PUBLIC PROCUREMENT PRACTICES

An Overview of Texas Law Relating to Municipal Purchasing

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# TABLE OF CONTENTS

Author’s Bio .................................................................................................................. 4

Preliminary Introduction ............................................................................................... 5

I. Traditional Procurement (Design-Bid-Build) ............................................................ 5
   A. Introduction ............................................................................................................ 5
   B. Texas Local Government Code Chapter 252 ....................................................... 5
      1. Competitive Bidding ....................................................................................... 5
      2. Exemptions ........................................................................................................ 7
      3. Change Orders .................................................................................................... 8
      4. Local Preference ............................................................................................... 8
      5. Historically Underutilized Businesses .............................................................. 9
      6. Penalties ............................................................................................................ 9

II. Alternative Procurement and Delivery Systems (S.B. 510) .................................... 9
   A. Introduction ............................................................................................................ 9
   B. Preliminary Matters .............................................................................................. 10
   C. Competitive Bidding ............................................................................................ 11
   D. Competitive Sealed Proposals ............................................................................ 12
   E. Design-Build Contracts ....................................................................................... 12
   F. Construction Manager ......................................................................................... 13
      1. CM Agent .......................................................................................................... 13
      2. CM At-Risk ....................................................................................................... 13
   G. Job Order Contracts ............................................................................................. 15

III. Local Government Corporations ............................................................................. 15
IV. Professional Services Procurement Act ................................................................. 16
   A. Engineering Practices Act ............................................................................. 16
   B. Architect Act ............................................................................................... 16
V. Financial Considerations ................................................................................... 17
   A. Workers Compensation .............................................................................. 17
   B. Payment and Performance Bonds ............................................................ 18
   C. Prompt Pay ................................................................................................ 18
VI. Miscellaneous .................................................................................................. 21
   A. Purchasing Cooperatives ............................................................................ 18
   B. Electronic Bidding ..................................................................................... 19
   C. Reverse Auction ........................................................................................ 19
Conclusion ............................................................................................................ 19

Special Thanks .................................................................................................... 19
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PUBLIC PROCUREMENT PRACTICES

PRELIMINARY INTRODUCTION

Texas cities are major participants in the procurement of goods and services. From office products to vehicles to helicopters, cities are always purchasing products to serve the needs and wants of city residents. Over the years, the legislature has passed many laws, some beneficial and some not, that affect how cities go about procuring goods and services. The two main points that appear to be addressed by those who make the rules, both the federal and state legislative and administrative bodies, are the fear of corruption in the process and the unique ability to address either real or perceived social woes through the public procurement process. This paper is a very brief overview of the methods of, and restrictions on, city procurement in Texas.

The information in this paper is provided for informational purposes and should never be substituted for the advice of local legal counsel.

I. TRADITIONAL PROCUREMENT

A. Introduction

Up until 2001, Chapter 252 of the Texas Local Government Code mandated competitive bidding for any contract that required the expenditure of more than $15,000 in city funds. Prior to 2001, Chapter 252 severely limited the manner in which cities could procure goods and services. The traditional procurement process has advantages, and the most important of these is familiarity. City attorneys, purchasing officers, and other city employees are knowledgeable in this type of procurement. Elected officials like this method because of its political simplicity. When a contract is awarded to the lowest responsible bidder using an objective standard, there is, at least in theory, little room for suggestions of impropriety, cronyism, or favoritism.

However, the assumption has always been that this method will always yield the best value and quality, which is not necessarily true. For example, quality may suffer because a city generally may not consider factors other than price except in specific, narrowly-drawn, circumstances.

B. Texas Local Government Code Chapter 252

1. Competitive Bidding

Currently, the Texas Local Government Code requires that all city contracts over $25,000 must be either competitively bid or must comply with a method described by Subchapter H, Chapter 271. TEX. LOC. GOV’T CODE § 252.021(a). Subchapter H adds several alternatives to competitive bidding for construction projects and is discussed below.

If a city chooses to award a contract based on the traditional competitive bidding scenario, §§ 252.041 and 252.043 prescribe the procedures for notice and award of the contract. If a city chooses to utilize the competitive sealed bidding requirement, notice of the time and place at which
the bids will be publicly opened and read aloud must be published at least once a week for two
consecutive weeks in a newspaper published in the city, and the date of the first publication must be
before the fourteenth day before the date set to publicly open the bids and read them aloud. Id. at §
252.041. If no newspaper is published in the city, the notice must be posted at the city hall for 14
days before the date set to publicly open the bids and read them aloud. Id.

