

2023 PROCUREMENT HANDBOOK

TEXAS ASSOCIATION OF COUNTIES

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TEXAS ASSOCIATION *of* COUNTIES

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BASICS OF THE COUNTY PURCHASING ACT AND COMPETITIVE BIDDING

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The  symbol indicates sections that have been updated since the previous publication.

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. Local Government Code §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 §2155.062(d), Government Code (*see question 5 below*); or
- Comply with Chapter 2269, Government Code (*see question 7 below*).

1. What are “items” under the Act?

“Item” is defined broadly under Local Government Code §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 \$50,000, then the commissioners court will likely be using a competitive procurement method to acquire the item.

2. What is an improper separate, sequential, or component purchase that violates the County Purchasing Act?

Separate, sequential or component purchases entered into with intent to avoid competitive bidding is illegal and constitutes an offense.¹ Whether a separate, sequential or component purchase has taken place under Local Government Code §262.023(c) will typically be a fact issue.

In one example, a county attorney purchased a laptop. The county’s cumulative budget for laptops exceeded \$50,000. The auditor questioned whether the county could pay for the laptop because it was purchased outside of the bulk purchase made by the county and without being competitively bid. The attorney general explained that improper separate, sequential or component purchases must be (1) discrete purchases that in ordinary purchasing practices would be purchased in one transaction and (2) were made with intent to avoid competitive bidding practices. Not all like items purchased by the county need be aggregated for bulk purchase to avoid separate, sequential or component purchases.²

In another example, an auditor questioned whether it was appropriate to pay for labor on a park project when the work was divided into phases that individually were valued under the bid threshold but cumulatively exceeded the bid threshold. The attorney general could not answer the auditor’s question in the opinion request process because determining what constitutes “ordinary purchasing practices” and establishing requisite intent to avoid competitive bidding requirements would require the taking of evidence and resolution of fact issues.³

¹ Tex. Local Gov’t Code §§262.023(c), 262.034

² Tex. Att’y Gen. Op. No. KP-0358 (2021)

³ Tex. Att’y Gen. Op. No. GA-0604 (2008)

3. 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.

4. What alternative competitive proposal procedures are available?

Competitive proposals (as opposed to competitive bids) may be sought under Local Government Code §262.030(a) for the purchase of insurance, high technology items, landscape maintenance, 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 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.

5. What is a reverse auction procedure?

A reverse auction allows suppliers/sellers of goods and services to 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.⁴



6. Are emergency purchases subject to the competitive bidding requirements?

No. The commissioners court may grant by order exemptions for purchases in a case of public calamity, to preserve or protect public health or safety, and unforeseen damage to public property.⁵ A public calamity purchase is necessary when the purchase must be made promptly and without notice to relieve the necessity of the citizens or to preserve the property of the county.⁶ The emergency must normally originate from involuntary occurrences and not the voluntary actions of the county authorities.⁷ Purchases necessary “to preserve or protect the public health or safety” do not require a calamity or emergency to have occurred to exempt the purchase from bidding requirements.⁸



7. Can a county use alternative contracting and delivery procedures for a construction project?

Yes, a county may utilize alternative contracting and delivery procedures for a public work contract pursuant to Government Code Chapter 2269.⁹ A public work contract includes any contract for constructing, altering, or repairing a public building or carrying out or completing any public work.¹⁰ A county may use a method other than competitive bidding provided in Chapter 2269, but before advertising the procurement, the governing body must make a determination on which alternative

⁴ Tex. Gov't Code §§2155.062(d), 2155.085

⁵ Tex. Local Gov't Code §262.024(a)

⁶ Tex. Local Gov't Code §262.024(a)(1)

⁷ See *State v. Angelina Cty*, 150 S.W.2d 379 (Tex. Comm'n App. 1941)

