or services that the city needs, at least two of those businesses must be contacted.[132] The city is only excused from this notification requirement if there are no such businesses located in the county in which the city is located. State law does not indicate the manner of individual notice that must be provided to the historically underutilized businesses. In any case, it may be advisable to use a manner of notice such as certified mail that would provide a record of contact with the listed businesses.

How does a city determine whether it has historically underutilized businesses within its area?

To determine what businesses within the county are classified as historically underutilized businesses, the city should use the list of such businesses provided by the Texas Facilities Commission (TFC).[133] A city may contact the TFC by phone at (512) 463-3446. Alternatively, a city may obtain information about historically underutilized businesses from the TFC's Web site www.tfc.state.tx.us.

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[129] *See* Tex. Att'y Gen.Op. Nos. DM-113 (1992); LA-93-073 (1993).
[130] *Id.* § 252.0215 (as amended by Texas Senate Bill 1765, 80th Legislature, Regular Session (2007)).
[131] *Id.* § 252.0215 (city to contact historically underutilized businesses based on list provided by Texas Facilities Commission – www.tbpc.state.tx.us); TEX. GOV'T CODE § 2161.061 (Texas Building and Procurement Commission shall certify underutilized businesses).
[132] Clark, Ronald H., *Texas Municipal Law and Procedure Manual* at 13-11 (revised 1997-1998).
[133] TEX. LOC. GOV'T CODE § 252.0215 (as amended by Texas House Bill 197, 77th Legislature, Regular Session (2001)) (city to contact historically underutilized businesses based on list provided by General Services Commission); TEX. GOV'T CODE § 2161.061 (General Services Commission shall certify underutilized businesses).

Is a city required to provide a preference for recycled materials in its bid requests?

Yes, a city must "give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quantity and quality."[134] Furthermore, a city is required to regularly review and revise its procurement procedures and specifications to eliminate procedures and specifications that explicitly discriminate against products made of recycled materials. Cities are also required to make sure their procurement procedures and specifications encourage the use of products made of recycled materials. The Texas Commission on Environmental Quality may order an exemption from these requirements for a city of less than 5,000 people if the commission finds that compliance would work a hardship on the city.

VIII. Statutory Exceptions to the Competitive Bidding or Proposal Requirements:

Exceptions Due to Public Health, Safety, or Welfare

Is a city required to bid for purchases that are necessary because of a public calamity?

A city is not required to follow the competitive procurement requirements of Texas Local Government Code Chapter 252 when making an expenditure because of a public calamity.[135] In order to qualify for this exception from the bidding requirements, the public calamity must be one that requires the immediate appropriation of money to relieve the necessity of the city's residents or to preserve the property of the city. For example, a city may need to purchase medicines or blankets to be dispersed at a temporary city shelter for victims of flooding or tornadoes. Such a purchase would arguably fall under this exception to the competitive bidding requirements. However, this practice does not appear to have been reviewed by the Texas courts or by the Attorney General. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive procurement requirements.

Can a city forego bidding or proposals if the purchases are necessary to protect the public health or safety of city residents?

A city may forego the competitive bidding procedures of chapter 252 of the Local Government Code when making a purchase that is necessary to preserve or protect the public health or safety of the city's residents.[136] Chapter 252 does not define or give examples of what constitutes a purchase that is "necessary to preserve or protect... public health or safety...." There also have not been many court cases or Attorney General Opinions that have addressed this competitive bidding exception. However, the following activities have been found to fall within the health and safety exception (and thus do not require competitive bidding): 1) building a sanitary sewage system and disposal plant;[137] 2) establishing a county ambulance service;[138] and 3) awarding a

[134] TEX. HEALTH & SAFETY CODE § 361.426; TEX. LOC. GOV'T CODE § 252.003 (requiring that a city follow the requirements set forth in section 361.426).
[135] TEX. LOC. GOV'T CODE § 252.022 (a)(1).
[136] *Id.* § 252.022 (a)(2).
[137] *Hoffman v. City of Mt. Pleasant*, 89 S.W.2d 193 (1936).

contract for collection, hauling, and disposal of solid waste (garbage).[139] Cities have also used this exception for the purchase of emergency equipment for city personnel, such as self-contained breathing apparatus for firefighters or bullet-proof vests for police officers. However, these practices have not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

Can a city forego bidding or proposals for purchases that are necessary because of unforeseen damage to public machinery, equipment or other property?