According to § 252.043, 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. Id. at § 252.043(a). The
city is required to indicate in the bid specifications that the contract may be awarded either to the
lowest responsible bidder or to the bidder who provides goods or services at the best value for the
municipality. Id. at § 252.043(c). Cities may use the following criteria when determining best
value:

(1) the purchase price;
(2) the reputation of the bidder and of the bidder's goods or services;
(3) the quality of the bidder's goods or services;
(4) the extent to which the goods or services meet the municipality's needs;
(5) the bidder's past relationship with the municipality;
(6) 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;
(7) the total long-term cost to the municipality to acquire the bidder's goods or
services; and
(8) any relevant criteria specifically listed in the request for bids or proposals.

Id. at § 252.043(b). This requirement may be somewhat misleading for construction contracts
because § 252.043(e) provides that, if the competitive sealed bidding requirement applies to the
contract for a construction project, the contract must be awarded to the lowest responsible bidder or
awarded using an alternative delivery method described by Subchapter H of Chapter 271.
Subchapter H authorizes what is essentially “best value” competitive bidding. Thus, a city has the
authority to construct a project using best value competitive bidding, but the authority to do so
comes from Chapter 271 instead of § 252.043.

A city must use traditional competitive bidding when awarding a contract for the
construction of 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, 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. Id. at § 252.043(d).

If a city chooses to award the project under the traditional method, it must choose the lowest
responsible bidder; but it may reject all bids if it chooses. Id. at § 252.043(a) & (f).

A city has the right to reject a bid that does not comply with the bid specifications, and the
courts will generally not overturn this type of legislative act. See Corbin v. Collin County
Commissioners Court, 651 S.W.2d 55, 57 (Tex. App.—Dallas 1983, no writ).
Some home rule cities have older, restrictive, charter provisions that govern procurement. Any provision in the charter of a home rule city that is in conflict with Chapter 252 and relates to the notice of contracts, advertisement of the notice, requirements for the taking of sealed bids based on specifications for public improvements or purchases, the manner of publicly opening bids or reading them aloud, or the manner of letting contracts, is trumped by the charter, unless the governing body of the municipality elects to have Chapter 252 supersede the charter. Id. at § 252.002. This provision has allowed a city to select a bidder who was not the low bidder based on controlling charter provisions. See Associated General Contractors of Texas v. City of Corpus Christi, 694 S.W.2d 581, 583 (Tex. App.—Corpus Christi 1985, no writ).

Several courts have held that a contract is not created by the mere submission of a bid. The submission by the contractor, and not a city’s solicitation to bid, is generally held to be the offer. Thus, a city probably has no mandate to enter into a contract with the lowest bidder because Chapter 252 grants the right to reject any and all bids. Id. at § 252.043(f). However, a city is probably subject to challenge if it simply rejects the bid that it has chosen and chooses another without repeating the procurement process.

2. Exemptions

Section 252.022 of the Local Government Code provides exemptions from the competitive bidding process. The most notable exemptions are:

1. A procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality - Subsection (a)(1);

2. A procurement necessary to preserve or protect the public health or safety of the municipality's residents - Subsection (a)(2);

3. A procurement necessary because of unforeseen damage to public machinery, equipment, or other property - Subsection (a)(3);

4. A procurement for personal, professional, or planning services - Subsection (a)(4);

5. Paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements - Subsection (a)(9);

6. A public improvement project, already in progress, authorized by the voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes authorized by the voters - Subsection (a)(10);

7. A payment under a developer participation contract authorized by Subchapter C, Chapter 212 - Subsection (a)(11);

8. A city may use an alternative delivery method - Subsection (d).
3. Change Orders

Chapter 252 provides the authority for cities to allow change orders. TEX. LOC. GOV’T CODE § 252.048(a). Cities should be careful not to abuse change-order authority. For example, if a city knows early in the bid process that it wants to make a large change to a contract, and makes that change immediately after awarding the contract, it may create an appearance of impropriety and possibly subject the city to suit. The Texas Attorney General has addressed this issue by stating that an entity subject to a competitive bidding statute must act only to promote the unmistakable legislative policy favoring unrestricted competition for public contracts. See, e.g., Ops. Tex. Att’y Gen. MW- 439 (1982); MW-344, MW-296 (1981), MW-139 (1980); H-1219 (1978); H-1086, H-972 (1977).

