

BASICS OF THE COUNTY PURCHASING ACT AND COMPETITIVE BIDDING

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Introduction

The purpose of this publication is to provide a summary of common questions that arise under the County Purchasing Act, Chapter 262, Subchapter C of the Local Government Code. This publication does not cover every competitive bidding law codified in Texas. This publication is not an all-inclusive reference.

COMPETITIVE BIDDING IN GENERAL

The general competitive bidding statute for counties is found in Subchapter C, of Chapter 262 of the Local Government Code, known as the County Purchasing Act. §262.023 requires a purchase of one or more “items” that requires an expenditure of more than \$50,000 to go through one of the following:

- The competitive bid or competitive proposal procedures outlined in the Act;
- Use the reverse auction procedure in Section 2155.062(d), Gov’t Code (*see question 4 below*); or
- Comply with Chapter 2269, Gov’t Code which is beyond the scope of this publication.

1. What are “items” under the Act?

“Item” is defined broadly under §262.022(5) as any service, equipment, good, or other tangible or intangible personal property, including insurance and high technology items, but not “professional services.” Although there are additional authorities in other statutes that apply to specific services and goods (discussed below), the general competitive bidding rules apply to almost everything except real estate. In short, if

the county wants to acquire something that costs more than \$50,000¹, then the commissioners court will likely be using a competitive procurement method to acquire the item.

2. What is the difference between a competitive bid and competitive proposal?

The terms are often used interchangeably, but generally, a request for bids is used when the purchasing county can articulate specifications or the goods or services sought have easily identifiable characteristics. This is also commonly referred to as sealed bidding. Generally, price is the main factor. Requests for proposals are used when specifications and requirements are difficult to define, and the county asks responsive vendors to propose solutions to meet the requirements. Cost or price is one factor, but may not be the only factor.

3. What alternative competitive proposal procedures are available?

Competitive proposals (as opposed to competitive bids) may be sought under §262.030(a) for purchase of insurance, high technology items, landscape management, travel management, or recycling.

In counties that have appointed a purchasing agent under §262.011 or employed a purchasing agent under §262.0115, the purchasing agent may, with the consent of the commissioners court, solicit proposals, rather than bids, for items other than insurance and high tech items if the purchasing agent determines that it is in the best interests of the county to make a request for proposals.

An alternative multi-step solicitation procedure is authorized under §262.0295. Engaging in the multi-step alternative requires a finding by the commissioners court that it is impractical to prepare detailed specifications for an item to support an award of a purchase contract. After making such a finding, quotations may be solicited through a request for unpriced proposals following the same notice and advertising process undertaken for regular requests for bids. After opening the unpriced proposals on the date specified in the notice, the commissioners court has 7 days to mail a request for priced bids from those proposals that qualified under the criteria set forth in the first phase of the multi-step request for proposals. Within 30 days of

¹ For those counties who have held an election and are operating under the County Road Department System, all purchases of equipment, materials and supplies for the county road department in excess of \$25,000 (as opposed to the County Purchasing Act's \$50,000 threshold) must be competitively bid in conformity with estimates and specifications prepared by the county road engineer. Subchapter D, Chapter 252, Tex. Transp.Code.

opening the unpriced proposals, the priced bids must be submitted to the commissioners court. The commissioners court may then conduct discussions with those responsible offerors who submit priced bids and who may be selected for award. Offerors must be treated fairly and equally if the commissioners court engages in discussions. Award is to be made to the responsible offeror with the lowest and best evaluated offer.

4. What is a reverse auction procedure?

A reverse auction allows suppliers/sellers of goods and services bid for contracts to provide designated goods or services. Over the course of the auction, the price submitted by suppliers/sellers will begin high and decrease. The bidders are anonymous to each other but can see the other supplier/seller price submissions. The bid winner is not necessarily the lowest cost supplier. *See* §2155.085, Tex. Gov't Code.

