

# **PURCHASING LAW BASICS FOR COUNTIES**

**TEXAS ASSOCIATION OF COUNTY AUDITORS**

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## **PURCHASING LAW BASICS FOR COUNTIES**

### **Introduction**

Purchasing law is a complex area, and the purpose of this paper is to provide an introduction to the purchasing requirements for counties in procuring goods and services.

Each governmental entity, whether the State, or a city, county or other political subdivision of the State, will have a group of laws which sets out the procurement requirements for that entity. This paper looks at the statutory requirements for counties. The basic framework will be similar for each type of governmental entity. The specific requirements may differ, however, for the various entities.

This paper refers to a number of statutes which apply to counties. Note that some laws applicable to local governments, including counties, are set out in the Texas Local Government Code, sometimes referred to in this paper as the "TLGC." Some laws applicable to State agencies and local governments, including counties, are set out in the Texas Government Code, sometimes referred to in this paper as the "TGC."

When reading statutes, whether in the TLGC, or in the TGC, it is extremely important to make sure you have correctly determined the type of governmental entity to which the statute applies. Statutes may use terms such as "local government," "governmental entity," or "local governmental entity" and each of these terms may refer to a different set of entities. In addition, two or more statutes may use the same term, but define it differently. One statute, for example, may define "local governmental entity" to include counties, while another statute may expressly provide that the term "local governmental entity" excludes counties. Always check the definitions set out in the statutes.

### **Some Basic Purchasing Terms**

**Bid Bond** – a bond issued by a surety which guarantees the obligation of a bidder who is awarded the contract to enter into a contract and furnish any required payment and performance bonds. Upon the bidder's failure to do so, the government may draw down the full amount of the bond.

**Bid Guarantee or Bid Security** – an amount required by the government in cash, cashier's check or wire transfer, in lieu of a bid bond, to secure the bidder's performance of its obligations after award.

**Competitive Sealed Bids** – bids submitted in a sealed envelope or container in response to a Request for Bids or Invitation to Bids, or submitted electronically where the government permits electronic submissions.

Competitive Sealed Proposals – proposals submitted in a sealed envelope or container in response to a Request for Proposals, or submitted electronically where the government permits electronic submissions.

Invitation to Bid (“ITB”) – the method by which the government initiates the competitive bid process by inviting members of the public to submit bids.

Payment Bond – a bond issued by a surety to guarantee the payment by the general contractor or subcontractors, up to the amount of the bond.

Performance Bond – a bond issued by a surety to guarantee the performance by a contractor of its obligations under the contract, up to the amount of the bond.

Request for Bids (“RFB”) – same as Invitation to Bid.

Request for Qualifications (“RFQ”) – the process used by many governmental entities to select providers of professional services for a specific task or project, by inviting members of those professions to submit their qualifications to perform the work.

Request for Proposals (“RFP”) – the procedure by which governmental entities initiate the Competitive Sealed Proposal process by inviting members of the public to submit proposals.

Reverse Auction Procedure – a competitive purchasing procedure authorized by law for specific purchases, where the government uses an auction format to get bids from suppliers over the internet.

## **I. COMPETITIVE PROCUREMENT REQUIREMENTS FOR GOODS AND SERVICES**

The County Purchasing Act, Chapter 262, Subchapter D of the Texas Local Government Code (“TLGC”), sets out the basic competitive requirements for the procurement of goods and services by a county, including construction contracts for public works projects.

As a general rule, if a county is required to use a competitive procurement method for the purchase of goods or services, it must use the competitive bid method, unless a statutory provision expressly permits another type of procurement method, such as competitive sealed proposals, to be used for that type of procurement.

Certain professional services, such as architectural and engineering services, cannot be obtained through a competitive bid process. These services can only be obtained using a qualification-based selection process required by the Texas Professional Services Procurement Act (Chapter 2254 TGC), such as a Request for Qualifications (“RFQ”)

A. Basic Purchasing Rules of Chapter 262

1. Before a county may purchase one or more items under a contract that requires an expenditure of more than \$50,000 (effective June 19, 2009, as modified by HB 987; previously \$25,000), the county must:
  - (a) comply with the procedures for competitive sealed bidding or competitive sealed proposals set out in Chapter 262; or
  - (b) use the reverse auction procedure for purchasing set out in Section 2155.062(d) of the Government Code; or
  - (c) comply with an alternative construction delivery method authorized for facilities authorized by Subchapter H, of Chapter 271 of the TLGC, or
  - (d) comply with the design-build method for civil engineering projects authorized by Subchapter J, of Chapter 271 TLGC;

UNLESS, the transaction is exempt from having to comply with a competitive procurement process under Section 262.024 of the TLGC or some other statute.

