

PURCHASING LAW BASICS FOR COUNTIES

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PURCHASING LAW BASICS FOR COUNTIES

Introduction

Purchasing law is a complex area, and the purpose of this paper is to provide an introduction to the obligations of counties in procuring goods and services.

Each governmental entity, whether the State, or a city, county or other local government, has a group of laws that sets out the procurement requirements for that entity. The basic framework is similar for each type of governmental entity: (1) competitive procurement is required for purchases over \$50,000 unless a statute provides an exemption, and (2) the competitive sealed bid method must be used unless a statute allows or requires competitive sealed proposals or another procurement method to be used. The specific requirements may differ, however, for the various entities. The list of exemptions may be different, for example, or the allowable purchase methods may be different for similar types of goods or services. There is one type of procurement that is uniform for most State agencies and virtually all local governments, and that is procurement for construction projects under Chapter 2269 of the Texas Government Code. The procurement methods set out in Chapter 2269 are the only ones that can be used by a county for selection of a contractor for construction projects. Because an understanding of the statutory provisions for construction projects requires an understanding of the alternative construction methods, I've described these methods and procurement requirements in a separate paper entitled "Alternative Construction Delivery Methods for Public Works Projects". This paper will not cover procurement methods for construction projects under Chapter 2269.

This paper covers statutory requirements that apply to counties. Note that some laws applicable to counties are set out in the Texas Local Government Code, referred to in this paper as the "TLGC." Some laws are set out in the Texas Government Code, referred to in this paper as the "TGC."

When reading statutes, whether in the TLGC or in the TGC, it is extremely important to make sure you have correctly determined the type of governmental entity to which the statute applies. Statutes may use terms such as "local government," "governmental entity," or "local governmental entity" and each of these terms may refer to a different set of entities. In addition, two or more statutes may use the same term, but define it differently. One statute, for example, may define "local governmental entity" to include counties, while another statute may expressly provide that the term "local governmental entity" excludes counties. Always check the definitions set out in the statutes.

One of the aspects of purchasing that makes it difficult to learn, is that there is a fairly well-established body of generally accepted purchasing procedures and practices that are not set out by statute or in case law. These established procedures for government purchasing agents can be found in purchasing manuals written or adopted by government purchasing offices. One source for information on purchasing procedures is the Model Purchasing Manual for Texas Cities and Counties, 2010 ed. published by the Texas Comptroller's Office. The information on procedures is useful, but some of the information on procurement law is out of date. The manual can be downloaded from the Comptroller's website at Texasahead.org/lga/finances/purchasing/.

Many questions arise on bid protests and the disqualification of bids or proposals. Statutes do not generally address these topics and there are not many cases or Texas Attorney General Opinions that provide guidance. Section 7 of this paper provides some information on these topics.

SECTION I.

COMPETITIVE PROCUREMENT REQUIREMENTS UNDER CHAPTER 262 TLGC

Subsection 1.0. Definitions.

"Bid Bond" – a bond issued by a surety which guarantees the obligation of a bidder who is awarded the contract to enter into a contract and furnish any required payment and performance bonds. Upon the bidder's failure to do so, the government may draw down the full amount of the bond.

"Bid Guarantee or Bid Security" – an amount required by the government in cash, cashier's check or wire transfer, in lieu of a bid bond, to secure the bidder's performance of its obligations after award.

"Bond funds" includes money in the treasury received from the sale of bonds and includes the proceeds of bonds that have been voted but have not been issued and delivered.

"Civil engineering project" means a project that is based primarily on civil engineering design and plans, including 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.

“Competitive Sealed Bids” – bids submitted in a sealed envelope or container in response to a Request for Bids or Invitation to Bids, or submitted electronically where the government permits electronic submissions.

“Competitive Sealed Proposals” – proposals submitted in a sealed envelope or container in response to a Request for Proposals, or submitted electronically where the government permits electronic submissions.

“Component purchases” means purchases of the component parts of an item that in normal purchasing practices would be purchased in one purchase.

“Current funds” includes money in the county treasury that is available in the current tax year, revenue that may be anticipated with reasonable certainty to come into the county treasury during the current tax year, and emergency funds.

“High technology item” – means a service, equipment, or good of a highly technical nature, including:

(A) data processing equipment and software and firmware used in conjunction with data processing equipment;

(B) telecommunications equipment and radio and microwave systems;

(C) electronic distributed control systems, including building energy management systems; and

(D) technical services related to those items.

“Invitation to Bid (“ITB”)” – the method by which the government initiates the competitive bid process by inviting members of the public to submit bids.

“Item” – means any service, equipment, good or other tangible or intangible personal property, including insurance and high technology items. The term

does not include professional services as defined by Section 2254.002, Government Code.

“Lowest and best” – means a bid or offer providing the best value considering associated direct and indirect costs, including transport, maintenance, reliability, life cycle, warranties, and customer service after a sale.

“Normal purchasing practice” – means:

(A) an accepted custom, practice, or standard for government procurement in the state; or

(B) a practice recognized by a national purchasing association regarding the purchase of a particular good or service.

“Payment Bond” – a bond issued by a surety to guarantee the payment by the general contractor or subcontractors, up to the amount of the bond.

“Performance Bond” – a bond issued by a surety to guarantee the performance by a contractor of its obligations under the contract, up to the amount of the bond.

“Planning services” 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.

“Purchase” – means any kind of acquisition, including by a lease or revenue contract.

“Request for Bids (“RFB”)” – same as Invitation to Bid.

“Request for Proposals (“RFP”)” – the procedure by which governmental entities initiate the Competitive Sealed Proposal process by inviting members of the public to submit proposals.