Change orders may not increase the original contract price by more than twenty-five percent (25%) and should not be used to purchase new products or to create an entirely new project. Id. at § 252.048(d). In any case, cities should be aware of the perils of “back-dooring” the competitive bidding requirements in this manner or any other.

4. Local Preference

Section 271.905 of the Local Government Code was added in 1999 and 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. TEX. LOC. GOV’T CODE § 271.905(a). 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.

Id. at § 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.

However, another provision, § 2252.002 of the Texas Government Code, states that:

A governmental entity may not award a governmental contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located.
This section is a “tit-for-tat” that somewhat protects Texas bidders from discrimination based on whether another state discriminates against non-resident bidders.

5. Historically Underutilized Businesses

When a city makes an expenditure of more than $3,000 but less than $25,000, the city is required to contact at least two historically underutilized businesses (HUB) on a rotating basis, based on information provided by the Texas Building and Procurement Commission (formerly the General Services Commission) pursuant to Chapter 2161 of the Government Code. TEX. LOC. GOV’T CODE § 252.0215. If the list fails to identify a historically underutilized business in the county in which the city is situated, the city is exempt from this section. More information on HUBs is available at http://www.tbpc.state.tx.us/hub/index.html.

6. Penalties

If a contract is made without complying with Chapter 252, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by any property tax paying resident of the city. TEX. LOC. GOV’T CODE § 252.061.

A city officer or employee may be charged with a Class B misdemeanor if he intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements. Id. at § 252.062. In addition, the final conviction of an officer or employee for violating Chapter 252 results in the immediate removal from office or employment of that person. For four years after the date of the final conviction, the removed officer or employee is ineligible: (1) to be a candidate for or to be appointed or elected to a public office in this state; (2) to be employed by the city with which the person served when the offense occurred; and (3) to receive any compensation through a contract with that city. Id. at § 252.063.

II. ALTERNATIVE PROCUREMENT AND DELIVERY SYSTEMS (S.B. 510)

A. Introduction

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 ability 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.

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. A city utilizing a traditional design-bid-build process via competitive bidding arguably cannot reject the lowest responsible bid even if the contractor is presently involved in a lawsuit with the city for a past project.

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 the 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 used 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 evolution 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. These best-value methods yield time savings, quality, and value, and attorneys for school districts, universities, and construction companies around the state have struggled to fairly and legally implement their newfound authority. Cities can learn much from their experiences. Following is a brief overview of city authority to use alternative delivery systems.

The Texas Municipal League (TML) has sample “packets” of information that include more detail than is covered here and also have sample forms and documents. Please contact the TML Legal Department at 512-231-7400 or legal@tml.org for copies of those materials.

**B. Preliminary Matters**

Section 252.021(a) of the Local Government Code authorizes cities to use the alternative delivery systems outlined in Subchapter H of Chapter 271 in lieu of traditional competitive bidding. However, it is important to note that these methods have certain restrictions.

First, the new methods are only available for “facilities.” Thus, a city project must meet the definition of a facility prior to utilizing any of these methods.

"Facility" means buildings, the design and construction of which, are governed by accepted building codes. The term does not include:
(A) 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

(B) buildings or structures that are incidental to projects that are primarily civil engineering construction projects.

TEX. LOC. GOV’T CODE § 271.111(7). In addition, a city must choose which, if any, of the new methods will produce the best value for the city. Id. at § 271.114(a). 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. Id. at § 271.112(a).

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. Id. at § 271.112(d).

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 briefly outlined below.¹

C. Competitive Bidding

A city is authorized to use “best-value” competitive bidding to select a contractor to perform construction, rehabilitation, alteration, or repair services for a facility. TEX. LOC. GOV’T CODE § 271.115. Under this method, a city is still authorized to reject any and all bids and may take into account the safety record of a bidder pursuant to a written definition and criteria for accurately determining the safety record of a bidder. Id. at § 271.026 & 271.0275.