A city is not required to follow the competitive bidding procedures when making a purchase that is necessary because of unforeseen damage to public machinery, equipment or other property.[140] For example, cities have used this exception to justify not taking bids for the purchase of parts for emergency equipment, such as firefighting equipment, when the equipment was unexpectedly damaged or broken. However, parts needed for the routine maintenance of firefighting equipment are generally purchased through the competitive bidding process. In addition, these practices have not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

Exceptions for Specialized Services

Are contracts for personal services exempt from the requirements for competitive bidding?

Texas law specifically exempts contracts for personal services from the competitive bidding requirements.[141] The Texas Supreme Court has defined "personal services" to include only those services which are performed personally by the individual who contracted to perform them.[142] Further, for a contract to qualify as a contract for personal services, the compensation in the contract should mainly pay for the labor of the individual providing the service, not for such things as insurance or materials.[143]

For example, the Attorney General held that a contract for the services of a construction manager was a contract for "personal services" and therefore not subject to competitive bidding requirements.[144] The Attorney General has also concluded that a contract for janitorial services would constitute a contract for personal services if a specific person is required to perform those services.[145] However, the following have been found not to be exempt from bidding under the

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[138] Tex. Att'y Gen. Op. M-806 (1971).
[139] *Browning-Ferris, Inc., v. City of Leon Valley*, 590 S.W.2d 729 (Tex. Civ. App—San Antonio1979, writ ref'd n.r.e.). *See* Tex. Att'y Gen. Op. JM-908.
[140] TEX. LOC. GOV'T CODE § 252.022 (a)(3).
[141] *Id.* § 252.022 (a)(4).
[142] *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895-896 (Tex. 1962).
[143] Tex. Att'y Gen. Op. MW-344 (1981).
[144] Tex. Att'y Gen. Op. MW-530 (1983).
[145] Tex. Att'y Gen. Op. JM-486 (1986).

exemption for "personal services": the provision of advertising space by a newspaper,[146] a contract for microfilming records,[147] an insurance contract,[148] a contract to operate container terminal facilities in a port,[149] and a contract for janitorial services that did not specify the particular person who was to perform the janitorial services.[150] Thus, these contracts were all subject to the competitive bidding requirements of Chapter 252 of the Local Government Code.

Can a city forego bidding for contracts for professional services?

Texas law specifically exempts contracts for professional services from the competitive bidding requirements.[151] Professional services have been described as those services which are mainly mental or intellectual rather than physical or manual. That is, professional services are those disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence.[152] For example, cities have used this exception to justify not taking bids for the services of an attorney. Some cities have also used this exception to justify employing outside consultants, such as insurance consultants, without competitively bidding those services. However, these practices have not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult with its local legal counsel before relying on this exception in order to avoid the application of competitive bidding requirements.

Additionally, it should be noted that a city is specifically prohibited under state law from obtaining certain professional services through competitive bidding. The Professional Services Procurement Act states that a city may not use traditional competitive bidding procedures to obtain the services of architects, engineers, certified public accountants, land surveyors, physicians, optometrists or state-certified real estate appraisers**.** If the professional services desired by the city do not fall under the Professional Services Procurement Act, they may generally be obtained with or without the use of competitive bidding, as the city desires.[153]

How may a city obtain the services of architects, engineers, certified public accountants, land surveyors, physicians, optometrists or a state certified real estate appraiser?

Cities are prohibited from using competitive bidding procedures to obtain the services of architects, engineers, certified public accountants, land surveyors, physicians, optometrists or state-certified real estate appraisers.[154] Instead, for contracts involving architectural, engineering, or land surveying services, a city must first select the most highly qualified provider and then attempt to negotiate a fair and reasonable price.[155] If the city is unable to negotiate a contract with the most highly qualified provider, the city must then formally end negotiations with that provider. After negotiations have formally ended, the city must select the next most

