PRACTICAL TIPS FOR PUBLIC PROCUREMENT

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GOVERNMENT LAW BOOT CAMP
July 27, 2016
Austin

CHAPTER 10

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Education

- J.D.,William & Mary School of Law, 2002; William & Mary Bill of Rights Journal, Managing Editor 2001 - 2002
- M.A., Political Science, University of Houston, 1999
- B.A., cum laude, Wellesley College, 1995

Affiliations

- Texas Super Lawyers Rising Stars Edition (2010 - 2012) Government/Cities/ Municipalities
- Commissioned by Governor Perry as a Yellow Rose of Texas
- City of West University Place, Zoning Board of Adjustment, 2011 - present
- Sugar Land Planning and Zoning Commissioner, 2009 - 2011
- Sugar Land Mobility Advisory Committee, 2010 - 2011
- Sugar Land Charter Review Commissioner, 2008 - 2009
- Sugar Land Parks and Recreation Policy Advisory Board Member, 2008 - 2009
- Texas Bar Foundation, Fellow
- Houston-Galveston Area Council Regional Planning Workgroup
- State Bar of Texas, School Law Section
- Houston Bar Association
- National School Boards Association – Council of School Attorneys
- Texas Association of School Boards - Council of School Attorneys
- Texas Association of School Business Officials

Bar Admissions

- Texas

Court Admissions

- U.S. District Court for the , Southern District of Texas
- U.S. Court of Appeals for the 5th Circuit

Sandy Hellums-Gomez initially joined Thompson & Horton as Counsel in 2012 after almost a decade in the Haynes and Boone Public Law and Litigation Sections. She became partner in January 2015. Sandy serves a variety of public entities in addition to schools including cities, counties, transportation districts, and port authorities. She provides general counsel, litigation, and transactional services with an emphasis on infrastructure projects, procurement, commercial and land use disputes. She also has extensive experience in condemnation, civil rights, elections law, legislative analysis, and open government. Prior to entering private practice, Sandy served as a Briefing Attorney to the
Honorable Leslie Brock Yates on the Fourteenth Court of Appeals.

REPRESENTATIVE MATTERS

Advised rail district regarding commuter rail feasibility agreement and conformity with ARRA and TxDOT funding requirements.

Counseled school district on joint development of compressed natural gas fueling station in conjunction with local municipality.

Created payment in lieu of taxes agreement for local school district in connection with a foreign trade zone manufacturing subzone application.

Advised economic development corporation regarding local preference procurement criteria and FEMA funding regulations.

Represent school district in nuisance and inverse condemnation case related to construction and operation of bus maintenance and storage facility.

Assisting non-profit organization with land use development of public promenade in EaDo.

SELECTED PUBLICATIONS AND SPEECHES

Ms. Hellums-Gomez has prepared materials for and/or has given presentations on the following topics:

"2015 Legislative Update" and "Best Practices for Business Officers: Procurement and Contracting," Whitley Penn Public Sector CPE Seminar, April 30, 2015

"Best Practices for Business Officers: Procurement and Contracting," TASBO 69th Annual Conference, February 19, 2015

"Introduction to Zoning," TASBO 69th Annual Conference, February 19, 2015

"Best Practices for Business Officers: Procurement and Contracting," Region IV Education Service Center Seminar (2014)

“Texas 83rd Legislative Update” Whitley Penn CPE for the Public Sector, July 29, 2013 and October 18, 2013.
“Filling the Gap: Public-Private Partnerships In Public Education Infrastructure Development” ABA Education Law Symposium, August 1, 2013.

“You Signed What? Procurement and Contracting Pitfalls”, Texas Association of Community Colleges, January 24-25, 2013.

"Dealing with the King: Tips for Doing Business with the Government", Corp. Couns. Rev., May 2012, at 65

"PPPs and Alternative Financing in Education", forthcoming address to ABA Education Law Symposium, October 5, 2012

"Best Practices in Public Bidding and Procurement", address to TASBO Summer Conference, June 15, 2012

"Slip Slidin' Away: Easements, Avulsion, Access, and the Ever Changing Law of Beachfront Property", reprinted in *At the Cutting Edge 2011*: *Land Use Law from the Urban Lawyer* (Dwight H. Merriam, ed., ABA Press 2011)

"Water Law and Policy", Address to the American Planning Association Law and Policy Conference, September 19, 2011