5. Is a contract that should have been competitively bid void or merely voidable?

In 1985, the legislature adopted the County Purchasing Act. Contracts entered into in violation of the County Purchasing Act are not automatically void, but a court may declare such contracts void in a taxpayer suit, or in some circumstances an unsuccessful bidder suit. *See* Tex. Atty. Gen. Op. GA-0247.

6. Can a contract that was entered into in violation of the County Purchasing Act be ratified by the commissioners court?

No. Ratification may not be used to justify the making of an illegal contract. Because the commissioners court lacks authority to enter into a contract in violation of the County Purchasing Act in the first place, a commissioners court lacks authority to subsequently ratify such a contract. *See* Tex. Atty. Gen. Ops. GA-0247 and GA-0383.

7. Can the County Auditor approve a claim for payment under a contract that was awarded in violation of the County Purchasing Act or other competitive bid laws?

No. Under chapter 113 of the Local Government Code, the county auditor may not audit or approve a claim unless the claim was incurred as provided by law. If the county auditor determines that the county awarded a contract without complying with the County Purchasing Act, §113.065 of the Local Government Code prohibits the auditor from approving a claim for payment on the contract. *See* Tex. Atty. Gen. Ops. GA-0247 and GA-0383.

8. Who has standing to challenge a contract award alleged to have been made in violation of the County Purchasing Act?

Any property tax paying citizen of the county may file suit to enjoin performance of a contraction made in violation of the Act. §262.033 Tex. Local Gov't Code.

At least one court has ruled that a corporation is a tax paying citizen for purposes of filing suit against a governmental entity to enjoin performance of a contract that was awarded in violation of the County Purchasing Act. *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App. – El Paso, March 18, 2004).

9. Are there any rules about what minimum specifications are required?

Generally, no. However, if specifications are so vague as to effectively prohibit vendors from bidding on the same material terms and conditions, then a contract awarded would likely be set aside by a court. In one rare example where county specifications were found to be insufficient, the county was seeking bidders for various road materials. The bid documents did not attempt to specify approximate quantities of materials the county wanted to buy, and the bid documents did not state how long a term the contract was to be in place. These omissions were found to prohibit meaningful competition. Tex. Atty. Gen. Op. No. MW-449 (1982).

10. Can the county require a prospective bidder to use a specific brand or model in its bid specifications?

Generally, no. For example, in *Texas Highway Commission v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525 (Tex. 1963), the State Highway Department set forth bid specifications requiring all materials furnished under its construction contracts be manufactured in the United States. The steel importers sued as taxpayers seeking to set aside the specifications as invalid, illegal or void. The Texas Supreme Court held that the domestic materials requirement was unduly restrictive and therefore violated the competitive bid laws.

Similarly, in *Davray, Inc. v. City of Midlothian, Texas*, 2005 WL 1586574 (N.D. Tex. July 6, 2005), the City was sued by unsuccessful bidder for a fire hydrant specification for a particular brand. The City argued that the brand name specification was required as a matter of public safety. The trial court disagreed, citing evidence in the record that other brands had the same attributes and qualities cited by the City in its specifications.

11. Can the county restrict its bids to local businesses?

Generally, no. The attorney general has opined that a requirement that a bidder be located within the county would be an illegal restriction on competition. However, the attorney general also conceded that circumstances may exist where the proximity of the bidders determines who the lowest responsible bidder is. Tex. Atty. Gen. Op. No. H-1086 (1977).

12. Can the county give preference to bidders who provide health insurance?

Yes. If a county receives one or more bids from a bidder who provides reasonable health insurance to its employees and requires a subcontractor the bidder intends to use to provide reasonable health insurance to the subcontractor's employees, the county may award the contract to a health insurance providing employer if the insurance providing employer's bid is within five percent of the lowest and best bid price received by the county from a bidder who does not provide or require reasonable health insurance for employees. Tex. Local Gov't Code §262.0271

13. Can the county take into consideration a bidder's past performance?

The safety history of a bidder may be taken into account if the commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder and the commissioners court has given notice in the bid specifications that the bidder's safety record may be considered in determining the responsibility of the bidder. Tex. Local Gov't Code §262.0275.