2. Special Provisions for Items Purchased With Certificates of Obligation and Anticipation Notes

- (a) If the purchase will be funded through certificates of obligation, then the competitive bid procedure set out in the Certificate of Obligation Act (Chapter 271, Subchapter C) must be used instead of the procedures described in Chapter 262.
- (b) If payment for construction costs will be made through anticipation notes, then the alternative construction delivery methods cannot be used if the contract amount exceeds the lesser of:
  - (i) 20% of the county's budget for the fiscal year in which the county enters into the contract, or
  - (ii) \$10 million.

3. Separate, Sequential or Component Purchases Prohibited

A county cannot use separate, sequential or component purchases in order to avoid the competitive procurement requirements.

B. Exemptions from the Chapter 262 Competitive Procurement Requirements

A county does not have to comply with the competitive procurement requirements of Chapter 262 for any of the following expenditures, PROVIDED THAT THE COMMISSIONERS COURT, BY ORDER, GRANTS THE EXEMPTION:

1. a procurement made because of a public calamity if it is necessary to make the purchase promptly requires the immediate appropriation of money to relieve the necessity of the citizens or preserve the property of the county;
2. a procurement necessary to preserve or protect the public health or safety of the county's residents;
3. a procurement necessary because of unforeseen damage to public machinery, equipment, or other property;
4. a procurement for personal or professional services;
5. any individual work that is performed and paid for by the day as the work progresses, provided that no individual is compensated under this provision for more than 20 working days in any three-month period;
6. a purchase of land or right-of-way;
7. an item that can be obtained from only one source\* (but see below), including:
  - (a) items for which competition is precluded because of patents, copyrights, secret processes, or natural monopolies;
  - (b) films, manuscripts, or books;
  - (c) electric power, gas, water, and other utility services;
  - (d) captive replacement parts or components for equipment;
  - (e) an item of food\*\* (but see below); and

- (f) personal property sold:
  - (i) at an auction by a state licensed auctioneer;
  - (ii) at a going out of business sale held in compliance with Ch. 17, Subch. F of the Texas Bus. and Commerce Code; or
  - (iii) by a political subdivision of this State, a state agency of this state, or an entity of the federal government
- 8. any work performed under a contract for community and economic development made by a county under Section 381.004; or
- 9. vehicle and equipment repairs.
- 10. A county can renew or extend a lease or an equipment maintenance agreement without going through the competitive procurement process, if the commissioners court by order grants the exemption and if:
  - (a) the lease or agreement has gone through the competitive bidding procedure within the preceding year;
  - (b) the renewal or extension does not exceed one year; and
  - (c) the renewal or extension is the first renewal or extension of the lease or agreement.

Note:

\* If the sole source exemption is used (7(a)-(f) above), then the county official who makes purchases for the county must provide the commissioners court with a signed statement that the purchase is available from only one source, and the commissioners court must enter in its minutes a statement to that effect.

\*\* The exemption for food (7(e) above) applies only to the sealed competitive bidding requirements on food purchases. Counties must solicit at least three bids for purchases of food items by telephone or written quotation at intervals specified by the commissioners court. Counties must award food purchase contracts to the responsible bidder who submits the lowest and best bid or shall reject all bids and repeat the bidding process. The purchasing officer taking telephone or written bids shall maintain, on a form approved by the commissioners court, a record

of all bids solicited and the vendors contacted. This record shall be kept in the purchasing office for a period of at least one year or until audited by the county auditor.

A county purchasing agent is required, under § 262.0245, to adopt procedures that provide for competitive bidding, to the extent practicable under the circumstances, for the county purchase of an item under a contract that is not subject to competitive bidding under the County Purchasing Act.