"Introduction to Open Records", Address to Houston Corporate Paralegal Association, September 14, 2011

"Slip Slidin' Away: Easements, Avulsion, Access, and the Ever Changing Law of Beachfront Property", *The Urban Lawyer* (Summer 2011)

"Local Land Use Regulation of Oil & Gas Development", Address to ABA Government Operations Committee, April 20, 2011

"Identifying Your True Client for In-House Counsel", In-House CLE presented to Service Corporation International

"Texas Supreme Court Resets Public Information Act Deadline", 47 The Houston Lawyer, March/April, 2010

"Who's the Boss: Determining your True Client When Representing a Governmental Entity", Address before Suing and Defending Governmental Entities 101, July, 2010

"The ABC's of Sovereign Immunity", Address before Suing and Defending Governmental Entities Boot Camp, July, 2009

"The ABC's of the Use of Outside Counsel", Address before Suing and Defending Governmental Entities Boot Camp, July 23, 2008

"A Long and Winding Road: Federal Funding for Interstate Toll Roads", 40 *The Urban Lawyer* (Summer 2008)

"Sovereign Immunity on Quantum Merit Claims", 45 *The Houston Lawyer* (Nov/Dec 2007)

"Note, Bits and Bites: The Carnivore Initiative and the Search and Seizure of E-Mail", 10 Wm. & Mary Bill Rts., J. 2002

"Privacy Law and the Challenge of New Communications Technologies: An Analysis of Encryption and Digital Telephony (1999)", (M. A. Thesis, University of Houston) (On file with the University of Houston)

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PRACTICAL TIPS FOR PUBLIC PROCUREMENT

I. INTRODUCTION

Public procurement laws govern the purchasing of goods and services by governmental entities. It rarely garners much attention from governmental entities until there is a problem and, unfortunately, those problems often receive a great deal of attention. Therefore, it is important for all government attorneys to have a basic knowledge of procurement laws. All governmental entities have a body of procurement laws that govern them. Some laws apply to all or most of the varying government types, while some bodies have laws applicable only to them. This paper and presentation will provide a brief overview of those laws.

II. LOCAL GOVERNMENTAL ENTITIES

A. Independent School Districts

The competitive procurement requirements for public schools are contained in Chapter 44, Subchapter B of the Texas Education Code.[1] Districts are required to competitively procure purchases for goods and services valued at $50,000 or more in the aggregate for each 12-month period.[2] Districts may utilize competitive bidding, competitive sealed proposals, reverse auctions, interlocal agreement, or any method provided under Texas Government Code Sec. 2269 for construction services. A district must determine which of these methods provides it with the best value prior to utilization.[3]

Schools are required to utilize the following factors in evaluating proposals: price; reputation of vendor; quality of goods or services; extent goods or services meet district's needs; vendor's prior relationship with the district; impact on ability of district to comply with rules relating to historically underutilized businesses; total long-term cost to district; principal place of business; and any other relevant factors listed in the bid or proposal.[4]

Procuring goods or services in violation of the requirements of Section 44 may result in criminal penalties. It is specially prohibited to make separate, sequential, or component purchases to avoid procurement requirements and may result in a Class B or Class C misdemeanor.[5] A conviction will result in removal from office or employment and future ineligibility.[6] Furthermore, a court may enjoin performance of a contract made in violation of these requirements and a prevailing party that brought such action may recover attorneys' fees from the district.[7]

B. Municipalities

The competitive procurement requirements for municipalities contained in Chapter 252, Texas Local Government Code, are very similar to the requirements applied to school districts. Chapter 252 is implicated in contract purchases that require an expenditure of more than $50,000 from "one or more municipal funds".[8] That said, the requirements of Chapter 252 are superseded by a home-rule municipality's charter unless that municipality elects to have Chapter 252 supersede the charter.[9] The requirements also do not apply to monies received from state or federal sources to conduct community development programs, under Chapter 373, if they are items purchased in a request-for-proposal (RFP) process described later in this paper.[10]