14. Can the county give preference to bidders who use recycled products?

Yes. §262.005 of the County Purchasing Act expressly incorporates the provisions of Health & Safety Code §361.426, which requires a county to give preference in purchasing to products made of recycled materials if the products meet specifications. Not only does Health & Safety Code §361.426 require counties to give preference to recycled products, it requires counties to affirmatively review and revise procurement procedures and specifications to eliminate discrimination against products made of recycled products, encourage the use of products made of recycled materials and to ensure to the maximum extent economically feasible that the county purchases products that may be recycled after they have served their intended use.

NOTICE PROVISIONS

1. How long and how frequently must a county advertise its intent to make a purchase subject to the County Purchasing Act?

At a minimum, a notice of a proposed purchase must be published at least once a week for two consecutive weeks in a newspaper of general circulation in the county with the first date of publication occurring at least 14 days before the date of the bid opening. If there is no newspaper of general circulation, then the notice must be posted in a prominent place in the courthouse for 14 days before the date of the bid opening. §262.025 Tex. Local Gov't Code.

2. Are advertisements for bids required to be posted on a county website, if the county has a website?

Although it is common practice for counties to post bidding opportunities on their websites, counties are not required by law to do so.

3. Can bids be opened early?

No. By its express terms, the County Purchasing Act requires that the notice for bids specifically advertise the time and place bids are to be publicly opened. §262.025(b)(2).

CONTRACTS

1. Can a contract be awarded for multiple years?

Yes. There is no statute that expressly authorizes multiple-year awards. Conversely, there are several statutes that limit or cap multiple-year award terms. For example, §271.009 Tex. Local Gov't Code limits a lease-purchase or other installment type contract under the Public Property Finance Act to a term of 25 years, and §116.021 Tex. Local Gov't Code authorizes counties to select a depository either under the County Purchasing Act or for a two to four-year term under this section plus negotiated renewal for another two year term.

2. How can the county enter a multiple year contract without creating an unconstitutional debt?

§271.903 Tex. Local Gov't Code expressly states that a multiple-year contract for the acquisition or lease of real or personal property that retains to the governing body the continuing right to terminate the agreement at the end of each budget period, is conditioned on a best efforts attempt to obtain and appropriate funds, or contains both the continuing right to terminate and the best efforts conditions, is a commitment of current revenues only. Alternatively, an interest and sinking fund must be established at the time the multiple-year obligation is created. Tex. Const. art. 11, §§5, 7

3. If the county finances, rather than outright purchases, an item, does the lease purchase have to be competitively bid?

Yes. The Public Property Finance Act expressly states that any contract entered into under the financing authority provided under Chapter 271 must also comply with the competitive bidding requirements of Chapter 262, the County Purchasing Act. §271.006 Tex. Local Gov't Code.

BONDS

1. What is the difference between a bid bond, a performance bond, and a payment bond?

A bid bond (sometimes called a proposal bond) guarantees a vendor submitted an accurate proposal and is able to begin work if awarded the contract. A performance bond ensures a project is completed according to the provisions of the contract, such as on time and within proposed cost. A payment bond is security to ensure that subcontractors and suppliers are paid for work performed and materials supplied.

2. Can a county require all vendors to submit bid bonds as a part of their bids or proposals under the County Purchasing Act?

Counties may (but are not required to) require bidders to furnish a bid bond for 5% of the total contract price for public works contracts. Counties may also require a bid bond for up to \$5,000 for any contract exceeding \$100,000. §262.032(a).

