

SOME STATE LAWS AFFECTING CONSTRUCTION FOR CITIES AND/OR COUNTIES
Current through 2009 legislative session

Note: The following provisions contain excerpts or summaries of the statutes for informational purposes, and are not intended to be complete or comprehensive.

1. **Notification to Texas Historical Commission and Possible Archeological Survey.** Section 191.021, *et seq.*, Texas Natural Resources Code. Section 191.0525 applies to construction on public lands.

191.0525. Notice Required.

(a) Before breaking ground at a project location on state or local public land, the person primarily responsible for the project or the person's agent shall notify the committee. The committee shall promptly determine whether:

- (1) a historically significant archeological site is likely to be present at the project location;
- (2) additional action, if any, is needed to protect the site; and
- (3) an archeological survey is necessary.

2. **Selection of Architects, Engineers and Land Surveyors.** Section 2254.001, *et seq.*, Texas Government Code (Professional Services Procurement Act).

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

Many governmental entities use Requests for Qualifications as the method to determine the most highly qualified provider. A governmental entity is not required to use this process under the Professional Services Procurement Act, but it should be able to establish that it met the requirement of selecting "the most highly qualified professional on the basis of demonstrated competence and qualifications." See, *La Villa Independent School Dist. v. Gomez Garza Design, Inc.*, 79 S.W. 3d 217, 2002 WL 1156031 (Tex. App. – Corpus Christi May 30, 2002) (NO. 13-00-782-CV), rehearing overruled (Jun 14, 2002).

3. **Demolition or Renovation Projects and Asbestos Requirements.** Chapter 1954, Texas Occupations Code, the Texas Asbestos Health Protection Act (formerly Art. 4477-3a, V.A.C.S.); Section 161.401-.407 Texas Health and Safety Code; Chapter 295, Texas Administrative Code (Asbestos Health Protection Regulations 25 TAC 295.31 *et seq.*)

Federal law establishes certain regulations for asbestos (see, e.g., 41 CFR Part 61, Subpart M). In addition, Texas statutes authorize the Health Department to adopt regulations governing asbestos removal and licensing requirements. The Texas Health Department adopted a number of regulations, which are published in the Texas Administrative Code. Chapter 295.31, *et seq.* is the main section regarding asbestos removal and licensing for asbestos-related activities.

25 TAC 295.34(a)(2) Demolition and/or renovation of a public building. Before performing any demolition in a public building, building owners shall ensure that all friable asbestos-containing material (ACM) or ACM which may become friable (*i.e.* Category II nonfriable ACM) are surveyed and abated in accordance with 40 CFR Part 61, Subpart M. Before performing any renovation in a public building, building owners are

required to survey and perform asbestos abatement for all asbestos-containing building material (ACBM) that could foreseeably be disturbed in the area to be renovated in accordance with these rules. The asbestos survey and abatement for the demolition and/or renovation shall be conducted by persons licensed in accordance with these rules, and according to the standards for removal specified in Sections 295.58 – 295.60 of this title

Chapter 1954, Texas Occupations Code

1954.252. Notice of Asbestos Removal, Encapsulation, or Enclosure.

(a) A person engaged in removing asbestos from or encapsulating or enclosing asbestos in a public building shall notify the department in writing at least 10 days before the date the person begins the removal, encapsulation, or enclosure project according to application laws.

(b) Notwithstanding Subsection (a), a person may give the required notice orally if the removal, encapsulation, or enclosure project is of an emergency nature.

1954.253. Supervision by Asbestos Abatement Supervisor.

The removal of asbestos from or the encapsulation or enclosure of asbestos in a public building must be supervised by an individual licensed as an asbestos abatement supervisor.

4. **Lead-Based Paint Abatement Requirements for Child-Occupied Facilities and Target Housing built before 1978.** Chapter 1955, Texas Occupations Code; Chapter 295 Texas Administrative Code (25 TAC 295.201, *et seq.*)

Lead based paint activities for Target Housing and Specified Child-Occupied Facilities, including visual inspection for risk assessment and remediation. Must be conducted by the appropriate certified personnel.

