

# **CONTRACTING AND COMPETITIVE BIDDING FOR TEXAS COUNTIES**

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# **CONTRACTING AND COMPETITIVE BIDDING FOR TEXAS COUNTIES<sup>1</sup>**

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State statutes impose a myriad of requirements on the purchase of goods and services of all kinds. In recent years, the Legislature has added a number of alternatives to the old, tried-and-true but often inflexible requirements that virtually everything be acquired by competitive bidding. That's good. Each alternative, and each exemption, has its own requirements to be met. That makes it complicated.

It is well beyond the scope of this paper to describe every aspect of contracting and bidding processes. This paper will summarize the main requirements applicable to Texas county government competitive acquisition processes and contracting. It focuses primarily on the state statutes applicable to purchasing and contracting, including alternative methods of contracting for construction projects.

The requirements for various specialized contracts also will be described: interlocal contracts and contracts concerning creation or acquisition of intellectual property. Finally, highlights of the recently-enacted statutory provisions regarding waiver of sovereign immunities by contracting will be summarized.

## **GENERAL REQUIREMENTS FOR COMPETITIVE BIDDING AND PROPOSALS**

The requirements for competitive acquisition of goods and services are found chiefly in Local Government Code chapter 262. Other provisions are found in Local Government Code Chapter 271.

### **COUNTY PURCHASING ACT**

The Act is found in TEX. LOC. GOV'T CODE §§ 262.021-.036. Section 262.023(a) sets forth the competitive requirements for certain purchases and provides that :

- (a) Before a county may purchase one or more items under a contract that will require an expenditure exceeding \$25,000,<sup>2</sup> the commissioners court of the county must:

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- (1) comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter;
- (2) use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing; or
- (3) comply with a method described by Subchapter H, Chapter 271.

These requirements apply to contracts for which payment will be made from current funds or bond funds or through anticipation notes authorized by Chapter 1431, Government Code, or time warrants. However, contracts for which payments will be made through certificates of obligation are governed by The Certificate of Obligation Act of 1971 (Subchapter C, Chapter 271).<sup>3</sup>

In applying this provision to the purchase of office supplies, separate purchases of supplies by an individual department are not considered to be part of a single purchase and single contract by the county if a specific intent to avoid the competitive bidding requirement of this subchapter is not present. TEX. LOC. GOV'T CODE § 262.023(c).

The competitive bidding requirements of the County Purchasing Act apply to expenditures made from funds generated by forfeitures under Code of Criminal Procedure section 59.06(c)(1). OP. TEX. ATT'Y GEN. Nos. DM-246 (1993), LO-94-040 (1994).

All bids or proposals must be received in a fair and confidential manner. TEX. LOC. GOV'T CODE § 262.0225.

## Notice

Notice must be published at least once a week for at least two consecutive weeks before the date of the bid opening, with first date of publication occurring before the 14<sup>th</sup> day before the bid opening. TEX. LOC. GOV'T CODE § 262.025(a). Notice must include:

- A. Specifications describing the item to be purchased or a statement of where the specifications may be obtained. TEX. LOC. GOV'T CODE § 262.025(b)(1).
  - (1) Bid specifications must be reasonably specific, so as to give all prospective bidders the opportunity to bid on a common standard. *Haas v. Gulf Coast Natural Gas Co.*, 484 S.W.2d 127 (Tex. Civ. App.—Corpus Christi 1972, no writ).

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<sup>2</sup> The similar requirement for cities was changed from \$25,000 to \$50,000 in 2007. See TEX. LOC. GOV'T CODE § 252.021(a).

<sup>3</sup> The difference in the bid requirements in the County Purchasing Act and the Certificate of Obligation Act will be described later in this paper.

- (2) If bid specifications fail to mention escalation clauses, the commissioners court may not accept a bid which contains an escalation clause. OP. TEX. ATT'Y GEN. No. MW-299 (1981).
- (3) Bid specifications which legitimately require patented articles substantially comply with the requirements of the applicable bidding provisions so long as the price is not unreasonable. *Vilbig Bros. v. City of Dallas*, 91 S.W.2d 336 (Tex. 1936).
- (4) Where commissioners court solicited bids and negotiated a contract with the sole bidder for a shorter time than that contained in the bid specifications, there was substantial compliance with the relevant statutes, rendering the contract legal. *Hayden v. Dallas County*, 143 S.W.2d 990 (Tex. Civ. App.—Dallas 1940, no writ).
- (5) Bid specifications cannot require materials exclusively made in the United States because this unduly restricts competitive bidding and defeats its purpose, and contributes to increased cost. Whether no harm results in fact is not the standard because the competitive bidding requirements are mandatory. *Texas Highway Commission v. Texas Association of Steel Importers*, 372 S.W.2d 525 (Tex. 1963).
- (6) Where the bid specifications required the bidder to have at least five years experience, there was no evidence that such a requirement stifled competitive bidding; therefore, there was substantial compliance with the applicable statute. *Anderson v. Parsley*, 37 S.W.2d 358 (Tex. Civ. App.—Ft. Worth, writ ref'd).
- (7) Where ambiguous bid specifications leave the bidding requirements to speculation and conjecture, competitive bidding is prevented. OP. TEX. ATT'Y GEN. No. MW-449 (1982).
- (8) The commissioners court may not specify the manufacturer brand name of machinery to be purchased through competitive bidding as such operates to unduly restrict competitive bidding. OP. TEX. ATT'Y GEN. No. C-376 (1965).
- (9) The county purchasing agent is not authorized to rewrite or, in the alternative, refuse to advertise bid specifications approved by the commissioners court but which, in the purchasing agent's judgment, are so narrowly written as to deny competitive bidding. OP. TEX. ATT'Y GEN. No. JM-208 (1984).
- (10) The county may not restrict its bids to local merchants and businessmen. OP. TEX. ATT'Y GEN. No. H-1086 (1977).

- (11) The county may not restrict its bids for the purchase of vehicles to exclude foreign models. OP. TEX. ATT'Y GEN. No. MW-139 (1980).
- (12) The county may not restrict the award of printing jobs to union printers. OP. TEX. ATT'Y GEN. No. H-1219 (1978).
- B. 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. TEX. LOC. GOV'T CODE § 262.025(b)(2).
- C. Whether the bidder should use lump sum or unit pricing. TEX. LOC. GOV'T CODE § 262.025(b)(3). While either a lump-sum or unit price method may be used, if the unit price method is used, the county must specify the approximate quantities estimated on the best available information. TEX. LOC. GOV'T CODE §262.028.
- D. The method of payment by the county. TEX. LOC. GOV'T CODE § 262.025(b)(4).
- E. The type of bond, if any, required by the bidder. TEX. LOC. GOV'T CODE § 262.025(b)(5).
- F. If payment is to be made through time warrants, the notice must also include a statement indicating the maximum time warrant indebtedness, rate of interest, and maximum maturity date of warrants. TEX. LOC. GOV'T CODE § 262.025(c).
- G. In a county with a population of 3.3 million or more, the commissioners court may require that a minimum of 25 percent of the work be performed by the bidder and, notwithstanding any other law to the contrary, may establish financial criteria for the surety companies that provide payment and performance bonds. TEX. LOC. GOV'T CODE § 262.025(d).

### **Additional Provisions**

Additional notice and bond provisions relating to purchase of certain equipment. TEX. LOC. GOV'T CODE § 262.0255.

- (1) A request for information about the costs of the repair, maintenance, or repurchase of equipment may be included in the notice of a proposed purchase of earth-moving, material-handling, road maintenance, or construction equipment. TEX. LOC. GOV'T CODE § 262.0255(a).
- (2) The commissioners court may require the bidder to furnish a bond to the county in a contract for the purchase of the equipment to cover replacement costs of equipment. TEX. LOC. GOV'T CODE § 262.0255(b).

## **Pre-Bid Conference**

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. TEX. LOC. GOV'T CODE § 262.0256.

A second separate provision, also codified as TEX. LOC. GOV'T CODE § 262.0256, applies to a county with a population of 2.8 million or more and additionally requires that, after a conference is conducted, any additional required notice for the proposed contract may be sent by certified mail, return receipt requested, only to prospective bidders who attended the conference. This notice is not subject to the requirements of Section 271.055. TEX. LOC. GOV'T CODE § 262.0256.

Bidding process for county jail renovation project was governed by statute outlining the competitive proposal procedure for insurance, high technology items, and special services; statutory definition of "high technology item" included data processing equipment and telecommunications systems, and jail renovations included telecommunication and data processing equipment. County breached its statutory duties under state's bidding laws in awarding contract for county jail renovation project, where county failed to state the relative importance of price and other factors that were considered in awarding contract, county awarded contract to bidder that originally submitted higher bid, and county gave only that bidder the opportunity to revise its proposal to undercut the other bid. *Securtec, Inc. v. County of Gregg*, (Tex. App.—Texarkana 2003, pet. denied).

Winning bidder on county transit system contract failed to comply with the specifications of county's bid request, and thus, bidder was not a responsible bidder under the County Purchasing Act; material part of county's request was for bidders to maintain a well-equipped garage to provide maintenance on county vehicles and winning bidder failed to respond to this specification in its bid. *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App.—El Paso 2004, no pet.).

## **Bid Opening**

Bids are to be opened publicly on the date specified in the notice. TEX. LOC. GOV'T CODE § 262.026(a). Opened bids are to be available for inspection. TEX. LOC. GOV'T CODE § 262.026(b).

## **Award of Contract**

Person who opens bids shall present them to the commissioners court. TEX. LOC. GOV'T CODE § 262.027(a). Commissioners court to award contract to the "responsible bidder who submits lowest and best bid." TEX. LOC. GOV'T CODE § 262.027(a)(1).<sup>4</sup>

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<sup>4</sup> Perhaps most notably, however, is that the award of a bid contract must be to the "responsible bidder who submits the lowest and best bid," or all bids must be rejected and new notice must be published to make the purchase. TEX.

- OR -

Commissioners court may reject all bids and publish a new notice. TEX. LOC. GOV'T CODE § 262.027(a)(2). *See also, Corbin v. Collin County Commissioners' Court*, 651 S.W.2d 55 (Tex. App.—1983, no writ) (construing preceding statute, TEX. REV. CIV. STAT. art. 2368a, § 2, commissioners court has the statutory right to reject *any and all bids*).

If two responsible bidders submit lowest and best bid, the commissioners court is to decide between the two by drawing lots. TEX. LOC. GOV'T CODE § 262.027(b).

Contract may not be awarded to a bidder who is not lowest dollar bidder, unless each lower bidder is given notice of the proposed award and is given an opportunity to appear and present evidence concerning responsibility. TEX. LOC. GOV'T CODE § 262.027(c).

In determining the lowest and best bid for the purchase of earth-moving equipment, or construction equipment, the commissioners court may consider the information submitted under Section 262.0255. TEX. LOC. GOV'T CODE § 262.027(d).

In determining the lowest and best bid for a contract for the purchase of road construction material, the commissioners court may consider the pickup and delivery location of the bidders and the cost to the county of delivering or hauling the material to be purchased. The commissioners court may award such contracts to multiple bidders if each selected bidder has submitted the lowest and best bid for a particular location or type of material. TEX. LOC. GOV'T CODE § 262.027(e).

The commissioners court may condition acceptance of a bid on compliance with a requirement for attendance at a mandatory pre-bid conference under Section 262.0256. TEX. LOC. GOV'T CODE § 262.027(f).

In determining who is a responsible bidder, the commissioners court may take into account the safety record of the bidder if: (1) the commissioners court has adopted a written definition and criteria for determining safety record; (2) notice was given to prospective bidders that their safety record would be considered; and (3) determinations are not arbitrary and capricious. TEX. LOC. GOV'T CODE § 262.0275. *But see, Corbin v. Collin County Commissioners' Court*, 651 S.W.2d 55 (Tex. App.—Dallas 1983, no writ) (holding that commissioners court had a statutory right to reject any and all bids).

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LOC. GOV'T CODE § 262.027(a). The “lowest and best bid” standard is not the same as the “best value” standard applicable to cities, but effectively means only that a county may consider a bidder’s “responsibility.”

Winning bidder on county transit system contract failed to comply with the specifications of county's bid request, and thus, bidder was not a responsible bidder under the County Purchasing Act; material part of county's request was for bidders to maintain a well-equipped garage to provide maintenance on county vehicles and winning bidder failed to respond to this specification in its bid. *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App.—El Paso 2004, no pet.).

If there are no bidders, the county must re-advertise for bids. There is no limited on the number of time bids must be unsuccessfully solicited; a county may not disregard competitive bidding requirements because of a lack of response to bid solicitations. OP. TEX. ATT'Y GEN. No. DM-4 (1991).

By appropriate orders adopted by the commissioners court, a county need not award a contract to a bidder in debt to the county. TEX. LOC. GOV'T CODE §262.0276.

### **Bid Mistakes**

Bid mistakes may result in contract being equitably rescinded if the conditions of “remediable mistake” are present. Ordinary negligence will not bar equitable relief unless such negligence “amounts to such carelessness or lack of good faith in calculation which violates a positive duty in making up a bid, taking into consideration the nature of the transaction and the position of the opposite contracting party . . . .” Additionally, the bidder must give notice of his mistake before the offeree materially changes his position. *James T. Taylor & Son, Inc. v. Arlington Indep. School Dist.*, 335 S.W.2d 371 (Tex. 1960).

Where contractor had failed to ascertain whether it could comply with construction bid, its subsequent inability to perform was not caused by innocent mistake, but was caused by contractor’s carelessness; therefore, county was not required to release contractor and surety on their bid bond. *Guido and Guido, Inc. v. Culberson County*, 459 S.W.2d 674 (Tex. Civ. App.—El Paso 1970, writ ref’d n.r.e.).

Where bidder made an honest mistake in calculating his bid, in doing so he was not negligent and was entitled to recover his bid deposit. *Jordan v. City of Beaumont*, 337 S.W.2d 115 (Tex. Civ. App.—Beaumont 1960, writ ref’d n.r.e.).

### **Alternative Multi-Step Competitive Proposal**

If the county official who makes purchases determines that it is impractical to prepare detailed specifications for an item to support the award, then he must notify the commissioners court. TEX. LOC. GOV'T CODE § 262.0295(a)(1).

After the commissioners court makes a finding that it is impractical to prepare detailed specifications, the county official who makes purchases may use the multi-step competitive proposal procedure. TEX. LOC. GOV'T CODE § 262.0295(a)(2). **The multi-step competitive proposal procedure applies only to a county with a population of 125,000 or more.** TEX. LOC. GOV'T CODE § 262.0295(a)(3).

Quotations must be solicited through a request for proposals. Public notice may include a general description of the item to be purchased and may request the submission of unpriced proposals. TEX. LOC. GOV'T CODE § 262.0295(b).

Within seven days after proposals are opened, the county official shall solicit by mailed request priced bids from the persons who submitted proposals and who qualified under the criteria stated in the first solicitation. TEX. LOC. GOV'T CODE § 262.0295(c).

Within 30 days after the date the unpriced proposals are opened, the county official shall present the priced bids to the commissioners court. The award shall be made to the responsible offeror whose bid is determined to be the lowest after negotiations. TEX. LOC. GOV'T CODE § 262.0295(d).

### **Alternative Competitive Proposal Procedure**

Insurance, high technology items, and special services come under the Alternative Competitive Proposal Procedure. TEX. LOC. GOV'T CODE § 262.030.

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

- (1) data processing equipment, software and firmware related to data processing equipment;
  - (a) It is the responsibility of the commissioners court to determine in the first instance whether a particular service is of a highly technical nature or whether it is a technical service related to a high technology item. OP. TEX. ATT'Y GEN. No. LO-88-120 (1988).
- (2) telecommunications, radio and microwave systems;
- (3) electronic distributed control systems, including building energy management systems; and
- (4) technical services related to those items.

TEX. LOC. GOV'T CODE § 262.022(4).

Special services means landscape maintenance, travel management, recycling. TEX. LOC. GOV'T CODE §§ 262.030(a)(1), (a)(2), (a)(3).

A county in which a purchasing agent has been appointed under Section 262.011, Local Government Code, may use the competitive proposal purchasing method authorized in this section for purchase of insurance or high technology items. The method may also 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.

Same procedure as for competitive bidding applies with respect to public notice. TEX. LOC. GOV'T CODE § 262.030(b).