A city must award a competitively bid contract at the bid amount to the bidder offering the best value to the city according to weighted selection criteria established by the city. The selection criteria may include factors such as:

1. the purchase price;
2. the reputation of the vendor and of the vendor's goods or services;
3. the quality of the vendor's goods or services;
4. the extent to which the goods or services meet the governmental entity's needs;
5. the vendor's past relationship with the governmental entity;

¹ The specific procedures for procurement under each alternative delivery method are clearly detailed in Subchapter H of Chapter 271 of the Local Government Code. For purposes of brevity, the details of each will not be fully covered here. Rather, this section is meant to be an overview.
6. the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses;
7. the total long-term cost to the governmental entity to acquire the vendor's goods or services; and
8. any other relevant factor specifically listed in the request for bids or proposals.

*Id.* at § 271.113(b).

**D. Competitive Sealed Proposals**

A city that wishes to use competitive sealed proposals must first select or designate an engineer or architect to prepare construction documents for the project according to the Professional Services Procurement Act, discussed below. *Tex. Loc. Gov’t Code* § 271.116(b).

The city prepares a request for competitive sealed proposals that includes construction documents, selection criteria, estimated budget, project scope, schedule, and other information that contractors may require to respond to the request. The governmental entity shall state in the request for proposals the selection criteria that will be used to select the contractor. *Id.* at § 271.116(d). The city may use the criteria listed previously in this paper under “competitive bidding.”

The city then receives, publicly opens, and reads aloud the names of the offerors and, if any are required to be stated, all prices stated in each proposal. Not later than the 45th day after the date of opening the proposals, the city must evaluate and rank each proposal submitted in relation to the published selection criteria. *Id.* at § 271.116(e).

Next, the city selects the offeror that offers the best value based on the published selection criteria and on its ranking evaluation. The city first attempts to negotiate a contract with the selected offeror. The city and its engineer or architect may discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. If the city is unable to negotiate a contract with the selected offeror, the city must, formally and in writing, end negotiations with that offeror and proceed to the next offeror in the order of the selection ranking until a contract is reached or all proposals are rejected. *Id.* at § 271.116(f).

Finally, the city must provide, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility. *Id.* at § 271.116(c).

**E. Design-Build Contracts**

Design-build is an alternative delivery method whereby a single company provides both design and construction under a single contract. A design-build firm consisting of a contractor, architect, and engineer contracts with, and is responsible to, the owner for delivery of the project. However, under § 271.119(b), a city must designate its own independent architect or engineer to act as its representative for the project in accordance with the Professional Services Procurement Act, discussed below.
A design-build firm is picked using a two-phase procurement process. First, a project owner prepares a request for qualifications. The request includes information on the project scope, project site, budget, special systems, and other relevant information. In addition, the owner prepares a “design criteria package.” The package may include criteria such as description and survey information regarding the site, interior space requirements, quality standards, and other requirements as necessary. Tex. Loc. Gov’t Code § 271.119(c). Based on the request for qualifications, the owner selects a shortlist of no more than five potential firms based on the firms’ expertise, technical competence, capability to perform, past performance, and other factors submitted by the firm. Id. at § 271.119(d)(1). At the next phase, the shortlisted firms submit additional information such as the technical approach, implementation plan, and the cost methodologies that each firm will use to reach the project goals. The city then ranks the firms and selects the firm that offers the best value. Id. at § 271.119(d)(2). Subsequent to the choice, the city attempts to negotiate a contract with the selected firm. If the city is unable to negotiate a satisfactory contract with the selected firm, the city shall, formally and in writing, end negotiations with that firm and proceed to negotiate with the next firm in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. Id.

Payment under the design-build contract is usually based on either a lump-sum or a guaranteed maximum price, and can be guaranteed at one of several stages throughout a project, including the preliminary design phase, detailed design phase, or anywhere in between.

F. Construction Manager

1. CM Agent

A construction manager-agent (CMA) is a legal entity that provides consultation to the governmental entity regarding construction, rehabilitation, alteration, or repair of the facility. Tex. Loc. Gov’t Code § 271.117(b). Utilizing a CMA allows a city to hire someone with the expertise to oversee a construction project on the city’s behalf and who represents the governmental entity in a fiduciary capacity. Id.

Before or concurrently with selecting a CMA, a city must select or designate an engineer or architect to prepare the construction documents for the project. Id. at § 271.117(c). The city then selects a CMA on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers or architects under the Professional Services Procurement Act, except that notice must be published in a newspaper of general circulation in the county in which the city's central administrative office is located. Id. at § 271.117(d).