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[146] *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 896 (Tex. 1962).
[147] Tex. Att'y Gen. Op. JM-890 (1988).
[148] Tex. Att'y Gen. Op. MW-494 (1982).
[149] Tex. Att'y Gen. Op. MW-344 (1981).
[150] Tex. Att'y Gen. Op. JM-486 (1986).
[151] TEX. LOC. GOV'T CODE § 252.022 (a)(4).
[152] Tex. Att'y Gen. Op. Nos. JM-1038 (1989); JM-940 (1988); and MW-344 (1981) (quoting with approval the definition of "profession" from Black's Law Dictionary 1089-[90] (5th ed. 1979)).
[153] Tex. Att'y Gen. Op. DM-106 (1992).
[154] TEX. GOV'T CODE § 2254.003.
[155] *Id.* § 2254.004.

highly qualified provider and attempt to negotiate a contract with that provider. If necessary, the city must continue the process of formally ending negotiations with one provider and selecting another provider for negotiations until a contract is obtained.

The Professional Services Procurement Act does not specify the exact process by which a city may procure accounting, medical, optometrist, or real estate appraisal services. The law merely prohibits obtaining these services through competitive bidding and requires that such services be selected on the basis of demonstrated competence and qualifications. However, it seems advisable that a city follow the same procedures for obtaining these services as must be followed in obtaining architectural, engineering, or land surveying services. That is, the city should first select a provider on the basis of competence and qualifications and then formally negotiate with that provider.

What procedure must cities use to obtain the services of a lawyer or the services of a law firm?

State law does not specify any particular procedures for obtaining the services of a lawyer or of a law firm. The Professional Services Procurement Act does not apply to attorneys,[156] and the selection of an attorney is presumably exempt from competitive bidding requirements as a "professional service."[157] Thus, a city may choose to obtain the services of an attorney with or without the use of competitive bidding. Many cities simply hire their legal counsel by majority vote of the city's governing body and then execute a contract for such services.[158]

Are contracts for planning services exempt from competitive bidding requirements?

Texas law specifically exempts contracts for planning services from the competitive bidding requirements.[159] However, it is important to note that the phrase "planning services" is specifically defined by Chapter 252. That term means "services primarily intended to guide governmental policy to ensure the orderly and coordinated development of the state or of municipal, county, metropolitan, or regional land areas."[160] In order to be eligible for the planning services exception to the competitive bidding requirements, the planning services to be procured must fit this definition.

Does competitive bidding apply to a contract for management services for a city museum, park, zoo or other facility?

Competitive bidding requirements do not apply to a contract for management services for a city facility if those services are provided by a non-profit organization that has provided significant benefits to the facility.[161] State law does not define what would constitute "significant benefit."

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[156] *See id.* § 2254.002 (definition of "professional services" within the meaning of the Professional Services Procurement Act).
[157] *See* i*d.* § 252.022 (a)(4); Tex. Att'y Gen. Op. JM-1189 (1990) at 5 (quoting *Hunter v. Whiteacre and Washington*, 230 S.W. 1096, 1098 (Tex. Civ. App. – San Antonio 1921, writ ref'd).
[158] Tex. Att'y Gen. Op. DM-106 (1992).
[159] TEX. LOC. GOV'T CODE § 252.022 (a)(4).
[160] *Id.* § 252.001 (5).
[161] *Id.* § 252.022 (a)(7)(F).

Does competitive bidding apply to services performed by blind or severely disabled persons?

Competitive bidding does not apply to the purchase of services performed by blind or severely disabled persons.[162]

Exceptions for Items Available From Only One Source

Does competitive bidding apply to the purchase of items that are available from only one source because of copyrights or "natural monopolies"?

Competitive bidding requirements do not apply to items that are available from only one source due to "patents, copyrights, secret processes, or natural monopolies."[163] For example, at least one city has used this exception to avoid the bidding requirements when purchasing a special type of surveillance camera for police work. The camera in question was able to transmit pictures directly to a lap-top computer using a patented process. The entity that owned the patent for this process was the sole source for this type of camera. However, it should be noted that this transaction has not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

Does competitive bidding apply to the purchase of "captive replacement parts" or components for equipment?