Cities may purchase goods and services through competitive bidding/sealed proposal procedures found in Chapter 252, the reverse auction procedure found in Texas Government Code section 2155.062, or comply with construction project purchasing requirements in Chapter 2269.[11] If competitive sealed bidding is used, then the contract may be awarded to the "lowest responsible bidder" or the one who provides the goods or services "at the best value for the municipality".[12] To determine the best value, the municipality should look at: the purchase price, the reputation of the bidder and of the bidder's goods and services, the quality of the bidder's goods or services, the extent to which the goods or services meet the municipality's needs, the bidder's past relationship with the municipality, the impact on the ability of the municipality to comply with the laws and rules relating to contracting with Historically Underutilized Businesses (HUBs) and non-profits that employ persons with disabilities, the total long-term cost to the municipality to acquire the goods/services from the bidder, and any relevant criteria that the municipality specifically lists in its request for bids or proposals.[13] The municipality should indicate in its bid specifications that the contract may be awarded to either

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[1] Tex. Educ. Code, Subchapter B.

[2] Tex. Educ. Code § 44.031(a).

[3] *Id*.

[4] *Id*. at 44.031(b)(1-9)

[5] *Id*. at 44.032(b-d).

[6] *Id*. at 44.032(e).

[7] *Id*. at 44.032(f).

[8] *See* Tex. Loc. Gov't Code § 252.021(a).

[9] *See* § 252.002.

[10] § 252.021(d).

[11] § 252.021(a).

[12] § 252.043(a).

[13] *Id.* at (b).

the lowest responsible bidder or to the bidder who provides goods or services at the best value for the municipality.[14] Additional facilities construction requirements are found in section 252.043.[15] Finally, notice is required for competitive sealed bids and competitive sealed proposals, including notice of time and place at which the bids will be publicly read.[16] Notice must be published in a newspaper within the municipality for two consecutive weeks, at least 14 days before the date the bids will be publicly opened and read.[17]

Certain prohibitions and considerations apply to the selection of bidders. Municipalities may consider the safety records of bidders in determining whether a bidder is a "responsible bidder", as long as the municipality's governing body has adopted criteria to measure safety records and does not do so in an arbitrary and capricious manner.[18] A municipality may establish that it can refuse to enter into a contract with a person indebted to that municipality, but the municipality may also decide that it will enter into a contract with such a person.[19]

If the requirements of Chapter 252 are not followed, a contract made in nonconformance with Chapter 252 is void and the performance may be enjoined by any tax paying resident of the municipality or by a person who submitted a bid for the contract, regardless of residency, if the contract is for the construction of public works.[20] Criminal penalties may also apply against a municipal officer or employee that intentionally or knowingly makes or authorizes "separate, sequential, or component purchases" to avoid the applicability of Chapter 252, discussed above, or someone who intentionally or knowingly violates Chapter 252.[21] The offense is a Class C misdemeanor.[22] Moreover, final conviction removes the officer or employee from office or employment and the same individual is ineligible for four years to be a candidate or elected office holder or be a municipal employee or receive compensation via a contract from the municipality where the offense occurred.[23]

C. Counties

County purchasing procedures differ somewhat from those of other local governmental entities. Texas Local Government Code Chapter 262, Subchapter D governs the basic procurement requirements for counties. Like cities and school districts, counties are required to procure contracts that require an expenditure exceeding $50,000.[24] When utilizing a competitive bidding process, the county must provide all bidders the opportunity to bid on:

> "equal terms and have bids judged according to the same standards."[25]

Counties may utilize competitive bidding, competitive proposals, reverse auction, or methods provided for construction in Chapter 2269, Government Code.[26]These methods do not apply to the purchase of management services for a golf course or a retail facility owned by the county and located on the premises of the golf course and landscape maintenance services for a county-owned golf course.[27]

Competitive sealed proposals are limited to the purchase of insurance, high technology items, landscape maintenance, travel management, and recycling.[28] Competitive bidding, therefore, is normally used in county purchasing.

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[14] *Id*. at (c). Note that the award must be given to the lowest responsible bidder if the contract applies related civil engineering construction projects that are primarily focused on civil engineering, in addition to the construction of highways, roads, streets, bridges, utilities, water supply projects, water plants, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, and drainage projects. *Id*. at (d). That said, if the contract concerns a construction project that is less than $1.5 million, competitive sealed proposal procedures may be used. *Id.* at (d-1).

[15] Construction projects awarded to a bidder must also have the bidder execute a bond in the full amount of the contract price, conditioned that the contract will faithfully perform the contract, and executed in accordance with state law. § 252.044.

[16] § 252.041.

[17] *Id*. If the contract is for the purchase of machinery or the maintenance of roads/streets, the notice must include a general specification of the machinery desired. *Id*.