3. What is the purpose of requiring a bid bond?

A bid bond provides some assurance that the county will not have to absorb all costs and expenses associated with re-awarding a contract when a bidder ultimately proves unable to perform. A 5% bid bond is not a penalty for failing to perform. It is similar to a liquidated damages clause where default is acknowledged to cause damages, but those damages are not easily ascertained. *See e.g., Guido & Guido, Inc. v. Culberson County*, 459 S.W.2d 674 (Tex. Civ. App. – El Paso, Oct. 21, 1970, writ refused n.r.e.) (citing cases).

4. Are performance and payment bonds required for all public works contracts?

No. Performance and payment bonds are required for public works contracts governed by Chapter 2253 of the Government Code, which is beyond the scope of this publication. Performance bonds are authorized, but not required, for public works contracts under the County Purchasing Act or any contract exceeding \$100,000 within 30 days of signing a contract or issuance of a purchase order, if so required by the county, if the contract exceeds \$50,000. §262.032. There is no provision for a payment bond under the County Purchasing Act.

SPECIAL FUNDS EXEMPT FROM COMPETITIVE BIDDING

1. Are purchases made from “hot check” funds collected by prosecutors under Art. 102.007 of the Code of Criminal Procedure required to be competitively bid?

No. “Hot check” fees collected by prosecutors under Art. 102.007 of the Code of Criminal Procedure are statutorily required to be deposited in the county treasury in a special fund administered by the prosecutor. Expenditures from the “hot check” fund are statutorily committed to the sole discretion of the prosecutor. Since the competitive bidding provisions require the commissioners court to administer the procedure and to reject bids or award contract, requiring “hot check” purchases to be competitively bid would place ultimate control of these expenditures in the commissioners court and outside the statutory sole discretion of the collecting prosecutor. Tex. Atty. Gen. Ops. JM-0967 (1988) and MW-0439 (1982).

2. Are purchases made from commissary proceeds required to be competitively bid?

Not usually. Commissary proceeds in most counties are under the sole control of the Sheriff by statute. *See* §351.0415 Tex. Local Gov’t Code. The County Purchasing Act does not apply to purchases within the exclusive authority of an official other than

the county commissioners court. Accordingly, a Sheriff in most counties may spend commissary proceeds without going out for competitive bids. Tex. Atty. Gen. Op. JC-0122 (1999).

In counties that (1) have a population of one million or more; (2) have two municipalities with a population of 200,000 or more; and (3) that are adjacent to a county with a population of a million or more, the Sheriff does not have exclusive control of commissary proceeds and commissary purchases are required to be competitively bid. Tex. Local Gov't Code §351.04155. Dallas and Tarrant Counties currently fall within the scope of §351.04155. Population trends indicate that Collin County will fall within scope by the time official 2020 census data is available.

3. Are purchases made with forfeiture funds required to be competitively bid?

Yes. The commissioners court has a ministerial duty to initiate competitive bidding upon receipt of request from the prosecutor or law enforcement agency entitled to spend the funds collected under article 59.06 Code of Criminal Procedure. Although the commissioners court has the right to reject bids, it may not do so for the purpose of delaying a forfeiture-fund purchase. Tex. Atty. Gen. Op. No. DM-243 (1993).

PENALTIES FOR VIOLATING THE COUNTY PURCHASING ACT

1. What happens if I violate the competitive bidding laws?

It depends. It is a Class B misdemeanor (up to \$2,000 fine and 180 days in jail) to intentionally or knowingly make or authorize separate, sequential, or component purchases to avoid the competitive bidding requirements under §262.023. It is a Class C misdemeanor (up to \$500 fine) to intentionally or knowingly violate the County Purchasing Act in a manner other than making sequential purchases designed to avoid the competitive bidding requirements.

Even if one violates the County Purchasing Act unintentionally, the county may face a taxpayer suit seeking to enjoin performance or execution of the contract and a judicial declaration that a contract is void.