After the selection of the CMA, the city procures, in accordance with applicable law (e.g., competitive bidding or an alternative delivery method), a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specific portion of the work. In other words, the city usually contracts directly with the trades, with the CMA administering the work in lieu of a general contractor.

2. CM At-Risk

Construction management is oftentimes best suited to larger projects that are schedule sensitive, difficult to define, or subject to frequent change orders. A construction manager-at-risk (CMAR) is a legal entity that assumes the risk for construction, rehabilitation, alteration, or repair
of a facility at the contracted price as a general contractor and provides consultation to the governmental entity regarding construction during and after the design of the facility. Tex. Loc. Gov’t Code § 271.118(b).

Before or concurrently with selecting a CMAR, a city must select or designate an engineer or architect to prepare the construction documents for the project. Id. at (c).

A city may select the CMAR in either a one-step or two-step process. The city must prepare a request for proposals, in the case of a one-step process, or a request for qualifications, in the case of a two-step process, that includes general information on the project site, project scope, schedule, selection criteria, estimated budget, and the time and place for receipt of proposals or qualifications, as applicable, and other information that may assist the city in its selection of a CMAR. The city must state the selection criteria in the request for proposals or qualifications, as applicable. The selection criteria may include the offeror's experience, past performance, safety record, proposed personnel and methodology, and other appropriate factors that demonstrate the capability of the CMAR. If a one-step process is used, the city may request, as part of the offeror's proposal, proposed fees and prices for fulfilling the general conditions. If a two-step process is used, the city may not request fees or prices in step one. In step two, the city may request that five or fewer offerors, selected solely on the basis of qualifications, provide additional information, including the CMAR’s proposed fee and its price for fulfilling the general conditions. Id. at (e).

At each step, the city must receive, publicly open, and read aloud the names of the offerors. At the appropriate step, the city must also read aloud the fees and prices, if any, stated in each proposal as the proposal is opened. Not later than the 45th day after the date of opening the proposals, the city must evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals. Id. at (f).

The city then selects the offeror that submits the proposal that offers the best value for the governmental entity based on the published selection criteria and on its ranking evaluation and attempt to negotiate a contract. If the city and first offeror cannot reach an agreement, the city must, formally and in writing, end negotiations with that offeror and proceed to negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. Id. at (g).

A CMAR must publicly advertise and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. A CMAR may seek to perform portions of the work itself if the CMAR submits its bid or proposal for those portions of the work in the same manner as all other trade contractors or subcontractors and if the city determines that the CMAR’s bid or proposal provides the best value. Id. at (h).

If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected, the CMAR may, without advertising, fulfill the contract requirements itself or select a replacement trade contractor or subcontractor to fulfill the contract requirements. Id. at (k).

The contract is usually paid by a fixed contract amount or a guaranteed maximum price.
G. Job Order Contracts

Job order contracting is a means to handle the minor construction, repair or alteration of facilities when work is of a recurring nature, but delivery times, type and quantities of work are indefinite. Examples may include things like carpet replacement and repainting. The usual contract term is for six months to two years with an option to renew. This type of contract is procured by a request for competitive sealed proposals based on experience, qualifications, past performance, technical ability, financial stability, reputation, and price that provide the overall best value. Job order contracting can be advantageous to a city because it eliminates the procedural requirements necessary to implement small projects and provides for a fast response by the contractor. It may, however, be perceived as a threat to in-house public works departments. For more detailed information, see TEX. LOC. GOV’T CODE § 271.120.

III. LOCAL GOVERNMENT CORPORATIONS

Subchapter D of Chapter 431, Texas Transportation Code, currently authorizes a city to create a local government corporation (LGC) to "aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments." TEX. TRANS CODE § 431.101(a). Subchapter D has been used by some local governments as an innovative and flexible tool to create non-profit corporations to aid in the procurement of goods and services or the construction of public works projects using alternative procurement and delivery methods.

An LGC is legally permitted to avoid restrictive procurement provisions because it is exempted from many of the restrictive statutory requirements presently applicable to the local government that creates it. For example, an LGC is exempt from the competitive bidding provisions that apply to cities and counties. See Id. at § 431.101(e); Op. Tex. Att’y Gen. No. JC-206 (2000).