“Request for Qualifications (“RFQ”)” – the process used by many governmental entities to select providers of professional services for a

specific task or project, by inviting members of those professions to submit their qualifications to perform the work.

“Reverse Auction Procedure” – a competitive purchasing procedure described in Section 2155.062(d) of the TGC, where the government publishes a description of goods and services needed and uses an auction format to get bids from suppliers over the internet.

“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 items that in normal purchasing practices would be purchased in one purchase.

“Time warrant” includes any warrant issued by a county that is not payable out of current funds.

Subsection 1.1 General Rules

A. STATUTORY AUTHORIZATION

Statutes Authorizing Procurement

a. Chapter 262 of the Texas Local Government Code (“TLGC”) sets out the basic competitive requirements for the procurement of goods and services by a county. It also describes the procurement methods which a county can use: (i) competitive sealed bid, (ii) competitive sealed proposal, (iii) reverse auction method (2155.062(d) TGC), and (iv) alternative construction delivery methods (Chapter 2269 TGC).

b. Section 2155.062(d) of the Texas Government Code (“TGC”) describes the reverse auction method, which counties may use for the procurement of goods and services.

c. Chapter 2269 of the Texas Government Code (“TGC”) sets out alternative construction delivery methods for construction projects. It authorizes counties to use selection methods for construction projects that are not available under Chapter 262, including construction manager at risk, construction manager agent, design-build and job order contracting. Chapter 2269 allows only some of these methods to be used for civil

engineering projects. Before using an alternative construction delivery method other than competitive sealed proposal, the governing body of the county must make a determination that the method provides the “best value” for the county.

d. Section 271.083 of the TLGC and Chapter 791 of the TGC authorize counties to participate in cooperative purchasing programs established by the State of Texas or other local governments for the purchase of goods and services. Participation in these programs satisfies the county’s competitive procurement requirement.

e. Chapter 2254 of the TGC sets out the requirements for the procurement of professional services for architects, engineers, and surveyors. Architects, engineers and land surveyors cannot be selected based on their fees or the cost of their services. Instead, the county must first determine the person or firm that is the best qualified to perform the services based on demonstrated competence and qualifications, and then negotiate a contract on fair and reasonable terms.

f. Subchapter C of Chapter 271 of the TLGC (the Certificate of Obligation Act) establishes the procurement method when certificates of obligation are used for the purchase of goods or services, including construction projects.

B. BASIC PURCHASING REQUIREMENTS UNDER CHAPTER 262

Requirement to use a Competitive Procurement Process.

Section 262.023 provides that before a county may purchase one or more items under a contract that will require an expenditure of more than \$50,000, the commissioners court of the county must:

- a. comply with the procedures for competitive sealed bidding or competitive sealed proposals set out in Chapter 262; or
- b. use the reverse auction procedure for purchasing set out in Section 2155.062(d) of the TGC; or
- c. comply with a method described by Chapter 2269 of the TGC (Alternative Construction Delivery Methods and Design-Build for certain civil engineering projects).

Limitation on Procurement Methods Due to Source of Funds

a. **Certificates of Obligation.** The procurement methods set out in B.1 above apply to contracts for which payment will be made from current funds, bond funds or through anticipation notes or time warrants. If certificates of obligations will be used for payment, the provisions in the Certificate of Obligation Act (describe in A. 1. f. above) apply. The Certificate of Obligation Act used to requirement procurement only through competitive bid, but it was amended in 2013 to authorize purchases through (i) “competitive procurement” and (ii) and use of the alternative construction delivery methods under Chapter 2269.

b. ***Anticipation Notes and Chapter 2269.*** If a county wants to use an alternative construction delivery method authorized by Chapter 2269, with payment to be made through the use of anticipation notes, the county may not issue anticipation notes for the payment of the contract in an amount that exceeds the lesser of:

- i. 20 percent of the county’s budget for the fiscal year in which the county enters into the contract, or
- ii. \$10 million.

c. ***State or Federal Programs.*** If purchases are made through a grant or other program that is funded in whole or in part by the State or the federal government, the county must strictly follow the purchasing requirements established by the program. Failure to do so may result in the loss of funds or ineligibility for reimbursement under the program. Generally compliance with the statutory procedures applicable to counties outlined in this paper will satisfy the procurement requirements of the program. However, the program may impose special requirements or compliance with State or federal laws that would not otherwise apply to counties.

3. Prohibition on Separate, Sequential or Component Purchases

A county may not divide purchases into separate, sequential, or component purchases (see the definition of these terms in Subsection 1.0), so that the contract amount of each purchase is \$50,000 or less, for the purpose of avoiding the competitive procurement requirements of Chapter 262. All separate, sequential or component purchases of items ordered or purchased, with the intent of avoiding the competitive procurement requirements of Chapter 262, from the same supplier, by the same officer, department, or institution, are treated as if they are a part of a single purchase and of a single contract. This means that cost of all such

purchases must be aggregated, and once the \$50,000 threshold has been reached, all subsequent purchases must be made using a competitive procurement method. Separate purchases of office supplies by an individual department, however, are not considered to be part of a single purchase and single contract by the county, if a specific intent to avoid the requirements of Chapter 262 is not present.

C. **METHODS THAT MAY BE USED FOR THE PURCHASE OF GOODS AND SERVICES UNDER CHAPTER 262**

1. Competitive Sealed Bids. A county that is purchasing goods or services under the procedures set out in Chapter 262 must use the competitive sealed bid method unless the Chapter expressly authorizes the use of competitive sealed proposals or an alternative procedure. Award will be made to the responsible bidder who submits the lowest and best bid.