5. **CITIES-- Procurement Requirements for Contracts requiring an expenditure of more than \$50,000 Chapter 252, Subchapter B of the Texas Local Government Code**

A. § 251.021(a) “Before a municipality may enter into a contract that requires an expenditure of more than \$50,000 from one or more municipal funds the municipality must:

- (1) Comply with the procedure prescribed by this subchapter and Subchapter C for competitive sealed bidding or competitive sealed proposals;
- (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 or J, Chapter 271 [i.e. the Alternative Construction Delivery Methods and Design-Build for certain civil engineering projects]

§ 251.021(c) If a method other than competitive sealed bidding is to be used, the governing body must determine before notice is given, that the method provides the best value for the City.

Exemptions. § 252.022 sets out general exemptions to the bidding requirement; §252.021(d) states that the Chapter doesn’t apply to expenditures of funds derived from the federal or state government for conducting a community development program established under Chapter 373 if a request for proposal process is used under § 252.021(d) and complying with § 252.0215.

If any these exemptions apply to the project, the contract does not have to be awarded through a competitive selection process.

- B. Projects for which the “original” competitive bid method must be used** – The “original” Competitive Bid method, (i.e. the one in which the award is required to be made to the lowest responsible bidder, **must** be used for all civil engineering projects **except** as provided in §252.043(d-1) and Subchapters H and J of Chapter 271 of the Local Government Code.

Exception: § 252.043 (d-1) for highways, roads, bridges, utilities, water and wastewater projects, and other civil engineering projects, or buildings or structures that are incidental to civil engineering projects, that will require an expenditure of \$1.5 million or less in construction funds, the City may use competitive sealed proposals prescribed by Section 271.116 of the Texas Local Government Code (i.e. one of the alternative construction delivery methods.)

- C. Projects for which the Alternative Construction Delivery Methods of Chapter 271, Subchapter H can be used:** Buildings for which the design and construction are governed by accepted building codes, except that the competitive sealed proposal and construction manager at risk methods may be used for "an improvement to real property." [See item 7 below for description of methods.]

Note: Check Charter provisions: § 252.002 provides that municipal Charter provisions regarding bidding on public improvements projects and purchasing control over Chapter 252 unless the governing body of the city elects to have this chapter supersede the Charter.

- D. Advertising Requirements** § 252.041 sets out the notice requirements.

- E. § 271.112(g) Use of State or Federal Highway Funds.** If state or federal highway funds are used for a facility, the appropriate state or federal purchasing requirements must be used, unless waived by such entity.

6. COUNTIES -- Procurement Requirements for Contracts requiring an expenditure of \$50,000 or more Chapter 262, Subchapter C of the Texas Local Government Code

- A.** “Before a County may purchase one or more items under a contract that will require an expenditure exceeding \$50,000 the Commissioners Court of the County must:

- (1) comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter,
- (2) use the reverse auction procedure, as defined in Section 2155.062(d), Government Code, for purchasing; or
- (3) comply with a method described by Subchapter H or J, Chapter 271” [i.e. the Alternative Construction Delivery Methods and Design-Build for certain civil engineering projects]

Exemptions: The statute provides two sets of exemptions to the requirements for competitive selection under Chapter 262 (1) Discretionary Exemptions § 262.024; and (2) Mandatory Exemption § 262.0241 Contract for golf course management in certain counties.

If any these exemptions apply to the project, the contract does not have to be awarded through a competitive selection process, except to the extent the transaction is governed by the Certificate of Obligation Act.

- B. Projects for which the “original” competitive bid method must be used** – The “original” Competitive Bid method, (i.e. the one in which the award is required to be made to the lowest responsible bidder, **must** be used (i) for all civil engineering projects, except

as provided by Subchapters H and J of Chapter 271, and (2) for all projects which will be funded through certificates of obligation or anticipation notes which exceed the lesser of (i) 20% of the budget for the fiscal year or (ii) \$10 million.

NOTE: The Alternative Construction Delivery Methods cannot be used for projects funded by certificates of obligation or anticipation notes which exceed the lesser of (i) 20% of the budget for the fiscal year or (ii) \$10 million. The methods set out in the Certificate of Obligation Act of 1971 (Subchapter C, Chapter 271) applies instead.