Additionally, if the county auditor determines that the county awarded a contract without complying with the County Purchasing Act, §113.065 of the Local Government Code prohibits the auditor from approving a claim for payment on the contract. *See* Tex. Atty. Gen. Op. No. GA-0247 (2004).

ALTERNATIVES TO COMPETITIVE BIDDING

Interlocal Cooperation Act

Chapter 791 of the Government Code authorizes counties to contract with each other, other local governments, or federally recognized Indian tribes within the State for the cooperative provision of governmental services. §791.011(d) spells out what terms an Interlocal Agreement must contain, including a provision stating that payments for the performance of functions under an interlocal agreement must be made from current revenues available to the paying party. A local government that purchases goods and services under the Interlocal Cooperation Act satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services. §790.025(d) Tex. Gov't Code.

Cooperative Purchasing Program

Chapter 271, Local Government Code, Subchapter F authorizes counties to participate in a cooperative purchasing program with another local government of this state or another state or with a local cooperative organization of this state or another state. A local government that purchases goods or services under this subchapter is deemed to satisfy state law requiring competitive bidding. §271.102(c) Tex. Local Gov't Code.

TASB BuyBoard

The Buy Board, or Local Government Purchasing Cooperative, is an administrative agency created under the Interlocal Cooperation Act and administered by the Texas Association of School Boards. The Buy Board is a well-known purchasing cooperative that may be used as an alternative to competitive bidding. For more information, visit buyboard.com.

State of Texas Multiple Award Contracts under Comptroller Schedules

Non-IT goods and services can be ordered directly from a vendor online through the Texas SmartBuy Membership Program, administered and maintained by the Comptroller. Purchases from Texas Smart Buy are deemed to satisfy competitive bid requirements. Tex. Gov't Code §2155.504. For more information, visit txsmartbuy.com.

Texas Department of Information Resources

Certain IT products and services can be ordered from the Texas Department of Information Resources. Purchases from DIR's cooperative and shared contracts are deemed to satisfy competitive bid requirements. Tex. Gov't Code §2054.0565. For more information, visit dri.texas.gov.

Federal Supply Schedule Sources

Counties may purchase goods or services available under federal supply schedules of the United States General Services Administration. Purchases from GSA supply schedules are deemed to satisfy competitive bid requirements. §271.103 Tex. Local Gov't Code. For more information, visit gsa.gov.

MANDATORY EXCEPTIONS TO COMPETITIVE BIDDING

Professional Services Procurement Act

Under Chapter 2254, Subchapter A, Tex. Gov't Code, a county may not competitively bid for the services of the following: a certified public accountant, an architect, a landscape architect, a land surveyor, a physician or surgeon, an optometrist, a professional engineer, a state certified or state licensed real estate appraiser, or a registered nurse.

Contracts for the professional services of an architect, engineer, or surveyor have a specific statutorily prescribed selection method under §2254.004 Tex. Gov't Code.

DISCRETIONARY EXCEPTIONS TO COMPETITIVE BIDDING

§262.024 Tex. Local Gov't Code contains a list of items that may be exempted from competitive bidding if the commissioners court *by order* grants the exemption:

Public Calamity

An item that must be purchased in 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.

Public Health or Safety

An item necessary to preserve or protect public health or safety of the residents of the county.

Whether an item is "necessary to preserve or protect the public health or safety of the residents of the county" is a question left to the commissioners court's discretion, subject to judicial review under an abuse of discretion standard. *Davray, Inc. v. City of Midlothian, Texas*, 2005 WL 1586574 (N.D. Tex. July 6, 2005)

Unforeseen Damage

An item necessary because of unforeseen damage to public property.

Personal or Professional Service

The discretionary exemption in §262.024(4) does *not* have the same meaning or effect as the term “professional services” in Chapter 2254 of the Government Code. If the county wishes to procure services listed in Chapter 2254, the county may NOT use sealed bids to acquire those services. Instead, the county issues a request for qualifications and negotiates a proposal price *after* selecting the most qualified professional or firm responding to the county’s request for qualifications.