The procedure for Competitive Sealed Bids is described in Subsection 1.2, paragraph A below.

2. Competitive Sealed Proposals.

A county may use competitive sealed proposals for the purchase of:

- i. insurance;
- ii. high technology items,
- iii. landscape maintenance;
- iv. travel management; or
- v. recycling.

b. A county in which a purchasing agent has been appointed (under section 262.011) or employed (under section 262.0115), may use the competitive sealed proposal process for the purchase of insurance or high technology items. In addition, the method may be used to purchase other items when the county official who makes purchases for the county determines, with the consent of the commissioners court, that it is in the best interest of the county to make a request for proposals.

The procedure for Competitive Sealed Proposals is described in Subsection 1.2, paragraph B below.

3. Alternative Multistep Competitive Proposal Procedure

If the county official who makes purchases for the county determines that it is impractical to prepare detailed specifications for an item to support the

award of a purchase contract, the official shall notify the commissioners court of its determination. If the commissioners court makes the same finding, then the county official may use the multistep competitive proposal procedure provided by Section 262.0295 is described in Subsection 1.2, paragraph C below.

4. Reverse Auction Method. A county may use the reverse auction method for the purchase of goods and services, as more fully described in Subsection 1.2, paragraph D below.

5. Cooperative Purchasing Methods. A County may purchase goods and services through a cooperative purchasing program as described in Section 2 of this paper.

6. Alternative Construction Methods under Chapter 2269. A county may use the procedures set out in Chapter 2269 of the TGC for the procurement of construction projects, including repairs and renovations.

The methods authorized to be used by Chapter 2269 for architectural projects are:

- a. Competitive Sealed Bids
- b. Competitive Sealed Proposals
- c. Construction Manager Agent
- d. Construction Manager at Risk
- e. Design Build
- f. Job Order Contracting

The methods authorized by Chapter 2269 for civil engineering projects are:

- a. Competitive Sealed Bids;
- b. Competitive Sealed Proposals;
- c. Construction Manager at Risk; and
- d. A separate Design Build method applicable only to civil engineering projects

7. Competitive Procurement Procedures For Exempt Purchases or Where There is No Bid.

a. A county that complies in good faith with the competitive bidding requirement and receives no responsive bids for an item may procure it using a competitive procurement procedure adopted by the county purchasing agent, or in counties where there is none, by the commissioners court.

- b. Items that are exempt from having to be purchased through a competitive procurement process must be purchased through a process established by the county purchasing agent, or in counties where there is none, by the commissioners court.

The procedure adopted by the purchasing agent or commissioners court must provide competition, to the extent practicable. For example, the county may establish a requirement that at least three vendors must be contacted to obtain price quotes before a selection is made.

D. EXEMPTIONS FROM THE REQUIREMENT TO USE A COMPETITIVE PROCUREMENT METHOD

1. Expenditure of \$50,000 or less. A county does not have to use a competitive procurement method if the amount of the contract is less than \$50,000.
2. Discretionary exemptions. A county does not have to comply with the competitive procurement requirements of Chapter 262 for any of the following expenditures, PROVIDED THAT THE COMMISSIONERS COURT, BY ORDER, FIRST GRANTS THE EXEMPTION:
 - a. a procurement made because of a public calamity if it is necessary to make the purchase promptly requires the immediate appropriation of money to relieve the necessity of the citizens or preserve the property of the county;
 - b. a procurement necessary to preserve or protect the public health or safety of the county's residents;
 - c. a procurement necessary because of unforeseen damage to public machinery, equipment, or other property;
 - d. a procurement for personal or professional services;
 - e. any individual work that is performed and paid for by the day as the work progresses, provided that no individual is compensated under this provision for more than 20 working days in any three-month period;
 - f. a purchase of land or right-of-way;

g. an item that can be obtained from only one source* (but see below), including:

- (i) items for which competition is precluded because of patents, copyrights, secret processes, or natural monopolies;
- (ii) films, manuscripts, or books;
- (iii) electric power, gas, water, and other utility services;
- (iv) captive replacement parts or components for equipment;
- (v) an item of food** (but see below); and
- (vi) personal property sold:
 - (1) at an auction by a state licensed auctioneer;
 - (2) at a going out of business sale held in compliance with Ch. 17, Subch. F of the Texas Bus. and Commerce Code; or
 - (3) by a political subdivision of this State, a state agency of this state, or an entity of the federal government

a. any work performed under a contract for community and economic development made by a county under Section 381.004, TLGC; or

b. vehicle and equipment repairs.

c. A renewal or extension of a lease or an equipment maintenance agreement if the commissioners court, by order grants the exemption, and:

- (i) the lease or agreement has gone through the competitive bidding procedure within the preceding year;
- (ii) the renewal or extension does not exceed one year; and
- (iii) the renewal or extension is the first renewal or extension of the lease or agreement.

Note:

* If the sole source exemption is used (g. above), then the county official who makes purchases for the county must provide the

commissioners court with a signed statement that the purchase is available from only one source, and the commissioners court must enter in its minutes a statement to that effect.

** The exemption for food (g (v) above) applies only to the sealed competitive bidding requirements on food purchases. Counties must solicit at least three bids for purchases of food items by telephone or written quotation at intervals specified by the commissioners court. Counties must award food purchase contracts to the responsible bidder who submits the lowest and best bid or shall reject all bids and repeat the bidding process. The purchasing officer taking telephone or written bids shall maintain, on a form approved by the commissioners court, a record of all bids solicited and the vendors contacted. This record shall be kept in the purchasing office for a period of at least one year or until audited by the county auditor.