Relative importance of price and other evaluation criteria must be specified. TEX. LOC. GOV'T CODE § 262.030(b).

Award must be to “the responsible offeror whose proposal is determined to be the lowest evaluated offer resulting from negotiation,” as evaluated considering the enunciated criteria. TEX. LOC. GOV'T CODE § 262.030(b).

Bidding process for county jail renovation project was governed by statute outlining the competitive proposal procedure for insurance, high technology items, and special services; statutory definition of "high technology item" included data processing equipment and telecommunications systems, and jail renovations included telecommunication and data processing equipment. County breached its statutory duties under state's bidding laws in awarding contract for county jail renovation project, where county failed to state the relative importance of price and other factors that were considered in awarding contract, county awarded contract to bidder that originally submitted higher bid, and county gave only that bidder the opportunity to revise its proposal to undercut the other bid. *Securtec, Inc. v. County of Gregg*, (Tex. App.—Texarkana 2003, pet. denied).

A county with a population of 800,000 or more may select an appropriately licensed insurance agent as the sole broker of record to obtain proposals and coverages for insurance that provides necessary coverage and adequate limits of coverage in all areas of risk, including public official liability, property, casualty, workers' compensation, and specific and aggregate stop-loss coverage for self-funded health care. TEX. LOC. GOV'T CODE § 262.036.

### **Modification After Award**

After award of contract, but before the contract is made, the county official may negotiate a modification if the modification 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. TEX. LOC. GOV'T CODE § 262.0305(a). Commissioners court must approve the modified contract. TEX. LOC. GOV'T CODE § 262.0305(b).

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 percent unless the change order is necessary to comply with a statute, rule, regulation, or judicial decision arising after the contract was made. The original contract price may not be decreased by 18 percent or more without the consent of the contractor. TEX. LOC. GOV'T CODE § 262.031(b); *Overstreet v. Houston County*, 365 S.W.2d 409 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (construing TEX. REV. CIV. STAT. art. 2368(a)) (current version at TEX. LOC. GOV'T CODE § 262.031(b)).

Modification may not amount to a complete revision of bid specifications despite the fact that the contract price was reduced less than 25 percent. *Niles v. Harris County Freshwater Supply Dist. No. 1A*, 336 S.W.2d 637 (Tex. Civ. App.—Waco 1960), *writ ref'd*, 339 S.W.2d 562 (Tex. Civ. App.—Waco 1960).

If the modifications to the contract are substantial, the revised plans will be treated as a new proposal and new bids will have to be solicited. OP. TEX. ATT'Y GEN. No. MW-296 (1981).

Where a statute requires that a contract be let to the lowest responsible bidder, a county cannot evade the law by making a substantial change in the contract after it has been awarded pursuant to the law. In order to render a contract void because of changes or deviations, they must be substantial. *City of Crockett v. Murdock*, 440 S.W.2d 864 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.) (citing *Wantland v. Anderson*, 203 S.W.2d 787 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.)).

### **Bid or Performance Bond**

A *bid bond* of 5% may be required for contracts exceeding \$100,000 or for contracts for public works. TEX. LOC. GOV'T CODE § 262.032(a).

A performance bond, executed with licensed surety, for full amount of contract price may be required if the full amount of the contract exceeds \$50,000 and if requested by the county. The bond is to be posted within 30 days of acceptance of bid award. However, this option to require a performance bond does not apply if a performance bond is **required** to be furnished by Chapter 2253, Government Code. TEX. LOC. GOV'T CODE § 262.032(b).

Bond guaranteeing faithful performance of contract with county to pave certain streets was not merely a guarantee of indemnity against loss, but liability of principal and surety upon bond arose upon breach of paving contract without the necessity of county first making repairs so as to establish amount of damage. *Nueces County v. Fletcher & Co.*, 181 S.W.2d 970 (Tex. Civ. App.—San Antonio 1944, writ ref'd n.r.e.)

A contract awarded a contractor, after competitive bidding, for air conditioning a courthouse did not automatically become void when contractor commenced construction work without having given prescribed bonds, and although commissioners court had authority to void the contract if contractor did not furnish such bonds, it also had the authority to require contractor to give bonds, and contract was valid where contractor furnished the bonds in time to protect both the county and those furnishing labor and materials. *Overstreet v. Houston County*, 365 S.W.2d 409 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.)

Entities whose rates are regulated are exempted from performance or bid bond requirements. TEX. LOC. GOV'T CODE § 262.032(d).

### **COUNTY PURCHASING ACT AND CITY REQUIREMENTS**

Many of the same kinds of provisions applicable to counties under the County Purchasing Act, Chapter 262, Texas Local Government Code, also apply to cities under Chapter 252, Texas

Local Government Code. However, care must be taken in relying on Chapter 252 as there are difference.

Significant examples of the differences are:

- (1) To rely on an exemption under the County Purchasing Act, the commissioners court must grant the exception by an order. For a city there is no similar requirement.
- (2) A county is required to comply with the competitive bidding procedures for contract that exceed \$25,000. TEX. LOC. GOV'T CODE § 262.023(a). In 2007, the Texas legislature raised this amount to \$50,000 for cities. TEX. LOC. GOV'T CODE § 252.021(a).
- (3) Counties are restricted in using the alternative construction delivery methods found in Subchapter H of Chapter 271 only if the contract is to be funded from current funds or bond funds or time warrants. Such methods cannot be used if the project is to be funded from certificates of obligation or in some instances anticipation notes.<sup>5</sup>

### **Exemptions From Competitive Bidding**

There are exemptions from the competitive bidding requirements.

#### *Mandatory Exemptions*

A contract subject to the Professional Services Procurement Act may not be awarded on the basis of competitive bids. TEX. GOV'T CODE § 2254.003.

Contracts for certain recreational services are exempt. Section 262.0241 applies only to a county that: (1) has a population of 20,000 or less, and (2) owns not more than one golf course open for public use. For an eligible county, the competitive bidding and competitive proposal procedures prescribed do not apply to the purchase of: (1) management services for (A) a county-owned golf course or (B) a retail facility owned by the county and located on the premises of the golf course, and (2) landscape maintenance services for a county-owned golf course. TEX. GOV'T CODE § 262.0241.

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<sup>5</sup> Section 262.023(b-1) provides that “A county that complies with a method described by Subchapter H, Chapter 271, as provided by Subsection (a)(3), to enter into a contract for which payment will be made through anticipation notes authorized by Chapter 1431, Government Code, may not issue anticipation notes for the payment of that contract in an amount that exceeds the lesser of:

- (1) 20 percent of the county's budget for the fiscal year in which the county enters into the contract;  
or
- (2) \$10 million.”

### *Discretionary Exemptions*

The County Purchasing Act has a list of exemptions from the competitive bidding requirement that can be granted and are found in Section 262.024, Texas Local Government Code. To use one of the discretionary exemptions, the commissioners court must affirmatively grant the exemption by an order.<sup>6</sup> Section 262.024(a) lists several items:

- (1) an item that must be purchased in a case of public calamity if it is necessary to make the purchase promptly to relieve the necessity of the citizens or to preserve the property of the county. The Attorney General explained:

Moreover, the statute provides for exceptions to the competitive bidding process in certain circumstances. For example, if the dump truck is needed to avert the consequences of a genuine public calamity, the county may purchase the truck without resort to competitive bidding. § 262.024(a)(1). The same will hold true if the purchase is necessary to preserve the public health or safety of county residents, or if it is required because of unforeseen damage to public property. § 262.024(a)(2),(3). ***Such outcomes will, of course, depend on the facts of the case and the exercise of sound discretion by the commissioners court.***

(Emphasis added.) OP. TEX. ATT'Y GEN. No. DM-4 (1991).

- (2) an item necessary to preserve or protect the public health or safety of the residents of the county. The Texas Supreme Court has construed the exemption for purchases necessary “to preserve or protect the public health or safety” as independent from the exemption for purchases made necessary by a public calamity. *See Hoffman v. City of Mt. Pleasant*, 89 S.W.2d 193, 194 (Tex 1936) (expenditures to repair and improve city sewer system). Thus, the competitive bidding provision does not apply to an expenditure to protect or preserve the public health, regardless of whether a public calamity made the purchase necessary. A county contract for ambulance service may be exempted by order of the commissioners court under section 262.024(a)(2) of the Local Government Code from the County Purchasing Act's normal competitive-purchasing requirement as “an item necessary to preserve or protect the public health or safety of the residents of the county.” Op. Tex. Att’y.Gen. No. M-806 (1971) is affirmed. The commissioners court may issue an order exempting the contract for ambulance service from competitive-purchasing requirements as a matter affecting the public health or safety. Op. Tex. Att’y.Gen., No. JC-0136 (1999).

- (3) an item necessary because of unforeseen damage to public property.

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<sup>6</sup> For cities, the exemptions are automatic and do not have to be affirmatively claimed by ordinance or resolution. TEX. LOC. GOV'T CODE § 252.022.

- (4) a personal or professional service<sup>7</sup>. In considering whether a contract for janitorial services was a contract for personal services, the Attorney General interpreted the predecessor to Section 262.024 and explained that “Someone who claims to have rendered ‘personal services’ must have performed the services himself. . . . If the contract . . . requires a specific person to perform janitorial services, it is a contract for personal services. If the contract merely requires a person or a corporation to provide persons who will perform janitorial services, it is not a contract for personal services. OP. TEX. ATT’Y GEN. No. JM-486 (1986). In reviewing whether a contract was one for professional services exempt under the city statute relating to competitive bidding, the Attorney General explained that whether a professional services contract is exempt from chapter 252 is generally a fact question within the province of a city's governing body: “[A] municipality has discretion in the first instance to determine whether particular services, other than those covered by [chapter 2254 of the Government Code] are professional services for purposes of exemption from competitive bidding requirements under Local Government Code section 252.022.” OP. TEX. ATT’Y GEN. No. DM-106 (1992) at 2. This reasoning would also apply to a county.
- (5) any individual work performed and paid for by the day, as the work progresses, provided that no individual is compensated under this subsection for more than 20 working days in any three month period.
- (6) any land or right-of-way.
- (7) an item that can be obtained from only one source, including:
- (a) items for which competition is precluded because of the existence of patents, copyrights, secret processes, or monopolies;
  - (b) films, manuscripts, or books;
  - (c) electric power, gas, water, and other utility services; and
  - (d) captive replacement parts or components for equipment;
- (8) an item of food.
- (9) personal property sold:
- (a) at an auction by a state licensed auctioneer;
  - (b) at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business and Commerce Code; or

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<sup>7</sup> Bidding of professional services prohibited under the Professional Services Procurement Act, Chapter 2254, Texas Government Code.

- (c) by a political subdivision of this state, a state agency, or an entity of the federal government.
- (10) any work performed under a contract for community and economic development made by a county under Section 381.004.
- (11) vehicle and equipment repairs. (added in 2007)

Section 262.024(b) provides: The renewal or extension of a lease or of an equipment maintenance agreement is exempt from the requirement established by Section 262.023 if the commissioners court by order grants the exemption and if:

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

Section 262.024(c) clarifies that where the sole source exemption is used, the commissioners court, after accepting a signed statement from the county official who makes purchases for the county as to the existence of only one source, must enter in its minutes a statement to that effect.

Section 262.024(d) requires that the exemption for an item of food applies only to the sealed competitive bidding requirements on food purchases. A county is required to solicit at least three bids for purchases of food items by telephone or written quotation at intervals specified by the commissioners court. A county is also required to award food purchase contracts to the responsible bidder who submits the lowest and best bid or reject all bids and repeat the bidding process. Further, the purchasing officer taking telephone or written bids under this subsection 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.

In using these exemptions, remember, they are “discretionary” exemptions and not automatic: The commissioners court must *grant* such exemptions “by order”. §262.024(a).

## **Purchasing Agent**

A county may have a purchasing agent<sup>8</sup> who supervises all county purchases by competitive bidding and makes most other purchases. The agent is given some authority to

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<sup>8</sup> A county purchasing agent is appointed by a board which, for counties with a population of 150,000 or less, comprises the county judge and the district court judges of the county, and for counties with a population greater than this, comprises three district court judges of the county and two members of the commissioners court (or, if there are fewer than three district courts, one district court judge and one member of the commissioners court).

formulate rules and procedures for implementing his/her duties, subject to approval by the commissioners court. § 262.011; *see also* § 262.0245 (must adopt competitive bidding procedures for purchases which are not required to be competitively bid under section 262.023, *e.g.*, for purchases under \$25,000).

## Violations and Penalties

Contracts made in violation of the required procedures are *void* and may be enjoined, and there are criminal penalties for intentional or knowing violations.

At this late date, it is still an issue that questions about sequential purchases still arise. As late as September 7, 2007, the Attorney General announced that a request for an opinion (RQ-0620-GA) had been submitted addressing this issue. The issue presented was whether a county auditor could submit for payment an invoice for labor which the county attorney had determined to violate the County Purchasing Act. The problem being that the project was to be performed in phases by the same contractor so that each phase would be under \$25,000 but, when completed, the project would exceed \$25,000. Even more puzzling was that the contract was apparently let by an individual commissioner and not by the commissioners court.

First, the individual members of a commissioners court have no authority to contractually bind the county by their separate action. *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 455 (1948). The commissioners court may validly act only as a body through an official public meeting and recorded vote reflected by the official minutes of the commissioners court. *Hays County v. Hays County Water Planning Partnership*, 106 S.W.3d 349, 360-361 (Tex. App.—Austin 2003, no pet.); *City of Bonham v. Southwest Sanitation, Inc.*, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied); *Stratton v. County of Liberty*, 582 S.W.2d 252, 254 (Tex. App.—Beaumont 1979, writ ref'd n.r.e.); *Orange County v. Hogg*, 269 S.W. 225, 226 (Tex. Civ. App.—Beaumont 1925, no writ).

Second, persons contracting with a governmental unit are charged by law with notice of the limits of that unit's authority, and such persons are "bound at their peril" to ascertain if a proposed contract is the subject of proper authority. *City of Bonham v. Southwest Sanitation, Inc.*, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied); *Base-Seal, Inc. v. Jefferson County, Texas*, 901 S.W.2d 783, 785-788 (Tex. App.—Beaumont 1995, writ denied) (county was precluded as a matter of law from paying an equipment purchase invoice because of a failure to comply with the requirements of the competitive bidding statutes).

Third, Chapter 262 prohibits purchasing methods designed to avoid the requirements of the competitive bidding statutes, including: (a) "component purchases," meaning the purchase of the component parts of an item that in normal purchasing practice would be purchased in one purchase; (b) "separate purchases," meaning the purchase, made separately, of items that in normal purchasing practices would be purchased in one purchase; and (c) "sequential purchases," meaning the purchase, made over a period, of items that in the normal purchasing

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§ 262.011(a). For counties of population over 100,000, the commissioners court may employ a person to act as purchasing agent, unless the appointment process has been used. § 262.0115.

practices would be purchased in one purchase. TEX. LOC. GOV'T CODE §§ 262.022, 262.023, 262.034. A county officer or employee commits a class B misdemeanor offense if he intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 262.023. TEX. LOC. GOV'T CODE § 262.034(a). The final conviction of a county official or employee for such an offense may result in his immediate removal from office and employment. TEX. LOC. GOV'T CODE § 262.035.

## **Injunction**

Any taxpaying citizen may enjoin performance under a contract made by a county in violation of Chapter 262. TEX. LOC. GOV'T CODE § 262.033.

## **Criminal Penalties and Removal**

- Class B misdemeanor for knowingly or intentionally avoiding bid requirements of TEX. LOC. GOV'T CODE § 262.023 by making or authorizing separate, sequential, or component purchases. TEX. LOC. GOV'T CODE § 262.034(a).
- Class B misdemeanor for intentionally or knowingly violating TEX. LOC. GOV'T CODE § 262.023 by any other conduct. TEX. LOC. GOV'T CODE § 262.034(b).
- Class C misdemeanor for any other knowing or intentional violations of this subchapter. TEX. LOC. GOV'T CODE § 262.034(c).
- A final conviction by a county officer or employee for an offense under TEX. LOC. GOV'T CODE §§ 262.034(a) or (b) results in the immediate removal from office or employment and the ineligibility of the person to be a candidate or appointed to public office, to be employed by the county, or to receive any compensation through a contract with the county for four years after the date of the final conviction. TEX. LOC. GOV'T CODE § 262.035.