⁸ See generally, Tex. Att'y Gen. Op. No. JC-0281 (2000) (finding competitive bidding provision in municipal purchasing statute did not require a calamity when purchase involved need to collect solid waste for purposes of public health); See *Hoffman v. City of Mt. Pleasant*, 89 S.W.2d 193 (Tex. 1936)

⁹ Tex. Gov't Code §2269.002(2)(A)

¹⁰ *Id.* at §2269.001(6)

method provides the best value for the county.¹¹ The criteria, value, and scoring methodology must be published in the request for proposals or qualifications.¹²

Counties may consider price, experience and reputation, quality of goods or services, impact on historically underutilized businesses, safety record, personnel, financial capability, and any other relevant factors.¹³

The alternative delivery methods available include competitive sealed proposals, construction manager-agent, construction manager-at-risk, design-build, and job order contracting.¹⁴ Each method has specific procurement requirements and may be limited in its applicability to a particular project. For example, design-build procurements under Subchapter H are limited to certain civil works projects such as roads, utilities, storm draining, or transit projects.¹⁵ Job order contracting is limited to projects of an indefinite and recurring nature such as maintenance, repair, or renovation.¹⁶ General requirements for each type of alternative delivery method are as follows:

7.1 Competitive Sealed Bidding (CSB).¹⁷ A CSB may be utilized for the construction, alteration, rehabilitation, or repair of a facility. Construction documents must be prepared by an architect or engineer prior to the bid process. The criteria for award is the lowest responsible bidder. A bid package must include construction documents, estimated budget, project scope, estimated completion date, and any other necessary information.

7.2 Competitive Sealed Proposal (CSP).¹⁸ A CSP may be utilized for the construction, alteration, rehabilitation, or repair of a facility. Construction documents must be prepared by an architect or engineer prior to the proposal process. The criteria for award is the best value proposal based upon the selection criteria and weighted value published in the proposal request. The CSP must include construction documents, selection criteria and weights, estimated budget, project scope, estimated completion date, and any other

¹¹ *Id.* at §2269.056

¹² *Id.* at §2269.056(b)

¹³ Tex. Gov't Code §2269.055(a)(1-8)

¹⁴ Tex. Gov't Code Subchs. D-I

¹⁵ Tex. Gov't Code §2269.351(1)(A)

¹⁶ *Id.* at §2269.40

¹⁷ *Id.* at §§2269.101-106

¹⁸ *Id.* at §§2269.151-155

necessary information. The county may negotiate with the highest ranked vendor regarding options for scope or time modifications.

- 7.3 Construction Manager-Agent (CMA).**¹⁹ A CMA may be utilized for the construction, alteration, rehabilitation, or repair of a facility. A CMA manages multiple contracts with various prime contractors on behalf of the county. It may provide personnel, equipment, and on-site management, but cannot self-perform any construction work. A CMA is procured in the manner prescribed by Government Code §2254, The Professional Services Procurement Act.
- 7.4 Construction Manager-at-Risk (CMAR).**²⁰ A CMAR may be utilized for any public work contract which includes the constructing, altering, or repairing a public building or carrying out or completing any public work. An architect is selected prior to procuring a CMAR. The CMAR serves as the general contractor during both the design and construction phase of the project. Counties may use a one-step or two-step procurement process. The one-step process must be used for federally funded projects. A two-step process includes a qualification round and a second round with five or less vendors selected to submit pricing. The proposal documents must include project site, project scope, schedule, selection criteria and weights, and estimated budget and time and place for receipt of proposals as well as any other necessary information.
- 7.5 Design-Build (DB).**²¹ A DB process selects a single entity to provide both the design and construction components of a project. It may be used for the construction, rehabilitation, alteration, or repair of a building or an associated structure. DB may not be used for civil engineering construction projects such as highways, roads, or water. A request for qualifications should include project site, project scope, budget, special systems, selection criteria and weights, and any other necessary information. Evaluation criteria shall include experience, competence, capability to perform, past performance, and other appropriate factors. Five proposals shall be chosen based on qualifications and asked to submit additional information proposals. Vendors are then ranked and chosen based on the best value to the county.