E. COMPETITIVE PROCUREMENT PROCEDURES FOR EXEMPT TRANSACTION

Section 262.0245 requires the county purchasing agent, or, in a county without a purchasing agent, the commissioners court to adopt procedures that provide for competitive procurement, to the extent practicable under the circumstances, for the procurement of items not subject to competitive procurement. An example would be getting price quotes from three vendors.

Subsection 1.2

Competitive Procurement Procedures Under Chapter 262

A. COMPETITIVE SEALED BIDS UNDER CHAPTER 262

1. Notice. The county must provide notice of the proposed purchase at least once a week for two consecutive weeks in a newspaper of general circulation in the county. The date of the first publication must be at least 14 days before the date of the bid opening.

- a. The notice published in the newspaper must include:
 - i. A general statement of the proposed purchase;
 - ii. The name and telephone number of the purchasing agent, and
 - iii. The county website address, if any.

- iv. the specifications describing the item to be purchased or a statement of where the specifications may be obtained;
 - v. the time and place for receiving and opening bids and the name and position of the county official or employee to whom the bids are to be sent;
 - vi. whether the bidder should use lump-sum or unit pricing;
 - vii. the method of payment by the county;
 - viii. the type of bond required by the bidder;
- b. If any part of the payment for a proposed purchase will be made through time warrants, the notice also must include:
- i. a statement of the maximum amount of time warrant indebtedness,
 - ii. the rate of interest on the time warrants, and
 - iii. the maximum maturity date of the time warrants.
- c. A notice for the purchase of earth-moving equipment, material-handling, road maintenance, or construction equipment may include a request for information about the costs of the repair, maintenance or repurchase of the equipment. The commissioners court may require the bidder to furnish to the county, in a contract for the purchase of the equipment, a bond to cover the repurchase costs of the equipment.

2. Prebid Conference

- a. The commissioners court may require a principal, officer, or employee of each prospective bidder to attend a mandatory pre-bid conference conducted for the purpose of discussing contract requirements and answering questions of prospective bidders.
- b. After a mandatory pre-bid conference is conducted, any additional required notice for the proposed purchase may be sent by certified mail, return receipt requested, only to the prospective bidders who attended the conference.

c. The commissioners court may condition acceptance of a bid on compliance with a requirement for attendance at a mandatory pre-bid conference.

3. Opening of Bids

a. The county official who makes purchases for the county shall open the bids on the date specified in the notice.

b. The date specified in the notice may be extended if the commissioners court determines that the extension is in the best interest of the county.

c. All bids, including those received before an extension is made, must be opened at the same time. The commissioners court may adopt an order that delegates the authority to make extensions to the county official who makes purchases for the county.

d. Opened bids shall be kept on file and available for inspection by anyone desiring to see them until the first anniversary date of the bid opening.

e. Opened bids are subject to disclosure under the Texas Public Disclosure Act. However trade secrets and information made confidential under the Act are not subject to disclosure.

4. Award of Contract

a. The officer in charge of opening the bids shall present them to the commissioners court in session.

b. The court must award the contract to the responsible bidder who submits the lowest and best bid or reject all bids.

c. A contract may not be awarded to a bidder who is not the lowest dollar bidder meeting specifications unless, before the award, each lower bidder is given (i) notice of the proposed award and (ii) an opportunity to appear before the commissioners court and present previously unconsidered evidence concerning the lower bid as best, which may include evidence of the bidder's responsibility.

Bidder's Safety Record. In determining who is a responsible bidder, the commissioners court may take into account the safety record of the bidder, of the firm, corporation, partnership, or institution represented by the bidder, or of anyone acting for such a firm, corporation, partnership, or institution if:

(i) the commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder;

(ii) the governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and

d. Before a contract is awarded, a bidder must give written notice to the officer authorized to open bids that the bidder intends to protest an award of the contract to a bidder that is not the lowest bidder. This requirement does not limit the ability of a bidder to speak at a public meeting of the commissioners court under the rules established by the court.

e. In determining the lowest and best bid for a contract for the purchase of earth-moving, material-handling, road maintenance, or construction equipment, the commissioners court may consider the information submitted on the cost of repair, maintenance and repurchase.

f. In determining the lowest and best bid for a contract for the purchase of road construction materials, the commissioners court may consider the pickup and delivery locations of the bidders and the cost to the county of delivering or hauling the material to be purchased.

g. The commissioners court may award contracts for the purchase of road construction material to more than one bidder if each of the selected bidders submits the lowest and best bid for a particular location or type of material.

h. If after the award the successful bidder fails to qualify for required bonds, or is otherwise unable to meet the requirements for the award, the commissioners court may award the contract to the next bidder in order of ranking as the lowest and best bid.

i. Identical Bids. If two responsible bidders submit the lowest and best bid, the commissioners court shall decide between the two by drawing lots in a manner prescribed by the county judge.

B. COMPETITIVE SEALED PROPOSALS UNDER CHAPTER 262

1. Types of Goods and Services. This method can be used for the purchase of goods and services described in Subsection 1.1, paragraph C.
2. Notice. The county must provide notice of the request for sealed proposals in the same manner as notice for competitive sealed bids described in paragraph B. above.
3. Evaluation Factors. Requests for proposals must solicit quotations and must specify the relative importance of price and other evaluation factors.
4. Disclosure. If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposal and identified as such.
5. Negotiations. As provided in the request for proposals and rules adopted by the commissioners court, the county may discuss proposals with offerors who are determined to be reasonably susceptible of being selected for award, and the offerors may be permitted to revise their proposals after submission and before award for the purpose of obtaining best and final offers.
6. Award. The contract must be awarded to the responsible offeror whose proposal is determined to be the lowest and best evaluated offer resulting from negotiation, taking into consideration the relative importance of price and the other evaluation factors set out in the request for proposals.