[18] § 252.0435.

[19] § 252.0436. Note that person includes corporations, non-profits, joint ventures, LLCs, and other entities that seek to enter into a contract with a municipality. *Id*.

[20] § 252.061.

[21] § 252.062(a)(b).

[22] § 252.062(c).

[23] § 252.063.

[24] Tex. Loc. Gov't Code § 262.023.

[25] *Id*. at § 262.0225.

[26] *Id.* at § 262.023(a)(1-3).

[27] *Id*. at § 262.0241.

[28] *Id*. at § 262.030.

Like other statutes, the county is required to publish notice of the competitive bid in a newspaper of general circulation and the publication must occur before the 14th day before the bid opening.[29] The contract is to be awarded to the responsible bidder who submits the lowest and best bid.[30] Lowest and best bid is defined as the bid providing the:

> "best value considering associated direct and indirect costs, including transport, maintenance, reliability, life cycle, warranties, and customer service after a sale".[31]

In determining the responsible bidder, counties may also consider safety record, bidder indebtedness and health insurance.[32]

Knowing violation of the purchasing laws may result in either a Class B or Class C misdemeanor.

III. THE STATE

Statewide contracting changed significantly during the 84th Legislative Session. Much of the change arose from the politically charged 21CT deal between the technology company 21CT and the Texas Health and Human Services Commission. A negative audit finding regarding purchasing procedures resulted in multiple changes to state procurement and contracting practices.[33] This may be the first step in many to revise the state procurement process.[34] Even with this uncertainty and the possibility of future changes to statewide contracting, attorneys representing statewide agencies or private companies that do business with the state should be aware of the new requirements codified through the passage of Senate Bill 20.

Senate Bill 20 was signed in the Texas Senate and House on June 1, 2015.[35] It was sent to Governor Abbott on the same date and was signed by the Governor on June 4, 2015.[36] It became effective on September 1, 2015.[37] The bill was codified by adding or amending several sections of the Government Code, including Sections 321.013, 403.03057, Section 441.1855, Section 572.069, Sections 2054.067, Section 2101.001, Section 2101.035, Section 2101.036, Section 2101.041, Section 2155.0755, Section 2155.077, Section 2155.078, Section 2155.089, Section 2156.181, Section 2157.0685, Section 2261.001, and Subchapter F to Chapter 2261. The bill also codified Section 51.9337 and Section 51.954 to the Education Code. Much of the bill's codified changes require implementation or procedures to be devised by the Comptroller of Public Accounts. Moreover, the bill's impact to multiple laws and avenues (such as changes to DIR's contracting procedure) are too broad for an introduction into procurement topic. Thus, this review will highlight key points that will likely be faced by attorneys "on the ground" at state agencies.

The first major change of the bill impacts only one state agency, the Texas Health and Human Services Commission (HHSC). The bill amended the requirements, found in Government Code section 321.013, for the State Auditor to conduct audits as specified in the audit plan, including recommending the audit plan for the state.[38] In devising the audit plan, the Comptroller is to consider the performance of audits on contracts entered into by HHSC that exceed $100 million annually, including managed care contracts.[39] These audits can be limited in scope to areas that pose the highest financial risk for the state and the auditor must determine whether or not the entity contracting with HHSC has spent state money as required by the contract at issue.[40] The State Auditor may contract with a private auditor to conduct this audit.[41]

The bill also requires, in Government Code Section 441.1855, a retention of each contract entered into by a state agency and all contract solicitation documents related to the contract until after the seventh anniversary of the date the contract expires or all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract documents are resolved.[42]

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[29] *Id*. at § 262.025.

[30] Tex. Loc. Gov't Code § 262.027.

[31] *Id*. at § 262.022(5-a).

[32] *Id*. at §§ 262.0271-0276.

[33] Terri Langford, *State Auditor: "Operational Defects" Led to 21CT Deal*, Texas Tribune (April 2, 2015), *available at* http://www.texastribune.org/2015/04/02/state-audit-operational-defects-led-21ct-deal/. In fact, the lack of centralization and the fact that the deputy inspector general had a relationship with the company caused problems in the contract process. *See Id*.

[34] *See* Aman Batheja, Limited Contracting Fixes Moving Forward, Texas Tribune (May 14, 2015), *available at* http://www.texastribune.org/2015/05/14/contracting-overhaul-moving-forward-impact-unknown/.