C. Types of Competitive Procurement Methods Which May Be Used

1. In general, the competitive bid process has to be used for a purchase unless a different method is authorized by statute.
2. a. The competitive sealed proposal method may be used for:
  - (i) insurance;
  - (ii) high technology items;
  - (iii) landscape maintenance;
  - (iv) travel management; and
  - (v) recycling.
- b. A county in which a purchasing agent has been appointed under Section 262.011 or employed under Section 262.0115 may use the competitive sealed proposal purchasing method authorized by this section for the purchase of insurance or high technology items, and in addition, for the purchase of other items when the county official who makes purchases for the county determines, with the consent of the commissioners court, that it is in the best interest of the county to make a request for proposals.
- d. A county with a population of 125,000 or more may use a two-step competitive proposal process set out in Section 262.0295 if the commissioners court finds that it is impractical to prepare detailed specifications for an item to support the award of a purchase contract.
3. Construction contracts have to be awarded by the competitive bid process unless an alternative construction delivery method can be used under Chapter 271, Subchapter H for the construction of buildings subject to building code requirements; or under Subchapter J dealing with design-build for certain civil engineering projects.

4. A county may use the reverse auction procedure for the purchase of goods or services.

D. Failure to Comply—Enforcement of Chapter 262 Requirements

1. A contract made without compliance with this Chapter is void, and performance of the contract may be enjoined by any property tax paying resident.
2. A county officer or employee who intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive procurement requirements of Chapter 262 commits a Class B misdemeanor.
3. A county officer or employee who intentionally or knowingly violates the competitive procurement requirements of Chapter 262 commits a Class B misdemeanor.
4. A county officer or employee who intentionally or knowingly violates Chapter 262, other than by conduct described in (2) or (3), commits a Class C misdemeanor.
5. A final conviction for an offense constituting a Class B misdemeanor results in the immediate removal of that person from office or employment, and for a period of four years following conviction, the removed officer or employee is ineligible to be appointed or elected to a public office in Texas, to be re-employed by the county, and to receive any compensation through a contract with that county.

**II. COMPETITIVE BIDDING PROCESS**

A. Procedures for Conducting Competitive Sealed Bids under Chapter 262

1. Notice of Competitive Bid Procurement

- (a) The county must publish notice of the competitive bid procurement at least once a week in a newspaper of general circulation in the county. The date of the first publication must be before the 14<sup>th</sup> day before the date of the bid opening.

- (b) The notice must include:
  - (i) the specifications describing the item to be purchased or a statement of where the specifications may be obtained;
  - (ii) the time and place for receiving and opening bids and the name and position of the county official or employee to whom the bids are to be sent;
  - (iii) whether the bidder should use lump-sum or unit pricing;
  - (iv) the method of payment by the county; and
  - (v) the type of bond required by the bidder.
- (c) If any part of the payment for a proposed purchase will be made through time warrants, the notice also must include a statement of the maximum amount of time warrant indebtedness, the rate of interest on the time warrants, and the maximum maturity date of the time warrants.
- (d) A notice for the purchase of earth-moving equipment, material-handling, road maintenance, or construction equipment
  - (i) may include a request for information about the costs of the repair, maintenance or repurchase of the equipment; and
  - (ii) The commissioners court may require the bidder to furnish, to the county in a contract for that purchase equipment, a bond to cover the repurchase costs of the equipment.
- (e) A purchase may be proposed on a lump-sum or unit price basis. If the county chooses to use unit pricing in its notice, the information furnished bidders must specify the approximate quantities estimated on the best available information, but the compensation paid the bidder must be based on the actual quantities purchased

2. Prebid Conference

- (a) The commissioners court may require a principal, officer, or employee of each prospective bidder to attend a mandatory pre-bid conference conducted for the purpose of discussing contract requirements and answering questions of prospective bidders.
- (b) If a bidder does not comply, his bid may be rejected.

3. Opening of Bids

- (a) The county official who makes purchases for the county shall open the bids on the date specified in the notice.
- (b) The date specified in the notice may be extended if the commissioners court determines that the extension is in the best interest of the county.
- (c) All bids, including those received before an extension is made, must be opened at the same time. The commissioners court may adopt an order that delegates the authority to make extensions under this subsection to the county official who makes purchases for the county.
- (d) Opened bids shall be kept on file and available for inspection by anyone desiring to see them.

4. Award of Contract

- (a) The officer in charge of opening the bids shall present them to the commissioners court in session.
- (b) The court must award the contract to the responsible bidder who submits the lowest and best bid or reject all bids and publish a new notice; except that:
  - (i) in determining the lowest and best bid for a contract for the purchase of earth-moving, material-handling, road maintenance, or construction equipment, the commissioners court may consider the information submitted on the cost of repair, maintenance and repurchase;
  - (ii) in determining the lowest and best bid for a contract for the purchase of road construction material, the

commissioners court may consider the pickup and delivery locations of the bidders and the cost to the county of delivering or hauling the material to be purchased.