C. ALTERNATIVE MULTISTEP COMPETITIVE SEALED PROPOSALS UNDER CHAPTER 262

1. Types of Goods and services. This method may be used for the purchase of goods and services described in Section 1.1, Paragraph C.
2. Notice. Notice must be given in the same manner as for competitive sealed bids, as described in Paragraph B above.
3. Evaluation Factors. Requests for proposals must solicit quotations, and must specify the relative importance of price and other evaluation

factors, but may use a general description of the item to be purchased instead of specifications, and may request the submission of unpriced proposals.

4. Obtaining Priced Bids. On the date specified in the request for proposals, the county official shall open the proposals and within seven days after that date, solicit by mail priced bids from the persons who submitted proposals and who qualified under the criteria stated in the first solicitation.

5. Presenting Priced Bids. Within 30 days after the date the unpriced proposals are opened, the county official shall present the priced bids to the commissioners court.

6. Negotiations. As provided in the request for proposals and rules adopted by the commissioners court, the county may discuss proposals with responsible offerors who submitted priced bids and who are determined to be reasonably susceptible of being selected for award and the offerors may be permitted to revise their proposals after submission and before award for the purpose of obtaining best and final offers.

7. Award. The contract must be awarded to the responsible offeror whose bid is determined to be the lowest and best evaluated offer resulting from negotiation.

8. Disclosure. All proposals and bids shall be available and open for public inspection after the contract is awarded.

D. REVERSE AUCTION METHOD UNDER 2155.062(d) TGC

In the reverse auction method the county advertises the types of goods or services that it requires, and bidders submit bids to provide the goods or services at a stated price.

Section 2155.062 (d) defines the reverse auction method as:

1. A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services; or
2. A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled

Internet location, in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services.

Counties sometimes use the reverse auction method through participation in the Texas Procurement and Support Services Cooperative Purchasing Program (State of Texas CO-OP) established by the Texas Comptroller's office, or other cooperative purchasing programs.

Subsection 1.3

Other Provisions Under Chapter 262

A. CONTRACT WITH PERSON INDEBTED TO THE COUNTY

A commissioners court may adopt an order entered into its minutes, after publishing notice in a newspaper of general circulation in the county that authorizes the county to refuse to enter into a contract or other transaction with a person who owes a debt to the county.

B. ELECTRONIC BIDS OR PROPOSALS

A county may receive bids or proposals through electronic transmission or by hard copy. A county must accept any bid or proposal submitted in hard copy. The county purchasing agent must adopt rules to ensure the identification, security, and confidentiality of electronic bids or proposals.

C. MODIFICATION AFTER AWARD

Chapter 262 allows the county official who makes purchases for the county to negotiate a modification of the contract if the award is in the best interest of the county and does not substantially change the scope of the contract or cause the contract amount to exceed the next lowest bid. The commissioners court must approve the change for it to become effective.

D. CHANGES IN PLANS AND SPECIFICATIONS

The commissioners court may make changes in plans, specifications, or proposals after a contract is made or if it becomes necessary to increase or decrease the quantity of items purchased. However, the total contract price may not be increased unless the cost of the change can be paid from available funds.

If a change order involves an increase or decrease in cost of \$50,000 or less, the commissioners court may grant general authority to an employee to approve the

change orders. However, the original contract price may not be increased by more than 25% unless the change order is necessary to comply with a state or federal statute, rule, regulation, or judicial decision enacted, adopted, or rendered after the contract was made. The original contract price may not be decreased by 18% or more without the consent of the contractor.

E. QUALIFICATION OF PURCHASING OFFICER

An officer authorized to make a purchase on behalf of a county or a county department or office may not make any purchase until providing to the county judge a signed acknowledgment that the officer has read and understands this chapter. This provision does not apply to a county that has appointed a purchasing agent under the provisions of Chapter 262.

Subsection 1.4

Enforcement and Criminal Violations Under Chapter 262

A. INJUNCTION.

Any property tax paying citizen of a county may file suit to enjoin performance under a contract made by a county in violation of Chapter 262.

B. CRIMINAL PENALTIES

1. A county officer or employee who intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 262.023 commits a Class B misdemeanor.
2. A county officer or employee, who intentionally or knowingly violates the procurement requirements of Chapter 262 other than by conduct described above in 1, commits a Class C misdemeanor.
3. Section 12.22 of the Texas Penal Code provides that a Class B misdemeanor is punishable by a fine not to exceed \$2,000, confinement in a jail for a term not to exceed 180 days, or both.
4. Section 12.23 of the Texas Penal Code provides that a Class C misdemeanor is punishable by a fine not to exceed \$500.

SECTION 2

COOPERATIVE PURCHASING PROGRAMS.

Counties have statutory authority under the Texas Interlocal Cooperation Act (Chapter 791 TGC) and Section 271.083 of the TLGC to participate in co-operative purchasing programs established by the State of Texas or other local governments. The Texas Comptroller's Office (State of Texas CO-OP), the Texas Association of School Boards (BuyBoard) and other local governmental entities have established cooperative programs. A county that wants to participate in a program must first enter into an interlocal agreement with the entity that established the cooperative program, before it can purchase goods and services through the program.

The entity that creates the cooperative purchasing program is required by law to comply with its own statutory procedures for procuring goods and services. Because the goods and services have been obtained through a competitive procurement process, the county can purchase them without having to conduct its own procurement process. Chapter 791 and Chapter 271 provide that participation in the cooperative purchasing program satisfies the county's procurement requirements.