The criminal penalties imposed for violations of the County Purchasing Act appear to require a *culpable mental state* to be imposed. OP. TEX. ATT'Y GEN. No. LO-94-087 (1994).

## **County Auditor Responsibility**

The Attorney General has addressed what happens if the county auditor determines that the county awarded a contract without complying with the County Purchasing Act. He has determined that Section 113.065 of the Local Government Code prohibits the auditor from approving a claim for payment on the contract. Such a contract is not void *ab initio* but may be voided by a court. The fact that the County Purchasing Act does not provide that a contract made in violation of its terms is void does not affect a county auditor's duty under Section 113.065 of the Local Government Code to disapprove a claim for payment on a contract awarded without complying with the County Purchasing Act. A commissioners court lacks authority to

ratify such a contract or to approve quantum meruit contract payments for such a contract. OP. TEX. ATT'Y GEN. No. GA-0247 (2004).

## **PUBLIC PROPERTY FINANCE ACT**

Local Government Code chapter 271 consists of ten subchapters. Subchapter A is the Public Property Finance Act. It provides very flexible financing of certain purchases and contracts by methods other than payments restricted to be from current funds. Notably, it permits the purchase of *personal property*<sup>9</sup> “on terms considered appropriate by the governing body,” via a lease, lease-purchase contract, installment purchase “or any other form considered appropriate by the governing body,” for a term “approved by the governing body” (but not to exceed 25 years, *see* TEX. LOC. GOV'T CODE § 271.009), and payable from a pledge of all or any part of revenues, funds or taxes available to the local government. TEX. LOC. GOV'T CODE § 271.005(a). However, counties must also comply with chapter 262 requirements. TEX. LOC. GOV'T CODE § 271.006. The resulting contract is an “authorized investment” for banks and other financial institutions, insurance companies and others. TEX. LOC. GOV'T CODE § 272.008.

## **COMPETITIVE BIDDING ON CERTAIN PUBLIC WORKS**

Subchapter B of Chapter 271 of the Local Government Code provides for competitive bidding on certain kinds of public works contracts – construction or repair of a structure, road, highway or other addition or improvement to real property, where competitive bidding is required by other law.

A contract that is subject to the Professional Services Procurement Act, Chapter 2254 is not affected by Subchapter B of Chapter 271 of the Local Government Code. TEX. LOC. GOV'T CODE § 271.022.

### **Competitive Bidding**

If a county is required by statute to award a contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property on the basis of competitive bids, and if the contract requires the expenditure of more than \$25,000 from the funds of the entity, the bidding on the contract must be accomplished in the manner provided by Subchapter B of Chapter 271. TEX. LOC. GOV'T CODE § 271.024.

### **Additional Competitive Procedures**

In the procedure for competitive bidding under Subchapter B of Chapter 271, the commissioners court is required to provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications. The county is to receive bids in a fair and confidential manner. The bids may be

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<sup>9</sup> Section 271.004 applies to certain purchases of real property, but only by a school district.

received in hard-copy format or through electronic transmission. A governmental entity shall accept any bids submitted in hard-copy format.

TEX. LOC. GOV'T CODE § 271.0245.

### **Advertisement for Bids**

The county must advertise for bids, and the advertisement for bids must include a notice that:

- (1) describes the work;
- (2) states the location at which the bidding documents, plans, specifications, or other data may be examined by all bidders; and
- (3) states the time and place for submitting bids and the time and place that bids will be opened.

The advertisement must be published as required by law. If no legal requirement for publication exists, the advertisement must be published at least twice in one or more newspapers of general circulation in the county. The second publication must be on or before the 10th day before the first date bids may be submitted.

The county must mail a notice containing the information required in the advertisement to any organization that:

- (1) requests in advance that notices for bids be sent to it;
- (2) agrees in writing to pay the actual cost of mailing the notice; and
- (3) certifies that it circulates notices for bids to the construction trade in general.

The county is required to mail the notice on or before the date the first newspaper advertisement under this section is published.

In a county with a population of 3.3 million or more, the county may require that a minimum of 25 percent of the work be performed by the bidder and, notwithstanding any other law to the contrary, may establish financial criteria for the surety companies that provide payment and performance bonds. TEX. LOC. GOV'T CODE § 271.025.

### **Opening of Bids**

Bids may be opened only by the commissioners court at a public meeting or by an officer or employee of the county at or in an office of the county. A bid that has been opened may not be changed for the purpose of correcting an error in the bid price. Subchapter B does not change the common law right of a bidder to withdraw a bid due to a material mistake in the bid. TEX. LOC. GOV'T CODE § 271.026.

## **Award of Contract**

The county is entitled to reject any and all bids. If a contract is awarded, the contract must be awarded to the lowest responsible bidder, but the contract may not be awarded to a bidder who is not the lowest bidder unless before the award each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body of the governmental entity or the designated representative of the governing body and present evidence concerning the bidder's responsibility. TEX. LOC. GOV'T CODE § 271.027.

## **Safety Record of Bidder**

In determining who is a responsible bidder, the county 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:

- (1) the governing body of the governmental entity has adopted a written definition and criteria for accurately determining the safety record of a bidder;
- (2) 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
- (3) the determinations are not arbitrary and capricious.

TEX. LOC. GOV'T CODE § 271.0275.

## **Effect of Noncompliance**

A contract awarded in violation of the Subchapter B requirements is void. TEX. LOC. GOV'T CODE § 271.028.

## **Criminal Penalties**

- (1) An officer or employee of a county commits an offense if the officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of the statute that requires a contract described by Section 271.024 to be awarded on the basis of competitive bids. This offense is a Class B misdemeanor.
- (2) An officer or employee of a county commits an offense if the officer or employee intentionally or knowingly violates the competitive bidding requirements of the statute that requires a contract described by Section 271.024 to be awarded on the basis of competitive bids, other than by conduct described in (1) above. This offense is also a Class B misdemeanor.

- (3) An officer or employee of a county commits an offense if the officer or employee intentionally or knowingly violates Subchapter B, other than by conduct described by Subsection (1) or (2). This offense is a Class C misdemeanor.

TEX. LOC. GOV'T CODE § 271.029.

### **Removal from Office, Ineligibility**

The final conviction of an officer or employee of the county for an offense under Section 271.029 punishable as a Class B misdemeanor 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 county with which the person served when the offense occurred; and
- (3) to receive any compensation through a contract with the county.

However, a conviction does not prohibit the payment of retirement or workers' compensation benefits to the removed officer or employee. TEX. LOC. GOV'T CODE § 271.030.

### **CERTIFICATE OF OBLIGATION ACT**

Subchapter C of Chapter 271 is the Certificate of Obligation Act of 1979. Subchapter C of Chapter 271 has procurement requirements that are in many ways similar to the requirements in the County Purchasing Act. However, there are significant differences. The Certificate of Obligation Act provides an alternative financing method for certain kinds of purchases to be made on the basis of certificates issued by cities and counties. Certificates of Obligation may be authorized for contracts for construction of any public work; purchase of materials, supplies, equipment, machinery, buildings, land and rights-of-way for authorized needs and purposes; payment for contractual services by a variety of professionals; and other purposes. TEX. LOC. GOV'T CODE § 271.045. Notably, certificates may be issued for the construction or equipping of a jail; constructing, renovating or improving a county-owned building; and constructing certain bridges, *see* TEX. LOC. GOV'T CODE § 271.046; and for demolition of certain "dangerous" structures. TEX. LOC. GOV'T CODE § 271.0461. There are detailed requirements for notice, authorization by ordinance, sale of the certificates, funding and exchange, authorization as investments, character as debts and security, refinancing, and other financial provisions. There are elaborate provisions regarding the competitive bidding procedures that apply to the award of the underlying contract to the "lowest responsible bidder" which will be explained below.

## **Competitive Bidding**

Before the commissioners court may enter into a contract requiring an expenditure by or imposing an obligation or liability on the county of more than \$25,000 using proceeds of certificates of obligation, the governing body must submit the proposed contract to competitive bidding. TEX. LOC. GOV'T CODE § 271.054.

### **Notice**

A county must give notice of the time, date, and place at which the county will publicly open the bids on a contract for which competitive bidding is required by this subchapter and read the bids aloud. The notice must be given in accordance with Subsection (b) or in accordance with the County Purchasing Act (Subchapter C, Chapter 262) if the issuer is a county. TEX. LOC. GOV'T CODE § 271.054.

If a county gives notice under this subsection, the notice must:

- (1) be published once a week for two consecutive weeks in a newspaper, as defined by Subchapter C, Chapter 2051, Government Code, that is of general circulation in the county, with the date of the first publication to be before the 14th day before the date set for the public opening of the bids and the reading of the bids aloud; and
- (2) state that plans and specifications for the work to be done or specifications for the machinery, supplies, equipment, or materials to be purchased are on file with a designated official of the issuer and may be examined without charge.

If the contract is to be let on a unit price basis, in addition to the other information required to be in the notice, the notice must specify, based on the best available information, the approximate quantities of the items needed by the issuer that are to be bid on.

The county may not authorize certificates unless the notice also states that: (1) the successful bidder must accept the certificates in payment for all or part of the contract price; or (2) the governing body has made provisions for the contractor to sell and assign the certificates and that each bidder is required, at the time of the receipt of the bids, to elect whether the bidder will:

- (A) accept the certificates of all or part of the contract price; or
- (B) accept the certificates.

In a county with a population of 3.3 million or more, the county and any district or authority created under Article XVI, Section 59 of the Texas Constitution of which the commissioners court is the governing body. The commissioners court may require that a minimum of 25 percent of the work be performed by the bidder and, notwithstanding any other law to the contrary, may establish financial criteria for the surety companies that provide payment and performance bonds.

## Exemptions

The Certificate of Obligation Act in Section 271.56 provides that a county is not required to advertise for bids in the following:

- (1) a case of public calamity if it is necessary to act promptly to relieve the necessity of the residents or to preserve the property of the issuer. [Note: This is very similar to the County Purchasing Act provision.]
- (2) a case in which it is necessary to preserve or protect the public health of the residents of the issuer. [Note: The County Purchasing Act addresses both public health and safety, where the Certificate of Obligation Act exception is only for public health.]
- (3) a case of unforeseen damage to public machinery, equipment, or other property. [Note: Substantially the same as the County Purchasing Act.]
- (4) a contract for personal or professional services. [Note: Substantially the same as the County Purchasing Act.]
- (5) work done by employees of the county and paid for as the work progresses. [Note: Differs from County Purchasing Act in that it is limited to county employees performing the work.]
- (6) the purchase of any land, building, existing utility system, or right-of-way for authorized needs and purposes. [Note: Substantially the same as the County Purchasing Act.]
- (7) expenditures for or relating to improvements in municipal water systems, sewer systems, streets, or drainage, if at least one-third of the cost of the improvements is to be paid by special assessments levied against properties to be benefited by the improvements. [Note: No similar provision in County Purchasing Act.]
- (8) a case in which the entire contractual obligation is to be paid from bond funds or current funds or in which an advertisement for bids has previously been published in accordance with this subchapter but the current funds or bond funds are not adequate to permit the awarding of the contract and certificates are to be awarded to provide for the deficiency;
- (9) the sale of a public security, as that term is defined by Section 1204.001, Government Code. [Note: No similar provision in County Purchasing Act.]
- (10) a county contract that, under the County Purchasing Act (Subchapter C, Chapter 262), is not required to be made in accordance with competitive bidding procedures like those prescribed by the Certificate of Obligation Act.

## **Pre-Bid Conference**

The commissioners 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. After a conference is conducted, any additional required notice for the proposed contract may be sent by certified mail, return receipt requested, only to prospective bidders who attended the conference. This notice is not subject to the requirements of Section 271.055. TEX. LOC. GOV'T CODE § 271.0565.

## **Award of Contract**

A contract let under this the Certificate of Obligation Act for the construction of public works or the purchase of materials, equipment, supplies, or machinery and for which competitive bidding is required by this subchapter must be let to the lowest responsible bidder and, as the governing body determines, may be let on a lump-sum basis or unit price basis. Note, that the commissioners court may condition acceptance of the bid on the attendance of a mandatory pre-bid conference under Section 271.0565. TEX. LOC. GOV'T CODE § 271.057

## **Right to Reject Bids**

The commissioners court may reject any and all bids submitted for which competitive bidding is required under the Certificate of Obligation Act. TEX. LOC. GOV'T CODE § 271.058.

## **Performance and Payment Bonds**

For a contract that is for the construction of a public works that is required under the Certificate of Obligation Act to be submitted to competitive bidding, the successful bidder must execute a good and sufficient payment bond and performance bond. The bonds must each be:

- (1) in the full amount of the contract price; and
- (2) executed, in accordance with Chapter 2253, Government Code, with a surety company authorized to do business in this state.

## **Change Orders**

After performance of a construction contract begins, the commissioners court may approve change orders if necessary to:

- (1) make changes in plans or specifications; or
- (2) decrease or increase the quantity of work to be performed or materials, equipment, or supplies to be furnished.

The total price of a contract may not be increased by a change order unless provision has been made for the payment of the added cost by the appropriation of current funds or bond funds for that purpose, by the authorization of the issuance of certificates, or by a combination of those

procedures. The original contract price may not be increased by more than 25 percent. The original price may not be decreased by more than 25 percent without the consent of the contractor. TEX. LOC. GOV'T CODE § 271.060.

### **Compensation on Unit Price Contracts**

Where the contract is let on a unit price basis, the compensation paid to the contractor must be based on the actual quantities of items constructed or supplied. TEX. LOC. GOV'T CODE § 271.061.

### **Certain Contracts Not Required to Be in Writing**

A contract executed under the competitive bidding provision or that is exempt from the notice requirements of the Certificate of Obligation Act is not required to be in writing if the work to be performed under the contract:

- (1) is legal services;
- (2) is work to be done by regular salaried employees; or
- (3) is to be paid as the work progresses.

TEX. LOC. GOV'T CODE § 271.062.

### **Unconstitutional Procedure Corrected by Resolution**

If a procedure used under the Certificate of Obligation Act is held to be in violation of the state or federal constitution, the county by resolution may provide an alternative procedure that conforms to the constitution. TEX. LOC. GOV'T CODE § 271.063.

### **Criminal Penalties**

- (1) An officer or employee of the county commits an offense if the officer or employee intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of Section 271.054. The offense is a Class B misdemeanor.
- (2) An officer or employee of the county commits an offense if the officer or employee intentionally or knowingly violates Section 271.054, other than by conduct described by above. This offense is also a Class B misdemeanor.
- (3) An officer or employee of the county commits an offense if the officer or employee intentionally or knowingly violates the requirements of the Certificate of Obligation Act , other than by conduct described in (1) or (2) above. This offense is a Class C misdemeanor.

TEX. LOC. GOV'T CODE § 271.064.

## **Removal from Office, Ineligibility**

The final conviction of an officer or employee of the county for an offense under Section 271.064 punishable as a Class B misdemeanor 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 county with which the person served when the offense occurred; and
- (3) to receive any compensation through a contract with the county.

However, a conviction does not prohibit the payment of retirement or workers' compensation benefits to the removed officer or employee. TEX. LOC. GOV'T CODE § 271.065.

## **STATE COOPERATION IN LOCAL PURCHASING PROGRAMS**

Subchapter D of Chapter 271, Local Government Code, provides for state cooperation in local government purchasing programs. It provides for the Comptroller of Public Accounts to establish a program to furnish purchasing services for local governments, including counties, and authorizes local government participation. This program can offer substantial savings for many kinds of purchases and may be used to satisfy "any state law requiring" competitive bids for purchase of the item of interest. TEX. LOC. GOV'T CODE § 271.083(b).

### **Participation**

A county may participate in the purchasing program, including participation in purchases that use the reverse auction procedure, as defined by Section 2155.062(d)<sup>10</sup>, Government Code, by filing with the commission a resolution adopted by the commissioners court requesting that the county be allowed to participate on a voluntary basis, to the extent the commission deems feasible, and stating that the county will:

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<sup>10</sup> Section 2155.062(d) provides the definition of "reverse auction procedure":

(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.