¹⁹ *Id.* at §§2269.201-208

²⁰ *Id.* at §§2269.251-258

²¹ *Id.* at §§269.301-311

7.6 Design-Build Civil Works (DB-CW).²² DB-CW may be used for other civil works projects including roads, streets, and bridges. A DB-CW may be used for a single integrated project and not for aggregated projects. DB-CW must be determined as the best delivery method for the project based on required elements including the project requirements, time constraints, timing for procurement, and capability to oversee the project. Entities are limited to six DB-CW projects in a year. The county must determine qualified vendors and then request a proposal that includes technical components. Cost proposals are subsequently evaluated and scored.

7.7 Job Order Contracting (JOC).²³ JOC may be utilized 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. It applies only to a facility that is a building subject to building codes or a structure or land associated with buildings. A JOC solicitation method shall be used based on contractual unit prices by specifying one or more published construction unit price books or providing a list of work items and requiring a coefficient. Multiple vendors may be selected. Individual job orders may be a fixed price based on contractual unit pricing or a unit price order based on quantities and line items delivered.

8. 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.²⁴

9. 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.²⁵

²² *Id.* at §§2269.351-367

²³ *Id.* at §§2269.401-411

²⁴ See Tex. Att’y Gen. Op. No. GA-0247 (2004)

²⁵ See Tex. Atty. Gen. Op. Nos. GA-0247 (2004) and GA-0383 (2005)

10. 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.²⁶

11. 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 contract made in violation of the Act.²⁷

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.²⁸

12. 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.²⁹

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

²⁶ See Tex. Atty. Gen. Op. Nos. GA-0247 (2004) and GA-0383 (2005)

²⁷ Tex. Local Gov't Code §262.033

²⁸ See *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App. – El Paso, March 18, 2004)

²⁹ See Tex. Atty. Gen. Op. No. MW-0449 (1982)

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 an 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.

14. 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.³⁰

15. 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.³¹

16. 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

³⁰ See Tex. Atty. Gen. Op. No. JH-1086 (1977)

³¹ Tex. Local Gov't Code §262.0271

specifications that the bidder's safety record may be considered in determining the responsibility of the bidder.³²

17. 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, but it also 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.

Certain entities, including counties, can receive an exemption from the requirement to give preference for recycled products if they petition the Texas Commission on Environmental Quality for an exemption and the Commission finds that compliance would cause a hardship on the entity.³³

18. Can the county require bids or proposals to be submitted electronically only, or does the county have to accept hard copies?

A county may require electronic bid or proposal submissions if the commissioners court adopts an order requiring electronic transmission and makes available all technology necessary to submit a bid or proposal electronically to any person who submits a hard copy bid or proposal in person. Otherwise, the county must accept hard-copy and electronic submissions.³⁴

19. Can the county implement a minority-owned, woman-owned, or historically underutilized business (MWBE/HUB) program?

A county may adopt MWBE/HUB programs if it can justify them with evidence of past discrimination in the county's contracting practices.³⁵ To do so, a county must establish the precise scope of the injury it seeks to remedy by identifying prior

³² Tex. Local Gov't Code §262.0275

³³ Tex. Health & Safety Code §361.426(d)

³⁴ Tex. Local Gov't Code §262.0225(c), (c-1)

³⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989)

discrimination with specificity.³⁶ This high bar can be satisfied through completion of a disparity study that shows a gap between the percentage of qualified, disadvantaged businesses in the relevant market that are available to undertake the sought-after work compared to the percentage of county-funded contracts presently awarded to MWBE/HUB subcontractors.³⁷ A county can also show a pattern of discrimination by gathering anecdotal evidence through interviews, surveys, and other information-gathering efforts.³⁸ If a county identifies underrepresentation through a disparity study, it must ensure any race-based program it adopts to remedy the discrimination is narrowly tailored to the discrimination that has been identified.³⁹

A county may also adopt aspirational goals for county spending targets toward MWBE/HUB contracts and can eliminate barriers to bidding by implementing race- and gender-neutral approaches in its bidding application process. Simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, and the elimination of formal barriers to the bidding process can increase MWBE/HUB participation. Through deliberate outreach and education, a county can maximize access for underrepresented contractors.