- C. Projects for which Alternative Construction Delivery Methods can be used:** Buildings for which the design and construction are governed by accepted building codes, except that the competitive sealed proposal and construction manager at risk methods may be used for "an improvement to real property." [See item 7 below for description of methods.] except as provided in B(2) above.
- D. Advertising Requirements:** Section 262.025 sets out the advertising notice requirements.
- E. § 271.112(g) Use of State or Federal Highway Funds.** If state or federal highway funds are used for a facility, the appropriate state or federal purchasing requirements must be used, unless waived by such entity.

7. Alternative Construction Delivery Methods (Apply to Both Cities and Counties) Chapter 271, Subchapter H of the Texas Local Government Code

- A. Alternative Construction Delivery Methods ("ACMs")** The following six Alternative Construction Delivery Methods ("ACM") can be used by cities or counties ("Owner") for architectural construction projects:
 - (1) Competitive Sealed Bid ;
 - (2) Competitive Sealed Proposal;
 - (3) Construction Manager Agent ;
 - (4) Construction Manager at Risk;
 - (5) Design-Build ; and
 - (6) Job Order Contracting

The Competitive Sealed Proposal and Construction Manager at Risk methods can be used for "an improvement to real property." This term is not defined, but the legislative history indicates that it is intended to include certain civil engineering projects. In addition, (1) the Competitive Sealed Proposal method can be used by cities for certain civil engineering projects as provided in Section 252.043(d-1), and (2) the design-build method may be used for certain civil works projects as provided in Subchapter J of Chapter 271 of the Texas Local Government Code.

- B. Best value – not lowest bid.** The contract will be awarded to the contractor who provides the "best value" to the Owner, based on the selection criteria established by the Owner in its procurement documents, and not to the contractor who is the lowest responsible bidder.

Unless the Owner uses the Competitive Sealed Bid method, the governing body of the Owner must determine which method provides the "Best Value" before advertising for the construction project.

When a specific method of construction is selected by the Board, the district must follow the procurement procedures set out in the section governing that method. Generally, these will involve using a Request for Qualifications ("RFQ"), a Request for Bids ("RFB") or a Request for Proposals ("RFP").

C. Selection Criteria. The Owner can consider the following factors in establishing its selection criteria:

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

D. Selection of Contractor The Selection Criteria will be set out in the solicitation documents (RFP, RFB, etc.) with assigned weights (points). The contractor with the most points will be the first-ranked contractor, with the remaining contractors ranked in accordance with the number of points received. If the method used is Competitive Sealed Bid, then the award is made to the highest-ranked contract at the amount bid. If one of the other ACMs is used, the Owner begins negotiations with the first-ranked contractor, and if the Owner is unable to reach a contract with the first-ranked contractor, then the owner formally terminates negotiations with the first-ranked contractor and begins negotiations with the second-ranked contractor. This process is followed until a contract is reached, or all contractors are rejected.

Section 271.115 Selecting Contractor for Construction Services Through Competitive Bidding

- The Owner selects an A/E to design the project and develop construction plans in the manner required by law (either a full-time in-house professional or by compliance with the Professional Services Procurement Act).
- The Owner issues a RFB based on the AE documents and the selection criteria established by Owner.
- The Owner awards the contract at the bid amount to the bidder who offers the best value to the Owner based on the selection criteria.

Section 271.116 Selecting Contractor for Construction Services Through Competitive Sealed Proposals

- The Owner selects AE to design the project and develop construction documents, either by using a full-time in-house professional or through the Professional Services Procurement Act.
- The Owner then requests sealed proposals based on the AE documents and the selection criteria established by Owner, the Estimated Budget, Project Scope, Project Schedule and other relevant factors.
- The proposals are publicly opened
- The Owner evaluates and ranks each proposal, and makes its selection of "best value" based on the selection criteria and ranking
- The Owner begins negotiation with the first ranked proposer, and if negotiations are not successful moves down the rank
- Owner must provide or contract for inspection services, testing of construction materials engineering, and the verification testing services necessary for acceptance of the project, independently of the Contractor, in accordance with the Professional Services Procurement Act

- The Owner has some ability to negotiate the bid amount with the proposer, and is not required to award the contract based on the bid amount (as is the case with a Competitive Sealed Bid).