- (1) designate an official to act for the local government in all matters relating to the program, including the purchase of items from the vendor under any contract, and that the governing body will direct the decisions of the representative;
- (2) be responsible for:
  - (A) submitting requisitions to the comptroller under any contract, or
  - (B) electronically sending purchase orders directly to vendors, or complying with comptroller procedures governing a reverse auction purchase, and electronically sending to the comptroller reports on actual purchases made under this provision that provide the information and are sent at the times required by the comptroller.
- (3) be responsible for making payment directly to the vendor; and
- (4) be responsible for the vendor's compliance with all conditions of delivery and quality of the purchased item.

A county that purchases an item under a state contract or under a reverse auction procedure, as defined by Section 2155.062(d), sponsored by the comptroller satisfies any state law requiring the county to seek competitive bids for the purchase of the item. The provisions of Chapter 2177, Government Code, shall apply to a county that exercises the ability to electronically send purchase orders and information under this provision. TEX. LOC. GOV'T CODE § 271.083.

## **COOPERATIVE PURCHASING PROGRAM**

Subchapter F of Chapter 271 of the Local Government Code authorizes the formation of a “local cooperative organization”<sup>11</sup> between local governments for the purpose of establishing a cooperative access to contracts with vendors for the purchase of materials, supplies, services or equipment. TEX. LOC. GOV'T CODE §271.101(1). As for Subchapter D purchases via the Comptroller’s program, the statute expressly provides that local government purchases via a local cooperative organization “satisfies any state law” requiring competitive bidding for the goods or services. TEX. LOC. GOV'T CODE § 271.102(c). In many ways, this approach is similar to what might be accomplished by a suitable interlocal contract.

### **Participation**

A county may participate in a cooperative purchasing program with another local government or a local cooperative organization. A county that is participating in a cooperative

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<sup>11</sup> “An organization of governments established to provide local governments access to contracts with vendors for the purchase of materials, supplies, services, or equipment.” TEX. LOC. GOV'T CODE § 271.101.

purchasing program may sign an agreement with another participating local government or a local cooperative organization stating that the signing local government will:

- (1) designate a person to act under the direction of, and on behalf of, that local government in all matters relating to the program;
- (2) make payments to another participating local government or a local cooperative organization or directly to a vendor under a contract made under this subchapter, as provided in the agreement between the participating local governments or between a local government and a local cooperative organization; and
- (3) be responsible for a vendor's compliance with provisions relating to the quality of items and terms of delivery, to the extent provided in the agreement between the participating local governments or between a local government and a local cooperative organization.

A local county that purchases goods or services under this subchapter satisfies any state law requiring the local government to seek competitive bids for the purchase of the goods or services.” TEX. LOC. GOV’T CODE § 271.102.

## **FEDERAL SUPPLY SCHEDULE SOURCES**

Subchapter G authorizes local government purchases from federal supply schedule sources, which will satisfy “any state law” requiring competitive bidding. TEX. LOC. GOV’T CODE § 271.103. However, the Attorney General has indicated that to the extent federal law no longer makes federal supply schedules of the United States General Services Administration available to local governments, section 271.103 of the Local Government Code is without effect. As no other state statute relies on or makes specific reference to the former federal cooperative purchasing program, however, the change in federal law does not appear to affect the purchasing authority of Texas agencies and political subdivisions under other state statutes. Whether a federal agency is authorized to provide particular goods to a state agency or local government will depend upon federal law. OP. TEX. ATT’Y GEN. No. JC-0230 (2000).

## **ALTERNATIVE PROJECT DELIVERY METHODS OF CONTRACTING FOR CERTAIN CONSTRUCTION PROJECTS**

Subchapter H of Local Government Code Chapter 271 provides for several alternative methods of contracting for certain construction projects. These include:

- (1) Competitive bidding;
- (2) Competitive sealed proposals;
- (3) Construction manager-agent contracts;
- (4) Construction manager-at-risk contracts; and
- (5) Design-build contracts;
- (6) Job order contracts.

Each of these methods will be summarized in turn. Each may be used for construction, rehabilitation, alteration or repair of a “facility.”

## **Warning**

When deciding to use one of these alternative methods, a county, unlike other governmental entities, must determine how it is going to pay for the construction project. Section 262.023(b) of the Local Government Code makes these methods available only for projects to be financed by current funds, bond funds, time warrants or in certain instances anticipation notes.<sup>12</sup> There have been instances where counties that have attempted to use these alternative methods were enjoined from proceeding and had to restart the process and issue a request for competitive bids. In 2007, the legislature passed H.B. 440 which would have permitted a county to use certificates of obligation, but the bill was vetoed by the governor.

## **Definition of Facility**

A “facility” is defined to be “buildings the design and construction of which are governed by accepted building codes” and, unless otherwise specifically provided, expressly does NOT include: road projects, water and wastewater plants and projects, wharves or docks, airport runways and taxiways, drainage projects, or other projects “associated with civil engineering construction,” or buildings incidental to projects that are primarily civil engineering construction. TEX. LOC. GOV’T CODE § 271.111(7).

Regardless of the method employed, certain minimum notice and advertising requirements apply. For counties, notice of the time and place for the bids or proposals, or responses to a request for qualifications, will be received and opened must be made in a paper of general circulation in the county once a week for at least two weeks prior to the relevant deadline for receiving bids, proposals or responses. If there is no newspaper in the county, the notice is to be posed at the courthouse door and publication in a newspaper of general circulation in the nearest county. TEX. LOC. GOV’T CODE § 271.112(e). Procedures must be followed, or the contract is *void* and may be enjoined; there are, as in statutes described previously, criminal penalties for failure to follow required procedures. TEX. LOC. GOV’T CODE § 271.112(f).

The chief difference between these alternative methods and traditional competitive bidding is that criteria other than price may be considered.<sup>13</sup> Generally, the county may consider a variety of factors in determining which bid or proposal offers the “best value” to the entity. These include:

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<sup>12</sup> Authorized by Chapter 1431, Government Code. However, Section 262.023 (b-1) prohibits a county from issuing anticipation notes for the payment of that contract in an amount that exceeds the lesser of: (1) 20 percent of the county's budget for the fiscal year in which the county enters into the contract; or (2) \$10 million.

<sup>13</sup> Only the competitive bidding procedures in chapter 262, applicable to counties that do not use one of these subchapter H alternative methods, retain the primarily-price-based “lowest responsible bidder” standard.

- (1) price;
- (2) vendor reputation, and reputation of the vendor's goods or services;
- (3) quality of the vendor's goods or services;
- (4) extent to which the goods or services meet the entity's needs;
- (5) vendor's past relationship with the entity;
- (6) impact on the ability of the entity to comply with rules relating to HUBs;
- (7) the long-term total cost to the entity to acquire the vendor's goods or services; and
- (8) *any other relevant factor specifically listed in the request for bids or proposals.*

TEX. LOC. GOV'T CODE § 271.113(b) (emphasis added). These are the same factors that are permitted in § 252.043(b) applicable to competitive bidding by cities.

Whatever such criteria are to be applied must be identified in the published notice. TEX. LOC. GOV'T CODE § 271.114(b).

### **("Alternative") Competitive Bidding**

In this approach, the county first hires an architect or engineer to design the project and develop construction plans. A request for bids is then issued, based on those plans and selection criteria specified by the governing body.

Subsections 271.112(d) and (e), described above, state the notice requirements that apply to competitive bidding under subchapter H.

The contract may be awarded to the bidder offering the "best value" to the county or city "according to the criteria that were established by the governing body." TEX. LOC. GOV'T CODE § 271.115(c). Section 271.113(b) states the criteria that may be considered in awarding a contract representing the "best value" to the governmental entity. *See* TEX. LOC. GOV'T CODE § 271.114(b) ("entity shall base its selection . . . on criteria authorized to be used under Section 271.113(b).")

This method does not permit the county to negotiate with the successful bidder.

Subchapter H controls over any conflict between it and "any other law relating to the purchasing of goods and services" except laws applying to contracting with HUBs. TEX. LOC. GOV'T CODE § 271.112(c).

The competitive bidding procedures of subchapter B expressly do not apply to competitive bidding under subchapter H. Sections 271.026, 271.027(a) and 271.0275 do apply to a competitive bidding process. TEX. LOC. GOV'T CODE § 271.115(b).

### **Competitive Sealed Proposals**

The city or county must first select an architect or engineer to design the project and to prepare construction documents. TEX. LOC. GOV'T CODE § 271.116(b). If the architect is not an employee of the entity, he/she must be selected on the basis of “demonstrated competence and qualifications.” *Id.*

The city or county must contract separately for inspection services, testing of construction materials and verification testing for acceptance of the project, that is, separately from the eventual contractor. TEX. LOC. GOV'T CODE § 271.116(c).

A request for sealed proposals is then prepared, including the construction documents, and identification of selection criteria specified by the governing body, an estimated budget, a statement of project scope, schedule and other pertinent information. TEX. LOC. GOV'T CODE § 271.116(d).

Sealed proposals are received by the stated deadline, opened publicly and read aloud. The city or county then has no more than 45 days to evaluate and rank each proposal using the stated, published selection criteria. TEX. LOC. GOV'T CODE § 271.116(e).

The contract first negotiates with the offeror whose proposal offers the “best value” based on the identified selection criteria and on the ranking evaluation. The entity and its engineer or architect may discuss options for a scope or time modification and any associated price change. If a contract is agreed, it is awarded to that offeror. If no contract can be agreed, the city or county must “formally and in writing” end negotiations with that offeror. The city or county then proceeds to the next best offeror, and repeats the process until a contract is agreed or all proposals are rejected. TEX. LOC. GOV'T CODE § 271.116(f). The city or county may NOT go back to reopen discussions with an offeror that has been rejected.

### **Construction Manager-Agent**

In this method, the Construction Manager-Agent functions as a project manager but does not have responsibility for design or construction. TEX. LOC. GOV'T CODE § 271.117.

As with the previously-described methods, the city or county first hires an architect or engineer to design the project and prepare plans. The city or county then selects the Construction Manager-Agent (“CMA”) through a request for proposals on the basis of demonstrated competence and qualifications.

The CMA may provide pre-construction phase services but does not contract directly with trade contractors or provide bonds for the project. Instead, the CMA functions as an advisor

and agent for the city or county, and the city or county contracts directly with a general contractor (if desired) and each trade contractor. The CMA oversees and coordinates work by the trade contractors and arranges for all testing of materials, inspection services and acceptance verification testing.

Please note that with a CMA, there is no general contractor. Consequently, the county will not have a single source to be bonded for the entire project.

### **Construction Manager-at-Risk**

In this approach, the Construction Manager-at-Risk (“CMR”) provides pre-construction phase services and serves as the general contractor. TEX. LOC. GOV’T CODE § 271.118. The contract may provide for a guaranteed maximum price for construction. If so, the CMA assumes the risk for costs in excess of that guaranteed maximum price.

As before, the city or county first selects an architect or engineer to design the project and prepare construction plans. At the same time, or after, the city or county selects the CMR by using either a one-step process or a two-step process.

In the one-step process, a request for proposals (“RFP”) is issued, based, as before, on the plans and stating applicable evaluation criteria. Prices may be requested. The offers received are evaluated and ranked based on the stated criteria and demonstrated competence and qualifications.

In the two-step process, a request for qualifications (“RFQ”) is issued. Prices (for the contract tasks specified for the CMR, not the entire project) or fees may NOT be requested in this first step. Responses are ranked based on the stated criteria. Up to the top five (5) responders may then be requested to provide additional information, including the CMR’s proposed fee and its price for fulfilling the general conditions of the contract.

In either approach, the city or county begins with the highest ranked offeror and negotiates to agree on a contract. As for the selection of a CMA, if the city or county is unable to agree on a contract with an offeror, negotiations are formally ended with that offeror, and the city or county begins negotiations with the next-ranked offeror. This process continues until a contract is agreed or all offers are rejected.

The CMR must advertise and receive bids or proposals from trade contractors. The CMR may seek to perform specific work itself if the CMR submits its bid or proposal for that work just as all other trade contractors do; if the governing body determines the CMR’s bid or proposal offers the best value, it may be awarded the work contract.

In this approach, as for the design-build approach discussed below, because the project design and plans usually have not been completed before the CMR is selected, the total price for construction may not have been established when the CMR is selected. In that instance, the CMR will usually propose a maximum construction price after the plans are developed, which the city or county can either accept, negotiate or reject. If a price agreement cannot be reached,

the contract terminates and another CMR must be selected by beginning the selection process all over. Alternatively, at this point, the city or county could decide to use a different method.

If a construction price agreement is reached, the contract is amended to reflect that price and the construction phase can begin. The construction price that has been agreed is often a guaranteed maximum price including both construction costs and the CMR's fee. *If actual construction costs exceed the agreed price, the CMR must absorb the difference.* (This is the "at risk" part of the designation.) If actual construction costs are less than the agreed price, the contract will determine how that difference is credited; the city or county needs to ensure that this provision is favorable.

### **Design-Build Contracts**

In this approach, the city or county contracts with a single entity to provide both the project design and construction plans and to build the project. TEX. LOC. GOV'T CODE § 271.119.

As with the CMA and CMR methods, the city or county first hires its own architect or engineer, but this time, not to design the project and prepare plans but to advise the city or county and to develop a design-criteria package for the project.

Selection of the design-build team (architect/engineer, general contractor, etc.) occurs in two steps, as for the two-step option with the CMR method. The city or county first prepares an RFQ based on the general information for the project, stated selection criteria, project scope, estimated budget and the design-criteria specifications developed by the city's or county's own architect or engineer. Each response is then evaluated and ranked, based on the stated criteria and on the experience, competence and other qualifications of the RFQ responders.

In step two, the city or county may ask for additional information from the top five (5) ranked responders and may interview them. Detailed engineering or architectural plans may not be requested of the responders at this point. These proposers are then evaluated and ranked in terms of the "best value" hierarchy represented by their proposals, based on the stated criteria and the qualifications and demonstrated competence of the teams. Then, as with the CMA and CMR methods, the city or county begins negotiation of a contract with the highest-ranked proposer. If no agreement can be reached, negotiations with that proposer are formally terminated and negotiations are begun with the next-highest ranked proposer, and so on, until a contract is agreed or all proposals have been rejected.

Once a contract is awarded, the design/build team designs the project plans and constructs the project. The team is responsible for all pre-construction and construction phase work described in the scope of work in the contract.

As was the case for the CMR method, the price is proposed by the design/build team once the plans have been developed and the team can estimate the costs of the project. Similar price negotiation, including setting a guaranteed maximum price, usually occurs to set the contract price. The design/build contractor assumes the risk that the construction will cost more than the agreed construction price.

## **Job Order Contracts**

A county may use the job order method to award contracts for the minor construction, repair, rehabilitation, or alteration of a facility if the work is of a recurring nature, but the delivery times are indefinite and indefinite quantities and orders are awarded substantially on the basis of prescribed and prepriced tasks. TEX. LOC. GOV'T CODE § 271.120.

The legislature in 2007 amended the statute to ensure that it was not used for major new construction projects. To use this method, the county may establish contractual unit prices for a job order contract by:

- (1) specifying one or more published construction unit price books and the applicable divisions or line items; or
- (2) providing a list of work items and requiring the offerors to bid or propose one or more coefficients or multipliers to be applied to the price book or work items as the price proposal.

The county is required to advertise for, receive, and publicly open sealed proposals for job order contracts. The county may require offerors to submit additional information besides rates, including experience, past performance, and proposed personnel and methodology. The county may award job order contracts to one or more job order contractors in connection with each solicitation of bids or proposals.

An order for a job or project under the job order contract must be signed by the county's representative and the contractor. The order may be a fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities or may be a unit price order based on the quantities and line times delivered.

The contractor must provide payment and performance bonds, if required by law, based on the amount or estimated amount of any order.

The base term of a job order contract is for the period and with any renewal options that the governmental entity sets forth in the request for proposals. If the county fails to advertise that term, the base term may not exceed two years and is not renewable without further advertisement and solicitation of proposals.

If a job order contract or an order issued under the contract requires engineering or architectural services that constitute the practice of engineering or the practice of architecture, the county must select or designate an architect or engineer to prepare the construction documents for the facility. If the architect or engineer is not a full-time employee of the county, the county must select the architect or engineer on the basis of demonstrated competence and qualifications as provided for in the Professional Services Procurement Act, Section 2254.004, Government Code.