20. Are there special requirements when using federal funds?

Yes. For every purchase it is important to identify the funding source and confirm whether there are any special procurement requirements. Federal funds are subject to the purchasing requirements of the Uniform Administrative Requirements, Cost, Principles, and Audit Requirements for Federal Awards (“Uniform Guidance”).⁴⁰ The focus of federal procurement is on providing full and open competition compliant with the Uniform Guidance.⁴¹

There are multiple methods of procurement that may be used under a federal award. These include both informal and formal methods. Informal procurements include micro-purchases and small purchases. Micro-purchases generally apply to acquisitions under \$10,000 or the amount set in 48 C.F.R. Part 2, subpart 2.1. Micro-purchases do not require a formal bid or quote, so long as the county determines the price to be reasonable.⁴² Small purchases are those under \$250,000 or the amount as

³⁶ *Id.*

³⁷ *Id.* at 470-471

³⁸ *See id.* at 509

³⁹ *Id.* at 470

⁴⁰ C.F.R. Part 200

⁴¹ *Id.* at §200.319

⁴² *Id.* at §200.320(a)(1)(ii)

set in 48 C.F.R. Part 2, subpart 2.1. For small purchases, price or rate quotations must be obtained to select a qualified vendor.⁴³ Purchases made with federal dollars between the state threshold amount of \$50,000 and the small purchase amount must follow applicable state procurement laws.

Formal procurement methods apply to contracts greater than \$250,000 and include sealed bids and proposals.⁴⁴ There are also a number of noncompetitive procurement options available including single source, exigency or emergency, express authorization from federal entity, or following a determination that the competition is inadequate.⁴⁵

There are a number of other requirements when utilizing federal funds, including mandatory contract terms, that make it essential to consult the Uniform Guidance before conducting procurements. Remedies for noncompliance can include withholding of payments, suspension, or termination of the federal award.⁴⁶

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.⁴⁷

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.

⁴³ *Id.* at §200.320(a)(1)(2)(ii)

⁴⁴ *Id.* at §200.320(b)

⁴⁵ *Id.* at §200.320(c)(1-5)

⁴⁶ *Id.* at §200.339(a-f)

⁴⁷ Tex. Local Gov't Code §262.025

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.⁴⁸

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, Local Government Code §271.009 limits a lease-purchase or other installment type contract under the Public Property Finance Act to a term of 25 years, and Local Government Code §116.021 authorizes counties to select a depository either under the County Purchasing Act or for a two or 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?

Local Government Code §271.903 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 effort 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.⁴⁹

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.⁵⁰

⁴⁸ Tex. Local Gov't Code §262.025(b)(2)

⁴⁹ Tex. Const. Art. 11, §§5, 7

⁵⁰ Tex. Local Gov't Code §271.006

BOND

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 can 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 or for contracts exceeding \$100,000.⁵¹

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.⁵²

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 for any contract exceeding \$50,000 within 30 days of signing a contract or issuance of a purchase order.⁵³ There is no provision for a payment bond under the County Purchasing Act.

⁵¹ Tex. Local Gov't Code §262.032(a)

⁵² 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)

⁵³ Tex. Local Gov't Code §262.032


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 contracts, 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.⁵⁴

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.⁵⁵ 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.⁵⁶

 In counties that (1) have a population of 2.1 million or more; (2) have two municipalities with a population of 250,000 or more; and (3) that are adjacent to a county with a population of 2.1 million or more, the Sheriff does not have exclusive control of commissary proceeds and commissary purchases are required to be competitively bid.⁵⁷ Dallas and Tarrant Counties currently fall within the scope of Local Government Code §351.04155.