Note that Section 791.011 of the TGC was recently amended to provide that a local government may not enter into a contract to purchase construction-related goods or services through a purchasing cooperative in an amount that exceeds \$50,000, unless a person designated by the local government certifies in writing that:

- (1) the project does not require architectural or engineering plans and specifications, or
- (2) the plans and specifications have been obtained.

The term "purchasing cooperative" is defined as a group purchasing organization that governmental entities join as members and the managing entity of which receives fees from members or vendors.

SECTION 3

ALTERNATIVE CONSTRUCTION DELIVERY METHODS FOR PUBLIC WORKS PROJECTS CHAPTER 2269 GOVERNMENT CODE

Please see my paper on this topic entitled *Alternative Construction Delivery Methods for Public Works Projects*.

SECTION 4

PROFESSIONAL SERVICES PROCUREMENT ACT CHAPTER 2254 TEXAS GOVERNMENT CODE

A. REQUIREMENTS UNDER THE PROFESSIONAL SERVICES PROCUREMENT ACT

1. Section 2254.004 provides that “[i]n procuring architectural, engineering or land surveying services, a governmental entity shall: 1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and (2) then attempt to negotiate with that provider a contract at a fair and reasonable price.” Under Section 2254.005, a contract entered into in violation of the provisions of the Professional Services Procurement Act is void.

2. Generally, in following this procedure, the county sends out a Request for Qualifications (“RFQ”) to professional firms, in which the county asks the professionals to submit their qualifications to perform work on a specific type of project. The county then interviews the candidates, and evaluates their respective qualifications based on weighted selection criteria. The county then ranks the candidates, and under the provisions of Section 2252.004, begins negotiations for a contract with the first-ranked candidate. If the negotiations do not result in an agreement for services, the county must formally end negotiations with that professional and begin negotiations with the next most highly qualified professional identified by the county.

3. It is important to note that under the Professional Services Procurement Act, the county is not allowed to ask for information on the cost of the professional’s services, until it gets to the negotiation stage. In other

words, the RFQ must not ask for any information on fees for performing services.

SECTION 5

INSURANCE REQUIREMENTS

Generally, there are no insurance requirements set out by statute for procurement contracts, except for the requirement for worker's compensation insurance described below. It is essential, however, for counties to require their vendors and contractors to maintain adequate insurance coverage to protect against loss, damage and negligence. Counties should seek the advice of a risk manager or insurance consultant in establishing appropriate insurance requirements in their contracts, and should establish a procedure for (i) checking certificates of insurance at the time the contract is signed, to make sure the required coverage has been obtained, and (ii) obtaining and reviewing a new insurance certificate prior to the expiration date of the policies described in the original certificate of insurance, to make sure the policies have been renewed.

Section 406.096 of the Texas Labor Code provides that:

- (a) a county that enters into a building or construction contract must require the contractor to certify in writing that the contractor provides worker's compensation insurance coverage for each employee of the contractor employed on the public project;
- (b) each subcontractor on the public project must provide such a certificate relating to coverage of the subcontractor's employees to the general contractor, who shall provide the subcontractor's certificate to the governmental entity;
- (c) a contractor who has a contract that requires worker's compensation insurance coverage may provide the coverage through a group plan or other method satisfactory to the governing body of the governmental entity;
- (d) employment of a maintenance employee by an employer who is not engaging in building or construction as the employer's primary business does not constitute engaging in building or construction.
- (e) In this section:

- (1) "Building or construction" includes:
 - (i) erecting or preparing to erect a structure, including a building, bridge, roadway, public utility facility, or related appurtenance;
 - (ii) remodeling, extending, repairing, or demolishing a structure; or
 - (iii) otherwise improving real property or an appurtenance to real property through similar activities.

SECTION 6

OTHER STATUTORY PROVISIONS

There are numerous laws, in addition to the ones set forth above, which affect purchasing requirements and contracts for purchase, services and construction. Set forth below are a few additional laws that are good to know.

A. CHAPTER 2252 OF THE TEXAS GOVERNMENT CODE – NON-RESIDENT BIDDERS

A governmental entity may not award a governmental contract to a non-resident bidder unless the non-resident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of the following:

- (1) the amount by which a resident bidder would be required to underbid the non-resident bidder to obtain a comparable contract in the state in which the non-resident's principal place of business is located; or
- (2) the amount by which a resident bidder would be required to underbid the non-resident bidder to obtain a comparable contract in the state in which a majority of the manufacturing relating to the contract will be performed.

B. CHAPTER 2253 OF THE TEXAS GOVERNMENT CODE – PUBLIC WORK PERFORMANCE AND PAYMENT BONDS

Chapter 2253 states that counties must require the contractor to provide Payment Bonds on public works contracts where the contract amount exceeds \$50,000, and Performance Bonds on public works contracts where the contract amount exceeds \$100,000. These bonds must be in place before work begins on the project.

If the government fails to ensure that any required bonds are obtained in connection with a project, then the government becomes liable to the same extent that the surety would be liable under the bonds. In other words, even if the government paid the contractor under the construction contract, if it did not make sure a Payment Bond was in place, and there are unpaid subcontractors, the government gets to pay the subcontractors, to the same extent as the surety would have been required to pay, had bonds been obtained.

C. CHAPTER 2258 OF THE TEXAS GOVERNMENT CODE – PREVAILING WAGE RATE

Chapter 2258 states that a worker employed on a public works project by or on behalf of a county (or other local government) must be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed.