## **WAIVER OF IMMUNITY FOR CONSTRUCTION RELATED CONTRACTS**

While other local governments are subject to Subchapter I of Local Government Code chapter 271, which waives immunity from suit<sup>14</sup> for contracts for goods and services, it does not apply to counties. However, if the contract is for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services, the county may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract. A suit on the contract brought by a county shall be brought in the name of the county. A suit on the contract brought against a county shall identify the county by name and must be brought in a state court in that county. TEX. LOC. GOV'T CODE § 262.007(a).

The total amount of money recoverable from a county on a claim for breach of the contract is limited to the following:

- (1) the balance due and owed by the county under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;
- (2) the amount owed for change orders or additional work required to carry out the contract;
- (3) reasonable and necessary attorney's fees that are equitable and just; and
- (4) interest as allowed by law.

An award of damages under this section may not include:

- (1) consequential damages, except as allowed under Subsection (b)(1);
- (2) exemplary damages; or
- (3) damages for unabsorbed home office overhead.

Section 262.007 does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity, nor does Section 262.007 waive sovereign immunity to suit in federal court.

## **DESIGN-BUILD PROCEDURES FOR CERTAIN CIVIL WORKS PROJECTS (NEW)**

Subchapter J of Chapter 271, Local Government Code, creates a design-build process for civil works projects and allows certain local governmental entities to use this process on a phased basis. Subchapter J expands the use of competitive sealed proposals and construction manager-at-risk civil works projects.

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<sup>14</sup> There are two aspects to sovereign immunity: immunity from suit and immunity from liability. Texas cases have held that entering into a contract waives immunity from liability (*i.e.*, for breach of the contract).

## **Population Size Limitations**

Before September 1, 2009, Subchapter J only applies to a county local entity with a population of 500,000 or more within its geographic boundaries or service area. After September 1, 2009, it will apply to a local governmental entity with a population of more than 100,000 within its geographic boundaries or service area. TEX. LOC. GOV'T CODE § 271.182.

## **Other Laws**

Subchapter J prevails over any other law relating to the purchasing of goods and services except a law relating to contracting with historically underutilized businesses and requires that purchasing requirements related to recycled products in Section 361.426, Health and Safety Code, apply to purchases made under Subchapter J. TEX. LOC. GOV'T CODE § 271.183.

## **Notice**

A local governmental entity is required to advertise or publish notice of requests for bids, proposals, or qualifications in any manner prescribed by law. The local government is required to publish notice of the time and place the bid or proposals or the request for qualifications will be received and opened in any manner prescribed by law. TEX. LOC. GOV'T CODE § 271.184.

## **Contracts for Civil Works Projects: Design-Build**

A local governmental entity is authorized to use the design-build method for the construction, rehabilitation, alteration, or repair of a civil works project. The local governmental entity and the design-build firm must follow the procedures provided by Subchapter J in using this method and in entering into a contract for the services of a design-build firm. TEX. LOC. GOV'T CODE § 271.185(a).

The contract for a project under may cover only a single integrated project. The local governmental entity may not enter into a contract for aggregated projects at multiple locations. However, a water treatment plant, including a desalinization plant, that includes treatment facilities, well fields, and pipelines is a single integrated project. TEX. LOC. GOV'T CODE § 271.185(b).

The local governmental entity is required to use certain criteria as a minimum basis for determining the circumstances under which the design-build method is appropriate for a project:

- (1) the extent to which the entity can adequately define the project requirements;
- (2) the time constraints for the delivery of the project;
- (3) the ability to ensure that a competitive procurement can be held; and
- (4) the capability of the entity to manage and oversee the project, including the availability of experienced personnel or outside consultants who are familiar with the design-build method of project delivery.

TEX. LOC. GOV'T CODE § 271.185(c).

The local governmental entity is required to make a formal finding on the criteria described by Subsection (c) before preparing a request for qualifications under Section 271.189. TEX. LOC. GOV'T CODE § 271.185(d).

### **Limitation on Number of Projects**

A local governmental entity with a population of 500,000 or more, a local governmental entity with a population of 100,000 or more but less than 500,000, and a municipally owned water utility with a separate governing body appointed by the governing body of a municipality with a population of 500,000 or more during the first four years that this Subchapter J applies to the local governmental entity under Section 271.182 is authorized enter into contracts for a certain number of projects in each fiscal year for the first four years that this subchapter applies. TEX. LOC. GOV'T CODE § 271.186(a).

A local governmental entity with a population of 500,000 or more, a local governmental entity with a population of 100,000 or more but less than 500,000, and a municipally owned water utility with a separate governing body appointed by the governing body of a municipality with a population of 500,000 or more is authorized to enter into a certain number of projects in any fiscal year after the period described by Section 271.186(a). TEX. LOC. GOV'T CODE § 271.186(b).

### **Use of Engineer**

A local governmental entity is required to select or designate an engineer who is independent of the design-build firm to act as its representative for the procurement process and for the duration of the work on the civil works project, and the selected or designated engineer has full responsibility for complying with Chapter 1001 (Engineers), Occupations Code. The selection of the engineer must be made pursuant to the Professional Services Procurement Act. TEX. LOC. GOV'T CODE § 271.187.

### **Use of Other Professional Services**

A local governmental entity is required to provide or contract for, independently of the design-build firm, the following services as necessary for the acceptance of the civil works project by the entity:

- (1) inspection services;
- (2) construction materials engineering and testing; and
- (3) verification testing services.

The selection of these services must be made pursuant to the Professional Services Procurement Act. TEX. LOC. GOV'T CODE § 271.188.

## **Request for Qualifications**

A local governmental entity is required to prepare a request for qualifications that includes:

- (1) information on the civil works project site;
- (2) project scope;
- (3) project budget;
- (4) project schedule;
- (5) criteria for selection under Section 271.191 and the weighting of the criteria; and
- (6) other information that may assist potential design-build firms in submitting proposals for the project.

The local governmental entity is also required to prepare a design criteria package as described by Section 271.190. TEX. LOC. GOV'T CODE § 271.189.

## **Design Criteria Package Contents**

The design criteria package may include, as appropriate:

- (1) budget or cost estimates;
- (2) information on the site;
- (3) performance criteria;
- (4) special material requirements;
- (5) initial design calculations;
- (6) known utilities;
- (7) capacity requirements;
- (8) quality assurance and quality control requirements;
- (9) the type, size, and location of structures; and
- (10) notice of any ordinances, rules, or goals adopted by the local governmental entity relating to awarding contracts to historically underutilized businesses.

TEX. LOC. GOV'T CODE § 271.190.

## **Evaluation of Design-Build Firms**

A local government entity is required to receive proposals and evaluate each offeror's experience, technical competence, capability to perform, the past performance of the offeror's team and members of the team, and other appropriate factors submitted by the team or firm in response to the request for qualifications, except that cost-related or price-related evaluation factors are not permitted at this stage. Each offeror is required to select or designate each engineer that is a member of its team based on demonstrated competence and qualifications, in the manner provided by Section 2254.004, Government Code, and certify to the local

governmental entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by Section 2254.004, Government Code. The local governmental entity is required to qualify offerors to submit additional information and, if the entity chooses, to interview for final selection. TEX. LOC. GOV'T CODE § 271.191.

### **Selection of Design-Build Firm**

The local governmental entity is required to select a design-build firm using a combination of technical and cost proposals as provided by Section 271.193. TEX. LOC. GOV'T CODE § 271.192.

### **Procedures for Combination of Technical Cost Proposals**

A local governmental entity is required to request proposals from firms identified under Section 271.191(c). The firm is required to submit a proposal not later than the 180th day after the date the local governmental entity makes a public request for the proposals from the selected firms. The request for proposals must include:

- (1) a design criteria package;
- (2) if the project site is identified, a geotechnical baseline report or other information that provides the design-build firm minimum geotechnical design parameters to submit a proposal;
- (3) detailed instructions for preparing the technical proposal and the items to be included, including a description of the form and level of completeness of drawings expected; and
- (4) the relative weighting of the technical and price proposals and the formula by which the proposals will be evaluated and ranked.

The technical component is a part of the proposal, and each proposal to include a sealed technical proposal and a separate sealed cost proposal. Further, the technical proposal must address:

- (1) project approach;
- (2) anticipated problems;
- (3) proposed solutions to anticipated problems;
- (4) ability to meet schedules;
- (5) conceptual engineering design; and
- (6) other information requested by the local governmental entity.

The local governmental entity shall first open, evaluate, and score each responsive technical proposal submitted on the basis of the criteria described in the request for proposals

and assign points on the basis of the weighting specified in the request for proposals. The local governmental entity may reject as nonresponsive any firm that makes a significant change to the composition of its firm as initially submitted. The local governmental entity shall subsequently open, evaluate, and score the cost proposals from firms that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals. The local governmental entity shall select the design-build firm in accordance with the formula provided in the request for proposals. TEX. LOC. GOV'T CODE § 271.193.

### **Negotiation**

After selecting the highest ranked design-build firm, the local governmental entity shall first attempt to negotiate a contract with the selected firm. If the local governmental entity is unable to negotiate a satisfactory contract with the selected firm, the entity shall, formally and in writing, end all 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 firms end. TEX. LOC. GOV'T CODE § 271.194.

### **Assumption of Risks**

The local governmental entity to assume

- (1) all risks and costs associated with:
  - (A) scope changes and modifications, as requested by the local governmental entity;
  - (B) unknown or differing site conditions unless otherwise provided by the local governmental entity in the request for proposals and final contract;
  - (C) regulatory permitting, if the local governmental entity is responsible for those risks and costs by law or contract; and
  - (D) natural disasters and other force majeure events unless otherwise provided by the local governmental entity in the request for proposals and final contract; and
- (2) all costs associated with property acquisition, excluding costs associated with acquiring a temporary easement or work area associated with staging or construction for the project.

TEX. LOC. GOV'T CODE § 271.195.

### **Stipend Amount for Unsuccessful Offerors**

The design-build firm retains all rights to the work product submitted in a proposal, unless a stipend is paid as provided below. The governmental entity is required to return all

copies of the proposal and other information submitted to an unsuccessful offeror. The local governmental entity prohibited from making use of any unique or nonordinary design element, technique, method, or process contained in the unsuccessful proposal that was not also contained in the successful proposal at the time of the original submittal, unless the entity acquires a license from the unsuccessful offeror. TEX. LOC. GOV'T CODE § 271.196(a).

A violation voids the contract that the local government entered into with the successful offeror. Further, the local governmental entity is liable to any unsuccessful offeror, or any member of the design-build team or its assignee, for one-half of the cost savings associated with the unauthorized use of the work product of the unsuccessful offeror. Any interested party may bring an action for an injunction, declaratory relief, or damages for a violation of this section. A party who prevails in an action under this subsection is entitled to reasonable attorney's fees as approved by the court. TEX. LOC. GOV'T CODE § 271.196(b).

The local governmental entity may offer an unsuccessful design-build firm that submits a response to the entity's request for additional information a stipend for preliminary engineering costs associated with the development of the proposal. The stipend must be one-half of one percent of the contract amount and must be specified in the initial request for proposals. If the offer is accepted and paid, the local governmental entity may make use of any work product contained in the proposal, including the techniques, methods, processes, and information contained in the proposal. The use by the local governmental entity of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the entity and does not confer liability on the recipient of the stipend under this subsection. TEX. LOC. GOV'T CODE § 271.196(c).

Notwithstanding other law, including Chapter 552, Government Code, work product contained in an unsuccessful proposal submitted and rejected under this subchapter is confidential and may not be released unless a stipend offer has been accepted and paid. TEX. LOC. GOV'T CODE § 271.196(d).

### **Completion of Design**

Following selection of a design-build firm, the firm's engineers shall submit all design elements for review and determination of scope compliance to the local governmental entity before or concurrently with construction. An appropriately licensed design professional shall sign and seal construction documents before the documents are released for construction. TEX. LOC. GOV'T CODE § 271.197.

### **Final Construction Documents**

At the conclusion of construction, the design-build firm shall supply to the local governmental entity a record set of construction documents for the project prepared as provided by Chapter 1001, Occupations Code. TEX. LOC. GOV'T CODE § 271.198.

## **Performance or Payment Bond**

A payment or performance bond is not required for the portion of a design-build contract that includes design services only. If a fixed contract amount or guaranteed maximum price has not been determined at the time a design-build contract is awarded, the penal sums of the performance and payment bonds delivered to the local governmental entity must each be in an amount equal to the construction budget, if commercially available and practical, as specified in the design criteria package. If the local governmental entity awards a design-build contract, the design-build firm shall deliver the bonds not later than the 10th day after the date the design-build firm executes the contract unless the design-build firm furnishes a bid bond or other financial security acceptable to the local governmental entity to ensure that the design-build firm will furnish the required performance and payment bonds before the commencement of construction. TEX. LOC. GOV'T CODE § 271.199.

## **COUNTY CONTRACT WITH PRIVATE ENTITY FOR JAIL FACILITIES**

A special provision exists for contracting with a private entity regarding jail matters. Subchapter F of Chapter 351, Texas Local Government Code.

### **Contract to Place Prisoners in Detention Facility**

A commissioners court, with the approval of the sheriff of the county, may contract with a private organization to place inmates in a detention facility operated by the private organization. The commissioners court may not contract with a private organization in which a member of the commissioners court or an elected or appointed peace officer who serves in the county has a financial interest or in which an employee or commissioner of the Commission on Jail Standards has a financial interest. A contract made in violation of this section is void. TEX. LOC. GOV'T CODE § 351.101.

### **Additional Authority to Contract**

A commissioners court may contract with a private vendor to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a jail, detention center, work camp, or related facility. The commissioners court may not award a contract unless the commissioners court requests proposals by public notice and not less than 30 days from such notice receives a proposal that meets or exceeds the requirements specified in the request for proposals. Before the commissioners court of a county enters into a contract under this section, the commissioners court of the county must receive the written approval of the sheriff of the county, which written approval shall not be unreasonably withheld, or if the county has a population of 2.8 million or more:

- (1) ensure that all services provided under the contract are required to meet or exceed standards set by the Commission on Jail Standards; or

- (2) receive the written approval of the sheriff of the county, which written approval shall not be unreasonably withheld.

TEX. LOC. GOV'T CODE § 351.102.

### **Contract Requirements**

The contract must:

- (1) if the contract includes operation or management of the facility by the private vendor, require the private vendor to operate the facility in compliance with minimum standards adopted by the Commission on Jail Standards and receive and retain a certification of compliance from the commission;
- (2) if the contract includes operation or management of the facility by the private vendor, provide for regular, on-site monitoring by the sheriff<sup>15</sup>;
- (3) if the contract includes construction, require a performance bond approved by the commissioners court that is adequate and appropriate for the proposed construction contract;
- (4) provide for assumption of liability by the private vendor for all claims arising from the services performed under the contract by the private vendor;
- (5) if the contract includes operation or management of the facility by the private vendor, provide for an adequate plan of insurance for the private vendor and its officers, guards, employees, and agents against all claims, including claims based on violations of civil rights, arising from the services performed under the contract by the private vendor;
- (6) if the contract includes operation or management of the facility by the private vendor, provide for a plan for the purchase and assumption of operations by the county in the event of the bankruptcy of the private vendor;
- (7) if the contract includes operation or management of the facility by the private vendor and if the contract involves conversion of an existing county facility to private vendor operation, require the private vendor to give preferential consideration in hiring to employees at the existing facility who meet or exceed the company's qualifications and standards for employment in available positions;

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<sup>15</sup> Only duty of sheriff with regard to detention facility operated by private vendor pursuant to contract with his county is to exercise "regular, on-site monitoring" of facility. OP. TEX. ATT'Y GEN. No. DM-86 (199280).

- (8) if the contract includes operation or management of the facility by the private vendor, require the private vendor to provide health care benefits comparable to that of the county;
- (9) provide for an adequate plan of insurance to protect the county against all claims arising from the services performed under the contract by the private vendor and to protect the county from actions by a third party against the private vendor, its officers, guards, employees, and agents as a result of the contract; and
- (10) if the contract includes operation or management of the facility by the private vendor, contain comprehensive standards for conditions of confinement.

TEX. LOC. GOV'T CODE § 351.103.