[35] *See* http://www.legis.state.tx.us/BillLookup/Actions.aspx?LegSess=84R&Bill=SB20

[36] *Id*.

[37] *Id*.; Section 31 of Senate Bill 20, *available at* http://www.legis.state.tx.us/tlodocs/84R/billtext/html/SB00020F.htm.

[38] Tex. Gov't Code § 321.013.

[39] Tex. Gov't Code Section 321.013(k).

[40] *Id*.

[41] *Id.*

[42] Tex. Gov't Code § 441.1855.

Additionally, several reporting and ranking requirements are now codified from the bill's amendment of multiple sections of state law.[43] Solicitation and contracting information must be included in the statewide uniform accounting system. Moreover, certain reporting requirements and training mandates apply to institutions of higher education. The Comptroller may bar vendors from participating in state contracts if more than two contracts between the vendor and the state have been terminated within three years. Finally, state agencies have to report to the vendor performance tracking system the results of contracts. Senate Bill 20 made other changes to state law, with several changes focused on the Texas Department of Information Resources (DIR).

Now that some time has passed from the passage of Senate Bill 20, administrative guidance has started to percolate related to the several codified changes from the bill. For example, the Attorney General recently opined that SB 20's codified changes to Government Code Section 2261.252 superseded earlier statutes and prohibit an institution of higher education from purchasing certain goods/services from a vendor that an institution's board member, or family member of that board member, has a prohibited financial interest in.[44] This opinion rejected the more specific allowability of certain prohibited transactions found in Texas Education Code Section 51.923(d). The Attorney General's opinion is interesting because it shows the argument for the wide reach and restrictive intent of the Legislature's changes to rein in state contracting and interested government officials relationships to vendors.

Thus, attorneys working in the area of state agency procurement would be well advised to track the specific changes codified by Senate Bill 20, monitor Attorney General guidance and case law developments related to the same, and watch the next legislative session for future changes.

IV. SPECIAL ISSUES

A. Sole Source

For the three main types of governmental entities discussed above, Texas law exempts so-call "sole sources" from the requirements of competitive bidding. As discussed above, Section 44.031(a) of the Education Code requires school districts to choose between several procurement methods.[45] A district is exempted from the requirement when it is purchasing items that are available from only one source.[46]

Specifically, a school district is exempt from competitive procurement methods for items that are only available from one source including such items a film, manuscript, or book; a utility service including electricity, gas, or water; a captive replacement part or component for equipment; and any item for which competition is not possible because of a patent, copyright, secret process, or monopoly.[47] The Texas Code Construction Act defines "includes" and "including" as terms of enlargement and:

> "not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."[48]

In its 2010 Financial Accountability System Resource Guide, the Texas Education Agency advises that:

> "[i]t is incumbent upon the district to obtain and retain documentation from the vendor which clearly delineates the reasons which qualify the purchase to be made on a sole source basis."

Most districts rely on documentation from the vendor. The documentation most often comes in the form of an affidavit executed by a representative of the vendor essentially testifying to the requirements listed in 44.031(j) and asking the vendor to provide justification for a sole source exception. Some ask for the vendor to provide a narrative describing the unique qualities and characteristics of the good that is necessary for the district's initiatives and programs.[49]

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[43] For the purposes of ease of citation, given the wide number of areas of the law that were amended, the following information comes from the LBB's Fiscal Note. *See* Legislative Budget Board, *In RE: SB 20 by Nelson*, Fiscal Note, 84th Legislative Regular Session (May 29, 2015), *available at* http://www.legis.state.tx.us/tlodocs/84R/fiscalnotes/html/SB00020F.htm.

[44] Tex. Atty. Gen. Op. KP-0093 (2016), *available at* https://texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0093.pdf

[45] Tex. Educ. Code § 44.031(a).

[46] Tex. Educ. Code § 44.031(j).

[47] *Id.*

[48] Tex. Gov't. Code § 311.005(13).

[49] *See, e.g.* Spring Independent School District Sole Source Justification, located at: http://www.springisd.org/docs2/biz/supply/Sole%20Source%20Justification%20030110.pdf .