The main purpose of creating an LGC, the utilization of alternative procurement and delivery methods in construction, is expressly authorized by S.B. 510 (2001), which is now codified in Chapter 252 and Subchapter H of Chapter 271 of the Texas Local Government Code. S.B. 354, passed by the legislature but vetoed by Governor Perry, would have severely curtailed the flexible nature of LGCs. The bill imposed such harsh restrictions on LGCs that their usefulness would have become practically nonexistent.

Contrary to the belief of a few, LGCs are not being abused. Rather, they are providing, with necessary supervision and statutory constraints, yet another construction alternative to achieve the best value and quality for the taxpayers. These corporations are created differently from political subdivisions and, more importantly, do not possess governmental authority, but may only “aid and act on behalf of” a city or county to accomplish the city’s or county’s governmental purposes. LGCs are subject to control and supervision by the governmental entity that creates them because the governmental body approves the corporation’s articles of incorporation and appoints the corporation’s directors. In addition, a corporation is subject to both the Texas Public Information and Open Meetings Acts. Id. at §§ 431.004; 431.005; 431.101(a). Out of the over 1,200 cities in Texas, very few have utilized this method of construction, but the elected governing bodies of Texas cities retain the local control to use this tool when it provides the best procedure under the circumstances.
IV. PROFESSIONAL SERVICES PROCUREMENT ACT

Chapter 2254 of the Texas Government Code prohibits a city from selecting a professional on the basis of competitive bids. Professional services are defined as accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising; or professional nursing. TEX. GOV’T CODE § 2254.002(2). Section 2254.003 provides that awards for professional services be on the basis of demonstrated competence and qualifications and for a fair and reasonable price. To procure professional services, a city must first select the most highly qualified provider on the basis of demonstrated competence and qualifications and then attempt to negotiate a contract at a fair and reasonable price. Id. at § 2254.004. If a satisfactory contract cannot be negotiated with that provider, the next most highly qualified provider is selected and so on with the same process until an agreement is reached.

A contract entered into or an arrangement made in violation of Chapter 2254 is void as against public policy. Id. at § 2254.005.

A. Engineering Practices Act

The Texas Engineering Practices Act (Act) provides that a city may not construct a public work involving engineering in which the public health, welfare, or safety is involved, unless: (1) the engineering plans, specifications, and estimates have been prepared by an engineer; and (2) the engineering construction is to be performed under the direct supervision of an engineer. TEX. OCC. CODE § 1001.407.

The Act does not apply to:

(1) a public work that involves electrical or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $8,000;

(2) a public work that does not involve electrical or mechanical engineering and for which the contemplated expenditure for the completed project does not exceed $20,000; or

(3) road maintenance or betterment work undertaken by the commissioners court of a county.

Id. § 1001.053.

B. Architect Act

The Texas Architects Act provides that a registered architect must prepare the architectural plans and specifications for:

(1) a new building that is to be constructed and owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building will be used for education, assembly, or office occupancy and the construction costs exceed $100,000; or
(2) any alteration or addition to an existing building that is owned by a State agency, a political subdivision of this State, or any other public entity in this State if the building is used or will be used for education, assembly, or office occupancy, the construction costs of the alteration or addition exceed $50,000, and the alteration or addition requires the removal, relocation, or addition of any walls or partitions or the alteration or addition of an exit.

TEX. OCC. CODE § 1051.303.

V. FINANCIAL CONSIDERATIONS

A. Workers Compensation Coverage

In 1991, in the midst of a complete overhaul of the workers’ compensation insurance system, a new provision went into effect that has drastically affected public construction. It requires that each contractor and subcontractor involved in a “building or construction contract” with a governmental entity in Texas provide proof that it covers its employees through workers’ compensation insurance. TEX. LABOR CODE § 406.096(a) & (b). This provision is not mandatory for the private sector. Detailed regulations implementing the statute are found in the Texas Workers’ Compensation Commission Rule 110.110.

The seminal case interpreting the Labor Code provision has held that the requirements are indeed mandatory. A public entity may not hire a contractor that does not subscribe to the state’s workers’ compensation system. Beldon Roofing & Remodeling Co. v. San Antonio Water System, 898 S.W.2d 351, 355 (Tex. App.—San Antonio 1995, writ denied). A public employer cannot opt out of the workers’ compensation system. TEX. LABOR CODE § 406.002(a). The Beldon court found this statute was indicative of the Legislature’s intent to ensure coverage for all workers working for or with public bodies. 898 S.W.2d at 353.