### **Disadvantaged Businesses**

For purposes of Subchapter E, of Chapter 351, "disadvantaged business" means:

- (1) a corporation formed for the purpose of making a profit in which at least 51 percent of all classes of the shares of stock or other equitable securities are owned by one or more persons who are socially disadvantaged because of their identification as members of certain groups, including black Americans, Hispanic Americans, women, Asian Pacific Americans, and American Indians, who have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control;
- (2) a sole proprietorship for the purpose of making a profit that is 100 percent owned, operated, and controlled by a person described by Subdivision (1) of this subsection;
- (3) a partnership for the purpose of making a profit in which 51 percent of the assets and interest in the partnership is owned by one or more persons described by Subdivision (1) of this subsection. Those persons must have a proportionate interest in the control, operation, and management of the partnership's affairs;
- (4) a joint venture in which each entity in the joint venture is a disadvantaged business under this subsection; or
- (5) a supplier contract between a disadvantaged business under this subsection and a prime contractor under which the disadvantaged business is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies.

The legislature has made a goal that disadvantaged businesses be given full and complete access to the process whereby contracts are let under this subchapter. It is also an intent of the legislature that the county and general contractor shall take into consideration participation of disadvantaged businesses having their home offices located in this state when awarding contracts.

The legislature has indicated that it is an intent of the legislature that a county that contracts under Subchapter E shall:

- (1) develop guidelines targeted to disadvantaged businesses in order to inform them fully about the county's contracting and procurement processes and the requirements for their participation in those processes;
- (2) develop guidelines to inform disadvantaged businesses of opportunities with the county, including, but not limited to, specific opportunities to submit bids and proposals. Steps that may be appropriate in certain circumstances include mailing requests for proposals or notices inviting bids to all disadvantaged businesses in the county who have requested the county procurement office to place the business on a mailing list;
- (3) require prime contractors, as part of their responses to requests for proposals or bids, to make a specific showing of how they intend to utilize participation by disadvantaged businesses as subcontractors;
- (4) identify disadvantaged businesses in the county that provide or have the potential to provide supplies, materials, services, and equipment to the county; and
- (5) identify barriers to participation by disadvantaged businesses in the county's contracting and procurement processes, such as bonding, insurance, and working capital requirements that may be imposed on businesses.

TEX. LOC. GOV'T CODE § 351.104.

### **Sovereign Immunity Inapplicable to Private**

A private vendor operating under a contract authorized by Section 351.102 is not entitled to claim sovereign immunity in a suit arising from the services performed under the contract by the private vendor. However, this section does not deprive the private vendor or the county of any benefits of any law limiting exposure to liability, setting a limit on damages, or establishing defenses to liability.

## CAUTION: WHEN YOU CONTRACT FOR INTELLECTUAL PROPERTY

There are some special considerations when you are contracting for the creation or use of intellectual property, in substantial part related to ownership principles applicable to intellectual property. This section will focus on copyright because that is the type of intellectual property most often contracted for or about by public entities.

The rules of ownership of copyrights are often unfamiliar. Copyright is a creature of (federal) statute; the ownership rules are statutory, and they do not always agree with your common sense of what is appropriate or fair. The basic presumption is that the “author” of the work is the copyright owner unless and until that ownership has been conveyed. 17 U.S.C. § 201(a).

Ownership may be conveyed only in writing; purported oral transfers are ineffective as a matter of law. 17 U.S.C. § 204.

It may surprise you that copyrights come in to being *when the work is created*. The author need not do anything to create his/her copyright interests. 17 U.S.C. § 102(a).

Why should a local government care about all this? Can you answer this question: Who owns your website?

Common sense tells you that since you paid for its creation and maintenance, you (the local governmental entity) owns it. But in many cases, unless care was taken in the contracting and other arrangements for its creation, that may not be true. The city or county may hold only an implied license to use the website materials.

How can that be, if you have paid for it?

Here is a more detailed explanation of the copyright ownership principles at play. The “author” is the *natural person* who creates a work. 17 U.S.C. § 102(a). There are two circumstances where that person is not considered the author, and hence is not the owner in the first instance: when the work is a “work-made-for-hire,” either by an employee or by an independent contractor. 17 U.S.C. § 101. In that case, the hiring party is considered to be the author and hence initial owner of the work.

Not every work made by an employee qualifies as a work-made-for-hire, however. Only works created by the employee *acting within the course and scope of employment* are works-made-for-hire. 17 U.S.C. § 101. If a work by an employee is within that employee’s scope of work, the employer is considered to be the author and owns the copyrights from the outset. But if the work is outside the usual scope of the employee’s job, the employee has, in effect, acted as an independent contractor for that work. And then the employer does not necessarily own the copyright.

For example, suppose that a work is made for the employer by an employee whose job description is for, say, accounting but who just happens to have some other skills, say, website

construction and maintenance, and is more than willing to get to spend work time or paid overtime helping the employer out by building some or all of the employer's new website or updating an existing website. Unless there is a written contractual agreement to the contrary, that website belongs to the employee, not the employer—although the employer will have an implied-at-law license to use the website it paid for.

Not every kind of work done by an independent contractor can be a work-made-for hire. Only works of a kind specifically listed in the statute qualify. There are nine kinds, and they may not include computer programs or websites, depending on the precise circumstances of creation. 17 U.S.C. § 101. In each instance, you need to consult the statutory list. Even if the work is of the right kind, you still need—unlike for the employee work-made-for-hire situation—a writing signed by the parties that identifies the work and states the parties' intent that it be a work-made-for-hire. Then the hiring party is considered the author, and hence the owner from the outset.

If there is not such a writing, or if the work is not of a kind that can be a work-made-for-hire by an independent contractor, the only way to acquire ownership is for the author to assign (transfer) ownership to the hiring party. *See* 17 U.S.C. § 201(d). That must be in writing. 17 U.S.C. § 204.

The lesson, therefore, is to ensure that contracts calling for an independent contractor to create or alter copyrightable works have appropriate provisions. The safest course, even where the work is of a kind that can be work-made-for-hire, is to have provisions calling for the work and associated intellectual property to be assigned/conveyed by the contractor to the hiring entity.<sup>16</sup> Indeed, it is best to have provisions that provide that the conveyance is effective at whatever state of development of the work, not just upon completion of the work, because in case the contractor for whatever reason does not finish the task, you will want to have the right to finish the work and own it.<sup>17</sup>

## **INTERLOCAL CONTRACTS**

Do not overlook the possibility of purchasing either cooperatively or from another public entity by interlocal agreement. The Interlocal Cooperation Act, Government Code chapter 791, has provisions that permit interlocal agreements for purchasing: A local government may, in

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<sup>16</sup> If there is not such a provision, and the contractor owns the copyright, the hiring party may and likely will have a license implied in law to use the work. The question then arises what the scope of that license may be; that is a fact question, to be determined from the intent and understanding of the parties, assuming it can be ascertained. That intent is likely to be inferred from the immediate purposes for which the hiring party intended the work – but perhaps not for as-yet unanticipated future uses. Thus, as a practical matter, the scope may and likely would be more restrictive than ownership rights.

<sup>17</sup> In one case, the hiring party had paid for the development of a work, which was almost but not complete at the time the independent contractor filed for bankruptcy. The contract provided only that the hiring party owned the work upon delivery of the completed work. The court found, notwithstanding the payments by the hiring party, the Trustee in Bankruptcy had title to the work.

general, contract with a state agency or another local government to purchase goods and services. TEX. GOV'T CODE § 791.025. Assuming the party from which you are purchasing has satisfied the purchasing requirements applicable to it, purchase via a qualified interlocal agreement will satisfy the requirements of competitive purchasing applicable to the city or county. TEX. GOV'T CODE § 791.025(c).

Remember that an interlocal contract has several mandatory elements: It must be authorized by each party's governing body. TEX. LOC. GOV'T CODE § 791.011(d). It must contain: a statement of purpose; a term; a statement of the duties and rights of each party; and a statement that the payments will be from current revenues only. TEX. LOC. GOV'T CODE § 791.011(d). The performing party must be fairly compensated. TEX. LOC. GOV'T CODE § 791.011(e). The agreement may be renewed annually. TEX. LOC. GOV'T CODE § 791.001(f).

## **SALE OF REAL PROPERTY**

A county can pursue a sale of the real property under Section 263.001 (public auction), Section 263.007 (sealed bid or sealed proposal), Section 263.008 (listing with real estate broker) or Section 272.001 (competitive sealed bid) of the Texas Local Government Code.

Under Section 263.001, the commissioners court is authorized to enter an order appointing a commissioner to sell or lease the property. The sale must be by auction. The appointed commissioner must publish notice of the auction before the 20th day before the date the auction is held. A sale by auction generally involves a sale to the highest bidder. The auction method is generally considered an appropriate method for properties that do not have a significant market value or which are not readily marketable. Section 263.001 does not expressly require that an appraisal be obtained by a county for this type of sale. However, Section 263.001 does not expressly state that the sales price obtained at auction will establish the fair market value of the property, as do the statutes that authorize a public auction by a city (Section 272.001 (b) and Section 253.008 of the Texas Local Government Code). It would be advisable for a county to establish a minimum bid or reserve amount for the auction, reflective of the fair market value of the property.

Section 263.007 of the Local Government Code authorizes the commissioners court to adopt a procedure by which the property is to be sold. The procedure may be through competitive sealed bids or competitive sealed proposals. The commissioners court must obtain an appraisal and determine the minimum bid amount based on that appraisal. Notice of the sale must be published in a newspaper of general circulation on two separate dates, and the sale may not take place until after the 14<sup>th</sup> day after the date of the second publication. The competitive sealed proposal procedure would give the county an opportunity to determine the financial ability of the purchaser to complete the sale and the ability of the purchaser to obtain any required consents to operate the Property.

Section 263.008 of the Local Government Code authorizes the commissioners court to list the property for sale with a licensed real estate broker. If the contract requires the broker to list the tract of real property for sale for at least 30 days with a multiple-listing service used by

other brokers in the county, the commissioners court, on or after the 30th day after the date the property is listed, may sell the tract of real property to a ready, willing, and able buyer who is produced by any broker using the multiple-listing service and who submits the highest cash. One disadvantage of this method is that the county would be required to pay a brokerage commission in connection with the sale. Brokerage commissions for commercial property generally range from 3% to 6% of the purchase price. This statute does not expressly require that the county obtain an appraisal of the Property, but the county would want to set a minimum purchase price for the Property.

Section 272.001 of the Local Government Code authorizes property to be sold through a competitive bid process and is an alternative procedure to Section 263.007, Local Government Code. Unlike Section 263.007, it does not permit a sale by sealed proposal, and it does not require the commissioners court to establish a specific procedure for the sale. The sale would follow the customary method for competitive bids. The notice must be published on two separate dates and the sale or exchange may not be made until after the 14th day after the date of the second publication. The statute requires the county to obtain an appraisal of the property and prohibits a sale for less than fair market value. This procedure would give the county an opportunity to determine the financial ability of the purchaser to complete the sale and the ability of the purchaser to obtain any required consents to operate the facility.

## **PROFESSIONAL SERVICES PROCUREMENT ACT**

Careful preparation should go into the selection of the professional who will be retained for county projects. For most construction projects, the selection will be pursuant to the Professional Services Procurement Act, Chapter 225.001, Texas Government Code.

### **Selection**

A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award: (1) on the basis of demonstrated competence and qualifications to perform the services; and (2) for a fair and reasonable price. The professional fees under the contract may not exceed any maximum provided by law. TEX. GOV'T CODE § 2254.003.

### **Contract for Professional Services of Architect, Engineer, or Surveyor**

Special requirements apply to procuring architectural, engineering, or land surveying services. The governmental entity is required to:

- (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.

If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering, or land surveying services, the entity is required to:

- (1) formally end negotiations with that provider;
- (2) select the next most highly qualified provider; and
- (3) attempt to negotiate a contract with that provider at a fair and reasonable price.

This process is continued until the process described in Subsection (b) to select and negotiate a contract is entered into. TEX. GOV'T CODE § 2254.004.

### **Violation**

A contract entered into or an arrangement made in violation of this subchapter is void as against public policy. TEX. GOV'T CODE § 2254.005.

### **Declaratory or Injunctive Relief**

This subchapter may be enforced through an action for declaratory or injunctive relief filed not later than the 10th day after the date a contract is awarded. TEX. GOV'T CODE § 2254.007.

## **PRACTICAL GUIDE FOR PUTTING THE COUNTY IN THE BEST POSITION FOR A SUCCESSFUL CONSTRUCTION PROJECT**

Many counties are embarking upon new construction projects. It all seems so simple. All you have to do is hire an architect or engineer to design the project, then find a contractor to build it, or for those who are able to do so, follow an alternative delivery method, such as design-build or construction manager at risk. The professionals do all the work. The county gets a fine, finished product at the end. What could go wrong?

Unfortunately, lots of things. The purpose of this paper is to briefly look at a number of areas in construction projects where problems frequently arise and make common sense suggestions, both of a legal and practical nature, to avoid or correct the problems before they become major stumbling blocks to a successful project.

In order to be in the best position for a successful construction project, the county should:

- (1) adopt a good process for selecting the project professionals;
- (2) utilize well-drafted, county-friendly contract forms;
- (3) implement a diligent contract administration procedure; and
- (4) follow good conflict-resolution procedures. The county's attorney can help put the county into the best position for a successful construction project by helping the county develop good forms and follow good procedures.

## **I. Good Process for Selecting Project Professionals**

The county should adopt a good process for selecting project professionals, and the county's attorney can assist the county in understanding its options and establishing a good procedure.

With regard to project engineers and architects, the county in most instances will be required to follow the procedures of the Professional Services Procurement Act, set out in Section 2254.001 of the Texas Government Code. The county should use this process to make a meaningful selection of the best qualified professionals for the project. Once the professionals are selected, the county should use them to carefully plan out the project.

When it comes to selecting the construction contractor, most local governmental entities are required to use the competitive bid process, or the design/bid/build method of construction for some or all of their projects. If the county is required to follow this method, the county will generally be required to select the lowest responsible bidder for the project. The county can, however, increase its odds of getting responsible bidders by establishing minimum qualifications for the contractor, where appropriate, and taking other measures to make sure that the lowest bidder is also a responsible bidder.

Counties are able to use the alternative delivery methods under Section 271.111 *et seq.* of the Texas Local Government Code.<sup>18</sup> If these methods are used, the county is required by statute to select the method which will provide the "best value" for the county's needs. In order to make a selection, the county should understand the advantages and disadvantages of the different alternative project delivery methods. These methods are discussed in Section B.

### **A. Selection of Architectural and Engineering Professional.**

Careful preparation should go into the selection of the professionals who will work on a project, and State laws governing the procurement of such professionals should be closely followed.

For most local governments, Section 2254.001 *et seq.* of the Texas Government Code, known as the Professional Services Procurement Act, sets out the method to be followed in selecting engineers and architects. 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.

Generally, in following this procedure, the county sends out a Request for Qualifications ("RFQ") to professional firms, interviews the candidates, and then makes a selection based on the qualifications. A matrix or some other set of criteria is used for determining the

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<sup>18</sup> Assuming the county is not financing the project with proceeds of certificates of obligation, unless an exception to the competitive bidding process in the Certificate of Obligation Act is established.

qualifications for selection. The county ranks the candidates based on the evaluation and begins negotiations with the first-ranked candidate. If the negotiations do not result in an agreement for services, the county must, in accordance with Section 2254.004(b), formally end negotiations with that professional and begin negotiations with the next most highly qualified professional identified by the county.

The RFQ should request information which shows the experience and expertise of the professionals. The RFQ should not request information on the fees which the professional would charge for its services because Section 2254.003 of the Texas Government Code prohibits a governmental entity from awarding a contract for professional services on the basis of competitive bids. It may be possible to ask in general what the professional would consider as a “fair and reasonable” professional fee for the services covered by the RFQ. OP. TEX. ATT’Y GEN. No. JM-155 (1984). The county, however, is probably safer reserving questions on fees to the negotiation stage of the selection process.