Similarly, cities are exempt from competitive bidding requirements for the procurement of items that are available from only one source, including: items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies; films, manuscripts, or books; gas, water, and other utility services; captive replacement parts or components for equipment; books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials; and management services provided by a nonprofit organization to a municipal museum, park, zoo, or other facility to which the organization has provided significant financial or other benefits.[50] The parallel provision for counties is identical to that for school districts.[51]

The best practice is for the governmental entity to engage in its best efforts to determine if the vendor truly is a sole source and to document that process and decision as much as possible. This includes conducting an independent evaluation of the alternatives available in the market and documenting the findings.

B. Professional Services

Services that qualify as professional services are exempt from the procurement requirements applicable to that governmental entity. Although the law specifically defines some services as professional services, when not specifically identified in either the procurement statute for the governmental entity[52] or the Professional Services Procurement Act, government entities regularly must determine whether other services constitute professional services based on criteria suggested in the common law.

1. Chapter 2254 of the Texas Government Code

Chapter 2254 of the Texas Government Code is commonly referred to as the Professional Services Procurement Act and is applicable to all governmental entities. Under Chapter 2254, a governmental entity may not select a provider of professional services or award a contract for professional services on the basis of competitive bids and a contract entered into or an arrangement made in violation of this prohibition is void as against public policy.[53] In the context of Chapter 2254's prohibition on competitive bidding for professional services, those services are defined as services within the scope of practice of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing.[54]

The selection of a service provider under Chapter 2254 must be based on:

> "demonstrated competence and qualifications to perform the service and for a fair and reasonable price."[55]

Governmental entities are specifically prohibited from considering fee when selecting architects, engineers, and surveyors. In other instances consideration of fees is allowed and the Attorney General, prior to adoption of Section 2254.004, stated that fees may be considered.[56]

In the selection of architects, engineers, and surveyors, the fee cannot be discussed or considered until the district has first determined that the architect, engineer, or surveyor is the most highly qualified for the project.[57] After that determination has been made, the district must attempt to negotiate a contract at a fair and reasonable with the top ranked person or firm before it may enter contract discussions with the next ranked provider.

2. Common Law

In addition to the types of professional services listed in Texas Government Code Chapter 2254, case law and Attorney General opinions provide guidance on the other types of services that a governmental entity's governing board may determine to be "professional services" excepted from competitive procurement.

The Attorney General generally has refrained from making factual determinations about whether particular services are properly classified as professional services. Instead, the Attorney General has stated that such factual determinations should be made by the governing body of a government entity subject to a review or challenge on abuse of discretion.[58]

Nevertheless, the Attorney General has recognized that "professional services" may encompass more than the services of physicians, attorneys, or others traditionally regarded as "professionals."[59] Furthermore, some opinions have demonstrated that determinations as to whether particular services, other than those covered by the Professional Services Procurement Act are professional services for

[50] Tex. Loc. Govt. Code § 252.022(a)(7).

[51] Tex. Loc. Govt. Code § 262.024(a)(7).

[52] Chapter 44 of the Texas Education Code or Chapters 252 and 262 of the Texas Local Government Code.

[53] Tex. Gov't. Code §§ 2254.003(a), 2254.005.

[54] Tex. Gov't. Code § 2254.002(2)(A).

[55] Tex. Gov't. Code § 2254.003(a).

[56] *See* Tex. Atty. Gen. Op. No. JM-155 (1984).

[57] Tex. Gov't. Code § 2254.004(a).

[58] Tex. Atty. Gen. Op. DM-418 (1996).

[59] *See* Tex. Atty. Gen. Op. DM-106 (1992); Tex. Atty. Gen. Op. JM–940 (1988); Tex. Atty. Gen. Op. MW–344 (1981).

competitive bidding purposes, frequently involve fact questions that the opinion process cannot address.[60]

Despite its stance that the determination of the status of professional services is fact-specific, over the years, the Attorney General held that professional services are those that:

a) require predominantly mental or intellectual, rather than physical or manual skills;
b) require years of education and service for one to attain competence and call for a high order of intelligence, skill and learning; and
c) have widely accepted standards of required study or specified attainments in a special knowledge as distinguished from mere skill.[61]

C. Emergency Purchasing

Also exempt from competitive purchasing requirements are those situations in which the governmental entity is faced with an emergency necessitating that it immediately purchase a good or service. Cities, counties, and school districts all have provisions allowing for these types of purchases outside the standard procurement process.

