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Legal Services Department Note: The Texas legislature is in session until May 30, 2005. During the session, the primary focus of the TML attorneys turns to analyzing bills and responding to the support needs of the TML Legislative Services Department. Because of this, you may find that response times for general legal inquiries are longer. Please have patience as we do our part to protect city interests at the Capitol.

When is a city required to use competitive bidding?

In general, a city must use a competitive sealed bidding or competitive sealed proposal process for a purchase of \$25,000 or more. TEX. LOC. GOV'T CODE § 252.021 (Vernon 2004). Home rule cities should examine their charters for specific requirements concerning the procurement of goods and services. TEX. LOC. GOV'T CODE § 252.002 (Vernon 1999).

Are there exemptions to the competitive bidding requirement for the purchase of goods and services?

Yes. There are fifteen specific exemptions listed in § 252.022 of the Texas Local Government Code, including procurements made to: (1) respond to a public calamity; (2) preserve or protect the public health or safety of residents; (3) obtain personal, professional, or planning services; (4) purchase land or rights-of-way; (5) obtain items that are available from only one source, such as manuscripts, captive replacement parts for equipment, or utility services; (6) construct certain public improvements if at least one-third of the cost is to be paid by special assessments levied on the property that will benefit from the improvement; (7) obtain personal property sold at certain auctions; (8) obtain property from political subdivisions of Texas, state agencies, or the federal government; (9) obtain personal property under certain interlocal contracts for cooperative purchasing; or (10) acquire goods for subsequent retail sale.

Are there any services that may not be awarded using competitive bidding?

Yes. For example, a city may not competitively bid services covered by the Professional Services Procurement Act. TEX. GOV'T CODE § 2254.003 (Vernon 1999); Op. Tex. Att'y Gen. No. DM-06 (1992).

The Professional Services Procurement Act (Chapter 2254 of the Texas Government Code) sets the procurement process for services from professionals, including licensed architects, landscape architects, state certified or state licensed real estate appraisers, certified public accountants, and professional engineers. A city must select professional service provider on the basis of demonstrated competence and qualifications to perform the services. The fee for most professional services must be consistent with the recommended practices and fees published by the applicable professional associations, and may not exceed any maximum provided by law.

Section 2254.004 of the Government Code expressly requires cities to complete a two-step process for negotiating architectural, engineering, or land surveying contracts. A

city must first choose a provider based on the “demonstrated competence and qualifications” of the candidate. Then the city must attempt to negotiate for a contract at a fair and reasonable price. If a contract with the first choice does not result in a satisfactory contract, the city ends negotiations with the first choice, and begin negotiating with the next most competent and qualified candidate until an agreement is reached.

What are the procedures for competitive bidding?

Chapter 252 of the Texas Local Government Code sets out the general procedure for competitive bidding. Cities must publish the time and place that bids will be publicly opened and read aloud at least fourteen days before opening the bids. A city must publish notice at least once a week for two consecutive weeks in a newspaper published in the city. If no newspaper is published in the city, the notice must be posted at the city hall for fourteen days before opening the bids.

A city may indicate in the bid specifications its intention to award certain contracts to the bidder who provides goods and services at the “best value,” but the city must list the authorized best value criteria in the bid specifications. Otherwise, a contract must be awarded to the lowest responsible bidder. TEX. LOC. GOV’T CODE § 252.043 (Vernon Supp. 2004).

A city must competitively bid and award civil engineering construction projects, such as road and water projects, to the lowest responsible bidder. After adopting written definitions and criteria for considering a bidder’s safety record, and properly notifying prospective bidders in the bid specification, a city may consider a bidder’s safety record when determining who is a responsible bidder. see TEX. LOC. GOV’T CODE § 252.0435 (Vernon 1999).

May a city receive bids or proposals electronically?

If a city council adopts rules to ensure the identification, security, and confidentiality of electronic bids or proposals, the city may receive bids or proposals through electronic transmission. TEX. LOC. GOV’T CODE § 252.0415 (Vernon Supp. 2004).

Can the bids be changed after award of the contract?

Once a bid has been opened, it may not be changed for the purpose of correcting an error in the bid price. TEX. LOC. GOV’T CODE § 252.043(g) (Vernon Supp. 2004). The bidder’s common law remedy is to withdraw his or her their bid. *Id.*

If changes in plans, specifications, or scope of work are necessary after the performance of the project has begun, a city may approve change orders to: (1) increase the total contract price up to twenty-five percent, as long as increases in costs are appropriated; or (2) decrease the original contract price by twenty-five percent. TEX. LOC. GOV’T CODE § 252.048 (Vernon 1999). Reductions larger than twenty-five percent are only authorized with the consent of the contractor. *Id.*

The city may delegate authority to an administrative official to approve change orders for up to \$25,000. TEX. LOC. GOV'T CODE § 252.048 (Vernon 1999).

What are the consequences if a city official makes sequential or separate purchases to avoid the competitive bidding requirement?

Sequential or separate purchases of items that in normal purchasing practices would be made in one purchase are prohibited. A municipal officer or employees who intentionally or knowingly make or authorize separate, sequential, or component purchases to avoid the competitive bidding requirements may face a class B misdemeanor and removal from office or employment. TEX. LOC. GOV'T CODE §§ 252.062, 252.063 (Vernon 1999).