The county should make its selection process meaningful by drafting a comprehensive RFQ and establishing a qualification-based selection process. In preparing its RFQ, the county should develop and set out in the RFQ:

- a comprehensive scope of services. This should be developed with the assistance or oversight of professionals. If the county does not have in-house professionals, it should consider contracting with a consultant to assist in developing the scope of services.
- a response form to be used in providing responses. This will help insure that the county gets the information it needs in a manageable size and in a format which lends itself readily to comparison between the candidates. It will also help level the playing field between big national firms and small, local firms which may be just as qualified, but which do not have professional marketing staff to help in preparing a response.
- the time limit the county will spend negotiating an agreement.
- the specific contract form which the selected consultants will be required to use. The form can be included by reference and copies made available to firms.
- any specific information which the county wants to consider in making its evaluation, such as
  - a. experience in designing similar projects,
  - b. ability to complete the work within a specified time period, and
  - c. the experience and expertise of the professionals who will be actually assigned to the project (as opposed to highly qualified experts who may be employed by the firm, but who may not be assigned to the project)
- the matrix or other criteria on which selection will be based.

The county should set up a qualification-based selection process by:

- soliciting interested professional firms (get lists from other area governmental agencies) and letting solicited firms know who else is being solicited;
- developing evaluation criteria for the needed professional services;
- weighing the criteria by their relative importance;

- developing evaluation guidelines for evaluators;
- selecting an evaluation team based on expertise, experience, and diversity;
- using interviews to gauge the effectiveness of the consultant team, or as a tie-breaker. Be aware that large firms may list nationally-recognized experts as team members, who may not perform any services on the county's project.

Once the professional team is selected, the county should use its professionals effectively to help plan the project. For each proposed project, the project team, consisting of staff and outside professionals, should:

- define the project down to minor details;
- estimate the desired project's cost;
- develop a project schedule;
- perform a cash flow analysis;
- identify all potential issues that can delay the schedule and increase the cost of the project (for example, the need to perform environmental remediation at the site, or road work that will occur in the vicinity of the project during the proposed construction period);
- address the gaps identified in (d) and (e), and adjust the schedule and cost estimate with appropriate contingencies. (Do not neglect economic inflationary trends, particularly localized ones in the building industry such as cost increases or difficulty in obtaining specific materials); and
- set up a funding mechanism for the project (bonds, general funds, etc.).

While the steps listed above seem obvious, it is surprising how many times the county fails to follow one or more of these procedures, resulting in project delays and increased project costs. As an example, counties often do not think about the need to conduct an environmental site assessment in connection with a construction project, particularly on property which it has owned for some time. The cost of having to abate lead or asbestos, or otherwise remediate property, can seriously increase the time and cost of a project and can even render the project unfeasible. The county's attorney can help the county to avoid problems of this nature by assisting the county to adopt a planning process utilizing its professional staff and consultants.

## **B. Choosing a Delivery Method for Construction**

The county should carefully follow the procedures set out in the law applicable to the county for selecting a construction contractor. Failure to do so may result in the contract being void, and can subject the county to an injunction, attorney's fees and criminal penalties. *See*, TEX. LOC. GOV'T CODE §§ 262.033, 262.034(a), 271.028, 271.029, 271. 271.064, 271.065 and 271.112(f). In some instances, it can result in a criminal violation. Counties are required to use the competitive bid process in selecting a construction contractor for some or all of their projects, unless authorized to use another method, such as those found in the alternative delivery methods in Subchapter H of Chapter 271, Texas Local Government Code. In this process, sometimes known as the design/bid/build process, the county first selects an architect/engineer to design the project by following applicable law. Once the design is complete, the county bids out the project based on the plans. The county will generally be required to select the lowest responsible bidder

as the contractor for the project. This often creates problems because the lowest bidder may not be the best bidder, and unless there is some way to establish that the lowest bidder is not “responsible,” it may be difficult to avoid having to select the lowest bidder.

To increase the chances of getting a responsible bidder who can competently perform the work, the county can, where appropriate, require reasonable qualifications and experience from the contractor. For example, if the proposed project is a project of a complex or specialized nature, it is not unreasonable for the county to require the contractor to have had successful experience in building similar facilities.

If a county has repeated problems with a contractor who routinely bids on projects, the county can take steps to have the contractor disqualified from bidding on projects because of his irresponsibility. Normally, the county will have to show a pattern of irresponsible behavior on contracts, such as failing to complete work, failing to pay subcontractors, defective work, etc., and should have good documentation to support its case.

If the county bids out a project and the lowest bidder comes in with a bid which is substantially below all of the other bids, this may be an indication that the lowest bidder has made an error in calculation, or worse still, doesn't know enough about the type of construction to have bid it correctly. The county should ask the lowest bidder to confirm the bid. If the bidder finds that he has made an error in his calculations, the county would be well advised to allow the bidder to withdraw his bid. If the bidder confirms his bid, the county may want to consider rejecting all bids and rebidding the project.

As previously explained, counties have several delivery methods to choose from in addition to the traditional design/bid/build method. These methods are set out in Subchapter H of Chapter 271, Texas Local Government Code, which permit the commissioners court to select the alternative delivery method which provides the “best value” for the county. For each method, the county creates a set of selection criteria and a scoring system which will be set out in the solicitation documents and which will be used as the basis in selecting the contractor. The selection criteria can include factors other than price, including the reputation of the contractor, the quality of his services, and other relevant criteria. Points will be assigned to each criterion, and the contractors will be rated based on their overall scores. The county then selects the contractor who provides the “best value” to the county based on the selection criteria. The county must document the basis for its selection and make the evaluations public no later than the seventh day after it awards the contract.

Note that, in general, the alternative delivery methods can only be used for buildings the design or construction of which are governed by accepted building codes. Unless expressly authorized, they cannot be used for civil engineering projects such as roads, water plants, utilities, wastewater plants, or similar projects. The following is an outline of the alternative construction methods, an explanation of what they entail, and an industry assessment of the advantages and disadvantages of each.

1. **Competitive Bid (Design/Bid/Build).** This is the traditional method of construction, although the award is based on best value and not on lowest bid.

a. Method

- The county selects an architect/engineer (“AE”) to design the project and develop construction documents [the county would normally make its selection through a Request for Qualifications (“RFQ”).]
- The county then advertises for bids based on the AE documents.
- The county selects the bidder as the contractor.
- If bids exceed the estimated/budgeted cost of project, county and AE have to modify design and rebid.

b. Advantages

- It’s a familiar system for many counties.
- The scope of the project is well-defined through the A/E process.
- There is competition for the contract price.
- The method is best suited to new projects that are not schedule sensitive or subject to potential change.

c. Disadvantages

- This is a slow delivery method, because the design has to be complete before the project can be bid, then the county has to go through the bid process.
- The contractor does not have any input in the design phase.
- The method fosters adversarial relationships between the parties.
- There is not much flexibility for change in this system.
- This is not a good method for projects that are schedule or sequence sensitive.

2. **Competitive Sealed Proposals.** This method is similar to Competitive Bid, except that the county has some ability to negotiate the proposal with the contractor prior to award.

a. Method

- The county selects AE to design the project and develop construction documents, normally through an RFQ.
- The county then seeks sealed proposals based on the AE documents.
- The county selects the contractor based on its proposal.

b. Advantages

- The scope of the project is well-defined through the A/E process.
- There is competition for the contract price.
- This method is best suited to new projects that are not schedule sensitive or subject to potential change.

c. Disadvantages

- This is a slow delivery method, because the design has to be complete before the project can be submitted for proposals, then the county has to go through the selection process.
- The contractor does not have any input in the design phase.
- This method fosters adversarial relationships between the parties.
- This is not a good method for projects that are schedule or sequence sensitive.

3. **Construction Manager at Risk.** In this method, the Construction Manager provides pre-construction phase services and serves as the general contractor. The contract may provide for a guaranteed maximum price (“GMP”) for construction.

a. Method

- The county selects the A/E to design the project and prepare the construction documents, normally through an RFQ.
- At the same time, the county selects the Construction Manager at Risk (“CMR”), through an RFQ/RFP or RFP process as provided by statute. There is no need to wait for the design to be complete.
- While the project is being designed, the CMR provides preconstruction services by interacting with the A/E. The CMR helps to determine:

Constructability – can the project be constructed as designed?

Costing – estimate of cost taking into account local market conditions, such as labor costs and availability of materials

Value Engineering – now that the contractor knows what the architect has in mind, how can he achieve the same thing for less cost?

The contractor's input may result in beneficial changes being made to the plans before construction begins, without having to resort to change orders during construction.

- Once the construction phase begins, the CMR is just like any other general contractor.
- The CMR serves as general contractor on the project, provides bonds for project and bids out trade contracts (i.e. subcontracting work). CMR may also perform some of the construction.
- Because the contract is entered into before the architectural plans are complete, there is no purchase price in the contract initially. The contract will provide that the contractor has to make a price proposal once the plans are developed. The county can either accept the proposal, in which case the contractor proceeds with construction, or reject the proposal in which case the contract terminates.
- Once the contract price is established, the contract generally provides that this is a guaranteed maximum price (“GMP”). In other words, the contractor takes the “risk” that the work can be performed for the GMP.
- It is still possible that the cost of the project will be increased by change orders, but theoretically, the need for change orders should be reduced due to the CMR's preconstruction services. Also, the GMP includes padding for contingencies.

b. Advantages

- Faster schedule for delivery, because you don't have to wait for design to be completed in order to select the contractor. You don't even have to wait for the design to be complete before construction begins, if the project is fast-tracked.
- The CMR provides assistance with design phase to reduce the project cost, the need for change orders and delays during construction phase due to design problems.

- More flexibility in selection of contractor.
- Architect and contractor act as a team, so less of an adversarial relationship (theoretically).
- Method provides more ability to handle change in project scope.
- Best suited to large new or renovation projects that are schedule sensitive, difficult to define, or subject to potential change.

c. Disadvantages

- It is difficult for the county to evaluate the GMP or determine whether best price has been obtained for the work, because there are no bids to compare it with.
- This is not a good method for small projects.

4. **Construction Manager as Agent.** This is a method where the Construction Manager generally serves as a project manager, and does not have any responsibility for design and or construction. This method is sometimes referred to as a “multiple prime contractors structure.”

a. Method

- County selects A/E to design project and prepare construction documents.
- County selects Construction Manager as Agent (“CMA”), usually through RFP. CMA provides pre-construction phase services (like CMR) but doesn’t contract with trade contractors or provide bonds for project.
- County contracts with each trade contractor directly.
- CMA oversees and coordinates work by trade contractors

b. Advantages

- The CMA provides assistance with design phase (just like CMR) to reduce project cost, the need for change orders, and delays during construction phase due to design problems.
- Architect and contractor act as a team, so less of an adversarial relationship.

- This method provides more ability to handle change in project scope.
- This method is best suited to large new or renovation projects that are schedule sensitive, difficult to define, or subject to potential change.

c. Disadvantages

- The county has to manage more contracts.
- There is no guaranteed maximum price.
- There is no single point of responsibility for construction.
- This is not a good method for small projects.

**Note:** Even though the CMA method is considered an alternative delivery method, a CMA who is not responsible for construction and does not guarantee the construction price is really performing a professional service which would normally come under the Professional Services Procurement Act. Consequently, most local governments can hire a CMA to serve as a project manager for a project (particularly complex or specialized projects) even if they use the traditional competitive bid method of construction.

5. **Design/Build.** This is a method where the county contracts with a single entity to design and build the project.

a. Method

- County selections an A/E to serve as the county's project professional
- The county's A/E helps develop a design-criteria for the project
- County goes through the statutory process to select a Design/Build Team, consisting of A/E and contractor which will then design and build the project based on the design criteria

b. Advantages

- Faster schedule for delivery
- Less adversarial relationship between team members
- The contractor provides assistance during design phase.
- Best for new or renovation projects that are time-sensitive.

c. Disadvantages

- Considered a sophisticated method, and county must have clear idea of project design and concept before selection.
- This is a difficult method for the typical county to manage.
- No checks and balances between architect and contractor.
- Potential for conflict between county and Design/Build Team.
- This is not a good method for projects that are difficult to define and are less time-sensitive.

## II. Developing Good Contract Forms

### A. Professional Services Agreements

The contract for professional services will dictate the entire relationship between the county and the professional, and will determine the outcome of most disputes, although the county will probably not have cause to find this out until there is a problem with the services, the project, or both. The county's attorney can help the county by making sure that the agreement for professional services adequately addresses the obligations and liability of the professional.

Many attorneys use AIA contracts because they are readily available and have a significant body of caselaw interpreting them. Most construction law attorneys who represent counties and other political subdivisions generally feel that AIA forms require modification in order to better protect the interests of the county. Many large architectural and engineering firms have their own professional services agreement forms. The county should never use any contract provided by the A/E without having the county's attorney review it first.

The county's attorney will want to make sure that any contract used for architectural or engineering services:

1. specifies the scope of work during the design phase, contract document preparation phase, and during construction phase.<sup>19</sup> [If the county anticipates that the professional's attendance will be required at a number of public hearings, meetings with the commissioners court, or meetings with staff and interested groups in the county, the contract should require attendance and state whether attendance is within the basic scope of services or is to be considered extra work. Any redesign services required to bring the project into line with bids should be within the basic scope of services.]

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<sup>19</sup> If the county is issuing debt to finance the project, care should be taken in limiting the architect's work to the minimum necessary to provide the information needed for the issuance of debt. If steps are not limited and the debt cannot be issued because bonds are defeated or the county changes its mind, the county can incur a substantial liability.

2. sets out the standard of care for services;
3. sets out performance measures, design standards, documentation requirements and key milestones and ties payment to milestones achieved;
4. states adequate insurance requirements, particularly requirements for professional liability insurance, and indicates whether self-insurance is acceptable;
5. provides the county with all the rights it needs to use the professional's design and contract documents, which may include:
  - a. the right to use the professional's work for the project, even if the professional is terminated;
  - b. the right to use the professional's work for future alterations, additions or renovations;
  - c. the right to use the work for other projects;
  - d. the right to reproduce the work.
6. contains a termination for convenience provision which is favorable to the county, and which does not require the county to:
  - a. pay for any amounts other than services completed to date of termination which are performed in accordance with the contract requirements (the professional should not be entitled to compensation for services which don't meet performance standards);
  - b. assume any obligation for subconsultant contracts;
  - c. pay the professional a termination fee;
7. sets out adequate remedies in the event of default, including the right of the county to withhold payments, and to terminate the contract without diminishing the right to sue for damages;
8. does not contain excessive exculpatory language or limitations on liability, such as:
  - a. unreasonably limiting the professional's responsibility for cost estimates;
  - b. limiting the professional's liability for errors to remedying them at no cost to county;

- c. limiting the county's ability to sue for damages for a period of time after completion of the services (e.g. one year);
- d. limiting county's remedies to actual damages;
- e. setting a dollar amount, particularly an inadequate one, on the professional's liability; and
- f. limiting liability to acts of gross negligence and intentional misconduct.

When going through the process of selecting the architect or engineer, it is a good idea to include in the RFQ the contract form which the county wants to use. This will cut down in the negotiating time and make sure that provisions favorable to the county are included in the contract.

Insurance is a very important consideration in a professional service contract, particularly professional liability coverage. A sample of insurance requirements for a professional service agreement is attached. The amount of coverage should be established by a risk manager or insurance consultant who is knowledgeable about commercial construction or public works projects. If the county does not have these resources available, it should consider contacting another governmental entity that has a risk manager or which routinely engages in large public work projects and determine what matrix or standards it applies.

In negotiating contracts for architectural services, it is important to remember that architectural work is protected by copyright law under the Architectural Works Copyright Protections Act of 1990, which constitutes an amendment to Section 101 of the Copyright Act of 1976. (Pub. L. No. 101-650. 1-04 Stat. 5089, 5133).

Copyright law protects five exclusive rights in the author:

- 1. the right to reproduce copies;
- 2. the right to sell and distribute copies;
- 3. the right to prepare derivative works;
- 4. the right to publicly display the works;
- 5. the right to perform the works; as well as the right to authorize others to exercise these rights.

These rights may be sold individually or all together in exclusive transfers, nonexclusive licenses, or in a complete transfer of the copyright.

The attorney representing the county should be certain to secure all the rights needed for the uses anticipated in the Professional Services Agreement. As stated above, these rights may

include the right to use the architects' work for the project, even if the architect is terminated, the right to use the work for future alterations, additions or renovations, and the right to use the work for other projects. The right to reproduce copies should also be addressed. If the county wants the exclusive right to use the design and materials, this must be carefully negotiated. It would be advisable to have an attorney knowledgeable about copyright law involved in the negotiations.