School districts are allowed to purchase on an emergency basis when the damage impacts the usability of a facility. There are actually two versions of the emergency provisions in Chapter 44 of the Education Code, but generally they both require damage, destruction, or system failure that would:

> "would prevent or substantially impair the conduct of classes or other essential school activities."[62]

Counties are provided a discretionary exemption from bidding requirements in several instances. These include items needed in the event of a public calamity, to preserve or protect public health or safety, or items needed due to unforeseen damage to public property.[63] Cities are afforded similar exemptions to those of counties.[64]

D. Construction Services

When purchasing construction services, most governmental entities will have to look to yet another statute to govern the procurement process. Public works--a contract for constructing, altering, or repairing a public building or carrying out or completing any public work—is governed by the Government Code Chapter 2269.[65]

A governmental entity must advertise or publish notice of requests for bids, proposals, or qualifications.[66] For a contract entered into by a governmental entity under a method provided by Chapter 2269, the governmental entity must publish notice of the time and place the bid or proposal or request for qualifications will be received and opened.[67]

When awarding construction contracts under Chapter 2269, a governmental entity may consider the price; the bidder's experience and reputation; the quality of the bidder's goods or services; the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses; the bidder's safety record; the bidder's proposed personnel; whether the bidder's financial capability is appropriate to the size and scope of the project; and any other relevant factor specifically listed in the request for bids, proposals, or qualifications.[68]

In determining the award of a contract, the governmental entity must consider and apply any existing laws, including any criteria, related to historically underutilized businesses; and consider and apply any existing laws, rules, or applicable municipal charters, including laws applicable to local governments, related to the use of women, minority, small, or disadvantaged businesses.[69]

1. Competitive Bidding

Competitive bidding involves a governmental entity awarding the contract for construction, alteration, rehabilitation, or repair of a facility by awarding it to the lowest responsible bidder.[70]

A governmental entity may contract for the construction, alteration, rehabilitation, or repair of a facility only after the governmental entity advertises for bids for the contract, receives competitive bids, and awards the contract to the lowest responsible bidder.[71]

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[60] Tex. Atty. Gen. Op. No. JM–1136 (1990); *see also* Tex. Atty. Gen. Op. JM–1038 (1989).

[61] Tex. Atty. Gen. Op. JM-1038 (1989); *see also* Tex. Atty. Gen. Op. DM-418 (1996); *Wooddell v. Dailey*, 230 S.W.2d 466 (W. Va. 1976); *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102 (Tex. App. – Eastland 1942, no writ).

[62] Tex. Educ. Code §44.031(h).

[63] Tex. Loc. Gov't. Code § 262.024(a)(1-3).

[64] Tex. Loc. Gov't. Code § 252.022(a)(1-3).

[65] Tex. Gov't. Code § 2269.001(6).

[66] Tex. Gov't. Code § 2269.052(a).

[67] Tex. Gov't. Code § 2269.052(b).

[68] Tex. Gov't. Code § 2269.055(a).

[69] Tex. Gov't. Code § 2269.055(b).

[70] Tex. Gov't. Code § 2269.101(a).

[71] Tex. Gov't. Code § 2269.101(b).

2. Competitive Sealed Proposals

Competitive sealed proposals involves a local governmental entity requesting proposals, ranking the bidders, negotiating, and then contracting with a general contractor for the construction, rehabilitation, alteration, or repair of a facility.[72]

Under this method, the governmental entity must select the vendor that submits the proposal that offers the best value for the governmental entity based on the selection criteria in the request for proposal and the weighted value for those criteria in the request for proposal its ranking evaluation.[73]

After selecting a vendor, the governmental entity must first attempt to negotiate a contract with the selected bidder.[74] The governmental entity and its architect or engineer may discuss with the selected bidder options altering the scope or time of the project as well as altering the price due to such a change.[75] If the governmental entity, is unable to negotiate a satisfactory contract with the selected bidder, the governmental entity must, formally and in writing, end negotiations with that bidder and proceed to the next bidder in the order of the selection ranking until a contract is reached or all proposals are rejected.[76]

3. Construction Manager – Agent

This involves a governmental entity contracting with a construction manager-agent to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors.[77] Under such a setup, a construction manager-agent may not perform any aspect of the construction, rehabilitation, alteration, or repair; be a party to a subcontract for construction; or provide or be required to provide performance and payment bonds.[78]

The construction manager-agent must be selected on the basis of demonstrated competence and qualifications.[79]