- (iii) the commissioners court may award contracts for the purchase of road construction material to more than one bidder if each of the selected bidders submits the lowest and best bid for a particular location or type of material.
- (c) It is possible for the commissioners court to make an award to someone who is not the lowest bidder if the court determines that the lowest bidder is not responsible. A contract may not be awarded to a bidder who is not the lowest dollar bidder meeting specifications unless, before the award, each lower bidder is given notice of the proposed award and is given an opportunity to appear before the commissioners court and present evidence concerning the lower bidder's responsibility.

#### B. Special Statutes Regarding Bidders or Award

1. Identical Bids. If two responsible bidders submit the lowest and best bid, the commissioners court shall decide between the two by drawing lots in a manner prescribed by the county judge.
2. Bidder's Safety Record. In determining who is a responsible bidder, the commissioners court may take into account the safety record of the bidder, of the firm, corporation, partnership, or institution represented by the bidder, or of anyone acting for such a firm, corporation, partnership, or institution if:
  - (a) the commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder;
  - (b) the governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and
  - (c) the determinations are not arbitrary and capricious.

3. Bidder Indebted to County. By an order adopted and entered in the minutes of the commissioners court and after notice is published in a newspaper of general circulation in the county, the commissioners court may adopt rules permitting the county to refuse to enter into a contract or other transaction with a person indebted to the county.
4. Non-Resident Bidders. This statute applies only to a county with a population of 400,000 or less. In purchasing any real property or personal property that is not affixed to real property, if the county receives one or more bids from a bidder whose principal place of business is in the county and whose bid is within three percent of the lowest bid price received by the county from a bidder who is not a resident of the county, then the county may enter into a contract with:
  - (a) the lowest bidder; or
  - (b) the bidder whose principal place of business is in the county, if the commissioners court determines, in writing, that the local bidder offers the county the best combination of contract price and additional economic development opportunities for the county created by the contract award, including the employment of residents of the county and increased tax revenues to the county.

### **III. COMPETITIVE SEALED PROPOSALS**

#### Competitive Proposals under Chapter 262

- A. The county must provide notice of the time and place where proposals will be received and publicly opened by publishing notice at least once a week for two consecutive weeks in a newspaper published in the county.
- B. Except as provided in Section 262.0295 for a two-step process, described below in D.3, requests for proposals must solicit quotations and must specify the relative importance of price and other evaluation factors.
- C. The contract must be awarded to the offeror whose proposal is determined to be "the lowest evaluated offer resulting from negotiation, taking into consideration the relative importance of price and the other evaluation factors set out in the request for proposals."
- D. Types of purchases for which competitive sealed proposal may be used:

1. For all counties, the competitive sealed proposal method may be used for:
  - insurance
  - high technology items
  - landscape maintenance
  - travel management, and
  - recycling.
2. A county in which a purchasing agent has been appointed under Section 262.011 or employed under Section 262.0115 may use this method for other items when the purchasing agent, with the consent of the commissioners court, determines it is in the county's best interest.
3. A county with a population of 125,000 or more may use a two-step competitive proposal process if the commissioners court finds that it is impractical to prepare detailed specifications for an item.
  - First unpriced proposals are solicited through an RFP with a general description of the item instead of specs
  - Within 7 days after proposals are opened, county requests price proposals from qualified vendors
  - Within 30 days, commissioners court makes an award to person whose bid is "the lowest evaluated offer resulting from negotiation."

**IV. REVERSE AUCTION METHOD UNDER SECTION 2155.062(D), TEXAS GOVERNMENT CODE**

Chapter 262 authorizes the use of the reverse auction method for the purchase of goods and services. A reverse auction procedure is:

- A. A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services; or
- B. A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services.

V. **ALTERNATIVE CONSTRUCTION DELIVERY METHODS FOR CERTAIN PUBLIC WORKS - CHAPTER 271, SUBCHAPTER H**

A. Sections 271.111-.121 of the Texas Local Government Code authorizes counties to use alternatives to the Chapter 252 and Chapter 271, Subchapter B Competitive Bid Requirements for construction projects which involve construction of a “facility” as defined by the statute. All alternative construction delivery methods may be used in connection with architectural construction projects, *i.e.* buildings in which the design and construction are governed by accepted building codes. The construction manager at risk method and competitive sealed proposals method may also be used for civil engineering projects, such as water and wastewater facilities.