Competitive bidding requirements do not apply to the purchase of captive replacement parts or components for equipment if those parts or components are available from only one source.[164] For example, cities have used this exception to justify not taking bids for the purchase of parts for specialized heavy equipment, such as fire trucks, sewer-cleaning equipment, and certain equipment for road building and maintenance. Frequently, only specialized parts manufactured by the vendor will properly fit such a piece of heavy equipment. It is important to note, though, that this use of the "captive replacement parts" exception has not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

Does competitive bidding apply to the purchase of electricity, gas, water and other utility services?

Competitive bidding is not required for the purchase of gas, water and other utility services if those services are available from only one source.[165] In regards to electricity, in 1999 the Texas

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[162] *Id.* § 252.022 (a) (13). *See also* Tex. Att'y Gen. Op. JM-444 (1986) (General statutes that require counties, cities, hospital districts, and school districts to engage in competitive bidding in order to make certain purchases do not apply to purchases of services or produce produced by persons with disabilities pursuant to section 122.014 [now section 122.017] of the Human Resources Code).
[163] TEX. LOC. GOV'T CODE § 252.022 (a)(7)(A).
[164] *Id.* § 252.022 (a)(7)(D).
[165] *Id.* § 252.022 (a)(7)(C).

Legislature amended section 252.022 of the Local Government Code to remove the purchase of electricity from the sole source requirement. Currently, the competitive bidding requirements do not apply to an expenditure for electricity.[166]

Does competitive bidding apply to the purchase of advertising?

Competitive bidding is not required for advertising by a city, other than legal notices.[167]

Does competitive bidding apply to the purchase of books and other materials for a public library?

Competitive bidding is not required for the purchase of books, papers, and other materials for a public library if those books, papers, or materials are available only from the persons holding exclusive distribution rights to the materials. Additionally, competitive bidding requirements do not apply to the purchase of rare books, papers and other rare library materials for a public library.[168]

Exceptions for Distress or Auction Purchases

Does a city violate bidding requirements if it purchases personal property at an auction?

A city is not required to comply with competitive bidding procedures when purchasing personal property at an auction by a state licensed auctioneer.[169] Currently, it does not appear that cities use this exception with any great frequency.

Does a city violate bidding requirements if it purchases property at a going-out-of-business sale?

A city is not required to comply with the competitive bidding procedures when purchasing personal property at a going-out-of-business sale.[170] However, for this exception to apply, the sale must comply with the requirements of subchapter F in chapter 17 of the Texas Business and Commerce Code. So, for example, a city might use this exception to purchase large quantities of office supplies at a going-out-of business sale if the sale complied with the requirements of the Business and Commerce Code. However, this practice has not been reviewed by the Texas courts or the Attorney General's Office. Thus, a city will want to consult its local legal counsel before relying on this exception to avoid competitive bidding requirements.

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[166] *Id.* § 252.022 (a)(15).
[167] *Id.* § 252.022(a)(16) (as amended by Texas Senate Bill 1765, 80th Legislature, Regular Session (2007)).
[168] *Id.* § 252.022 (a)(7)(E).
[169] *Id.* § 252.022 (a)(12)(A).
[170] *Id.* § 252.022 (a)(12)(B).

Exceptions for Purchases from Other Governmental Entities

Does a city violate bidding law if it purchases property or services directly from another political subdivision of this state, a state agency or a federal agency without following competitive bidding procedures?

There are a number of statutes that allow a city to purchase either property or services from other governmental entities or agencies without following competitive bidding procedures.

The Interlocal Cooperation Act[171] generally allows a city to enter into an agreement with another local governmental entity, such as a county or another city, to perform specific governmental functions and services, such as solid waste collection, fire protection, planning and administrative services. The Act further provides that a city may agree with another local government, a state agency (including the Texas Facilities Commission), or a council of governments to purchase goods (and services reasonably related to the operation and maintenance of the goods) from that entity.[172]

Chapter 271, Subchapter D, of the Local Government Code allows a city, by resolution of its governing body, to participate in cooperative purchasing programs established by the State Facilities Commission for the purchase of goods at prices established through purchase contracts of the Commission. The city must agree to be solely responsible for, among other things, submitting the proper requisitions to the Commission under the contract in question, direct payment to the vendor, and enforcement of the vendor's compliance with conditions for delivery and quality of the purchased goods.[173]

Sections 252.022(a)(12)(B) and (12)(D) of the Local Government Code exempt purchases of personal property sold by a political subdivision of the state, a state agency, an entity of the federal government, or a regional planning commission (e.g., a regional council of governments) under an interlocal contract for cooperative purchasing from competitive bidding.