The county is required to determine the general prevailing wage rate for its public works contracts, including the prevailing rate for legal holidays and overtime work by:

1. conducting a survey of Worker's wages within their locality; or
2. using the prevailing wage rate as determined by the U.S. Department of Labor in accordance with the Davis-Bacon Act.

Contractors and subcontractors on a public works project are required to pay the prevailing wage rates to laborers employed on the project. The Davis-Bacon wage rates for Texas counties can be obtained at the following website: WWW.WDOL.GOV/DBA.ASPX

D. CHAPTER 2251 TGC INTEREST DUE FROM GOVERNMENT ENTITY ON OVERDUE PAYMENTS

Chapter 2251 of the TGC regulates payments by governmental entities and provides the interest required on late payments. The late payment terms also apply to a vendor who is late in paying amounts to a governmental entity.

1. Sec. 2251.021. Time for Payment by Governmental Entity. (a) Except as provided by Subsection (b), a payment by a governmental entity under a contract executed on or after September 1, 1987, is overdue on the 31st day after the later of:

- (i) the date the governmental entity receives the goods under the contract;
 - (ii) the date the performance of the service under the contract is completed; or
 - (iii) the date the governmental entity receives an invoice for the goods or service.
- (b) A payment under a contract executed on or after September 1, 1993, owed by a political subdivision whose governing body meets only once a month or less frequently is overdue on the 46th day after the later event described by Subsections (a)(1) through (3).

For purposes of this section, the renewal, amendment, or extension of a contract executed on or before September 1, 1993, is considered to be the execution of a new contract.

2. Sec. 2251.025. Interest on Overdue Payment. (a) A payment begins to accrue interest on the date the payment becomes overdue.

(b) The rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. The rate in effect on September 1 is equal to the sum of:

- (i) one percent; and
- (ii) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday.

(c) Interest on an overdue payment stops accruing on the date the governmental entity or vendor mails or electronically transmits the payment. In this subsection, "governmental entity" does not include a state agency.

3. Sec. 2251.027 When Interest Payment Must Be Paid.

Under Sec. 2251.027, the political subdivision is required to pay interest at the time the overdue payment is made. The political subdivision may not require the vendor to request the interest payment or to wait an additional day for payment.

When entering into a contract, the political subdivision may not require a vendor to waive its rights under Chapter 2251.

4. Sec. 2251.029 Partial Payments.

If only a partial payment is made by the due date, then interest accrues on the unpaid portion in accordance with these provisions.

5. Sec. 2251.042 Disputed Items.

(a) If a governmental entity disputes the payment of an invoice, it must notify the vendor of the error in the invoice not later than the 21st day after the date the governmental entity receives the invoice.

(b) If a dispute is resolved in favor of the vendor, the vendor is entitled to receive interest on the unpaid balance of the invoice submitted by the vendor beginning on the date under Section 2251.021 that the payment for the invoice is overdue.

(c) If a dispute is resolved in favor of the governmental entity, the vendor shall submit a corrected invoice that must be paid in accordance with Section 2251.021. The unpaid balance accrues interest as provided by this chapter if the corrected invoice is not paid by the appropriate date.

(d) Under Sec. 2251.043, if suit is brought to collect an invoice payment or interest due, the governmental entity or the vendor shall pay the reasonable attorney fees of the prevailing party.

6. Sec. 2251.051 Vendor's Remedy for Nonpayment.

(a) A vendor may suspend performance required under a contract with a governmental entity if:

(1) the governmental entity does not pay the vendor an undisputed amount before it becomes late, and

(2) the vendor gives the governmental entity written notice:

(A) informing the governmental entity that payment has not been received; and

(B) stating the intent of the vendor to suspend performance for nonpayment.

(b) The vendor may not suspend performance under this section before the later of:

(1) the 10th day after the date the vendor gives notice under Subsection.

(c) A vendor who suspends performance under this section is not:

(1) required to supply further labor, services, or materials until the vendor is paid the amount provided for under this chapter, plus costs for demobilization and remobilization; or

(2) responsible for damages resulting from suspending work if the governmental entity with which the vendor has the contract has not notified the vendor in writing before performance is suspended that payment has been made or that a bona fide dispute for payment exists.

7. Sec. 2251. 030 Prompt or Early Payment Discount Encouraged.

(a) The intent of the legislature is that a governmental entity should take advantage of an offer for an early payment discount.

(b) A governmental entity may not take an early payment discount a vendor offers unless the governmental entity makes a full payment within the discount period.

(c) If a governmental entity takes an early payment discount later, the unpaid balance accrues interest beginning on the date the discount offer expires.

E. CHAPTER 2252 INTEREST ON RETAINED PUBLIC WORKS CONTRACT PAYMENTS

If a county retains more than 5% of the payments under a construction contract to secure the performance of the work, the county must put the retainage in an interest-bearing account and pay the interest to the contractor with the retainage upon completion of the contract. This requirement does not apply to a public work contract in which the total contract price estimate at the time of execution of the contract is less than \$400,000.

SECTION 7

BID PROTESTS; DISQUALIFICATIONS; CHANGES TO TERMS

A BID PROTESTS

Persons responding to Requests for Bids, Request for Proposals and even Requests for Qualifications may protest a solicitation procedure used by a

governmental entity if it does not follow statutory requirements or the governmental entities' own internal policies and procedures or if it gives an unfair advantage, or a unfair disadvantage to others. As an example, an architect may protest a Request for Proposals or Request for Qualifications that requires information on fees, because the Professional Services Procurement Act (discussed in Section 4) prohibits requiring this information as the basis for selection. As another example, a contractor may protest a procurement procedure in which the county required bid bond in its solicitation, and then waives the requirement after bid opening, because prospective bidders may have been deterred from bidding because of this requirement for a bid bond. Note that the protestor does not have to show that the solicitation gave an unfair advantage or disadvantage to himself or any of the other respondents. It is generally sufficient if the protestor can show that procedure gave an unfair advantage or disadvantage to any potential respondent.