1. If a construction contract for the construction of a facility is required to be procured through a competitive process under Chapter 262 (that is, the contract amount is over \$50,000 and the procurement is not exempt from the competitive procurement requirements), then a county may use one of the construction methods set out in Chapter 271, Subchapter H, instead of the competitive bid requirement set out in Chapter 262. BUT NOTE: A county may not use an alternative construction delivery method if the project is funded by certificates of obligation. Instead the county has to comply with the provisions of the Certificate of Obligations Act, which requires the competitive bid process to be used. In addition, a county that intends to use anticipation notes to fund a project using one of these alternative construction delivery methods may not issue anticipation notes for the payment of the contract in an amount that exceeds the lesser of:

- (a) 20% of the county's budget for the fiscal year in which the county enters into the contract, or
- (b) \$10 million.

The alternative construction delivery methods are:

- (a) Competitive Bid (which is different from the Chapter 262 method);
- (b) Competitive Sealed Proposal;
- (c) Construction Manager as Agent;
- (d) Construction Manager at Risk;
- (e) Design-Build Contract; or
- (f) Job Order Contract.

2. Each method, as set out in Chapter 271, Subchapter H, has its own procurement procedures to be followed, which involve either

Requests for Bids, Requests for Qualifications, or Requests for Proposals, as specified by statute.

3. If the county wants to use an alternative construction delivery method other than the competitive sealed bid process, the commissioners court must, before advertising, determine which method provides the best value for the county, The commissioners court may delegate the authority to make this determination to a designated representative.
4. For each of the methods set out in Chapter 271, Subchapter H, the county may award the contract to the Contractor who provides the “best value” to the county based on the selection criteria established by the county in its procurement documents. The selection criteria may include factors other than the construction cost. The list of permitted selection criteria is:
  - (a) price;
  - (b) vendor reputation, and reputation of the vendor’s goods or services;
  - (c) quality of the vendor’s goods or services;
  - (d) extent to which the goods or services meet the entity’s needs;
  - (e) vendor’s past relationship with the entity;
  - (f) impact on the ability of the entity to comply with rules relating to HUBs;
  - (g) the long-term total cost to the entity to acquire the vendor’s goods or services; and
  - (h) *any other relevant factor specifically listed in the request for bids or proposals.*
5. The county must assign weights (for example, points) to the selection criteria in its solicitation request. It will evaluate the proposers based on these selection criteria and rank the proposers from highest to lowest. The Commissioners court must approve the ranking and authorize negotiation of a contract based on the ranking. Negotiations will begin with the first ranked candidate, and if an agreement cannot be reached, negotiations must be terminated with that proposer, and can proceed with the next-

ranked proposer. It should be noted that with regard to the competitive sealed bid method, the county is required to award the contract on the basis of the bid amount proposed by the bidder, and cannot negotiate price.

6. The county must document the basis of its selection, and must make the evaluations public not later than the 7<sup>th</sup> day after the date the contract is awarded.

B. A brief description of these construction methods is as follows:

1. Competitive Bid (Design/Bid/Build) [Section 271.115, Texas Local Government Code]. This method is similar to the traditional method of competitive bid, except that selection is based on factors other than lowest bid.

(a) Method

- The Owner selects an architect/engineer (“AE”) to design the project and develop construction plans in the manner required by law.
- The Owner issues a RFB based on the AE documents and the selection criteria established by Owner.
- The Owner selects the bidder who offers the best value based on the published selection criteria.
- The award is for the bid amount.

2. Competitive Sealed Proposals [Section 271.116 Texas Local Government Code]. This method is similar to Competitive Bid method except that proposals are used instead of bids.

(a) Method

- The Owner selects AE to design the project and develop construction documents.
- 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, terminates negotiations with that proposer, and moves down the rank
3. Construction Manager at Risk [Section 271.118 Texas Local Government Code]. In this method, the Construction Manager provides pre-construction phase services and serves as the general contractor. The contract may provide for a guaranteed maximum price (“GMP”) for construction.
- (a) Method
- The 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.
  - Not later than the 45<sup>th</sup> day after the date of opening the proposals, the Owner must evaluate and rank each contractor in relation to the criteria set out in the RFP. The Owner will make its determination 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, the Owner terminates negotiations with that proposer, and moves down the rank.
4. Construction Manager as Agent [Section 271.117, Texas Local Government Code]. This is a method where the Construction Manager generally serves as a project manager and does not have any responsibility for design and/or construction. This method is sometimes referred to as a “multiple prime contractor structure.”