The “professional services” referred to in §262.024 are defined under common law. There is very little guidance available about what services are considered personal or professional and can properly be exempted from competitive bidding under Chapter 262.

The Texas Attorney General Opinion procedure is not an effective outlet for obtaining guidance in this area because whether a particular service qualifies as “personal or professional services” is a fact issue left to the discretion of the commissioners court. Generally, a professional service is one that requires predominantly mental or intellectual skill or belonging to a discipline requiring special knowledge or attainment and a high order of learning, skill and intelligence. *See e.g.*, Tex. Att’y Gen. Op. No. JM-1136 (1990)

Individual Work

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.

Acquisition of Land or Right-of-Way

The purchase of “any land or right-of-way”.

Sole Source Items

Sole source items, such as those covered by patents, copyrights, secret processes, monopolies; creative works such as films, manuscripts or books; electric power, gas, water and other utilities; captive replacement parts.

Food

An item of food – but see §262.024(d), which requires counties to solicit at least three bids for purchases of food items by telephone or written quotes at intervals specified by the commissioners court. Records of the informal food item quotes shall be retained for one year or until audited by the county auditor. Award for food purchase contracts

must go to the responsible bidder who submits the lowest and best bid, or all bids shall be rejected and the informal bidding process shall be repeated.

Personal Property Sold at Auction

Personal property sold at auction by a state licensed auctioneer; at a liquidation sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code; or by a political subdivision of this state, a state agency, or an entity of the federal government.

Community and Economic Development

Any work performed under a contract for a community and economic development corporation made by a county under Section 381.004.

Vehicle and Equipment Repairs

Any repairs on county vehicles or equipment.

SPECIAL STATUTORY EXCEPTIONS TO COMPETITIVE BIDDING LAWS

From time to time, the Legislature will exempt specific types of transactions or purchases from competitive bidding. The following is a list of some of these specific authorities:

Certain Transportation Construction

A local government corporation expenditure for: (1) an improvement constructed in a reinvestment zone the construction of which is managed by a private venture participant; or (2) an improvement construction by the corporation for which more than 50 percent of the construction is funded by a private entity is exempt from competitive bidding procedures. Tex. Transp. Code §431.110

Housing Finance Corporation

A housing finance corporation is exempt from any competitive bidding requirement imposed on the award of contracts for acquisition, construction, rehabilitation or lease, sale or other disposition of property for action taken under the Texas Housing Finance Corporations Act. Tex. Loc. Gov't Code §394.904.

Purchase from Certain Nonprofits

Products or services purchased from a nonprofit agency for persons with disabilities under Chapter 122, Human Resources Code.

Airport Purchases

Certain purchases of a jointly operated county and municipal airport under Subchapter D, Chapter 22, Texas Transp. Code.

Depository for Certain Sale Proceeds

Selection of depository for proceeds from sale of county park, recreational, and cultural resources bonds in counties with a population greater than 5,000. Tex. Local Gov't Code §320.079.

CONFLICTS OF INTEREST QUESTIONNAIRES

Chapter 176 of the Local Government Code requires county officers, vendors and “other persons” to file a completed conflict of interest questionnaire if the vendor has a business relationship with the county and a business relationship with a county officer or a family member of the county officer that results in the county officer or the county officer’s family member receiving more than \$2,500 in taxable non-investment income during the 12-month period preceding the date that the vendor or county officer become aware that a contract between the vendor and county has been executed, negotiated or contemplated.

As a result, some counties are now attaching Chapter 176 conflicts of interest questionnaires in the form promulgated by the Texas Ethics Commission with their invitations to bid and require that the questionnaire be completed as a condition to submitting a responsive bid.

For more information regarding conflict of interest questionnaires, see TAC’s *Short Answers to Common Questions: Disclosure Requirements for County Officials* publication.