Note: For those who use AIA forms, the AIA Document B-141-1997, Standard Form of Agreement between Owner and Architect generally permits use of the Architect's work only in connection with the project, not for future alterations or renovations. Paragraph 1.3.2 of B-141 provides in relevant part [emphasis added]:

1.3.2.1 Drawings, specifications and other documents, including those in electronic form prepared by the Architect and the Architect's consultants are Instruments of Service *for use solely with respect to this Project*. The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.

1.3.2.2 Upon execution of this Agreement, the Architect grants to the Owner *a nonexclusive license to reproduce the Architect's Instruments of Service solely for the purposes of constructing, using and maintaining the Project*, provided the Owner shall comply with all obligations, including prompt payment of all sums when due.

1.3.2.3 Except for the licenses granted in subparagraph 1.3.2.2, no other license or right shall be deemed granted or implied under this Agreement.... The Owner *shall not use the instruments of service for future additions or alterations to this Project or for other Projects*, unless the Owner obtains the prior written agreement of the Architect....

The county's attorney will probably want to change this provision.

## **B. Construction Contracts**

It is imperative that the county utilize a construction contract which adequately protects its interest. The purpose of the construction contract is to define the project, specify the scope and quality of construction, establish the time-frame for performance and the cost of the construction to county, assign responsibilities, and allocate risks.

Generally in a construction project, the construction contract consists of the:

1. Basic Agreement between the county and the contractor which describes the project and the contract documents and specifies the construction price and the time to complete;
2. General Conditions, which state the administrative details of the project;

3. Special or Supplemental Conditions, which are terms which modify or supplement the general conditions for a particular project, such as adding a requirement for environmental liability insurance, if the project requires asbestos removal or environmental remediation;
4. Plans, which are the architectural and engineering drawings for the project;
5. Specifications, which are the details for the construction of the project;
6. Timelines, and other submittals required of the contractor by the contract;
7. Change Orders, which are written (or oral) changes to the contract which alter the plans or specifications, resulting in a change in the time for performance and/or the construction price (Note that Field Orders, which are minor changes in, or interpretations of, the plans or specifications which do not result in a change in time or cost, may also constitute part of the contract); and
8. Other technical manuals, project manuals or addenda specifically incorporated into the contract.

The construction contract is the main tool for addressing problems as they arise in a construction project. If the contract anticipates problems and provides the county with adequate methods to address them by allocating risks and prescribing available remedies, then the county is in the best possible position to resolve or defend claims without having to resort to litigation. Any attorney who has had to prosecute or defend against a claim under a contract which does not allocate the risks or provide adequate remedies, has a heightened appreciation for a well-drafted contract.

If a county does not have its own contract form, there are a number of contract forms available for use, such as those prepared by the American Institute of Architects (AIA). In representing the county, it is not advisable to use any of these forms unless they have been modified to better represent the interests of the county.

A large number of construction disputes arise out of or involve:

1. Delays in the project;
2. Responsibility for increased project costs arising from errors in plans and specifications furnished by the county;
3. Responsibility for delays and increased project costs arising from concealed conditions or changes in condition of the project;
4. Third party claims for damages or failure to pay subcontractors;

5. Liquidated damages provisions.

In order to adequately establish the construction requirements and address the areas most susceptible to disputes, the county's construction contract form should:

1. Define the project;
2. Specify the scope and quality of construction;
3. Establish the time-frame for performance of the work;
4. Establish the cost of the construction to the county, with payments tied to the percentage of completion or milestones reached;
5. Establish the amount of retainage;
6. Contain a "no damages for delay" clause;
7. Allocate risk for errors in plans and specifications in a fair manner;
8. Allocate the risk for concealed conditions or for changes in condition in a fair manner;
9. Contain a liquidated damages provision based on reasonable costs to the county;
10. Contain adequate insurance and bond requirements;
11. Contain adequate remedies for default, including provisions which allow the county to terminate the contract, withhold funds, and sue for damages (both actual and consequential) in the event of a contractor default;
12. Contain provisions which require the contractor to file a claim within a reasonable period of time after the contractor knows, or should reasonably know, of the cause for the claim;
13. Contain a provision that once a change order is executed by both parties, the contractor cannot claim additional compensation or time for the subject matter of the change order;
14. Set out all provisions required in connection with government construction contracts, such as prevailing wage rates and representations that the contractor has worker's compensation insurance.

*Damages for Delays.* In order to protect the county, the county's attorney should make sure that the construction contract contains provisions addressing liability for project delays. Normally, the contract should require the contractor to be liable for delays caused by the acts or

omissions of the contractor, a subcontractor or supplier. Delays caused by acts of God are normally addressed in a force majeure clause which allows an extension of time for performance, but no monetary recovery, for delays which arise from causes beyond the reasonable control of the parties. A county will be liable for delays which result from the acts or omissions of the county and which actually delay or hinder the contractor's work, resulting in damages to the contractor, unless the contract limits the county's liability through an enforceable "no damages for delay" clause.

In *City of Houston v. RF Ball Construction Co.*, 570 S.W.2d 75 (Tex. Civ. App.—Houston [14<sup>th</sup> District] 1978, writ ref'd n.r.e.), the Court upheld the enforceability of a "no damages for delay" clause similar to the following one:

*Contractor shall receive no compensation for delays or hindrance to the work, except when direct and unavoidable extra cost to contractor is caused by failure of the Owner to provide information or material, if any, which is to be furnished by Owner or access to the work. When such extra compensation is claimed a written statement thereof shall be presented by contractor to Owner and if by Owner found correct shall be approved. If delay is caused by specific orders given by Owner to stop work or by performance of extra work or by failure of Owner to provide material or necessary instructions for carrying on the work, then such delay will entitle contractor to an equivalent extension of time, contractor's application of which shall, however, be subject to approval of Owner. No such extension of time shall release contractor or surety on its performance bond from all contractor's obligations hereunder, which shall remain in full force until discharge of the Contract.*

This provision does not relieve the county of all liability for county-caused delays; it limits the activities of the county for which delay damages may be claimed and restricts the county's liability to "unavoidable direct costs and an extension of time", thereby relieving the county of liability for consequential damages.

It should be noted, however, that a court may refuse to enforce a "no damages for delay" clause when the delay was not intended or contemplated by the parties to fall within the scope of the provision, resulted from bad faith acts of the one seeking the benefit of the clause, has extended for such an unreasonable time that the party delayed would have been justified in abandoning the contract, is not within the specific delays enumerated by the contract, or results from arbitrary or capricious acts. See *Green International v. Solis*, 951 S.W.2d 384 (Tex 1997); *Jensen Construction Co. v. Dallas County*, 920 S.W.2d 761 (Tex. App.—Dallas, 1996) writ denied.

*Concealed Conditions and Changes in Condition.* Normally, a contractor who encounters unforeseen or unexpected conditions on the site is liable to perform his obligations under the construction contract without being entitled to additional compensation. See, e.g. *Brown-McKee, Inc. v. Western Beef, Inc.*, 538 S.W.2d 840 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) This can result in a substantial hardship to the contractor where an unexpected condition, not within the contemplation of the parties, arises during the course of construction.

An example would be where both the contractor and the county reasonably believe that one type of soil prevails in the construction site, but find unexpectedly during the course of construction that another type of soil, which makes construction more difficult and expensive, in fact prevails. Many contracts provide relief to the contractor by allowing him to obtain additional reasonable compensation, if concealed conditions or changed conditions arise which are materially different from those contemplated by the parties when they entered into the contract.

*Insurance and Bond Requirements.* The county should seek the assistance of a risk manager in establishing insurance requirements and coverage amounts, and all requirements should be stated in the contract. The amount of coverage required to adequately protect the county and third parties depends in part on the nature and complexity of the project. If environmental remediation is required in connection with the project, including, but not limited to, the abatement and transportation of asbestos containing materials, environmental insurance should be required in connection with the activities performed by the environmental consultant or contractor.

It is important to have the contract set out the bonds required to be provided by the contractor in connection with the project. Bond requirements for public works projects are set out in Section 2253.021, *et seq.* of the Texas Government Code. If the contract is in excess of \$100,000, the contractor is required to provide a performance bond in the amount of the contract, executed to the county, prior to performing work. The performance bond must be conditioned on the faithful performance of the work in accordance with the plans, specifications and contract documents. The purpose of the performance bond is to protect the county by requiring the surety to take over the contractor's obligations and complete the project, or pay the County an amount not to exceed the face amount of the bond.

If the contract is in excess of \$25,000, the contractor is required to provide a payment bond in the amount of the contract, executed to the county, prior to performing work. The purpose of payment bonds is to protect the subcontractors who furnish services or materials for the construction project, since they are unable to obtain a lien on the public works project. ***Under Section 2253.027 of the Texas Government Code, a county that fails to obtain a required payment bond becomes liable for all payments which a surety would be liable for in connection with a payment bond, and the unpaid subcontractor is entitled to a lien on money due to the general contractor.***

If no bonds are required for the project, the county should consider having a contract provision which does not obligate the county to make any payments until all construction is complete.

*Remedies.* To fully protect the county, it is important that the contract provide the county with the right to terminate for convenience and adequate remedies in the event of a default by the contractor. The contract should expressly state that remedies are cumulative and not exclusive and should include the right to withhold further payments, terminate the contract, sue for damages (both actual and consequential) and pursue any other remedy available at law or equity. The right to withhold payments becomes a very effective mechanism for resolving disputes,

particularly when the county is trying to get the contractor to finish out the project by providing required documentation or completing punch-list items.

For those who use AIA forms, note that the AIA 201 1997 General Conditions contains a mutual waiver of consequential damages. In most instances, it is the county, rather than the contractor, who will be able to establish and obtain consequential damages for a default under the construction contract. This may not be a provision which the county will want to have in its construction contract.

*Liquidated Damages.* It is often beneficial to have a contract provision which allows the county to assess liquidated damages in the event of a delay in construction beyond the date for substantial completion specified in the contract. Liquidated damages provisions are enforceable if the stated amount is reasonable compensation for a breach, actual damages are difficult or impossible to calculate, and the clause does not constitute a penalty. *Loggins Construction Co. v. Stephen F. Austin State University Board of Regents*, 543 S.W.2d 682 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). In order to establish that the liquidated damages are reasonable compensation, the County normally needs to estimate the costs it will incur in additional expenses, fees, overtime, and salaries for each day in which the completion of the work is delayed. If the county may become liable for penalties for noncompliance with laws which the construction was intended to address, these amounts should be calculated into the liquidated damages provisions. If the project is revenue generating, such as a convention center or hospital, then an estimate of lost net income would be used in the calculation.

*Other Provisions.* The contract should set out provisions covering all requirements peculiar to government construction contracts. Two examples are prevailing wage rates and contractor's certification of worker's compensation insurance requirements. Under Sections 2258.021 and 2258.023 of the Texas Government Code, a contractor who has a contract with a political subdivision, and all subcontractors on the project, are required to pay workers "not less than the general prevailing rate of per diem wages for work of a similar character in the locality which the work is performed, for regular days, holidays, and overtime work." The political subdivision is required to determine the general prevailing rate of per diem wages in the locality in which the work is to be performed in accordance with Section 2258.022 of the Texas Government Code. The contract should therefore contain a requirement that the general contractor pay the prevailing wage rate and that all subcontracts entered into by the general contractor require subcontractors to pay the prevailing wage rate.

Section 406.096 of the Texas Labor Code requires governmental entities to require the contractor to certify in writing that it has worker's compensation insurance. This certification should be provided as part of the contract award process.

Section 2251.021 of the Texas Government Code provides that interest on overdue payments shall accrue at the rate 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 plus 1%.

### III. GOOD CONTRACT ADMINISTRATION PROCEDURES

The county should establish a good contract administration procedure, which includes, among other things, a method of determining that professional service agreements and construction contracts are signed by authorized persons, insurance requirements are met, as established by certificates of insurance, and all bonds required by the construction contract have been provided, before a notice to proceed is issued. The county should also have a method of inspecting construction to make sure that the amounts invoiced are really owed, that the contractor has provided all documentation, and that lien waivers are obtained.

The Contract Administration system should address the following:

1. Contract Authorization
  - a. The contracting party should provide a corporate resolution, copy of partnership or joint venture agreement, or other appropriate organizational documents to show that the persons signing on its behalf are authorized to do so, and to bind the principals.
2. Insurance Requirements -- Staff should review each insurance certificate to make sure it:
  - a. Is issued by the insurance agency, and signed by an agent;
  - b. Correctly states the name of the contractor (not a similar sounding name),
  - c. Shows the county as an additional insured in accordance with the contract requirements, and any endorsement required for notice before cancellation of coverage,
  - d. Correctly sets out all of the types of coverage required by the contract, showing the correct dollar amount of coverage and giving policy numbers;
  - e. Shows as insurers companies which meet the Best rating or other criteria set out in the contracts;
  - f. If the contract is with a joint venture, and professional liability insurance is maintained by only one of the venturers, the county will need to determine that the coverage is adequate to protect against the acts or omissions of both venturers.
3. Bond requirements:

The Bonds and the Bond Powers of Attorney should be provided to contract administration staff. Staff should review the bonds to make sure they:

- a. Are consistent with contract requirements, *e.g.* payment and/or performance bonds;
- b. Are on the form required by the county;
- c. Are signed by the contractor and by a person designated to act on behalf of the corporate surety under the Bond Power of Attorney;
- d. Are issued to the county,
- e. Show the correct contract amount and project designation.

Staff should review the Bond Power of Attorney to make sure:

- a. The person designated in the Power of Attorney to act on behalf of the corporate surety in fact signed the bonds;
- b. The type and amount of bonds are consistent with any limitations stated in the Bond Power of Attorney;
- c. The bond Power of Attorney and the bonds were signed before any stated expiration date for the authorization.

#### 4. Payments

The project manager or other staff should establish a procedure with the AE to:

- a. Review invoices and requests for payment to make sure that payment is authorized;
- b. Inspect construction when necessary;
- c. Request all documentation to be provided by contractor, including a list of all subcontractors and suppliers;
- d. Obtain lien waivers from the subcontractors, suppliers and prime contractors.

## **IV. GOOD DISPUTE RESOLUTION PROCEDURES**

Even if the county has followed good selection procedures, used good contract forms and employed good contract administration procedures, contract problems can arise. Contractors don't perform the work in accordance with contract requirements, poor scheduling or project management result in project delays, subcontractors don't get paid and walk off the job. When problems do occur, it is important for the county to establish a good system of dealing with them

1. All problems should be dealt with promptly.
2. Bring the problem to the attention of the contractor and give him an opportunity to explain or fix it. Ideally, this should be done in writing.
3. If the problem isn't fixed or recurs notify the contractor in writing. Put him on notice that you will pursue remedies available under your contract, or, if the problem is serious, take action under the contract, such as withholding payments, after the time period for any notice has expired. Copy the surety on the correspondence.
4. Set up a meeting with the contractor to discuss the problem and find out what steps he intends to take to fix the problem or to keep it from recurring. Take notes of the meeting. Send a letter to the contractor and surety after the meeting setting out what the contractor has agreed to do.
5. If the problem continues, notify the surety and take action under the contract or bond.
6. Be fair in resolving disputes. If the county has some culpability, factor that in.
7. The county should not get involved in subcontract disputes between the contractor and a subcontractor.

Early intervention, providing the contractor with the opportunity to correct problems, monitoring progress, documenting the problems and taking decisive action when it seems apparent that the project has a serious problem, is the best approach to take. It is very important to document problems in writing. It provides a record which shows not only the dates on which events occurred, but evidence that the county gave notice and opportunity to cure.

Often counties are reluctant to notify the surety when there is a problem. This is because the county has often built up a working relationship with the contractor, and doesn't want to upset the contractor by notifying the surety. The county's attorney can help by being the person to write the letters and contact the surety. The surety can really help get problems straightened out because the surety wants to make sure that it doesn't have to pay out any money to fix a contract problem, and the contractor is usually responsive to the surety because he doesn't want to have problems getting bonded in the future.

If problems do get serious, and the county has to take action under the contract or performance bond, he'll be glad that the contract provides adequate remedies to protect him, and that the bond is in place and can be relied upon.