(a) Method

- Owner selects A/E to design project and prepare construction documents.
- 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

(b) Pre-construction and Construction Phase Services

- CMA may provide pre-construction phase services like CMR, but doesn’t contract with trade contractors or provide bonds for project.
- Owner contracts with each trade contractor directly.
- CMA oversees and coordinates work by trade contractors

5. Design/Build [Section 271.119 Texas Local Government Code]. This is a method where the Owner contracts with a single entity to design and build the project.

(a) Method

- Owner selects its own A/E to develop a design-criteria package for the project.
- Selection of the design/build team, consisting of AE and the contractor, is made in two phases. In Phase 1, 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 2, the Owner may ask for additional information 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, the Owner terminates negotiations with that proposer, and moves down the rank.

(b) Pre-construction and Construction Phase Service

- The design/build team designs the plans and constructs the project.
- The team is responsible for all pre-construction and construction phase services described in their scope of work.

6. Job Order Method [Section 271.120 Texas Local Government Code]. This method is used for repairs, rehabilitation or alteration of a building or buildings when the work is of a recurring nature, such as recarpeting, or repainting interiors or exteriors, but the delivery times are indefinite.

(a) Method

- 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.

**VI. DESIGN-BUILD PROCEDURES FOR CERTAIN CIVIL ENGINEERING PROJECTS – SUBCHAPTER J OF CHAPTER 271 OF THE TLGC**

- A. This subchapter allows cities, counties and certain other local governments to use the design-build method of construction for certain public works civil engineering projects, using a two-step selection method which includes an RFQ and a Request for technical and cost proposals.
- B. This method may be used by the specified local governments which have a population of more than 100,000 within their geographic boundaries or service areas.

## VII. OTHER LAWS AFFECTING PURCHASING OR CONSTRUCTION

There are numerous laws, in addition to the ones set forth above, which affect purchasing requirements and contracts for goods, services and construction. Set forth below are a few additional laws which are good to know.

A. Chapter 171 of the Texas Local Government Code – Regulation of Conflicts of Interest of Officers of Municipalities, Counties and Certain Other Local Governments

This statute defines and regulates conflicts of interest by local government officials. It defines a conflict of interest and details how local government officials can carry on government activities when they have some commercial interest in the entity doing business with the government.

B. Chapter 271 of the Texas Local Government Code – State Cooperation in Local Purchasing Program

The Texas Building and Procurement Commission is required by this subchapter to establish a program to perform purchasing services for local governments. If feasible, the Commission will extend state contract prices to local governments, solicit bids on items for them and provide information and technical services on the program. The Commission is allowed to charge an amount not exceeding the costs of services performed, and is allowed to adopt rules and procedures to administer the program.

C. Chapter 791 of the Texas Government Code – Interlocal Cooperation Act

The Interlocal Cooperation Act allows local governments to contract with one another and with an agency of this state, or a similar agency of another state, to perform “governmental functions and services,” including cooperative agreements to purchase goods or services.

Governmental functions and services are defined as any of the following:

- Police protection and detention services;
- Fire protection;
- Streets, roads and drainage;
- Public health and welfare;
- Parks and recreation;
- Library services;
- Museum services;
- Waste disposal;
- Planning;
- Engineering;

- Administrative functions (defined as functions normally associated with routine operations of government, such as tax assessment and collection, personnel services, purchasing, data processing, warehousing, equipment repair and printing); and
- Other governmental functions which are of mutual concern to the contracting parties.

D. Chapter 2252 of the Texas Government Code – Non-resident Bidders

A governmental entity may not award a governmental contract to a non-resident bidder unless the non-resident 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 non-resident bidder to obtain a comparable contract in the state in which the non-resident's principal place of business is located. This provision does not apply to a contract involving federal funds.

E. Chapter 2253 of the Texas Government Code – Public Work Performance and Payment Bonds

Chapter 2253 requires Payment Bonds in connection with county public works contracts where the contract amount exceeds \$25,000, and Performance Bonds on public works contracts where the contract amount exceeds \$100,000. These bonds must be in place before work begins on the project.