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 of the Code of Criminal Procedure.

⁵⁴ See Tex. Atty. Gen. Op. Nos. JM-0967 (1988) and MW-0439 (1982)

⁵⁵ Tex. Local Gov’t Code §351.0415

⁵⁶ See Tex. Atty. Gen. Op. No. JC-0122 (1999)

⁵⁷ Tex. Local Gov’t Code §351.04155; amended by HB 4559, 88th (R) Leg., effective September 1, 2023

Although the commissioners court has the right to reject bids, it may not do so for the purpose of preventing or delaying a forfeiture-fund purchase.⁵⁸

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 of the Local Government Code. 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 separate, sequential, or component purchases designed to avoid the competitive bidding requirements.⁵⁹

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.⁶⁰

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

⁵⁸ See Tex. Atty. Gen. Op. No. DM-0246 (1993)

⁵⁹ Tex. Local Gov't Code §262.034

⁶⁰ See Tex. Atty. Gen. Op. No. GA-0247 (2004)

the local government to seek competitive bids for the purchase of the goods and services.⁶¹

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.⁶² Counties should make efforts to confirm the components of a cooperative purchase and ensure competitive processes are used when possible. See the sample “Cooperative Purchasing Form” (Exhibit A).



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 (TASB). 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.⁶³ 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 (DIR). Purchases from DIR’s cooperative and shared contracts are deemed to satisfy competitive bid requirements.⁶⁴ For more information, visit dir.texas.gov.

⁶¹ Tex. Gov’t Code §791.025(c)

⁶² Tex. Local Gov’t Code §271.102(c)

⁶³ Tex. Gov’t Code §2155.504

⁶⁴ Tex. Gov’t Code §2054.0565

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.⁶⁵ For more information, visit gsa.gov.



Public-Private Partnerships

A county may utilize public-private partnerships for qualifying projects under Government Code Chapter 2267.⁶⁶ The Texas Legislature passed Chapter 2267 to encourage investment and provide flexibility for local governments contracting with private entities on a broad array of infrastructure projects.⁶⁷ Before a county may employ Chapter 2267 provisions, its commissioners court must first approve a resolution electing to participate under the chapter's scope.⁶⁸ It must also adopt reasonable guidelines that, among other specific requirements, encourage competition and guide the county's selection of projects before the county may request or consider a proposal for a qualifying project.⁶⁹ Other requirements, including the specific procurement procedures for public-private partnerships, are outlined in Chapter 2267.⁷⁰

MANDATORY EXCEPTIONS TO COMPETITIVE BIDDING

Professional Services Procurement Act

Under Government Code Chapter 2254, Subchapter A, 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, a registered nurse, an interior designer, or a forensic analyst or forensic science expert.⁷¹ The selection of a professional services provider should be on the

⁶⁵ Tex. Local Gov't Code §271.103

⁶⁶ Tex. Gov't Code §2267.001

⁶⁷ *Id.* at §§2267.001-002

⁶⁸ *Id.* at §§2267.001

⁶⁹ *Id.* at §§2267.052

⁷⁰ *Id.* at §§2267.001-066

⁷¹ Tex. Gov't Code ch. 2254, subch. A; Tex. Gov't Code §2254.002

basis of demonstrated competence and qualifications of the vendor and for a fair and reasonable price.⁷²

Contracts for the professional services of an architect, engineer, or surveyor have a specific statutorily prescribed selection method under Government Code §2254.004. Selection is based upon the most highly qualified provider of the architectural, engineering, or surveying services.⁷³