Section 271.117 Contracts for Facilities: Construction Manager-Agent.

- Owner selects A/E to design project and prepare construction documents either through the use of a full-time in-house professional or the Professional Services Procurement Act.
- Owner selects Construction Manager as Agent (“CMA”), through an RFP on the basis of demonstrated competence and qualifications in the same manner as under the Professional Services Procurement Act
- Owner or CMA must procure inspection services, testing of construction materials engineering, and the verification testing services necessary for acceptance of the project, independently of the contractor, in accordance with the Professional Services Procurement Act

Section 271.118 Contracts for Facilities: Construction Manager-At-Risk

- The Owner selects the A/E to design the project and prepare the construction documents, either through a full-time in-house professional or through the Professional Services Procurement Act.
- At the same time, or at any time thereafter, the Owner selects the Construction Manager at Risk (“CMR”), through either a one-step or two-step process. In the one-step process, the Owner uses an RFP, in the two-step process, the Owner uses an RFQ first, and then further evaluates five or fewer candidates
- The Owner evaluates and ranks each contractor (within 45 days after opening of proposals), and makes its selection of “best value” based on the selection criteria and ranking
- The Owner begins negotiation with the first ranked contractor, and if negotiations are not successful moves down the rank
- The CMR is required to publicly advertise and receive bids or proposals from trade contractors for the performance of all major elements of the work in accordance with section 271.118 If CMR proposes to do any of this work, it must also submit a bid or proposal
- Owner must provide or contract for inspection services, testing of construction materials engineering, and the verification testing services necessary for acceptance of the project, independently of the CMR, in accordance with the Professional Services Procurement Act

Section 271.119 Design-Build Contracts for Facilities

- Owner selects its own Architect or Engineer (“A/E”) to develop a design-criteria package for the project either through use of a full-time in-house professional or through the Professional Services Procurement Act
- Selection of the design/build team, consisting of AE and the contractor, is made in two phases. In Phase I, Owner prepares an RFQ for a design/build team that includes general information on the project, selection criteria, project scope, budget, and the design-criteria package and evaluates each contractor based on experience, competence and other qualifications.
- In Phase II, the Owner may ask for additional information including cost and interview the design/build teams. The Owner will rank the teams and make its selection based on the selection criteria and ranking.
- If Owner cannot negotiate a contract with the first ranked team, it moves down the rank
- Owner must provide or contract for inspection services, testing of construction materials engineering, and the verification testing services necessary for

acceptance of the project, independently of the design-build firm, in accordance with the Professional Services Procurement Act

Section 271.120 Job Order Contracts for Facilities Construction or Repair

- If a job order contract or an order requires AE services, those services must be provided in accordance with the manner provided by law.
- To select the contractor, the Owner prepares an RFP
- The Owner may establish contractual unit prices
- The Owner may award one or more job order contracts to one or more job order contractors in connection with each RFP
- After the award, specific work orders are made through the execution of a job order
- The contractor is required to provide payment and performance bonds for a specific job order, if the job order amount falls within the statutory requirements for bonds (i.e. in excess of \$25,000 for Payment Bonds; in excess of \$100,000 for Performance Bonds)

E. **Advertising Requirements** are set out in Section 271.112.

8. Additional Requirements Applicable to Competitive Bidding On Public Works Contracts.

Subchapter B of Chapter 271 sets out additional requirements applicable to competitive bidding on certain Public Works contracts. By statute, these provisions do not apply to the ACMs except as noted below.

A. The following requirements apply only to competitive bids which are not an ACM:

Section 271.0245 provides that the Owner must:

- 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;
- receive bids in a fair and confidential manner, and
- may receive bids in hard copy format or through electronic transmission, but must accept any bids that are submitted in hard-copy format.