If the government fails to ensure that any required bonds are obtained in connection with a project, then the government becomes liable to the same extent that the surety would be liable under the bonds. In other words, even if the government paid the contractor under the construction contract, if it did not make sure a Payment Bond was in place and there are unpaid subcontractors, the government gets to pay the subcontractors, to the same extent as the surety would have been required to pay had bonds been obtained.

F. Chapter 2258 of the Texas Government Code – Prevailing Wage Rate

Chapter 2258 states that a worker employed on a public works project by or on behalf of a county (or other local government) must be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed.

The county is required to determine the general prevailing wage rate for its public works contracts, including the prevailing rate for legal holidays and overtime work by:

1. conducting a survey of workers wages within their locality; or
2. using the prevailing wage rate as determined by the U.S. Department of Labor in accordance with the Davis-Bacon Act.

Contractors and subcontractors on a public works project are required to pay the prevailing wage rates to workers employed on the project.

- G. Chapter 176 of the Texas Local Government Code sets out requirements for disclosure by vendors and prospective vendors who have an employment or other business relationship with a local government officer or have given gifts valued more than \$2,500 in the aggregate in a 12-month period.

## **VIII. PURCHASING PROCEDURES AND POLICIES**

One of the aspects of purchasing which makes it so difficult to learn, is that there is a fairly-well established body of generally accepted purchasing procedures and practices that are not set out by statute or in case law. They are established procedures for government purchasing agents and can often be found in the purchasing manuals written or adopted by government purchasing offices.

### Disqualification of Bids/Proposals

One such area of established purchasing practices which are not set out comprehensively by Texas statutes or case law is the disqualification of bids and proposals. It is generally the case that bids or proposals received by the government after the deadline for submission are disqualified and are not considered for award. They may be returned unopened, or if opened, are generally not added to the bid or tally. Bids which are received on time are generally read aloud and added to the tally, although they may later be disqualified for failure to meet a specified requirement set out in the Instructions to the Bidders/Proposers. Disqualified bids or proposals are generally returned to the bidder.

The issue of whether a bid or proposal may or must be disqualified is an issue that arises very frequently, so it is surprising that there is very little Texas case law addressing this issue. The main Texas case on this issue is a fairly recent case entitled *Spaw Glass Construction Corp. v. City of Houston*, 974 S.W.2d 876 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1998), rev. denied. It states that a defect in a bid (or proposal) which is non-waivable and requires disqualification of the bid or proposal is based on two criteria: (a) waiver of the defect would create an unfair advantage for the bidder or disadvantage to actual or potential bidders, and (b) waiver would deprive the government of its assurance that the contract would be entered into, performed, and guaranteed according to its specified requirements. Some examples of defects which generally result in disqualification are late bids,

as discussed above, the failure of the bidder to sign the bid (which was one of the issues in *Spaw Glass*), and the failure of the bidder to include a required bid bond for the full amount specified in the Instructions. All of these defects fall into both of the categories for disqualifications identified by the Court in *Spaw Glass*.

Defects which may not merit disqualification, and which may be waived by the government, are known as irregularities or informalities. Normally, the Bid or Proposal Instructions will reserve to the government the right to waive irregularities or informalities. These may include defects such as the bidder's use of numeric amounts only, when the Bid Instructions say to provide bid amounts in both words and numbers, or the bidder's failure to identify subcontractors in the bid as required by the Instructions, at least where the other bid documents indicate that this information may be submitted after the contract is signed (this was a second issue in the *Spaw Glass* case). Although there is no case law on point, it is generally believed that government entities may choose to strictly enforce reasonable bid requirements, as long as they do so uniformly, and may disqualify a bid due to an irregularity or informality.

Bids may also be disqualified if they are non-responsive. Non-responsive bids are ones which in some manner fail to adequately address the information required by the Bid Instructions or which qualify performance of the contract on conditions, or take issue with a requirement. As an example, if the Instructions to Bidders state that the selected bidder must construct Phase 1 of the project, and if directed by Owner Phase 2 of the project, an unresponsive bid would be one in which the bidder responded that it would construct Phase 2 only if the request to construct Phase 2 was made within 30 days of final completion of Phase 1. A government can generally reject a bid which is unresponsive.