Contracts for the professional services of physicians, optometrists and registered nurses may be selected and awarded on the basis of the provider's agreement to payment of a set fee, as a range or lump-sum amount and the provider's affirmation and the county's verification that the provider has the necessary occupational licenses and experience if the number of contracts to be awarded is not otherwise limited.⁷⁴

Under Chapter 2254, Subchapter C of the Government Code, a county may not competitively bid for legal services provided on a contingent fee basis. A contingent fee contract for legal services must be awarded to a well-qualified attorney or law firm on the basis of demonstrated competence, qualifications and experience in the requested services after negotiation of a fair and reasonable price. A "contingent fee contract" means a contract for legal services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained. The term "contingent fee contract" includes an amendment to a contract for legal services if the amendment changes the scope of representation or may result in the filing of an action or amending of a petition in an existing action.⁷⁵

There are a number of statutory procedural requirements attached to the award of a contract for contingent fee legal services, including written notice to the public at least 72 hours in advance of an open meeting of the reasons for and the desired outcome of the litigation, the qualifications and competencies of the attorney or law firm to be awarded the contract, the reasons the litigation can't be pursued by county personnel, the reasons the litigation can't be pursued on a non-contingent, hourly basis, the nature of any relationship between the attorney or law firm and the county, and the reason why a contingent fee contract is in the best interests of the taxpayer.⁷⁶ Additionally, a contingent fee contract for legal services must be submitted to the

⁷² Tex. Gov't Code §2254.003

⁷³ *Id.* at §2254.004

⁷⁴ Tex. Gov't Code ch. 2254, subch. A; Tex. Gov't Code §2254.008

⁷⁵ Tex. Gov't Code §2254.101(2)

⁷⁶ Tex. Gov't Code §2254.1036

Texas Attorney General for review and approval with a copy of the written notice to the public required by Government Code §2254.1036.⁷⁷

DISCRETIONARY EXCEPTIONS TO COMPETITIVE BIDDING

Local Government Code §262.024 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.⁷⁸

Unforeseen Damage

An item necessary because of unforeseen damage to public property.

Personal or Professional Service

The discretionary exemption in Local Government Code §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.

⁷⁷ See Tex. Gov’t Code §2254.1038

⁷⁸ See *Davray, Inc. v. City of Midlothian, Texas*, 2005 WL 1586574 (N.D. Tex. July 6, 2005)

The “professional services” referred to in Local Government Code §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.⁷⁹

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, or monopolies; creative works such as films, manuscripts or books; electric power, gas, water and other utilities; and captive replacement parts. Counties should maintain documentation justifying the use of sole source including verification from vendors especially when utilizing federal funds. See the sample “Sole Source Justification Form” (Exhibit B).



Food

An item of food – but see Local Government Code §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

⁷⁹ See, e.g., Tex. Att’y Gen. Op. No. JM-1136 (1990)

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 Business & Commerce Code, Subchapter F, Chapter 17; 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 Local Government Code §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 constructed by the corporation for which more than 50 percent of the construction is funded by a private entity is exempt from competitive bidding procedures.⁸⁰

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

⁸⁰ Tex. Transp. Code §431.110

lease, sale or other disposition of property for action taken under the Texas Housing Finance Corporations Act.⁸¹

Purchase from Certain Nonprofits

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

Airport Purchases

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

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 of 5,000 or greater.⁸²

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.

⁸¹ Tex. Local Gov’t Code §394.904

⁸² Tex. Local Gov’t Code §320.079



BEST PRACTICES FOR COUNTY PROCUREMENT

Counties must follow federal, state, and local policies regarding the procurement process. However, it is also important to adopt and follow best practices when possible and especially in instances where there are no clear legal requirements. Utilizing basic principles and practices applicable to most local governmental entities will help ensure legal compliance.