Section 271.025 provides:

(a) that the Owner must include in the advertisement for bid:

- a description of the work
 - the location at which the bidding documents, plans, specifications or other data may be examined by the bidders; and
 - the time and place for submitting bids and the time and place that bids will be opened.
- (b) publication requirements for the advertisement, if not otherwise established by law;
- (c) The Owner must mail a notice containing the advertising information described in (a) to any organization that requests that notices for bids be sent to it, and meets the other requirements set out in subsection (c).

Section 271.027 (b) provides:

- The contract must be awarded to lowest responsible bidder
- The contract may not be awarded to a bidder who is not the lowest bidder unless, before the award, each low bidder is given notice of the proposed award, and 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.

B. The following requirements apply to all competitive bids:

Section 271.026 provides that bids:

- May be opened only by the governing body of the Owner at a public meeting or by an officer or employee of the Owner at or in an office of the Owner;
- May not be changed once they are opened.

Section 271.027 (a) provides that:

- The Owner is entitled to reject any and all bids.

Section 271.0275 states that in determining who is a responsible bidder, the Owner may take into account the safety record of the bidder if:

- The Owner adopted a written definition and criteria for accurately determining the safety record of a bidder;
- The Owner has given notice to prospective bidders in the bid specifications that the safety record of the bidder may be considered in determining the responsibility of the bidder; and
- The determinations are not arbitrary and capricious.

9. **Enforcement of Purchasing Statutes.** Under Section 271.029 of the Local Government Code, an officer or employee of a governmental entity commits an offense if the person intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements for public works contracts. The offense is a Class B misdemeanor. Any other intentional or knowing violation by an officer or employee of the statute requiring competitive bidding on public works contracts is also a Class B misdemeanor

Upon final conviction, an officer or employee who commits a Class B misdemeanor as provided above is immediately removed from office or employment and is ineligible (i) to be employed by or receive compensation from the governmental entity with which it served at the time of the offense, or (ii) to be a candidate for or hold any public office in the state, for a period of four years from the date of conviction.

10. **Cooperative Purchasing program for goods or services with one or more other local governments.** Section 271.101, *et seq.* of the Texas Local Government Code regarding Cooperative Purchasing Contracts.

§ 271.102. Cooperative Purchasing Program Participation

(a) A local government may participate in a cooperative purchasing program with another local government or a local cooperative organization.

(b) A local government that is participating in a cooperative 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.

(c) A local government 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.

11. **Payment and Performance Bonds Required for Certain Construction Contracts.** Section 2253.021, *et seq.* of the Texas Government Code regarding Performance and Payment Bonds.

§ 2253.021. Performance and Payment Bonds Required

(a) A governmental entity that makes a public work contract with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity:

- (1) a performance bond if the contract is in excess of \$100,000; and
- (2) a payment bond if the contract is in excess of \$25,000 (or in excess of \$50,000 for cities and certain joint boards);

(b) The performance bond is:

- (1) solely for the protection of the state or governmental entity awarding the public work contract;
- (2) in the amount of the contract; and
- (3) conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.

(c) The payment bond is:

- (1) solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work, labor or material; and
- (2) in the amount of the contract.

(d) A bond required by this section must be executed by a corporate surety in accordance with Section 1, Chapter 87, Acts of the 56th Legislature, Regular Session, 1959 (Article 7.19-1, Vernon's Texas Insurance Code).

(e) A bond executed for a public work contract with the state or a department, board, or agency of the state must be payable to the state and its form must be approved by the attorney general. A bond executed for a public work contract with another governmental entity must be payable to and its form must be approved by the awarding governmental entity.

§ 2253.027. Liability of Governmental Entity

If a governmental entity fails to obtain from a prime contractor a payment bond as required by Section 2253.021:

- (1) the entity is subject to the same liability that a surety would have if the surety had issued a payment bond and if the entity had obtained the bond; and
- (2) a payment bond beneficiary is entitled to a lien on money due to the prime contractor in the same manner and to the same extent as if the public work contract were subject to Subchapter J, Chapter 53, Property Code.

12. **Prevailing Wage Rate Required for Public Works Contract** Section 2258.022, *et seq.*, Texas Government Code.