Counties should establish a procedure for handling bid protests. Ideally, this procedure should allow the protestor to be able to have his grievance heard at some level by county officers or officials who were not involved in issuing the solicitation, and who have no direct or indirect responsibility for the solicitation. As an example, the procedure may require employees involved in the solicitation, or their supervisors to hear and act on the grievance, but allow the protestor to appeal to a higher authority, such as a department head or the commissioners court. Although the county's legal counsel does not have to be part of the process, he or she should be consulted when a protest is made. There is no reason to go through a protest procedure if the attorney determines that there is a legal problem with the solicitation and that it should be reissued.

Protestors can file a lawsuit to establish the invalidity of a solicitation, but only after they have gone through the entire protest procedure established by the county. Protestors do not generally file a lawsuit unless the solicitation is for a large project, because the only remedy which a successful protestor can obtain is the invalidation of the solicitation. Protestors are not entitled to damages because they cannot show that they would have been the successful respondent if the solicitation had been validly performed. Even if the protestor was the only respondent, the county could still have rejected all responses.

B. DISQUALIFICATION OF BIDS/PROPOSALS

The issue of whether a bid or proposal may or must be disqualified is an issue that arises very frequently, so it is surprising that there is very little Texas case law addressing this issue. The main Texas case on this issue is a fairly recent case entitled *Spaw Glass Construction Corp. v. County of Houston*, 974 S.W.2d 876 (Tex. App. – Houston [14th Dist.] 1998), rev. denied. It holds that a defect in a bid

(or proposal) is non-waivable and requires disqualification of the bid or proposal, if either of two criteria is met: (a) waiver of the defect would create an unfair advantage for the bidder or disadvantage to actual or potential bidders, or (b) waiver would deprive the government of its assurance that the contract would be entered into, performed, and guaranteed according to its specified requirements. Some examples of defects which generally result in disqualification are late bids, the failure of the bidder to sign the bid (which was one of the issues in *Spaw Glass*), and the failure of the bidder to include a required bid bond for the full amount specified in the bid instructions.

Defects which may not merit disqualification, and which may be waived by the government, are known as irregularities or informalities. The Bid or Proposal Instructions should expressly reserve to the government the right to waive irregularities or informalities. These may include defects such as the bidder's use of numeric amounts only, when the Bid Instructions say to provide bid amounts in both words and numbers, or the bidder's failure to identify subcontractors in the bid as required by the Instructions, at least where the other bid documents indicate that this information may be submitted after the contract is signed (this was a second issue in the *Spaw Glass* case). In general, government entities may choose to strictly enforce reasonable bid requirements which might otherwise be waivable, as long as they do so uniformly, and may disqualify a bid due to an irregularity or informality. For counties, this follows from the fact that the governing body of a county has the right "to reject any and all bids." Sec. 252.043(f), TEXAS LOCAL GOV'T CODE.

Bids may also be disqualified if they are non-responsive. Non-responsive bids are ones which in some manner fail to adequately address the information required by the Instructions, which qualify performance of the contract, or which take issue with a requirement. As an example, if the Instructions to Bidders state that bidders must submit bids on Phase 1 and Phase 2 of the project, a bid in which the bidder responded that it was bidding only on Phase 2 of the Project would be unresponsive. A government can generally reject a bid that is unresponsive.

C. WITHDRAWAL OF BIDS OR PROPOSALS

Generally, bids or proposals may be withdrawn by the respondent prior to the deadline for submission, and may even be changed and resubmitted prior to the submission deadline. After opening, bids or proposals may not be withdrawn for the period specified in the Instructions, except that respondents have a common law right to withdraw a bid or proposal due to a material mistake of fact. For example, a bidder would be able to withdraw its bid if the bid provided that goods would be provided for \$12.50 per unit, when the bid should have stated \$125.00

per unit. If the bidder or proposer withdraws its bid or proposal for a material mistake, the county may in some instances retain the bid bond or security that was required to be provided with the bid or proposal.

D. CHANGES TO BIDS OR PROPOSALS

A bid that has been opened may not be changed for the purpose of correcting any error in the bid price.

Chapter 262 allows proposals to be revised as part of discussions with the county in the selection process in order to provide the best and final proposal. However, the county must allow all qualified proposers the opportunity to discuss and revise their proposals. In addition, the changes have to be reasonable. The county cannot agree with a proposer to materially change the nature of the goods or services being provided or the scope. Everyone who submits a proposal has to be proposing on the same goods and services.

Chapter 262 allows the county official who makes purchases for the county to negotiate a modification of the contract if the award is in the best interest of the county and does not substantially change the scope of the contract or cause the contract amount to exceed the next lowest bid. The commissioners court must approve the change for it to become effective.

Chapter 262 permits the commissioners court to make changes in plans, specifications, or proposals after a contract is made or if it becomes necessary to increase or decrease the quantity of items purchased. However, the total contract price may not be increased unless the cost of the change can be paid from available funds.

If a change order involves an increase or decrease in cost of \$50,000 or less, the commissioners court may grant general authority to an employee to approve the change orders. However, the original contract price may not be increased by more than 25% unless the change order is necessary to comply with a state or federal statute, rule, regulation, or judicial decision enacted, adopted, or rendered after the contract was made. The original contract price may not be decreased by 18% or more without the consent of the contractor.