In general, public procurement should provide open and fair competition that results in selecting the best value and quality for the expenditure of public funds.⁸³ The fundamental tenants of openness, impartiality, and competition will form the basis of a compliant procurement process. Procurement departments and purchasing agents should also implement best practices that may include the following:

- **Adopt written policies and procedures.**⁸⁴ It is essential to have written policies addressing all areas of procurement, including those not expressly required by law. Counties should consider adopting written policies or procedures related to ethics/conflicts, payment, evaluations, and approvals. Federal law requires counties have documented procurement procedures, consistent with state and local requirements to receive and utilize federal funds.⁸⁵
- **Identify the funding source prior to procurement process.** Prior to issuing a procurement, a county should confirm the source of funds or potential funds that will be paying for the goods or services. The procurement process must then comply with all the applicable requirements. Federal funds or individual grants may have different and/or additional requirements. Failure to comply with these requirements during the purchasing process may limit a county's ability to subsequently change the source of funding for that contract.
- **Maintain documentation.** Counties should maintain documentation of the entire procurement process including notices, evaluation documents, approvals, and final contracts. In addition, entities should maintain documentation of the basis for determinations unique to a particular procurement. For example, if a vendor is disqualified, the basis for that decision should be retained in the procurement and vendor file. Even in the case of emergency purchasing, it is important to

⁸³ *Sterrett v. Bell*, 240 S.W..2d 516 (Tex. Civ. App. – Dallas 1951, no writ history)

⁸⁴ Tex. Loc. Gov't Code §262.011(o) (authorizing county purchasing agent to adopt rules and procedures to implement duties).

⁸⁵ 2 C.F.R. §200.318(a)

memorialize the steps and decisions made to ensure fair, equal, and open competition.

- **Create standard procurement documents.** A county should create form procurement documents that can be used for bids, proposals, or qualifications. This portion of the procurement document should include uniform elements that should be contained in most formal procurements such as notice requirements, criteria and weights, evaluation procedure, applicable ethics policies, forms/certifications, and unique local or federal requirements (such as MWBE/HUB program). It is also best practice to include a form contract or general terms and conditions that will form the basis of the vendor agreement.

EXHIBIT A

Cooperative Purchasing Form	
Cooperative: [Name]	Cooperative Contract No.: [Member]
Cooperative Contract Dates: [Confirm currently valid]	
Cooperative Contract Scope: [Confirm includes requested goods/services]	
Coop Purchaser: Insert Name and contact info of coop purchaser	
Evaluation	
Vendor 1: Name and Contact Info	
Pricing: Insert price quote based on confirmed coop bid pricing.	
Evaluation: Review additional criteria and insert valuation notes.	
Vendor 2: Name and Contact Info	
Pricing:	
Evaluation:	
Vendor 3: Name and Contact Info	
Pricing:	
Evaluation:	
Were you able to obtain three (3) quotes? (Circle One) YES NO If no, explain what efforts were made to obtain three (3) quotes.	
Did you confirm the price and scope of the quotes with Coop? (Circle One) YES NO	
Is this for construction-related goods or services for more than \$50,000? (Circle One) YES NO If yes, do you certify that the goods/services do not require architecture/engineering plans or that such plans have been prepared? (Circle One) YES NO	
Purchaser Name:	
Authorized Signature:	Date:

EXHIBIT B

Sole Source Justification Form	
Purchase Item: [Name and Company] [Include name, manufacturer, and model number of item being purchased or the services to be purchased]	
Description of requested items or services and their purpose(s):	
Reason(s) for requesting a sole source purchase: <ul style="list-style-type: none">○ Covered by patents, copyrights, secret processes.○ Monopoly○ Creative works such as films, manuscripts, or books○ Electric power, gas, water, and other utilities○ Captive replacement parts○ If other, please explain.	
Explain why product or service is the only item that can satisfy requirements:	
Identify other sources reviewed and reason they are unacceptable:	
I certify that the above statements are true and correct, and that no other material fact or consideration offered or given has influenced this recommendation for a sole-source or proprietary purchase.	
Purchaser Name:	
Authorized Signature:	Date: