

CONTRACTING AND COMPETITIVE BIDDING FOR TEXAS COUNTIES

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Presented to

**64th Texas County Auditors Annual Conference
Galveston, Texas**

October 2009

CONTRACTING AND COMPETITIVE BIDDING FOR TEXAS COUNTIES¹

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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 \$50,000,² 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).³

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 14th 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).

² As modified effective June 19, 2009 by HB 987. Previously the amount was \$25,000.

³ 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).⁴

⁴ 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).

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 contracts that exceed \$50,000. TEX. LOC. GOV'T CODE § 262.023(a), as modified effective June 19, 2009 by HB 987 (previously \$25,000). 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.⁵

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.

⁵ 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.⁶ 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.

⁶ 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 service⁷. 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

⁷ 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 agent⁸ who supervises all county purchases by competitive bidding and makes most other purchases. The agent is given some authority to

⁸ 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, questions about sequential purchases still arise. On September 7, 2007, for example, 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. In Opinion No. GA-0604 (2008), the Attorney General opined that in order to determine whether the bidding requirements of the County Purchasing Act were violated, the facts of the case must be taken into account, including whether the purchase was undertaken with the intent of avoiding the requirements of the Act, and whether the purchase would be made as a single purchase in normal purchasing practices. Since the Attorney General's Office cannot determine issues of fact, the Attorney General could give no opinion on whether a violation of the County Purchasing Act had occurred.

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).

§ 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.

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 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*⁹ “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

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

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 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 \$50,000 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)¹⁰, 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:

¹⁰ 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”¹¹ 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

¹¹ “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 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.” Section 271.112(g), however, states that if a contract for a facility uses State or Federal highway funds, the purchasing requirements of the State or Federal funding entity apply, unless waived by them.

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.¹² 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 generally 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). With regard to competitive sealed proposals and construction manager at risk, however, a facility is defined to mean “an improvement to real property.” This term is not defined, but the legislative history indicates that this term is intended to include civil engineering projects.

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 posted 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).

¹² 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.

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

- (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

¹³ 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.

§ 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 predescribed 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 suit¹⁴ 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.

¹⁴ 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).

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.

Population Size Limitations

This method is only available to counties with a population of more than 100,000 within its geographic boundaries or service area. TEX. LOC. GOV'T CODE § 271.182, as modified by SB 229.

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 sheriff¹⁵;
- (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

¹⁵ 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).

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;

- (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) own 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.¹⁶ 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.¹⁷

¹⁶ 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.

¹⁷ 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.

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 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).

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 2254.001, 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. 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 a professional is selected or all providers are rejected. 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.