Finally, Chapter 271, Subchapter G, of the Local Government Code allows local governments (including cities) to enter into cooperative purchasing agreements with each other for goods and services,[174] and to purchase goods and services available under federal supply schedules established by the U.S. General Services Administration, without following competitive bidding procedures.[175]

Compliance with the requirements of any of the cooperative or interlocal agreement purchasing statutes described above automatically satisfies the competitive bidding requirements of state law. Many specific interlocal purchasing practices have not been reviewed by the Texas courts or the Attorney General's Office. Therefore, a city will want to consult its legal counsel before relying on any of the exceptions noted above to avoid competitive bidding requirements.

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[171] *Id.* ch. 791.
[172] TEX. GOV'T CODE § 791.025.
[173] TEX. LOC. GOV'T CODE § 271.083; Tex. Att'y Gen. Op.DM-350 (1995).
[174] TEX. LOC. GOV'T CODE § 271.102.
[175] *Id.* § 271.103.

Exceptions for Purchases with Specialized Financing

Does competitive bidding apply to a contract for paving drainage, street widening, and other public improvements if at least one-third of the cost is paid through special assessments?

A city is not required to comply with competitive bidding requirements when expending money for paving drainage, street widening, and other public improvements if at least one-third of the cost is to be paid by special assessments levied on the benefitted property.[176] Currently, it does not appear that cities use this exception with any great frequency.

Does competitive bidding apply to a contract for a previously authorized public improvement that is experiencing a deficiency in funding to complete the project?

Competitive bidding requirements do not apply to expenditures for a public improvement that is already in progress if there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters.[177] This exception to the competitive bidding requirement only applies to a project that was authorized by the voters of the city. Currently, it does not appear that cities use this exception with any great frequency.

Are developer participation contracts subject to competitive bidding if the city's participation is limited to thirty percent of the total contract price?

A "developer participation contract" is a contract between the city and a developer for the developer to be responsible for the construction of public improvements (other than buildings). Under such a contract, the city agrees to pay for part of the cost of the public improvements. A city of 5,000 or more in population may enter into such a contract without following competitive bidding procedures if the contract meets all the requirements of Local Government Code Chapter 212, subchapter C.[178] Among the requirements of that subchapter is that the city's level of participation in the contract must not exceed 30 percent of the contract price.[179] Additionally, the developer must execute a performance bond.[180] If a developer participation contract does not meet these requirements as well as all the other requirements contained in chapter 212, subchapter C, then the contract is subject to all of the normal rules regarding competitive bidding.[181]

[176] *Id.* § 252.022 (a)(9).
[177] *Id.* § 252.022 (a)(10).
[178] *Id.* § 212.071.
[179] *Id.* § 212.072.
[180] *Id.* § 212.073.
[181] *Id.* § 212.071.

Can a city forego bidding for work that is performed and paid for by the day?

Yes, Chapter 252 of the Local Government Code specifically excepts from the bidding requirements "a procurement for work that is performed and paid for by the day as the work progresses."[182] Nearly identical language is found in the County Purchasing Act.[183] A recent Attorney General Opinion interpreting the County Purchasing Act concluded that a contract for work performed and paid for by the day is a contract only for the day.[184] The fact that payment on a contract is made on a daily basis does not make it into a contract for work performed and paid for by the day. Thus, a contract obligating the county to pay for all future work or obligating a party to provide day labor to do the future work on a project is not a contract for work performed and paid by the day. This is true even if the contract stipulates that payment must be made on a daily basis. Since a contract for work performed and paid for by the day rarely reaches the $50,000 bidding threshold, this exception is used very infrequently.

IX. Ethical Requirements Relating to Municipal Procurement

What is Chapter 176 of the Local Government Code?

Chapter 176 is a relatively new ethics law that was enacted by H.B. 914 in 2005. It requires certain local government officials to disclose employment and business relationships with vendors who conduct business with local government entities. After the law was implemented, city officials and others believed that the law created several unintended consequences. Consequently, the bill's author sought an opinion from the Texas Attorney General to clarify many provisions of Chapter 176. In response, the Attorney General's Office released Opinion Number GA-0446, which concluded that legislative changes to the law would be necessary if the bill's author wished to lessen extremely tough requirements. In response, the Legislature passed H.B. 1491 during the 2007 regular legislative session. The bill became effective on May 25, 2007.