2258.022 Determination of Prevailing Wage Rates.

(a) A public body shall determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of workers needed to execute the contract and the prevailing rate for legal holiday and overtime work by:

- (1) conducting a survey of the wages received by classes of workers employed on projects of a character similar to the contract work in the political subdivision of the state in which the public work is to be performed; or
- (2) using the prevailing wage rate as determined by the United States Department of Labor in accordance with the Davis-Bacon Act (40 U.S.C. § 276a, *et seq.*), and its subsequent amendments.
- (b) [Applies only to public work located in a county bordering Mexico, or a county adjacent to a county bordering Mexico.]
- (c) The public body shall determine the general prevailing rate of per diem wages as a sum certain, expressed in dollars and cents.
- (d) A public body shall specify in the call for bids for the contract and in the contract itself the wage rates determined under this section.
- (e) The public body's determination of the general prevailing rate of per diem wages is final.

2258.023. Prevailing Wage Rates to be Paid by Contractor and Subcontractor; Penalty

- (a) The contractor who is awarded a contract by a public body or a subcontractor of the contractor shall pay not less than the rates determined under Section 2258.022 to a worker employed by it in the execution of the contract.
- (b) A contractor or subcontractor who violates this section shall pay to the state or a political subdivision of the state on whose behalf the contract is made, \$60 for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rates stipulated in the contract. A public body awarding a contract shall specify this penalty in the contract.
- (c) A contractor or subcontractor does not violate this section if a public body awarding a contract does not determine the prevailing wage rates and specify the rates in the contract as provided by Section 2258.022.
- (d) The public body shall use any money collected under this section to offset the costs incurred in the administration of this chapter.
- (e) A municipality is entitled to collect a penalty under this section only if the municipality has a population of more than 10,000.

13. **Interest Due from Government Entity on Overdue Payments.** Sections 2251.002, *et seq.*, Texas Government Code provide for the interest rate due on payments when governmental entities do not pay on time.

2251.025. Interest on Overdue Payment.

- (a) A payment begins to accrue interest on the date the payment becomes overdue.
- (b) Interest accrues on an overdue payment at the rate of one percent each month.
- (c) Interest on an overdue payment stops accruing on the date the governmental entity or vendor mails or electronically transmits the payment. In this subsection, "governmental entity" does not include a state agency.

2251.021. Time for Payment by Governmental Entity.

- (a) Except as provided by Subsection (b), a payment by a governmental entity under a contract executed on or after September 1, 1987, is overdue on the 31st day after the later of:
 - (1) the date the governmental entity receives the goods under the contract;

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

2251.002. Exceptions

- (a) This chapter does not apply to a payment made by a governmental entity, vendor, or subcontractor if:
 - (1) there is a bona fide dispute between the political subdivision and a vendor, contractor, subcontractor, or supplier about the goods delivered or the service performed that causes the payment to be late;
 - (2) there is a bona fide dispute between a vendor and a subcontractor or between a subcontractor and its supplier about the goods delivered or the service performed that causes the payment to be late;
 - (3) the terms of a federal contract, grant, regulation, or statute prevent the governmental entity from making a timely payment with federal funds;or
- (4) the invoice is not mailed to the person to whom it is addressed in strict accordance with any instruction on the purchase order relating to the payment.

2251.027. Payment of Interest by Political Subdivision

- (a) A political subdivision shall compute interest imposed on the political subdivision under this chapter.
- (b) The political subdivision shall pay the interest at the time payment is made on the principal.
- (c) The political subdivision shall submit the interest payment with the net amount due for the goods or service.
- (d) The political subdivision may not require a vendor to petition, bill, or wait an additional day to receive the interest due.
- (e) The political subdivision may not require a vendor or subcontractor to agree to waive the vendor's or subcontractor's right to interest under this chapter as a condition of the contract between the parties.

2251.029. Partial Payment

- (a) The unpaid balance of a partial payment made within the period provided by this chapter accrues interest as provided by Section 2251.025 unless the balance is in dispute.
- (b) Section 2251.042 applies to a disputed balance.

2251.042. Disputed Payment

- (a) A governmental entity shall notify a vendor of an error in an invoice submitted for payment by the vendor not later than the 21st day after the date the entity receives the invoice.
- (b) If a dispute is resolved in favor of the vendor, the vendor is entitled to receive interest on the unpaid balance of the invoice submitted by the vendor beginning on the date under Section 2251.021 that the payment for the invoice is overdue.
- (c) If a dispute is resolved in favor of the governmental entity, the vendor shall submit a corrected invoice that must be paid in accordance with Section 2251.021. The unpaid balance accrues interest as provided by this chapter if the corrected invoice is not paid by the appropriate date.

14. **Requirements if governmental entity retains more than 5% on certain construction projects.** Section 2252.031, *et seq.*, Texas Government Code.

2252.032. Retainage.

A governmental entity shall:

- (1) deposit in an interest-bearing account the retainage of a public works contract that provides for retainage of more than five percent of the periodic contract payment; and
- (2) pay the interest earned on the retainage to the prime contractor on completion of the contract.

2252.033. Exemptions

This subchapter does not apply to:

- (1) a public works contract executed before August 31, 1981;
- (2) **a public works contract in which the total contract price estimate at the time of execution of the contract is less than \$400,000;** or
- (3) a public works contract made by the Texas Department of Transportation under Subchapter A, Chapter 223, Transportation Code.

15. **Worker's Compensation Insurance Requirements.** Required coverage for certain building or construction contractors, § 406.096, Texas Labor Code.

§406.096. Required Coverage for Certain Building or Construction Contractors.

- (a) A governmental entity that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employer of the contractor employed on the public project.
- (b) Each subcontractor on the public project shall provide such a certificate relating to coverage of the subcontractor's employees to the general contractor, who shall provide the subcontractor's certificate to the governmental entity.

16. **Consideration of Location of Bidder's Principal Place of Business.** Section 271.905 Texas Local Government Code.

§271.905 provides that if a local government receives one or more bids from a bidder whose principal place of business is in the local government and whose bid is within 3% of the lowest bid price received by the local government from a bidder who is not a resident of the local government, the local government may enter into a contract with:

- (i) the lowest bidder; or
- (ii) the bidder whose principal place of business in is the local government, if the governing body of the local government determines, in writing, that the local bidder offers the local government the best combination of contract price and additional economic development opportunities for the local government created by the contract award, including the employment of residents of the local government and increased tax revenues to the local government.

17. **Consideration of Location of Bidder's Principal Place of Business in Certain Municipalities.** Section 271.9051 of the Texas Local Government Code

§271.9051 provides that if a municipality with a population of less than 250,000 receives one or more competitive sealed bids from a bidder whose principal place of business is in the city and whose bid is within 5% of the lowest bid price received by the city from a bidder who is not a resident of the city, the city may enter into a contract with:

- (i) the lowest bidder; or
- (ii) the bidder whose principal place of business is in the city, if the governing body of the city determines, in writing, that the local bidder offers the city the best combination of contract price and additional economic development opportunities for the city created by the contract award, including the employment of residents of the city and increased tax revenues to the city.

18. Non-resident Bidders. Section 2251.002, *et seq.*, Texas Government Code.

2252.002. Award of Contract to Nonresident Bidder

A governmental entity may not award a governmental contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located.

2252.003. Publication of Other States' Laws on Contracts

(a) The Comptroller annually shall publish in the Texas Register:

- (1) a list showing each state that regulates the award of a governmental contract to a bidder whose principal place of business is not located in that state; and
- (2) the citation to and a summary of each state's most recent law or regulation relating to the evaluation of a bid from and award of a contract to a bidder whose principal place of business is not located in that state.

(b) A governmental entity shall use the information published under this section to evaluate the bid of a nonresident bidder. A governmental entity may rely on information published under this section to meet the requirements of Section 2252.002.

2252.004. Contract Involving Federal Funds

These provisions do not apply to a contract involving federal funds.

19. Award of Contract if Identical Bids. Section 271.901, *et seq.*, Texas Local Government Code.

271.901. Procedure for Awarding Contract if Municipality Receives Identical Bids

(a) If a municipality or district is required to accept bids on a contract and receives two or more bids from responsible bidders that are identical, in nature and amount, as the lowest and best bids, the governing body of the municipality or district shall enter into a contract with only one of those bidders and must reject all other bids.

(b) If only one of the bidders submitting identical bids is a resident of the municipality or district, the municipality or district must select that bidder. If two or more of the bidders submitting identical bids are residents of the municipality or district, the municipality or district must select one of those bidders by the casting of lots. In all other cases, the municipality or district must select from the identical bids by the casting of lots.

20. Right to Work. Section 271.121 of the Texas Local Government Code.

§ 271.121 provides that in procuring goods or services; awarding a contract; or overseeing procurement or construction for a public work or public improvement, a governmental entity:

- (i) may not consider whether a vendor is a member of or has any other relationship with any organization; and
- (ii) shall ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to an organization.

21. **Design-Build for Certain Civil Works Projects.** Subchapter J of Chapter 271 of the Texas Local Government Code, which applies to cities, counties and other specified local governments:

- (i) provides that the design-build method of construction may be used for certain civil works projects, including utilities, roads, and water supply projects.
- (ii) Subchapter J applies to a local government (as defined in the statute) with a population of more than 100,000 within its geographic boundaries or service area.

22. **Trench Safety Requirements.** Section 756.023 of the Texas Health and Safety Code requires specific contract provisions for projects involving trench excavation that will exceed a depth of five feet:

§ 756.023. TRENCH EXCAVATION FOR POLITICAL SUBDIVISION.

(a) On a project for a political subdivision of the state in which trench excavation will exceed a depth of five feet, the bid documents provided to all bidders and the contract must include:

(1) a reference to the Occupational Safety and Health Administration standards for trench safety in effect during the period of construction of the project;

(2) a copy of special shoring requirements, if any, of the political subdivision, with a separate pay item for the special shoring requirements;

(3) a copy of any geotechnical information that was obtained by the owner for use by the contractor in the design of the trench safety system; and

(4) a separate pay item for trench excavation safety protection.

(b) The separate pay item for trench excavation safety protection must be based on the linear feet of trench excavated. The separate pay item for special shoring requirements, if any, of the political subdivision must be based on the square feet of shoring used.

(c) A political subdivision may require a bidder to attend a prebid conference to coordinate a geotechnical investigation of the project site by bidders. In awarding a contract, a political subdivision may not consider a bid from a bidder who failed to attend a required prebid conference.

(d) This section does not apply to a person subject to the safety standards adopted under and the administrative penalty provisions of Subchapter E, Chapter 121, Utilities Code.

23. **Use of Park, Recreational and Other Property.** Chapter 26 of the Texas Parks and Wildlife Code requires a public hearing and a finding by the governing body of a political subdivision, before the political subdivision can approve any program or project that requires the use or taking of land designated and used as a park, recreation area, wildlife refuge or historic site:

PARKS AND WILDLIFE CODE CHAPTER 26. PROTECTION OF PUBLIC PARKS AND RECREATIONAL LANDS

§ 26.001. PROTECTED LAND; NOTICE OF TAKING.

(a) A department, agency, political subdivision, county, or municipality of this state may not approve any program or project that requires the use or taking of any public land designated and used prior to the arrangement of the program or project as a park, recreation area, scientific area, wildlife refuge, or historic site, unless the department, agency, political subdivision, county, or municipality, acting through its duly authorized governing body or officer, determines that:

(1) there is no feasible and prudent alternative to the use or taking of such land; and

(2) the program or project includes all reasonable planning to minimize harm to the land, as a park, recreation area, scientific area, wildlife refuge, or historic site, resulting from the use or taking.

(b) A finding required by Subsection (a) of this section may be made only after notice and a hearing as required by this chapter.

(c) The governing body or officer shall consider clearly enunciated local preferences, and the provisions of this chapter do not constitute a mandatory prohibition against the use of the area if the findings are made that justify the approval of a program or project.

This statute has generally been construed to require the public hearing and finding when there is any proposed project which is not related to the use or improvement of the land for its designated purpose, including the installation of utilities.