4. Construction Manager-At-Risk

This construction method involves a governmental entity contracting with an architect or engineer for design and construction phase services and contracting separately with a construction manager-at-risk to serve as the general contractor and to provide consultation during the design and construction, rehabilitation, alteration, or repair of a facility.[80]

The governmental entity may either use a one- or two-step process.[81] In a one-step process, the governmental entity must prepare a single request for proposals.[82] In a two-step process, the governmental entity must prepare an initial request for qualifications that includes:

a) a statement as to whether the selection process is a one-step or two-step process;
b) general information on the project site, project scope, schedule, selection criteria and the weighted value for each criterion, and estimated budget and the time and place for receipt of the proposals or qualifications; and
c) other information that may assist the governmental entity in its selection of a construction manager-at-risk.[83]

If a one-step process is used, the governmental entity may request proposed fees and prices for fulfilling the general conditions of the project.[84] If a two-step process is used, the governmental entity cannot request fees or prices in step one, but instead narrow down the bidders based on their responses to the request for qualifications.[85] In the second step, the governmental entity may request that a maximum of five bidders, who have been selected solely on the basis of their qualifications, provide more information, including their fees and prices.[86]

The governmental entity must select the vendor that submits the proposal that offers the best value for the governmental entity based on the published selection criteria and on its ranking evaluation.[87] Much like CSP, after selecting a vendor, the governmental entity must first attempt to negotiate a contract with the selected bidder.[88] If the governmental entity, is unable to negotiate a satisfactory contract with the selected bidder, the governmental entity must, formally and in

[72] Tex. Gov't. Code § 2269.151(a).

[73] Tex. Gov't. Code § 2269.155(a).

[74] Tex. Gov't. Code § 2269.155(b).

[75] *Id.*

[76] Tex. Gov't. Code § 2269.155(c).

[77] Tex. Gov't. Code § 2269.201(a).

[78] Tex. Gov't. Code § 2269.203.

[79] Tex. Gov't. Code § 2269.207.

[80] Tex. Gov't. Code § 2269.251(a).

[81] Tex. Gov't. Code § 2269.253(a).

[82] Tex. Gov't. Code § 2269.253(b).

[83] *Id.*

[84] Tex. Gov't. Code § 2269.253(d).

[85] Tex. Gov't. Code § 2269.253(e).

[86] *Id.*

[87] Tex. Gov't. Code § 2269.254(a).

[88] Tex. Gov't. Code § 2269.254(b).

writing, end negotiations with that bidder and proceed to the next bidder in the order of the selection ranking until a contract is reached or all proposals are rejected.[89]

5. Job Order Contracts

Job order contracting ("JOC") is a method of procurement used for:

> "maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature but the delivery times, type, and quantities of work required are indefinite."[90]

This applies only facilities that are buildings, the design and construction of which is governed by building codes.[91] It does not apply to highways, roads, streets, bridges, utilities, water supply projects, water and wastewater plants, water and wastewater distribution or conveyance facilities, wharfs, docks, airport runways, or drainage projects.[92]

When using the JOC method, a governmental entity establishes contractual unit prices by either

a) specifying one or more published construction unit price books, such as the RS Means and the applicable divisions or line items; or
b) providing a list of work items and requiring the bidders to propose one or more coefficients or multipliers to be applied to the price book or prepriced work items as the price proposal.[93]

The governmental entity may award a JOC to one or more bidders.[94] The term for such a contract may not be longer than two years.[95] After the JOC is awarded, individual job orders are awarded to the selected vendors. Each order may be a fixed price, lump-sum contract based on contractual unit pricing applied to estimated quantities; or a unit price order based on the quantities and line items delivered.[96]

V. CONCLUSION

This article outlines the basic governing procurement law that most local governmental entities deal with on a regular basis. Hopefully, it will provide a solid jumping off point for lawyers new to the field. It should be reiterated that it is important to remember the goals of public procurement and source of funding in making legal determinations in this arena.

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[89] Tex. Gov't. Code § 2269.254(c).

[90] Tex. Gov't. Code § 2269.401.

[91] Tex. Gov't. Code § 2269.402.

[92] *Id.*

[93] Tex. Gov't. Code § 2269.404.

[94] Tex. Gov't. Code § 2269.406.

[95] Tex. Gov't. Code § 2269.409.

[96] Tex. Gov't. Code § 2269.410(b).