What local government entities are subject to this law?

The requirements of the bill apply to most political subdivisions, including a city.[185] The bill also applies to a local government corporation, board, commission, district or authority whose members are appointed by a mayor or the city council.

What local government officers are subject to this law?

A city councilmember, director, superintendent, administrator, president or any other person who is designated as the executive officer of the local government entity is considered a local government officer ("officer").[186] A city may also extend the requirements of the statute to an employee of the city who has the authority to approve contracts on behalf of the city.[187]

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[182] *Id.* § 252.022 (a)(5).
[183] *See id.* § 262.024.
[184] Tex. Att'y Gen. Op. LA-98-015 (1998).
[185] TEX. LOC. GOV'T CODE § 176.001(3).
[186] *Id.* § 176.001(4).
[187] *Id.* § 175.005(a).

When is an officer required to file a "conflicts disclosure statement"?

An officer is required to file a conflicts disclosure statement ("statement") if a vendor enters into a contract with the city or if the city is considering entering into a contract with the vendor, and the officer or officer's family member has an employment or other business relationship with the vendor that results in the officer or officer's family member receiving taxable income that is more than $2,500 in the preceding twelve months.[188] An officer who receives investment income, regardless of amount, is not required to file a disclosure statement. Investment income includes dividends, capital gains, or interest income gained from a personal or business checking or savings account or other similar account, a personal or business investment, or a personal or business loan.[189]

An officer is also required to file a statement if the officer or officer's family member accepts from a vendor one or more gifts with an aggregate value of more than $250 in the preceding twelve months.[190] An officer is not required to file a statement in relation to a gift, regardless of amount, that is accepted by an officer or officer's family member if the gift is given by a family member of the person accepting the gift, is a political contribution, or is food, lodging, transportation or entertainment accepted as a guest.[191]

(Note: An officer is required to file a statement no later than 5:00 p.m. on the seventh business day after the date on which the officer becomes aware of facts that require a filing of the statement.)

How does Chapter 176 define a "vendor"?

A vendor is any person who enters or seeks to enter into a contract with a city. The term also includes an agent of a vendor.[192]

How does Chapter 176 define a "family member"?

A family member is defined as a person related to another person within the first degree of consanguinity (blood) or affinity (marriage). An officer's family member would include the officer's spouse, father, mother, son, daughter, father-in-law, mother-in-law, son-in-law, daughter-in-law or stepchild.[193]

To what types of contracts does the law apply?

The law applies to any written contract for the sale or purchase of real property, goods, or services.[194] A contract for services would include one for skilled or unskilled labor, as well as for professional services.[195]

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[188] *Id.* § 176.003(a)(2)(A).
[189] *Id.* § 176.001(2-b).
[190] *Id.* § 176.003(a)(2)(B).
[191] *Id.* § 176.003 (a-1).
[192] *Id.* § 176.002(a).
[193] *Id.* § 176.001(2).
[194] *Id.* § 176.001(1-d).
[195] *Id.* § 176.001(6).

When is a vendor required to file a "conflicts of interest questionnaire"?

A vendor is required to file a conflicts of interest questionnaire ("questionnaire") if the vendor has a business relationship with the city and has: (1) an employment or other business relationship with an officer or an officer's family member that results in the officer receiving taxable income that is more than $2,500 in the preceding twelve months; or (2) has given an officer or an officer's family member one or more gifts totaling more than $250 in the preceding twelve months.

A vendor is required to file a questionnaire not later than the seventh business day after the latter of the following: (1) the date the vendor begins discussions or negotiations to enter into a contract with the city or submits an application or response to a bid proposal; or (2) the date the vendor becomes aware of a relationship or gives a gift to an officer or officer's family member.[196]

With whom should the statements and/or disclosures be filed?

The statements and disclosures must be filed with the records administrator of the city.[197] A records administrator includes a city secretary, a person responsible for maintaining city records, or a person who is designated by the city to maintain the statements and disclosures filed under this bill.