The only stated exemption from the workers’ comp rule is for maintenance employees working for an employer whose primary business does not include building or construction. TEX. LABOR CODE § 406.096(d). Attorney general opinions have defined “maintenance” generally as ordinary upkeep and repairs necessary to preserve something in good condition. Tex. Att’y Gen. Op. No. DM-469 (1998). However, the same office specifically refused to rule on whether some of the following contracts were subject to the workers’ comp rule: the installation of carpet for a single office, the replacement of a single glass window pane, or even annual service contracts for elevator and fire alarm maintenance. Tex. Att’y Gen. Op. No. DM-300 (1994).

The Texas Municipal League has advised cities to require workers’ comp for all contracts, period, regardless of the type or compensation involved. Why so broad an interpretation? DM-300 rules out several plausible attempts to develop further exceptions to the statutory rule. First, the opinion states that no “small contract” exception exists, even for fifty-dollar carpet repair jobs. It acknowledges that very small contracts will be substantially more expensive but states that “the legislature anticipated this effect and determined that the added cost was justified by the benefits of requiring coverage.” It implies that “smaller and less expensive independent contractors” will have to pass on the cost of subscription to the workers’ compensation system.
Second, DM-300 holds that the governmental entity may not enter into an agreement in which the workers’ compensation carrier for the entity adds the contractor’s employees onto the entity’s policy as covered employees. The entity is not a “hiring contractor” as defined by § 406.141 of the Labor Code since it does not act as a contractor when it pays a company to do work on its public projects. Perhaps a city could hire a one or two person firm as temporary “employees” rather than contractors and cover them with its policy this way. Having cities go to this length, however, is probably not what the Legislature intended.

Finally, DM-300 opines that the statute is not met when a general contractor and its subcontractors enter into agreements that the subs are independent contractors and accordingly do not have to be covered by workers’ compensation insurance. This last holding addresses the most common argument cities encounter when dealing with contractors that do not carry workers’ compensation, yet still desire to bid on public projects.

**B. Payment and Performance Bonds**

A city entering into a public works contract must require the contractor, before beginning the work, to execute a payment bond to the city if the contract is in excess of $25,000. Tex. Gov’t Code § 2253.021(a)(2). The purpose of a payment bond is to protect subcontractors and suppliers providing goods or services to the prime contractor.

A city entering into a public works contract must require the contractor, before beginning the work, to execute a performance bond to the city if the contract is in excess of $100,000. Tex. Gov’t Code § 2253.021(a)(1). The purpose of a performance bond is to protect the interests of the city by ensuring the contractor’s faithful performance of his obligations under the contract.

**C. Prompt Pay**

Chapter 2251 provides that a city must pay on contracts promptly. The law governs payments to any vendor that supplies goods or services to cities and generally requires payment within thirty days of receiving the goods, services, or an invoice, with several exceptions. Tex. Gov’t Code § 2251.021. The law defines a vendor as someone who supplies goods or a service to a city, and the attorney general has confirmed that it applies to construction contracts. Id. at § 2251.001(10); Op. Tex. Att’y Gen. No. DM-88 (1992).

**VI. MISCELLANEOUS**

**A. Purchasing Cooperatives**

Subchapters D and F of Chapter 271 of the Local Government Code authorize cities to enter into cooperatives with the state or other local governments for the purpose of procuring goods and services. The state purchasing cooperative is online at www.tbpc.state.tx.us, and TML’s and TASB’s cooperative is online at www.tml.org. In addition, several councils of governments offer cooperative purchasing.
B. Electronic Bidding

A city is now authorized to receive bids or proposals under Chapter 252 through electronic transmission if the governing body adopts rules to ensure the identification, security, and confidentiality of electronic bids or proposals and to ensure that the electronic bids or proposals remain effectively unopened until the proper time. Tex. Loc. Gov’t Code § 252.0415(a).

C. Reverse Auction

Cities are now authorized by § 252.021 of the Local Government Code to use a reverse auction procedure in accordance with § 2155.062(d) of the Government Code.

CONCLUSION

As long as there are cities in Texas, those cities will purchase goods and services to serve the needs and wants of city residents. The laws that govern city procurement are based on the fear of corruption in the process and the unique ability to address either real or perceived social woes through the public procurement process. This paper is meant only to provide a very brief overview of the major statutes that affect city procurement in this area. For specific questions, please contact the Texas Municipal League Legal Department at 512-231-7400 or visit the website at www.tml.org.

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