A city that maintains a Web site is required to post statements and disclosures that are required to be filed under the bill. However, a city that does not have a Web site is not required to create or maintain one.[198]
(Note: A city does not have a duty to ensure that a vendor that is required to file a questionnaire does so.)

What happens if a statement is not filed?

An officer or vendor who knowingly fails to file a statement or a disclosure when required to do so commits a Class C misdemeanor.[199] A Class C misdemeanor is punishable by a fine of up to $500. It is an exception to prosecution if an officer/vendor files a statement/questionnaire not later than the seventh day after the date the person receives notice from the city of the alleged violation.

(Note: The validity of a contract between a city and a vendor is not affected solely because an officer or vendor fails to file a statement or disclosure.)

[196] *Id.* § 176.006.
[197] *Id.* § 176.003(b).
[198] *Id.* § 176.009(a).
[199] *Id.* §§ 176.003(c); 176.006(f).

Where can an officer or vendor obtain the necessary forms?

The Texas Ethics Commission is charged with creating statement and disclosure forms and has adopted new forms that conform to the new bill. The forms can be found at www.ethics.state.tx.us.

What is Chapter 171 of the Local Government Code?

Chapter 171 of the Local Government Code regulates local public officials' conflicts of interest.[200] It prohibits a local public official from voting or participating in a matter involving a business entity or real property in which the official has a substantial interest if an action on the matter will result in a special economic effect on the business that is distinguishable from the effect on the public or, in the case of a substantial interest in real property, it is reasonably foreseeable that the action will have a special economic effect on the value of the property, distinguishable from its effect on the public.[201]

A public official who has such interest is required to file, before a vote or decision on any matter involving the business entity or real property, an affidavit with the city's official record keeper, stating the nature and extent of the interest.[202] In addition, a public official is required to abstain from further participating in the matter. However, a public official who required to file an affidavit is not required to abstain from participating in the matter if a majority of the members of the governing body have a substantial interest and are required to file and do file affidavits of similar interests on the same official matter.[203]

More detailed information on Chapter 171 is available in a separate Attorney General publication known as "Conflicts of Interest Made Easy" located online at www.texasattorneygeneral.gov.

X. Enforcement of Bidding Requirements

What civil remedies are available to an individual or entity if the competitive bidding laws are not followed?

If a city enters into a contract without complying with the requirements of Chapter 252, the contract is void.[204] Any property tax paying resident of the city may bring suit in district court to stop the performance or payment of the contract.

What criminal penalties apply if the competitive bidding laws are not followed?

If a person fails to comply with the competitive bidding or competitive proposal procedures required by Local Government Code Chapter 252, that person may be convicted of a Class B

[200] *Id.* §§ 171.001-.010.
[201] *Id.* § 171.004(a).
[202] *Id.* § 171.004(b).
[203] *Id.* § 174.004(c).
[204] *Id.* § 252.061.

misdemeanor.[205] This includes a situation in which a person makes or authorizes separate, sequential, or component purchases in an attempt to avoid competitive bidding requirements. A class B misdemeanor may be punished by a fine of up to $2,000, confinement in jail for up to 180 days, or both the fine and confinement.[206]

Can city officials or employees be removed from office for failure to comply with competitive bidding laws?

Under Texas law, an individual is automatically removed from his or her position if that person is finally convicted of failing to comply with the competitive bidding or competitive proposal procedures required by Local Government Code chapter 252.[207] Once removed from office, such a person may not hold any public office in this state for four years after the date of final conviction. Also, for four years after the date of final conviction, the convicted person may not be employed by the city where the person was serving when the offense occurred and may not receive any compensation through a contract with the city. The convicted person may, however, continue to receive any retirement or workers' compensation benefits.

Are there different consequences for elected officials, as compared to city staff, for bidding violations?

State law provides that any official (elected or city staff) who is convicted of failing to comply with competitive bidding or competitive proposal requirements under the Local Government Code is subject to certain punishment. It would appear that a prosecuting attorney could seek charges against any city staff or elected officials who authorized a criminally illegal purchase practice. What would constitute such an approval is not clear and would depend on the facts involved.

[205] *Id.* § 252.062.
[206] TEX. PENAL CODE § 12.22.
[207] TEX. LOC. GOV'T CODE § 252.063.